ILLINOIS POLLUTION CONTROL BOARD
February 25, 1993

ILLICO INDEPENDENT OIL COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 92-173
	)	(UST Fund)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

KENNETH R. EATHINGTON, of SUTKOWSKI & WASHKUHN, APPEARED ON BEHALF OF PETITIONER; and

JAMES G. 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 November 5, 1992 by petitioner Illico Independent Oil Company (Illico) pursuant to Section 22.18b(g) of the Environmental Protection Act (Act). (415 ILCS 5/22.18b(g) (1992).)[1] Illico seeks review of the Illinois Environmental Protection Agency's (Agency) October 2, 1992 partial denial of reimbursement from the Underground Storage Tank (UST) Fund. A hearing was held on February 2, 1993, in Danville, Illinois. No members of the public attended. Neither party chose to file a brief, but relied on closing arguments.

There are three issues in dispute in this case. The first issue is whether costs associated with the removal of tanks from which there was no release are reimbursable. The second dispute is whether costs incurred in installing a monitoring well which was destroyed within one month of installation are reimbursable. Finally, the parties disagree on whether costs incurred in disposing of contaminated material are reimbursable, where the company hired to dispose of that material apparently lacked proper permits.

BACKGROUND

This case involves the removal of USTs and corrective action at a convenience store, with gasoline dispensing operations, in Westville, Illinois. The facility is known as the Apollo Mart.

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[1] The Act was formerly codified at Ill.Rev.Stat. 1991, ch. 111½, par. 1001 et seq.

(R. B at 59; Tr. at 18-19.)[2] Illico purchased the site from LePaul Oil Company on September 29, 1989. (R. B at 60.) In October 1989 Illico became aware that a release of petroleum had occurred; however, the Emergency Services Disaster Agency (ESDA)[3] had been notified on September 13, 1989. (R. B at 60.) The Westville site had nine USTs, three of which were leaking. (R. B at 60.) The tanks which were confirmed to be leaking were not side by side, but were scattered throughout the tank farm. (Pet. Exh. 1, 2; Tr. at 21-29.) The contractor who removed the tanks believes that the leaking tanks were tank numbers 1, 3, and 4. (Pet. Exh. 3; Tr. at 30-31.)

The tanks were taken out of service on September 7, 1989, and were removed on October 26 and 27, 1989. (R. B at 61-69.) On February 20, 1990 three monitoring wells were developed and sampled. A fourth monitoring well, known as MW-4, had been destroyed "by the ongoing renovation of the facility." (R. A at 28; Tr. at 39-41.) In its application for reimbursement, Illico stated that the three tanks which were leaking were taken out of service because water was discovered in the tanks, and "a decision was made to upgrade the tank cluster." In response to the question asking why the tanks were removed, Illico stated "upgradation." Illico indicated that there had been a release from those three tanks. (R. B at 61-63.) As to the other six tanks which were not leaking, Illico indicated that the tanks were taken out of service "to remove the UST to upgrade", and that the tanks were pulled for "upgradation". Illico stated that there had not been a release from those six tanks. (R. B at 64-69.)

On May 9, 1991, Illico submitted its application for reimbursement from the UST Fund to the Agency. (R. B at 50-51, 59-69.) The invoices reviewed by the Agency covered the period from October 1989 to March 29, 1991, and the total amount requested was $134,178.16. (R. A at 81.) On October 2, 1992, the Agency issued its decision, finding that, after deducting the applicable $10,000 deductible, $88,718.40 was reimbursable. The Agency listed five separate amounts for which reimbursement was denied. (R. A at 81-82.) Illico filed its petition for review with the Board on November 5, 1992.

DISCUSSION

Initially, the Board must note that its review of this case

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[2] "R. A" denotes citation to the Agency record, technical file, "R. B" indicates citation to the Agency record, fiscal file, and "Tr." indicates citation to the hearing transcript.

