ILLINOIS POLLUTION CONTROL BOARD
April 17, 2003

REZMAR CORPORATION,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 02-91
	)	(UST Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

MICHAEL J. HUGHES, NEAL, GERBER & EISENBERG, APPEARED ON BEHALF of REZMAR CORPORATION; and

JOHN J. KIM APPEARED ON BEHALF OF THE RESPONDENT.

OPINION AND ORDER OF THE BOARD (by M.E. Tristano):

On April 8, 2002, Rezmar Corporation (Rezmar) filed a petition for review with the Board pursuant to Section 57.9(c)(2) of the Environmental Protection Act (Act) (415 ILCS 5/57.9(c)(2)) and Sections 105.500-105.510 of the Board's procedural rules (35 Ill. Adm. Code 105.000-105.510). The petition asks the Board to reverse the Illinois Environmental Protection Agency's (Agency) decision to deny payments of certain costs for reimbursement from the Underground Storage Tank (UST) Fund for about $119,000 in clean up costs Rezmar incurred. For the reasons stated below, the Board affirms the Agency's decision.

PROCEDURAL BACKGROUND

On December 18, 2002, a hearing in this matter was held in Chicago. One witness testified at the hearing. Rezmar presented testimony from Mr. Larry Bertsch, a project manager and geologist from GaiaTech Inc., hired by Rezmar as an environmental consultant. Based on the legal judgment, experience and observations of the hearing officer, the credibility of the witness is not an issue in this matter.

On January 22, 2003, Rezmar filed a post-hearing memorandum in support of its petition for review of reimbursement determination. On February 21, 2003, the Agency filed a response to Rezmar's post-hearing memorandum. On March 3, 2003, Rezmar filed a post-hearing reply to the Agency's response.

FACTUAL BACKGROUND

On December 18, 2002, the parties agreed to a stipulation of facts. Rezmar is an Illinois corporation with its offices located at 853 North Elston, Chicago. Rezmar is the manager of 850 N. Ogden L.L.C., which owned certain property located at 850 N. Ogden, Chicago (site) from March 1998 until portions of the site were sold as individual housing units starting in late 2000. During preparation of the site for development purposes, Rezmar hired GaiaTech, Inc. and R.W. Collins Company to provide environmental consulting and engineering services and to assist with the removal of two USTs.

On May 3, 1999, R.W. Collins removed one 550-gallon gasoline UST and one 5,000-gallon heating oil UST from the ground at the site. GaiaTech provided technical and oversight services for the UST removal project. During the removal of the USTs, holes were observed in the base and side walls of both tanks by GaiaTech and by a representative of the Office of the State Fire Marshal. In addition, a pool of oil was found in the heating oil UST excavation. After removal of the heating oil UST, oil and perched water flowed into the excavation from surrounding soils and fill material. R.W. Collins recovered approximately 3,600 gallons of oil from the heating oil UST and approximately 900 gallons of oil from the heating oil UST excavation by vacuum truck, and transported the oil for off-site disposal.

After temporary backfilling of the heating oil UST excavation, Rezmar submitted a 20-Day Report to the IEPA on May 23, 1999. Rezmar's contractors scheduled a return visit to the site to continue investigation and removal of petroleum-contaminated soils. On June 11, 1999, during the planned soil removal activities, a significant amount of oil and oil-impacted soils were encountered in the area adjacent to the former UST, and approximately 500 gallons of oily product flowed into the new excavation from the surrounding soils. This oily product was removed by vacuum truck beginning on June 12, 1999, with the investigation and removal efforts continuing in order to evaluate and mitigate potential migration and other hazards.

During the excavation of contaminated soils adjacent to the former heating oil UST location, Rezmar's subcontractors encountered a network of abandoned clay sewer pipes, at varying depths, which were partially or completely filled with oil and water. GaiaTech observed discharges of oil and water from these pipes and from the backfill and native soils adjacent to the former tank and surrounding the clay pipes. Rezmar's subcontractors encountered several catch basins attached to the clay pipes, one of which was filled with approximately 50 gallons of oil. Some of this material was gelatinous in nature and had to be excavated from the site.

