ILLINOIS POLLUTION CONTROL BOARD
April 17, 2003

RANTOUL TOWNSHIP HIGH SCHOOL DISTRICT NO. 193,	)	
Petitioner,	)	
	)	PCB 03-42
v.	)	(UST Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

PATRICK D. SHAW OF MOHAN, ALEWELT, PRILLAMAN & ADAMI APPEARED ON BEHALF of PETITIONER; and

JOHN J. KIM, SPECIAL ASSISTANT ATTORNEY GENERAL, APPEARED ON BEHALF of THE RESPONDENT.

OPINION AND ORDER OF THE BOARD (N.J. Melas):

On October 7, 2002, Rantoul Township High School District No. 193 (District or Rantoul) timely filed a petition asking the Board to review a September 5, 2002 underground storage tank (UST) fund reimbursement determination of the Illinois Environmental Protection Agency (Agency). *See* 415 ILCS 5/40(a)(1) (2002); 35 Ill. Adm. Code 105.404. The Agency rejected the District's proposed budget amendment to the high priority corrective action plan concerning two leaking USTs at the District's site located at 200 S. Sheldon Street in Rantoul, Champaign County.

The District disputes the Agency determination regarding lack of documentation concerning costs for bid proposals, relocation of underground utilities, removal of migration pathways, backfill compaction and density testing, demurrage, specified personnel, and attorney fees. The District contends and contends that all costs were necessary and required. For the reasons below, the Board affirms the Agency's denial decision on all costs except those related to possible migration pathways, for which the Agency concedes reimbursement is appropriate. After setting forth the facts and procedural history of this case and the legislative framework, the Board will discuss the issues and explain its decision.

FACTS

The District operates a high school located at 200 South Sheldon Street, Rantoul, Champaign County. Rec. 14. On May 20, 1997, the school district found a petroleum release while removing two 500-gallon USTs. Rec. 100. Rantoul immediately notified the Illinois Emergency Management Agency, and the release became UST fund Incident No. 970899. Rec.

100. Rantoul submitted a site classification completion report to the Agency on November 13, 1998. Rec. at 47. The report identified a gas line as a potential migration pathway. Rec. at 49. The Agency rejected the site classification report due to Rantoul's failure to demonstrate that migration pathways were adequately addressed. Rec. at 47. Rantoul submitted another site classification report on July 1, 1999. The Agency rejected this report for failure to define the setback zone and adequately address migration pathways, and directed Rantoul to propose a groundwater investigation plan. Rec. at 50, 52. On September 28, 1999, Rantoul submitted an amended physical soil classification and groundwater investigation plan to the Agency. Rec. at 54. The Agency approved the plan with modifications. Rec. at 55. The Agency directed Rantoul to do borings near the gas line to be analyzed for indicator contaminants. Rec. at 57.

As requested by the Agency, Rantoul took the borings. Rec. at 82-84. From the results, Rantoul determined there were three manmade migration pathways impacted by the release. Rec. at 78. The migration pathways were: (1) an underground gas line, approximately six feet from the tank pit; (2) an underground water line located about three feet east of the tank pit; and (3) a storm sewer line located approximately thirty feet from the tank pit. Rec. at 77-78; Rec. at 84. A professional engineer certified these migration pathways as threatening human health or human safety or having the potential to cause explosions. Rec. at 66-67. The Agency classified the site as "high priority." Rec. at 66-67.

Rantoul hired a consultant, Applied Environmental Technologies (AET), to perform corrective action. Rantoul submitted a high priority corrective action plan, including budget, to the Agency on August 21, 2001. The Agency approved the plan and budget with modifications on October 5, 2001. Rec. at 89. The Agency approved $163,631.96 in corrective action costs out of a total of $185,662.32 requested by Rantoul. Rec. at 91, 146. AET began to define the boundaries of the soil and groundwater contamination plumes for Rantoul. Rec. at 103-104. The locations of the utilities, including the gas and water lines, were different in the final plans than in the maps submitted to the Agency in the original corrective action plan. Tr. at 28, 32-33, 46. AET submitted an amended budget on behalf of Rantoul Township on May 8, 2002, requesting a total of $241,303.63 in corrective action costs. Rec. at 8.

The Agency denied $77,671.67 in costs proposed in the budget amendment in a letter dated September 5, 2003, approving only the $163,631.96 in corrective action costs approved in the original budget. Rec. at 8, 16. The letter states that the submitted budget amendment contains personnel costs that lack sufficient documentation. Rec. at 3, par. 1. The letter states the budget amendment includes costs for unnecessary and unreasonable overnight mail charges and costs for relocating underground utilities that that are not corrective action costs. Rec. at 3, par. 2, 3. Costs associated with compaction of backfill materials, including personnel and contractor time and the rental of soil compactors, were denied as not corrective action costs. Rec. at 3, par. 4. Costs associated with the removal of "possible migration pathways" were denied as not corrective action costs. Rec. at 4, par. 5. The Agency denied costs for demurrage. Rec. at 4, par. 6. Finally, handling charges were approved only to certain percentages of the cost. Rec. at 5, par. 7.