[3] ESDA is now known as the Emergency Management Agency.

has been complicated by the confused state of the record filed by the Agency. The documents in the record are not presented in chronological order (for example, a December 3, 1991 Agency letter to Illico appears at pages 73-74 of the technical file, while Illico's January 6, 1992 response to that letter appears earlier in the technical file, at pages 53-57), and several documents are included more than once, without explanation. Most disturbing is the fact that Illico's application for reimbursement is not located in one place. Pages four and five of the application are found at pages 50-51 of the fiscal file, while pages one through three are located at pages 59-69. This muddled record, coupled with the fact that neither party chose to file a brief, has made the Board's review of this case unnecessarily difficult.

In its petition for review, Illico challenged the Agency's determination generally. At hearing, however, Illico indicated that its challenge to denial items one and two, relating to costs for concrete replacement and an adjustment for costs lacking supporting documentation, had been withdrawn. (Tr. at 7.) Therefore, the three amounts remaining in dispute are $14,338.68 for costs associated with the removal of the six USTs which were identified as not having a release, $1,797.09 in costs associated with the installation of a monitoring well which was destroyed within one month of installation, and $3,127.50 in costs incurred in disposing of contaminated material. (R. A at 82.)

Tank Removal Costs

The Agency denied reimbursement of $14,338.68 in tank removal costs for six tanks, stating that those six tanks were identified as not having a release. Therefore, the Agency found that the costs are not corrective action costs, and are not reimbursable. (R. A at 82.)

Illico makes two alternative arguments with respect to these tank removal costs. First, Illico contends that the removal of the six USTs was indeed corrective action, because all nine tanks had to be removed to reach and remove the contaminated soil. Illico points out that the leaking tanks were not contiguous, and that some of the nine tanks were manifolded together. Illico argues that there is nothing in the Act which requires that a tank be leaking in order for its removal to be considered corrective action. Illico points to the statutory definition of "corrective action", and maintains that the removal of the six non-leaking tanks was "an action to stop, minimize, eliminate, or clean up a release of petroleum..." (415 ILCS 5/22.18(e)(1)(C) (1992).)

In the alternative, Illico argues that the Agency incorrectly apportioned the tank removal costs by allowing reimbursement of only three-ninths of the total amount of the

unapportioned tank removal costs. Illico contends that there are certain costs, such as the costs of bringing equipment to the site, which were incurred whether three tanks or nine tanks were removed. In support of this contention, Illico submitted an affidavit from the contractor who removed the tanks. That affidavit stated that because the three tanks which were leaking could not have been removed without affecting other tanks, the costs to remove only the three leaking tanks would have been $14,100. (Pet. Exh. 4.)[4]

In response to Illico's contention that the disputed tank removal costs were indeed corrective action costs, the Agency points out that Illico indicated on its application for reimbursement that the tanks were taken out of service and removed for "upgradation." The Agency states that the Board has recognized that there may be more than one purpose for an action (Southern Food Park v. Illinois Environmental Protection Agency (December 19, 1992), PCB 92-88), and argues that the decision to remove the non-leaking tanks was not only prompted by corrective action concerns. The Agency maintains that there are other means of remediating soil contamination than removal of the soil.

As to Illico's alternative argument, that the Agency improperly apportioned the costs of the tank removal, the Agency contends that proportionate calculation has been used by the Agency and upheld by the Board. (Export Packaging Co. v. Illinois Environmental Protection Agency (April 23, 1992), PCB 91-203.) The Agency states that Illico did not provide any breakdown of the tank removal costs, so that it was impossible for the Agency to determine what costs should be assigned to individual tanks.

After a review of the record and the arguments of the parties, the Board finds that the challenged tank removal costs are corrective action costs, and thus reimbursable. We do not agree with the Agency's witness, who testified that removing a non-leaking tank would not constitute an action to stop, minimize, eliminate, or clean up a release. (Tr. at 83.) We find nothing in the statute which indicates that a tank must be leaking in order for its removal to constitute corrective action. Rather, the inquiry is whether the removal of a non-leaking tank fulfills the definition of corrective action. In Martin Oil Marketing v. Illinois Environmental Protection Agency (August 13, 1992), PCB 92-53, the Board recognized that if it could be proven that the removal of an unregistered tank was corrective action associated with leakage from a registered tank, that removal

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[4] According to the technical review of bills performed by the Agency, the total cost of the tank removal was $21,508. (R. B at 252.)

costs would be eligible for reimbursement. We find that the same principle applies to this case: if an applicant demonstrates that removal of a non-leaking tank is corrective action, it is irrelevant that there had been no release of petroleum from that tank.