Following a rainstorm during the weekend of June 12-13, 1999, the heating oil UST excavation became partially filled with oil and water. This oil and water was removed from the excavation on June 14, 1999. Between June 14 and June 22, 1999, R.W. Collins removed approximately 24,000 gallons of oil and water from the excavation, clay pipes and catch basin. R.W. Collins also removed 2,375 cubic yards of saturated soil from the site. At the completion of the excavation, oily product remained in certain pipes and saturated soils that were inaccessible due to the presence of a temporary office trailer. In order to minimize further migration, the pipes were sealed with concrete at both ends.

On June 20, 1999, Rezmar requested that the Agency grant a 30-day extension of time for submittal of a 45-Day Report. By a letter dated July 12, 1999, the Agency determined that early

action activities could be conducted beyond the 45-day period, and informed Rezmar that the initial 45-day period for which early action costs would be considered reimbursable was extended to July 17, 1999. On July 15, 1999, Rezmar's subcontractors completed additional investigation activities, including trenching and sampling activities and backfilling of pipeline areas. Rezmar submitted a 45-Day Report and Free Product Removal Report to the Agency on or about August 3, 1999.

Between May 1-8, 2000, after removal of temporary office buildings on the site, Rezmar's subcontractors conducted another investigation and removal of pipelines and soils. Following the completion of removal activities in May 2000 in areas that were previously inaccessible, Rezmar submitted to the Agency a Free Product Removal Update Report, prepared by GaiaTech and dated June 14, 2000. The Agency approved this report by letter dated July 3, 2000. GaiaTech subsequently prepared and submitted to the Agency a Site Classification Completion Report dated November 21, 2000. On March 16, 2001, the Agency issued a letter approving the Site Classification Report and stating that no further action was required at the site.

GaiaTech prepared a LUST Early Action Reimbursement Billing Package, dated April 13, 2001, which was submitted to the Agency for review. On December 3, 2001, the Agency issued a final decision with respect to the April, 2001 request for reimbursement, denying payment of certain costs. In Item 3 of the Agency's list of deductions, the Agency deducted $107,114 from the invoices related to work performed by R.W. Collins, on the basis that the costs were associated with the removal of more than four feet of fill material. The Agency deducted $11,763.28 from GaiaTech's invoice number 5308-6052, on the basis of lack of documentation. Specifically, the Agency stated that the dates of performance of work were not included and that these dates were necessary to determine whether the costs were incurred on the date of the planned tank pull. Rezmar seeks review of the Agency's December 3, 2001 denial letter.

STATUTORY BACKGROUND

Section 732.202 – Early Action

(a) Upon confirmation of a release of petroleum from an UST system in accordance with regulations promulgated by the OSFM, the owner or operator or both, shall perform the following initial response actions within 24 hours after the release:

1) Report the release to IEMA (*e.g.*, by telephone or electronic mail):

2) Take immediate action to prevent any further release of the regulated substance to the environment; and

3) Identify and mitigate fire, explosion and vapor hazards.

(b) Within 20 days after confirmation of a release of petroleum from a UST system in accordance with regulations promulgated by the OSFM, the owner or operator shall perform the following initial abatement measures:

1) Remove as much of the petroleum from the UST system as is necessary to prevent further release into the environment;

2) Visually inspect any above ground releases or exposed below ground releases and prevent further migration of the released substance into surrounding soils and groundwater;

3) Continue to monitor and mitigate any additional fire and safety hazards posed by vapors or free product that have migrated from the UST excavation zone and entered into subsurface structures (such as sewers or basements);

4) Remedy hazards posed by contaminated soils that are excavated or exposed as a result of release confirmation, site investigation, abatement or corrective action activities.

* * *

6) Investigate to determine the possible presence of free product and begin free product removal as soon as practicable and in accordance with Section 732.203.

* * *

(d) Within 45 days after confirmation of a release, owners or operators shall assemble information about the site and the nature of the release, including information gained while confirming the release or completing the initial abatement measures in subsections (a) and (b) of this Section. This information shall include, but is not limited to, the following:

* * *

4) Results of the free product investigations required at subsection (b)(6) of this Section, to be used by owners or operators to determine whether free product must be recovered under Section 732.203.

Section 732.203- Free Product is defined as "a contaminant that is present as a non-aqueous phase liquid for chemicals whose melting point is less than 30 degrees C (*e.g.*, liquid not dissolved in water)."

