ILLINOIS POLLUTION CONTROL BOARD
August 13, 1992

MARTIN OIL MARKETING, #64 Petitioner, v. ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	PCB 92-53 (Underground Storage Tank Reimbursement)

PHILLIP DITTAMORE AND DONALD WATERLANDER APPEARED ON BEHALF OF PETITIONER;

DANIEL MERRIMAN AND JEANNE HEATON, ENVIRONMENTAL PROTECTION AGENCY, APPEARED ON BEHALF OF THE RESPONDENT.

OPINION AND ORDER OF THE BOARD (by B. Forcade):

This matter comes before the Board on a petition for review of an underground storage tank reimbursement determination filed by Martin Oil Marketing (Martin) on April 8, 1992. The petition seeks review of the Environmental Protection Agency's (Agency) determination that $62,904.64 in costs associated with the removal of underground storage tanks (USTs) were ineligible for reimbursement. A hearing was held on this matter on June 11, 1992, in Chicago, Illinois. No members of the public attended the hearing. The parties chose not to file briefs but relied on closing arguments.

FACTS

Martin owns and operates a service station located at 3554 W. North Ave. in Chicago, Cook County, Illinois. This site contained sixteen underground storage tanks. The tanks consisted of six 4,000 gallon gasoline tanks, a 4,000 gallon kerosene tank and nine tanks (seven 4,000 gallon and two 550 gallon) containing inert materials. (R.A[1] at 35.) Martin estimated the dates that the nine tanks were last used as: one in 1964, two in 1970, five in July of 1982 and one in September of 1984. (R.A at 24 - 26.) Martin notified ESDA (Emergency Services and Disaster Agency) of a leak from the underground storage tanks on October 30, 1990. (R.B at 4.)

On January 8, 1991, Martin forwarded an application for reimbursement from the underground storage tank fund to the

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[1] "R.A at ____" references the technical file of the Agency record. "R.B at ____" references the fiscal file of the Agency record.

Agency. (R.A at 2 - 21.) The Agency informed Martin that the nine tanks containing inert material were not eligible for reimbursement and that a breakdown of costs separating the cost for the ineligible tanks was required before the Agency could further review the application. (R.A at 34 - 35.) Martin provided the Agency with an estimate of the costs for the removal of the abandoned tanks and the disposal of the inert material in the tanks. (R.A at 44 - 45.) This cost was estimated as $19,519.84. (R.A at 45.)

On March 6, 1992, the Agency informed Martin that $62,904.64 in costs were denied reimbursement. (R.A at 55 - 57.) The amount in issue, $62,904.64 is comprised of $27,043.50 for concrete replacement, $150.00 for expenses incurred prior to notification of ESDA, $16,139.56 in undocumented costs, $51.74 for costs that were double billed and $19,519.84 for costs associated with tanks that were unregistered. (R.A at 57.)

Martin is not contesting the denial of costs that were incurred prior to notifying ESDA. (Tr. at 8.) Martin has submitted additional documentation to the Agency and the Agency has approved reimbursement of the costs that were previously denied due to lack of documentation. (Tr. at 9.) The Agency also reviewed the charges that were denied reimbursement because of double billing and determined these charges to be reimbursable. (Tr. at 9.) Therefore, the costs still at issue are the cost for concrete replacement and the costs associated with the removal of the unregistered tanks. (Tr. at 5.)

DISCUSSION

Replacement of Concrete

Martin argues that the Agency has previously reimbursed for costs associated with the replacement of concrete. Martin also argues that the replacement of concrete was part of the corrective action plan submitted to the Agency. Martin further argues that if it had known that the replacement of concrete was not reimbursable, it would have selected an alternate method of remediation. Martin argues that the Agency indicated that the costs of concrete replacement would be reimbursable by previously allowing such reimbursement and by approval of the corrective action plan containing concrete replacement. (Tr. at 14.)

The Agency contends that the replacement of concrete is not reimbursable because it is not corrective action. The Agency does not deny that it may have previously allowed reimbursement for the replacement of concrete but admits that this was in error and occurred during the early years of the reimbursement program. The present policy of the Agency is that reimbursement is not allowed for the replacement of concrete. The Agency also relies

on previous decisions of the Board upholding the Agency's denial of reimbursement for the cost of replacement of concrete.