In this case, Illico presented testimony from its president that removal of all nine tanks was necessary to remove all contaminated soil. (Tr. at 32-36.) Although the Agency's witness testified that there are methods of remediation other than excavation and removal (Tr. at 97), the Agency does not contend that one of these other methods would have been "better", or that excavation and removal was somehow incorrect in this situation. In short, there is no evidence that the excavation and disposal of the soil did not accomplish its purpose--the remediation of the contamination.

We are not persuaded by the Agency's claim that because Illico stated on its reimbursement application that the non-leaking tanks were taken out of service and removed for "upgradation", costs for removal of those tanks cannot be corrective action. We note that Illico indicated that all nine tanks, including the three from which there was a release, were removed for "upgradation". (R. B at 61-69.) Therefore, if an applicant's answer to the inquiry as to why the tanks were removed was dispositive, none of the tank costs, including those for the tanks which were leaking, would be reimbursable. That is clearly not the case. Instead, as the Board has repeatedly stated, the determination whether an activity constituted "corrective action" is a two-part inquiry: whether the costs were 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. (See, e.g., Miller v. Illinois Environmental Protection Agency (PCB 92-49), July 9, 1992; Enterprise Leasing Co. v. Illinois Environmental Protection Agency (PCB 91-174), April 9, 1992.)

Just as any other activity, the inquiry whether removal of non-leaking tanks constitutes corrective action must be made on a case-by-case basis. As stated above, we find that the evidence in this case indicates that the costs of removal of the six non-leaking tanks are corrective action costs. Therefore, we reverse the Agency's determination that $14,338.68 in tank removal costs is not reimbursable.

Monitoring Well Costs

The Agency also disallowed $1,797.09 in costs associated with the installation of a monitoring well which was destroyed within one month of installation. The Agency stated that the costs are not corrective action costs, and therefore are not

reimbursable. (R. A at 82.) The disputed costs are the costs attributable to MW-4, which was destroyed before groundwater samples were taken from that well.

Illico makes two alternative arguments with respect to the monitoring well costs. First, Illico contends that it is clear that the monitoring well was sunk, and that soils were drawn from the boring which was subsequently finished as MW-4. Illico maintains that MW-4 was created as a result of a release of petroleum, and that the monitoring well should be covered regardless of whether groundwater samples were taken.

In the alternative, Illico raises the argument as to apportioning costs as it made in regard to the tank removal costs: that there are certain costs which would have been incurred, regardless of whether three or four wells were completed. Illico's president specifically identified the costs of pressure washer rental and the costs of bringing the crew to the site. (Tr. at 41-42.) Thus, Illico contends that it is entitled to a recomputation of costs excluded by the Agency.

In response, the Agency argues that MW-4 never contributed to knowledge of the site, and that the Agency cannot pay for something that has not added to corrective action. The Agency states that although a soil boring was apparently taken, the Agency never received any analysis of that boring. The Agency also points out that a boring hole must be upgraded into a monitoring well.

As to Illico's contentions regarding recomputation of costs, the Agency's witness testified that the only fixed costs which would have been incurred regardless of the number of monitoring wells were $186 in per diem expenses for overnight lodging and meals, $255 in mobilization and demobilization of the drill rig, equipment and personnel, and $95 in mobilization and demobilization of a pickup, equipment, and personnel. (Tr. at 68-69.)

After a review of the record and the arguments of the parties, the Board concludes that costs associated with the construction of MW-4 are not corrective action costs, and are not reimbursable. It is undisputed that MW-4 was destroyed within one month after its creation, and before any groundwater sampling from that well was performed. We do not see how the creation of MW-4, in and of itself, was an action to stop, minimize, eliminate, or clean up a release of petroleum. We recognize that MW-4 was created with an eye towards fulfilling these purposes, but the destruction of the well prevented that fulfillment. However, because the Agency's witness admitted that a few costs would have been incurred regardless of the number of wells constructed, we partially reverse the Agency's determination. The Agency is directed to reimburse Illico for $186 in per diem

expenses, $255 in costs for mobilization and demobilization of the drill rig, and $95 in costs for mobilization and demobilization of a pickup truck. (R. B at 90; Tr. at 68-69.) We affirm the Agency's denial of reimbursement as to the remaining $1261.09 in expenses associated with MW-4.

