

ILLINOIS POLLUTION CONTROL BOARD
November 19, 1992

JAMES LYNCH,)	
)	
Petitioner,)	
)	
v.)	PCB 92-81
)	(Underground Storage Tank
ILLINOIS ENVIRONMENTAL)	Reimbursement Determination)
PROTECTION AGENCY,)	
)	
Respondent.)	

JAMES LYNCH APPEARED PRO SE; and

TODD RETTIG AND GREGORY RICHARDSON APPEARED ON BEHALF OF
RESPONDENT.

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

This matter is before the Board on a petition for review filed June 1, 1992 by petitioner James Lynch pursuant to Section 22.18b(g) of the Environmental Protection Act (Act). (Ill.Rev.Stat. 1991, ch. 111½, par. 1022.18b(g).) Lynch seeks review of the Illinois Environmental Protection Agency's (Agency) April 27, 1992 partial denial of reimbursement from the Underground Storage Tank (UST) Fund. A hearing was held on September 30, 1992, in Carlinville, Illinois. No members of the public attended. Neither party filed a brief.

The only issue in this case is whether costs incurred in association with a planned removal of USTs are "corrective action" costs and thus reimbursable by the Fund.

BACKGROUND

This case involves the removal of USTs at Jim's Shell and Marine, located at 400 North Springfield in Virden, Illinois. (R.A at 2.)¹ Mr. Lynch purchased the property on January 1, 1979. (R.A at 3.) The site contained six USTs, all of which were taken out of service on November 30, 1990. (R.A at 3-8, 14.) On March 28, 1991, the Office of the State Fire Marshal (OSFM) received Lynch's application for a permit to remove the six tanks. (R.B at 1-2.) OSFM issued that permit for removal of

¹ "R.A" denotes citation to Part 1 of the Agency record, and "R.B" indicates citation to Part 2 of the Agency record. "Tr." refers to the transcript of the September 30, 1992 hearing.

0137-0165

the USTs on April 22, 1991. (R.B at 1-2.) The tanks were removed on May 10, 1991. (R.A at 3-8, 14; R.B at 3.) Contamination was discovered during the course of the removal of the tanks, and a strong petroleum odor and discoloration of the soil was noted. (R.B at 13, 43, 52; Tr. at 5-8.) One of the tanks was perforated. (R.B at 13, 52; R.A at 3.) Lynch notified the Illinois Emergency Services and Disaster Agency (ESDA) of the release on May 10, 1991.² (R.B at 5.) Lynch subsequently performed remedial activities on the site.

Lynch filed an application for reimbursement with the Agency on August 21, 1991. (R.A at 2-20.) The invoices submitted in support of the application covered the period from May 1991 to October 1991, and the total amount requested was \$88,854.27. (R.A at 127.) On April 27, 1992, the Agency issued its decision, finding that, after deducting the applicable \$15,000 deductible, \$66,515.53 was reimbursable. The Agency denied reimbursement of \$7,338.74 in tank removal costs. (R.A at 127-129.) Lynch filed his petition for review with the Board on June 1, 1992.

DISCUSSION

As noted above, the Agency denied reimbursement of \$7,338.74 in tank removal costs, stating that the tanks were not removed in response to a release, and that therefore the associated costs are not corrective action. (R.A at 129.) The Agency pointed to Section 22.18(e)(1)(C) of the Act, which states in part:

Corrective action does not include removal of an underground storage tank if the tank was removed or permitted for removal by the Office of the State Fire Marshal prior to the owner or operator providing notice of a release of petroleum in accordance with applicable notice requirements.
(Ill.Rev.Stat. 1991, ch. 111½, par. 1022.18(e)(1)(C).)

This limitation, excluding tank removals where permitted prior to notification of a release, was added by P.A. 87-323, effective September 6, 1991.

In its letter denying reimbursement of the \$7,338.74 in tank removal costs, the Agency cited to this statutory limitation in support of its contention that the tank removal costs are not corrective action costs. However, the Board has previously held in determining whether tank removal costs are reimbursable as

² The Board notes that the date of ESDA notification is given as May 14, 1991 in several places in the record. (R.A at 4; R.B at 52.) However, the ESDA form documenting the incident report is clearly dated May 10, 1991. (R.B at 5.) The Board accepts that May 10 date as the date of ESDA notification.

corrective action costs, the law to be applied is the definition of "corrective action" as it existed when the costs were incurred. (Galesburg Cottage Hospital v. Illinois Environmental Protection Agency (August 13, 1992), PCB 92-62, slip op. at 3-6; see also Pulitzer Community Newspapers, Inc. v. Illinois Environmental Protection Agency (December 20, 1990 and February 28, 1991), PCB 90-142.) Where a statutory amendment involves prior activity or a certain course of conduct, the law to be applied is the provisions in effect at the time that the course of conduct occurred. In this case, the costs were incurred in May 1991, well before the statutory amendment was effective on September 6, 1991. Thus, the limitation of Section 22.18(e)(1)(C) cannot be applied to this case.³

The definition of "corrective action", as it existed in May 1991, stated:

"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, 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. 111½, par. 1022.18(e)(1)(C).)