Section 732.203 – Free Product Removal

(a) Under any circumstance in which conditions at a site indicate the presence of free product, owners or operators shall remove free

product to the maximum extent practicable while initiating or continuing any actions required pursuant to this Part or other applicable laws or regulations. In meeting the requirements of this Section, owners or operators shall:

1) Conduct free product removal in a manner that minimizes the spread of contamination into previously uncontaminated zones by using recovery and disposal techniques appropriate to the hydrogeologic conditions at the site that properly treats, discharges or disposes of recovery by products in compliance with applicable local, State and federal regulations;

2) Use abatement of free product migration as a minimum objective for the design of the free product removal system;

3) Handle any flammable products in a safe and competent manner to prevent fire or explosions;

4) Within 45 days after the confirmation of presence of free product from a UST, prepare and submit to the Agency a free product removal report on forms prescribed and provided by the Agency…; and

5) If free product removal activities are conducted more than 45 days after the confirmation of the presence of free product, submit free product removal reports in accordance with a schedule established by the Agency.

(b) For purposes of reimbursement, owners or operators are not required to obtain Agency approval pursuant to Section 732.202(g) for free product removal activities conducted more than 45 days after initial notification to IEMA of a release.

Section 732.103 defines fill material as "non-native or disturbed materials used to bed and backfill around an underground storage tank."

Section 732.606(a): Costs ineligible for the removal from the Fund include but are not limited to:

Costs for the removal, treatment, transportation, and disposal of more than four feet of fill material from the outside dimensions of the UST, as set forth in Appendix C of this Part, during early action activities conducted pursuant to Section 732.202(f). and costs for the replacement of contaminated fill materials with clean fill materials in excess of the

amounts set forth in Appendix C of this Part during early action activities conducted pursuant to Section 732.202(f) of this Part.

PETITIONER'S ARGUMENT

Rezmar argues that the Agency erroneously deducted the costs in question, which were reasonably incurred in responding to and reporting a release of petroleum, investigating and removing free product and free product saturated soils, and mitigating site hazards, in accordance with 35 Ill. Adm. Code 732.202 and 732.203. Rezmar also argues that the Agency erroneously deducted costs that were adequately documented. Pet. Post-Hrg. Br. at 4.

Soil Removal and Disposal Costs

Rezmar first challenges the deduction of $107,114 from R.W. Collins' Invoice Number 9288. It is Rezmar's position that the material excavated, investigated and removed by R.W. Collins was not fill material, as the Agency contends. Pet. Post-Hrg. Br. at 4-5. Rezmar argues that the Agency's categorization of 2,375 cubic yards of soil as fill material was not supportable and unwarranted. The project narrative submitted to the Agency described the material as "saturated soil," "native soil," and "free product impacted soils." Mr. Bertsch testified that the majority of the materials removed were native soils, some of which were saturated with liquid or contained pockets of free product. Pet. Post-Hrg. Br. at 5-6.

Rezmar states that under Section 732.202, it was required to take continuous steps to investigate and abate the presence of free product and explosive vapors, to remedy petroleum releases and to minimize the potential for further releases and migration of free product. In addition, Rezmar argues that Section 732.203 requires it to ensure that the site is not left in a condition that would contribute to migration of the free product, and to remove as much of the free product as possible. Pet. Post-Hrg. Br. at 7-8.

In certain circumstances, Rezmar argues, it may not always be possible to pump out free product in liquid form. The presence of free product in pipelines and sewer conduits may require significant excavation of native soils. Larry Bertsch testified that Rezmar's contractors observed and removed a significant amount of free product from the tank excavation, from pipelines, from catch basins, and from pockets in the soil. He also testified that most of the material removed by R.W. Collins was saturated soil or liquid that could not be easily separated out. Pet. Post-Hrg. Br. at 8.

Rezmar's position is that its actions were not only reasonable but required by the UST early action regulations regarding free product. At the time of the initial site assessment activities the extent of the free product was not known. The work performed by R.W. Collins was necessary to fully investigate the presence and to control further migration of the free product. From a practical and a safety standpoint, Rezmar argues, the saturated materials needed to be removed from the site. Pet. Post-Hrg. Br. at 9.