PROCEDURAL HISTORY

Rantoul filed this petition with the Board on October 7, 2002. A hearing was held in Springfield on February 18, 2003, at which Mr. Donald Grammer, a professional engineer at Applied Environmental Technologies, and Mr. Jay Gadosh, an Agency employee, testified. On March 14, 2003, Rantoul waived the decision deadline in this proceeding until May 15, 2003.

LEGAL FRAMEWORK

The Board's authority to review an Agency budget determination in UST reimbursement claims arises from Section 57.7(c)(4)(D) and 57.8(i) of the Environmental Protection Act (Act). 415 ILCS 5/57.7(c)(4)(D), 57.8(i) (2002). Section 57.7(c)(4)(D) grants owners and operators the right to appeal an Agency determination on a proposed plan to the Board in accordance with the procedures of Section 40 of the Act. 415 ILCS 5/40 (2002). Section 57.8(i) of the Act grants the right to petition the Board to review the Agency denial or partial payment of a UST fund reimbursement request in the manner provided in Section 40 of the Act.

When seeking reimbursement from the UST Fund at a high priority site, the owner or operator must supply the Agency with "an accounting of all costs associated with the implementation and completion of the corrective action plan." 415 ILCS 5/57.7(c)(1)(B). The owner or operator must prove that the costs associated with the budget are reasonable, will be incurred in performing corrective action, and will be used to satisfy only the minimum requirements of the Act. 415 ILCS 57.7(c)(4)(C). If the Agency denies the budget, the Agency must provide the owner or operator in writing within 120 days: (1) the sections of the Act or Board regulations that would be violated if the budget were approved; (2) an explanation of the Board regulations that may be violated if the budget were approved; (3) the specific information that the Agency deems the budget lacks; and (4) the specific reasons why the Act and Board regulations would not be met if the budget were approved. 415 ILCS 57.7(c)(4)(D).

Regarding legal defense costs, Section 732.606(g) of the Board rules provides:

> Costs ineligible for payment from the Fund include but are not limited to: . . . Legal defense costs including legal costs for seeking payment under these regulations unless the owner or operator prevails before the Board and the Board authorizes payment of legal fees [415 ILCS 5/57.8(l)]. 35 Ill. Adm. Code 732.606(g).

DISCUSSION

Costs Not Deemed Corrective Action

Bid Proposals

Rantoul argues that the Agency should reimburse it for $11,820 in costs to prepare the bid proposals because bid preparation is a condition precedent for school districts to comply with Section 57.7 of the Act. Br. at12. Rantoul explains that letting bids is necessary for a school district prior to awarding a bid to a contractor pursuant to the Illinois Constitution and the School Code. Ill. Cost. Art. 7, Sec. 8; 105 ILCS 5/10-20.21. Furthermore, Rantoul contends that the

letting of bids proves Rantoul chose the most reasonable cost alternative. The Agency's denial letter stated: "Bid proposals are not required for compliance with the LUST Program; therefore, activities related to the Bid Specifications must be removed from the budget." Rec. at 4.

The Agency argues that just because letting bids is required by the School Code, it does not mean that the Agency should reimburse for that activity through the UST Fund. Resp. at 6. The Agency maintains that letting bids is not a corrective action

The Board affirms the Agency's decision. The Board recognizes that by law, school districts must let bids before awarding a bid to a contractor and agrees that letting bids can help show a cost is reasonable. However, the Board finds that costs incurred for preparing the bid specifications are not costs incurred for performing corrective action. Though the costs incurred for bid specifications themselves are not reimbursable, they are useful for showing that other costs are eligible for reimbursement, specifically that the corrective action costs are reasonable. The Board affirms the Agency's denial of these costs.

Relocation of Underground Utilities

Rantoul argues that there was no way to work around the utility lines at issue and that the utilities were active and could not be simply removed. Br. at 15; Reply at 8. Rantoul contends the utility lines had to be relocated or the school would have had to be closed down. *Id.*

The Agency maintains that while the costs of removing utility lines can be reimbursable, the costs of relocating utility lines are not. Resp. at 8. In its denial letter, the Agency notes that the costs of removing the utility lines exceed the minimum requirements for corrective action necessary to comply with the Act, Section 57.5(a), and Board rules, Section 732.606(o). 415 ILCS 5/57.5(a); 35 Ill. Adm. Code 732.606(o). The Agency concludes that relocating utility lines is not corrective action. Resp. at 8.