Disposal of Contaminated Material

Finally, the Agency denied reimbursement of $3,127.50 in costs associated with the disposal of contaminated material. The Agency found that these costs are not corrective action, and thus are not reimbursable. (R. A at 82.) This amount was paid to Safety-Kleen, who was hired by Illico to dispose of contaminated product (apparently water). Safety-Kleen apparently mixed that contaminated product with used crankcase oil, which was not from Illico's facility. (Tr. at 54-55.) The Agency submitted an affidavit from Douglas W. Clay, manager of the Agency's Disposal Alternatives Unit, stating that Safety-Kleen did not submit manifests, nor did supplemental waste stream permits exist, for the contaminated water to be transported from Illico's facility to Safety-Kleen's Urbana facility. (Resp. Exh. 1.) The record does contain manifests for the transportation of used crankcase oil from the Urbana facility to the Breslube facility in Indiana. (Resp. Exh. 1; R. B at 240-242.)

Illico contends that this cost does indeed meet the definition of corrective action, in that the action was clearly taken for the purpose of minimizing or cleaning up a release of petroleum, and constituted remediation. Illico notes that Safety-Kleen has not been prosecuted for the alleged violation, and that to penalize Illico for an action for which Safety-Kleen has not been penalized is unfair.

In response, the Agency notes that contaminated material from a leaking UST is special waste, and maintains that a generator has some obligations to assure proper disposal. The Agency contends that it should not reimburse a cost where the regulations were not complied with in incurring that cost.

After a review of the record and the arguments of the parties, the Board reverses the Agency's denial of reimbursement for the costs associated with disposal of the contaminated product. We agree that a generator, such as Illico, has some obligations to assure proper disposal. We believe that in some cases, a generator's carelessness in arranging for proper disposal of contaminated material might result in costs which are not reimbursable by the Fund. However, this is not a case where the applicant simply dumped the material in a ditch, or hired an unlicensed hauler. It is uncontested that Illico retained Safety-Kleen because of its national reputation and ability to handle the waste. (Tr. at 44.) There are no allegations that Illico, in some way, failed to fulfill its obligation to arrange

proper disposal, nor any allegation that Illico itself failed to obtain some needed permit. The Agency does not contend that, if Safety-Kleen had properly manifested the material, that the costs were not of the type which constitute corrective action. Rather, the costs were denied for reimbursement because of the alleged failure of Safety-Kleen to comply with regulations under the Act. In sum, under the facts of this case, we find that the costs at issue are corrective action costs, and thus reimbursable.

CONCLUSION

In sum, the Board finds that $14,338.68 in tank removal costs, and $3,127.50 in costs of disposal of contaminated material, are corrective action costs, and thus reimbursable. The Board partially affirms the Agency's determination that costs associated with the construction of a monitoring well destroyed before any sampling occurred are not reimbursable. However, the Agency is directed to reimburse Illico for the costs which would have been incurred, regardless of the number of wells constructed.

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

ORDER

The Board hereby reverses the Agency's October 2, 1992 determination that $14,338.68 in tank removal costs is not reimbursable. The Agency's determination that costs associated with the MW-4 monitoring well are not reimbursable is only partially reversed, with the direction that the Agency is to reimburse Illico for $186 in per diem expenses, $255 in costs for mobilization and demobilization of the drill rig, and $95 in costs for mobilization and demobilization of a pickup truck. The Agency's determination as to the remaining $1261.09 in monitoring well expenses is affirmed. Finally, the Board reverses the Agency's determination that $3,127.50 in costs for the disposal of contaminated product is not reimbursable.

This case is remanded to the Agency for disbursement of the additional $18,002.18 amount, consistent with this opinion and order. This docket is closed.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41) 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.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the aboye opinion and order was adopted on the 25th day of February, 1993, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board