Rezmar states that the site conditions and the nature of the investigation and excavation work should have been apparent to the Agency from the documents available in the project file.

GaiaTech supplied a detailed project narrative with the reimbursement package and it stated that the removal of the saturated soils were performed on an emergency basis. In addition, at the time of review the Agency was in possession of two Free Product Removal Reports and a Site Classification Report that described the free product investigation and removal work. Pet. Post-Hrg. Br. at 9.

Lack of Documentation

Rezmar argues that the Agency erroneously deducted the amount of $11,763.28, which costs were adequately supported on the invoices and documents submitted. To support this Rezmar states that the date of removal, May 3, 1999, was included in the reimbursement documentation related to GaiaTech's Invoice No 5308-6052. The reimbursement package also included a project narrative describing in detail the activities occurring on each day. Pet. Post-Hrg. Br. at 11.

RESPONDENT'S ARGUMENTS

The Board's Regulations Limit What Can Be Reimbursed as Early Action

The Agency position is that Rezmar's argument is inconsistent with the plain language of the Board's regulations and the concept of early action and later corrective action. The Agency points out that Section 732.606(a) defines the scope of what type of removal activities may be reimbursed as an early action activity. The Agency may approve removal of only up to four feet of fill material from the outside dimensions for the UST. Any other request for reimbursement of costs associated with removal of soil, the Agency argues, is more properly characterized as a request for reimbursement of corrective action costs. The Agency states that if this were not the case, then an owner or operator of a leaking UST would have no limitations on how much material could be removed during early action. Resp. Post-Hrg. Br. at 3.

The Agency argues that there was an avenue for Rezmar to pursue to seek reimbursement of those removal costs. Rezmar could have chose to classify the site as a high priority site and then proceed to seek reimbursement under the heading of corrective action costs. The Agency states that Rezmar did not choose this option and it is now unfair to ask the Agency to bend or overlook the Board's regulations to find a means by which Rezmar can receive reimbursement. Resp. Post-Hrg. Br. at 4.

The Agency also argues that Section 732.202 does not contain any language that supports Rezmar's position that removal of contaminated material is considered to be an early action activity. Section 732.202(a) requires the performance of certain initial response actions, none of which include soil removal. Sections 732.202(b) and 732.202(c) call for initial abatement actions to be taken within 20 days of contamination of the release, but none of those provisions call for the removal of contaminated soil. Section 732.202(d)(4) does require that hazards posed by contaminated soils be remedied, but does not require or call for those soils to be removed. Section 732.202(e) requires a 45-Day Report be submitted to the Agency detailing the action taken per Section 732.202(d). Section 732.202(f) states that early action may also include disposal in accordance with applicable regulations, but the statutory citation included in that

provision references the limitation of removal of four feet of fill material. Thus, argues Rezmar, the reliance placed on Section 732.202 for the argument that soils beyond those allowed by Section 732.606(a) can be removed is without merit. Resp. Post-Hrg. Br. at 4.

Soil Contaminated With Free Product is Not Free Product Itself

The Agency also argues that the contaminated soil removed at the site was not free product but rather soil contaminated with free product. The definition of free product contemplates a contaminant floating on water. The removal of such material is consistent with the removal of free product requirements found in Section 732.203. Resp. Post-Hrg. Br. at 5.

The Agency states that Rezmar is arguing that Section 732.203 allows for the removal of contaminated soil under the guise that the soil is contaminated with free product, and is essentially the same as free product. The Agency argues that this position is inconsistent with the clear provisions of the regulation and with the definition of free product. The definition of free product does not include soil contaminated with a contaminant that is present as a non-aqueous phase liquid for chemicals whose melting point is less than 30 degrees Celsius. When contaminated soil is the subject of the removal, the activity is more properly characterized as a corrective action activity and should be presented so. Resp. Post-Hrg. Br. at 5-6.

Lack of Adequate Documentation Prevented Approval of Certain Costs

The Agency argues that it denied some of the costs found in the invoice submitted by GaiaTech because the costs in question did not have dates when the work was actually done, including personnel, equipment, and subcontractor costs. The decision letter stated "[t]his was a planned tank pull and the dates are necessary because the costs on the day of the tank pull are not reimbursable. It is possible if dates are submitted some costs are eligible." Resp. Post-Hrg. Br. at 7.