Budget Certification Form. Rantoul argues that the Agency's budget certification form is illegal in form and intent. Br. at 17. Both Rantoul and a professional engineer working at the site signed a statement provided by the Agency certifying that Rantoul is not seeking reimbursement for costs associated with utility replacement. Rec. at 27. Rantoul contends that the statement, called a budget certification form, is an illegal form. Br. at 17. Rantoul maintains this is so because the form requires a certified engineer to agree not to include costs associated with utility replacement, among other costs, in the budget certification form for reimbursement. Most of the costs listed come from the language of the Act or Board rules. However, the Act and Board rules do not contain specific language regarding utility replacement. Therefore, Rantoul contends that by creating a form prohibiting those particular costs from reimbursement, the Agency has essentially executed a "backdoor" rulemaking regarding such costs, citing Platolene 500 v. IEPA, PCB 92-9, at 7-8 (May 7, 1992).

The Agency maintains that the budget certification form is not its justification for denying reimbursement to Rantoul for utility relocation. Rather, the Agency denied costs for replacement and/or relocation because utility relocation is not corrective action. Rec. at 3-4.

The budget certification form, with the engineer's signature, is simply proof that Rantoul acquiesced to this position, according to the Agency. Resp. at 11.

Along with an application for payment, the Act requires certification from a professional engineer, acknowledged by the owner or operator. 415 ILCS 5/57.8(a)(6)(A). Under Section 732.606(o), "costs for corrective action activities and associated materials or services exceeding the minimum requirements necessary to comply with the Act" are ineligible costs. 35 Ill. Adm. Code 732.606(o). The Board finds the budget certification form did not conflict with the requirements of the Act or Board rules.

Rantoul's argument thatrelocation of the underground utilities was necessary for it to complete site remediation shows Rantoul's hardship in completing construction, but does not prove relocation was a corrective action. Relocation itself was not necessary to comply with the minimum corrective action requirements of the Act and Board rules. Accordingly, the Board finds the Agency properly denied costs associated with the relocation of underground utilities.

Removal of Possible Migration Pathways

The Agency concedes that costs related to the removal of old drain lines should have been approved in the amended budget request. Resp. at 11-12. The costs amount to $889.50 for excavation, removal, and plugging of possible migration pathways. The Board remands this to the Agency for approval.

Backfill Compaction and Density Testing

Rantoul alleges that costs to compact backfill materials are eligible for payment from the UST fund because the Agency approved the costs in the original budget. Br. at 21. Additionally, Rantoul contends these costs were necessary to create a proper bed for asphalt or concrete as an engineered barrier. Br. at 22. Rantoul argues that because it relied on the Agency's approval of the original budget in spending money to backfill the area in question, the Agency should reimburse for the costs of compaction in the amended budget as well. Br. at 21.

The Agency responds that pursuant to Section 732.606(w) of the Board rules, costs associated with the compaction of backfill material are ineligible for payment from the UST fund. Resp. at 12; 35 Ill. Adm. Code 732.606(w). The Agency concedes that the costs were originally approved, but states that the approval was a mistake, understandable because of the volume of budget requests the Agency reviews every year. *Id.*

The Agency also characterizes Rantoul's argument as a claim of collateral estoppel against the Agency. Resp. at 13. The Agency continues that to collaterally estop the government, the moving party must show the government made a misrepresentation with knowledge that the misrepresentation was untrue. Medical Disposal Services, Inc. v. IEPA, 286 Ill. App. 3d 562, 677 N.E.2d 428 (1st Dist. 1997). The Agency contends that in this case the approval was a mistake, and that the Agency did not knowingly misrepresent that the compaction costs could be approved. Resp. at 13.

The Board finds that none of the backfill compaction costs are reimbursable. As noted by the Agency, backfill compaction costs are ineligible pursuant to the Board rules. 35 Ill. Adm. Code 732.606(w). The purposes of the UST fund are narrow. Strube v. PCB, 242 Ill. App. 3d 822, 610 N.E.2d 717, 851 (3rd Dist. 1993). The Act establishing the UST fund limits reimbursement for high priority sites to corrective action that mitigates any threat to human health, human safety or the environment resulting from the UST release. 415 ILCS 5/57.7(c)(1)(A). Additionally, the Board has held that an action playing primarily a restorative role, even if partially contributing to corrective action, is not necessary to meet the minimum requirements of the Act. Eugene Graham v. IEPA, PCB 95-89 slip op. at 30 (Aug. 24, 1995).

Rantoul has failed to show that backfill compaction associated with the installation of the engineered barrier will mitigate any threat to human health, human safety or the environmental resulting from the release. The amended petition states the engineered barrier was needed for bus traffic. Rec. at 20. Therefore, it appears from the record that the purpose of the engineered barrier and related backfill compaction is to restore the site for bus traffic.