As the Board held in Miller and in Enterprise Leasing Co. v. Illinois Environmental Protection Agency (April 9, 1992 and June 4, 1992), PCB 91-174), this definition presents a two-part test: whether the costs are incurred as a result of action to "stop, minimize, eliminate, or clean up a release of petroleum", and whether the costs are the result of activities such as tank removal. The Board finds that the tank removal costs incurred by Lynch meet both parts of the definition. Therefore, the tank

³ The Board also points out that Lynch's application for reimbursement was filed with the Agency on August 21, 1991, before the statutory amendment was effective on September 6, 1991. The Board has previously held that when determining eligibility for reimbursement (as opposed to the issue of corrective action), the applicable law is that which is in effect on the date of the filing of the application. (Miller v. Illinois Environmental Protection Agency (July 9, 1992), PCB 92-49; First Busey Trust & Investment Co. v. Illinois Environmental Protection Agency (February 27, 1992), PCB 91-213.) Therefore, even under that standard, Section 22.18b(e)(1)(C) cannot be applied in this case.

removal costs are reimbursable as corrective action costs.

At hearing, the Agency did not specifically contend that the tank removal costs are not corrective action because of the limitation in Section 22.18(e)(1)(C). Instead, the Agency argued that Section 22.18b(a)(3) precluded reimbursement of the tank removal costs. Section 22.18b(a)(3) states that an owner or operator is eligible for reimbursement from the UST Fund if:

the costs of corrective action or indemnification were incurred by an owner or operator as a result of a release of petroleum, but not including any hazardous substance, from an underground storage tank. (Ill.Rev.Stat. 1991, ch. 111 $\frac{1}{2}$, par. 1022.18b(a)(3).)

The Agency maintained that because the tank was removed before the release was discovered, the facts of this case do not satisfy the requirements of Section 22.18b(a)(3). Thus, the Agency asserts that the tank removal costs are not reimbursable. (R.A at 129; Tr. at 19-20.)

The Board is not persuaded by the Agency's arguments on this issue. Section 22.18b(a)(3) merely sets forth the requirement that only corrective action costs are reimbursable. We must then specifically look to the definition of "corrective action", contained in Section 22.18b(e)(1)(C), to determine whether the disputed costs are indeed "corrective action" costs. As the Board found above, the tank removal costs in the instant case meet both parts of the definition of "corrective action", and are thus reimbursable.

Finally, the Board notes that although six tanks were removed from the site, only one tank was leaking. (R.A at 3; R.B at 13, 52.) The record does not indicate whether the \$7,338.74 in disallowed tank removal costs was for the removal of all six tanks, or for just one tank. (R.A at 36, 119-121.) Because the record is unclear, and because the Agency never raised an objection to the tank removal costs on the grounds that some of those costs might not be allowable because they are not related to a release of petroleum, the Board finds that the entire \$7,338.74 in tank removal costs should be reimbursed.

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

ORDER

The Board hereby reverses the Agency's April 27, 1992 determination that \$7,338.74 in tank removal costs is not reimbursable. This case is remanded to the Agency for disbursement of the \$7,338.74 amount, consistent with this opinion and order. This docket is closed.

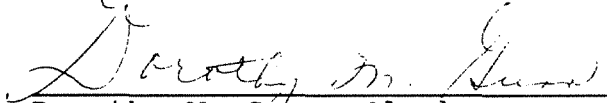
0137-0168

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (Ill.Rev.Stat. 1991, ch. 111½, par. 1041) provides for the appeal of final Board orders. The Rules of the Supreme Court of Illinois establish filing requirements. (But see also 35 Ill.Adm.Code 101.246 "Motions for Reconsideration" and Castenada v. Illinois Human Rights Commission (1989), 132 Ill.2d 304, 547 N.E.2d 437.)

J.C. Marlin 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 November, 1992, by a vote of 6-1.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

0137-0169