The Agency states that its concern was not that the date of the tank removal was not noted, but rather that some of the costs included in the invoice may have been part of planned tank pull activities. If such costs were included, then they would not be eligible for reimbursement. The lack of adequate documentation as to the dates of the work performed led to the denial. Resp. Post-Hrg. Br. at 7.

Rezmar states that the date on the invoice should be sufficient; however, the Agency disputes that it is clear from the invoice for there was no date associated with each of the activities. Rezmar also argues that other portions of the reimbursement request included information that could have filled in those gaps. The Agency disputes this claim, since a review of those pages cited by Rezmar does not provide a breakdown of the activities and dates of activities needed to sufficiently cross-reference the GaiaTech invoice. Resp. Post-Hrg. Br. at 7-8.

DISCUSSION

Soil Removal and Disposal Costs

After review of the record and the arguments of the parties, the Board affirms the Agency's $107,114 deduction for costs for the removal of more than four feet of fill material from the outside dimensions of the UST during early action activities. Rezmar's argument is inconsistent with the language of the Board's regulations and the concept of early action and later corrective action. The statute states " … for the purpose of payment for early action costs, fill material shall not be removed in an amount in excess of four feet from the outside dimensions of the tank." 415 ILCS 5/57.6(a)(1)(B).

As a result of this statute, the Agency is limited to approving only up to four feet of fill material from the outside dimensions of the UST. Any other requests for reimbursement of costs associated with removal of soil, even during the period for early action activities, are more properly characterized as a request for reimbursement of corrective action costs. As the Agency points out, if this were not the case, then an owner or operator of a leaking UST would have no limitations on how much material could be removed during early action. This would be contrary to the controls and limitations imposed by the regulation. There was an opportunity for Rezmar to pursue to seek reimbursement of those removal costs. Rezmar could have chosen to classify the site as a high priority site and seek reimbursement under corrective action costs.

The Board also does not find persuasive Rezmar's argument that since there was free product encountered the removal of the soil was part and parcel of the free product removal and should be reimbursed. Under Section 732.103, free product is defined as a contaminant that is present as a non-aqueous phase liquid for chemicals whose melting point is less than 30 degrees Celsius. The contaminated soil at the site was not free product. Removal of such material is consistent with the removal of free product requirements found in Section 732.203.

The arguments presented by Rezmar are not consistent with Sections 732.202 and 732.203. As a result the Board affirms the Agency's determination to deny reimbursement in the form sought by Rezmar.

Lack of Documentation

Based on Board precedent, the burden is on applicants to demonstrate that incurred costs are related to corrective action, properly accounted for, and reasonable. Beverly Malkey, as Executor of the Estate of Roger Malkey d/b/a Malkey's Mufflers. v. IEPA PCB 92-104 (Mar. 11, 1993) at 4. When requesting reimbursement from the fund, the owner or operator must provide an accounting of all costs. *Id.* Rezmar argues that the date on the invoice should be sufficient. However, the Board finds persuasive the Agency's claim that there was not a date associated with each of the activities in the invoice.

Rezmar failed to provide a breakdown of the activities needed to sufficiently cross-reference the GaiaTech invoice. This does not support Rezmar's position that other portions of the reimbursement request included information that could have filled in those gaps in the invoice. The costs in question had no dates when the work was done, such as personnel, equipment and subcontractor. The Board affirms the Agency's position that this was a planned

tank pull and the dates were necessary because the costs on the date of the tank pull are not reimbursable.

CONCLUSION

The Board finds that Rezmar did not meet its burden of proving that the Agency erroneously deducted the costs in question.

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

ORDER

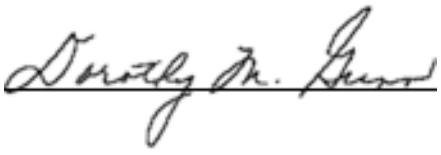
The Board affirms the Agency's December 3, 2001 reimbursement determination disallowing reimbursement of certain costs claimed by Rezmar.

IT IS SO ORDERED.

Board Member N.J. Melas abstained.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a)(2002); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, Certify that the Board adopted the above opinion and order on April 17, 2003, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board