The Board also notes that Rantoul did not claim that collateral estoppel requires the Agency to approve costs for backfill compaction. Rantoul did not contend the Agency knowingly misrepresented that it would reimburse the compaction costs in the original petition. Rather Rantoul argued that the Agency approved backfill compaction costs contained in the original budget because the corrective action plan called for an engineered barrier. However, for the reasons stated above, the Board affirms the Agency's denial of all of the backfill compaction costs.

Demurrage

Rantoul argues that $11,820 in demurrage costs are reimbursable because they are for additional personnel time of the School District's professional engineer and professional geologist, and not for delay, as the Agency has characterized the cost. Reply at 11-12. Rantoul maintains that wet weather and problems with compaction commanded additional engineering services. Reply at 12.

The Agency maintains that its definition of demurrage was correct and that the Agency was proper in denying these costs as ineligible. Resp. at 14. The Agency points out that in the past the Board has interpreted demurrage to mean "standby charges." Clarendon Hills Bridal Center v. IEPA, PCB 93-55, slip op. at 28 (Feb. 16, 1995). The Agency contends there is no support in the Act, Board rules, or Board precedent for Rantoul's interpretation. Resp. at 14.

The Board determines that the retention of the professional engineer and geologist beyond the predicted number of hours does not fall within the definition of demurrage. Demurrage relates to the detention of a vehicle or vessel beyond the time necessary for loading or unloading. Clarendon Hills, PCB 93-55, slip op. at 28-29. Therefore, the Agency was incorrect in characterizing these costs as demurrage. However, the extra hours the engineer and geologist spent on November 19 and 26, 2001, related to backfilling. Rec. at 31. The Board has determined above that backfilling compaction is not a reimbursable activity. Furthermore,

preparing the bid specifications was determined not a reimbursable activity, so the Agency also properly denied the additional costs of coordinating such specifications. Rec. at 0034.

The remaining personnel costs denied as demurrage include additional time spent by consultants due to another group's poor coordination and additional time necessary to coordinate the job with the ongoing school construction. Rec. at 0024. Rantoul did not show these activities were for corrective action nor that they were incurred to meet the minimum requirements of the Act and Board regulations. The Board affirms the Agency's denial of these costs.

Costs Lacking Sufficient Documentation

Personnel Costs

Rantoul argues that the Agency erroneously denied reimbursement for personnel costs. Rantoul contends that there is sufficient documentation to determine whether the additional personnel costs relate to corrective action. Br. at 26. Rantoul acknowledges that remand with respect to these charges may be necessary.

The Agency argues it properly denied the personnel charges. The Agency explains that because the personnel costs were intermingled with costs deemed ineligible for approval, the Agency could not determine how to apportion the costs. Reply at 14. The Agency also contends it is Rantoul's responsibility to show that the personnel costs related to some corrective action. Reply at 15.

When requesting reimbursement from the fund, the owner or operator must provide an accounting of all costs (415 ILCS 57.7(c)(1)(B)) and demonstrate the costs are reasonable and will not be used for corrective action activities in excess of those required to meet the minimum requirements of the Act (415 ILCS 57.7(c)(1)(C)). The documents Rantoul submitted regarding the personnel charges do not show the costs are reasonable. Rantoul did not present any testimony at hearing explaining how the Agency record demonstrates that these costs are reasonable and associated with reimbursable corrective action activities. Therefore, the Board finds the Agency was proper in denying these costs.

Attorney Fees

Rantoul requests the Agency pay Rantoul's legal fees from the UST fund under the prevailing party provision of the Act. *See* 415 ILCS 5/57.8(l).

While the Board has discretion to award attorney fees in cases where the petitioner prevails, the Board does not authorize payment of attorney fees in this proceeding. The Board denies reimbursement of attorney fees on the grounds that Rantoul prevailed only on the issue of costs related to the removal of possible migration pathways, to which the Agency conceded.

CONCLUSION

For the reasons stated above, the Board affirms the Agency's denial of costs associated with preparing bid specifications, relocating underground utilities, backfill compaction and density testing, demurrage, personnel costs, and attorney fees. The Board reverses the Agency's denial of costs related to the removal of possible migration pathways.

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

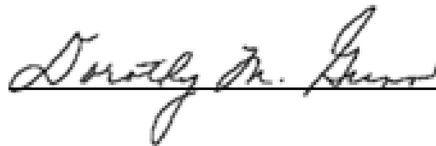
ORDER

For the reasons discussed above, the Board affirms the Agency's September 5, 2003, determination that costs to prepare bid specifications, relocate underground utilities, backfill compaction and density testing, demurrage, personnel costs, and attorney fees are not reimbursable. The Board reverses the Agency's denial of costs related to the removal of possible migration pathways, which the Agency also concedes are reimbursable, and remands this issue to the Agency for approval in the form of a newly amended corrective action plan budget review letter concerning Rantoul's UST fund incident no. 970899 request.

IT IS SO ORDERED.

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 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board