ILLINOIS POLLUTION CONTROL BOARD
December 18, 1997

OWENS OIL COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 98-32
	)	(UST - Reimbursement)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

MR. FRED C. PRILLAMAN AND MS. BECKY S. McCRAY OF MOHAN, ALEWELT, PRILLAMAN & ADAMI APPEARED ON BEHALF OF PETITIONER;

MR. JOHN. J. KIM AND MS. VALERIE A. PUCCINI APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by R.C. Flemal):

This matter is before the Board on a petition filed by Owens Oil Company (Owens) on August 25, 1997, for review of an Illinois Environmental Protection Agency (Agency) underground storage tank fund reimbursement determination. Owens filed this petition to appeal the July 18, 1997, Agency final determination which disallowed $6,900 in corrective action costs.

The Board herein finds that the Agency acted arbitrarily in disallowing the corrective action costs at issue. We accordingly reverse the Agency's determination and direct that reimbursement be made.

BACKGROUND

Owens is the owner of a gasoline service station located at 401 Main Street, Greenfield, Greene County, Illinois, known as Facility No. 0610155002. In 1989, Owens notified the Illinois Emergency Management Agency (IEMA) that there was a release of petroleum from an underground storage tank (UST) at the Owens site. IEMA assigned the release as Incident No. 892647.

In 1994, Owens contracted with the consulting firm, CW^3M, to remediate the site. The corrective action plan included source removal, trench installation, and groundwater recovery and treatment. Specifically regarding the groundwater treatment, CW^3M built a groundwater treatment plant, operational for three years, and leased it to Owens. The lease was an oral agreement at a rate of $3,500/month. In 1996 Owens filed three reimbursement applications

(covering nine months of treatment) for corrective action costs with the Agency, all of which included requests for the $3,500/month lease. The Agency fully reimbursed Owens for each of the $3,500/month costs.

Owens filed the instant claim for reimbursement on or about May 1, 1997. The application requested reimbursement of correction action costs in the amount of $17,635.94, which included an additional three months of lease of the groundwater treatment plant. Pet. at 2. On July 18, 1997, the Agency issued its final determination and found Owens eligible for $10,735.94 in reimbursement costs. The reimbursement included all items except for $6,900 of the $10,500 requested for lease of the groundwater treatment plant. The Agency explained the denial as: "$6,900.00, deduction in costs with the Monthly Mobil Groundwater Lease that the owner/operator failed to demonstrate were reasonable. (Section 22.18b(d)(4)(C) of the Illinois Environmental Protection Act.)." Joint Exh. 1 at 003.

DISCUSSION

We find that the controlling issue in this case is that, having previously determined the $3,500/month lease rate to be reasonable, it was arbitrary for the Agency, without some indication greater than here present, to reverse that previous determination.

An administrative agency is "bound by prior custom and practice in interpreting . . . rules and may not arbitrarily disregard them." Alton Packaging Corp. v. PCB and IEPA, 146 Ill. App. 3d 1090, 497 N.E. 2d 864, 866 (5th Dist. 1987). When an agency departs from its prior practice, it accordingly must be for good cause, such as change in law, determination that the facts of the new matter are different from those upon the prior practice was based, or determination that the prior practice was in error (see, e.g., Chuck and Dan's Auto Service v. IEPA, (August 26, 1993) PCB 92-203 and Chemrex, Inc., v. IEPA, (February 4, 1993), PCB 92-123). No such cause is present here.

There was no change in the applicable law over the period at issue. Moreover, it is uncontested that the facts presented to the Agency were the same in the four applications at issue. Owens submitted the same application for reimbursement on four occasions. All applications involved the same site, the same monthly groundwater treatment lease, the same parties, and the same remediation plan. Joint Exh. 1 at 023, 052, and 088.

The Agency does contend that at the time of review of the fourth application it had reason to believe that the $3,500/month lease rate was excessive. This contention is based on a reported conversation held between Mr. Christopher Kohrmann, who was the Agency's project manager for the fourth application[1], and Mr. Brian Bauer, another Agency project manager. Tr. at 22-24. According to Kohrmann, Bauer told him that he had obtained from a vender a quoted lease rate of $1,200/month for a similar treatment system. Tr. at 24.

[1] The project manager for the first three applications was a different individual, Mr. Robert Mathis.

This alleged quoted rate is the sole basis used by the Agency in determining to reimburse the fourth application at the reduced $1,200/month rate. Tr. at 27. The decision as well was solely Kohrmann's. Tr. at 33.

On examination, however, Mr. Kohrmann testified that he was not a party to the phone conservation in which the alleged $1,200 rate was given. Tr. at 24. Moreover, he did not know the vendor's name, when the quote was given, what the terms of the quote where, whether the treatment plant was the same as used by Owens, or whether there was any follow-up to determine that the $1,200/month rate was reasonable. Tr. at 25-27. Similarly, Kohrmann testified that he did not consult the Agency's job performance guidance (Pet. Exh. 6) of April 1, 1996 (Tr. at 33), the Agency's LUST Project Manager's Handbook (Tr. at 33), or any Agency rule (Tr. at 34) for any additional guidance. Neither did Kohrmann review any of the three prior Owens' applications (Tr. at 33) or the files of any reimbursements[2] made for other UST sites at which leases of groundwater treatment plants were involved (Tr. at 37).

We find this minimal investigation scanty basis for the Agency to reverse its prior determinations regarding the reasonableness of the $3,500/month lease rate. While we agree with the Agency that there is no explicit requirement upon it to consult any specific documents or conduct any specific investigation of its own (see Agency brief at 16-18), we disagree that this constitutes license for the Agency to reverse itself without more foundation than is here present. Some modicum of evidence must exist, else the decision is arbitrary. We find that that modicum does not exist here.

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

ORDER

The July 18, 1997, determination of the Illinois Environmental Protection Agency to disallow $6,900 in reimbursement of corrective action costs to Owens Oil Company is hereby reversed. The Board directs the Agency to reimburse Owens Oil Company, in the amount disallowed, according to standard reimbursement procedures.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1996)) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of service of this order. Illinois Supreme Court Rule 335 establishes such filing requirements. See 145 Ill. 2d R. 335; see also 35 Ill. Adm. Code 101.246, Motions for Reconsideration.

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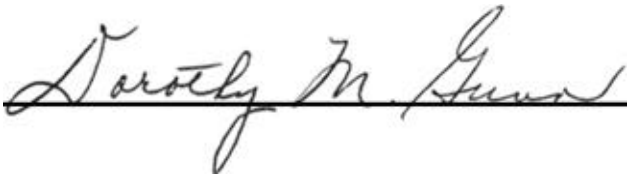
[2] At hearing Owens showed, based on the Agency's own records for sites other than the Owens' site, that reimbursement for similar groundwater treatment plant leases had been at the $3,500/month rate.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 18th day of December 1997, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board