The corrective action plan submitted by Martin does not specifically mention the replacement of concrete (Tr. at 31) but the need to replace the concrete could reasonably be assumed due to the nature of the plan. The approval of a corrective action plan cannot be construed as an approval for reimbursement. Approval of a corrective action plan does not mean that the measures approved are eligible for reimbursement. The Agency noted in a letter to Martin that the technical review of the site and the reimbursement review are conducted separately. (R.B at 154.) Mr. Bur Filson of the Agency, described the review of the corrective action plan and reimbursement as two separate functions. (Tr. at 108.) The Board has held that the Agency is not in a position to make pre-determinations on the reimbursement of specific costs because the Agency has not promulgated rules concerning which costs are reimbursable. (Strube v. IEPA (May 21, 1992), PCB 91-205, ___PCB___.)

Mr. Mehrens, of RAM Engineering, testified that he was personally involved in a site where reimbursement was allowed for the replacement of concrete and was aware of other cases. (Tr. at 35.) Mr. Mehrens notes that there were some differences between the two cases but the method of remediation was the same. (Tr. at 36 - 37.) The other case referenced by Martin occurred sometime in 1990. (Tr. at 34.) The Agency admits that this was early in the development of the program and may have been an oversight. (Tr. at 131.) Reimbursement from the fund is governed by the statute and not by previous determinations of the Agency.

The statute allows for reimbursement from the fund "for costs of corrective action or indemnification." (Section 22.18b(a).) In Platolene 500, Inc. v. IEPA (May 7, 1992), PCB 92-9, ____PCB____, the Board held that in most cases the replacement of concrete is not corrective action and is not reimbursable. (See also Strube v. IEPA (May 21, 1992), PCB 91-105, __PCB___, Warren's Service v. IEPA (June 4, 1992), PCB 92-22, ___PCB___ and Bernard Miller (July 9, 1992), PCB 92-49, ___PCB___.) Martin does not argue that the replacement of concrete at its site was corrective action. There are no facts in this case to show that the concrete was replaced as a corrective action. Reimbursement is only allowed for corrective action and Martin has failed to show that the replacement of concrete at the site was a corrective action.

Therefore the Board affirms the Agency denial of reimbursement of $27,043.50 for the replacement of concrete.

Unregistered tanks

Martin contends that they made every effort to register the tanks with the Office of the State Fire Marshall (OSFM). The registration form included all sixteen tanks located at the site. (R.A at 22 - 26, Tr. at 59.)

In Village of Lincolnwood v. IEPA (June 4, 1992), PCB 91-83, ___PCB____, the Board held that it "has no authority over registration of USTs and, therefore, the issue of whether the ... USTs, could, should, or might be registered is not material to the Board's review.." Any determination of registration is made by the OSFM and is not reviewable by the Board. The records of the OSFM indicate that of the sixteen tanks on the site only seven were registered by the OSFM. (Tr. at 143.) The remaining nine tanks were not eligible for registration because the tanks did not meet the OSFM's definition of a tank for registration purposes. (Tr. at 146.)

In addition Martin argues that the removal of the nine unregistered tanks was necessary to remove the contaminated soil in the area of the tank. Martin contends that the removal of the nine tanks was a corrective action and is reimbursable. Martin argues that because the tanks were properly abandoned in place, the removal of the tanks was not required. (Tr. at 80.) The engineer for Martin contends that the only reason for the removal of the tanks was to remediate the area. (Tr. at 80.) Martin further contends that the removal of the tanks is similar to the removal of other objects discovered during the excavation. Martin contends that the removal of foundation or other objects would be reimbursable and therefore the removal of the tanks should be reimbursable. Mr. Mehrens of RAM Engineering, testified concerning a hypothetical situation.

> Q. So an object which was buried which was blocking your access to contaminated soil would most probably have to be removed prior to excavating the contaminated soil?
>
> A. The decision would be made on each particular object, yes, on whether or not it's cost effective to remove.
>
> Q. And in your opinion you felt it was cost effective to remove the nine unregistered tanks.
>
> A. Yes.
>
> Tr. at 85.

The Agency argues that the amount deducted represents the cost of removal and transport of the unregistered tanks and the material contained in the tanks. The Agency contends that the tanks were not registered and the cost of corrective action

associated with unregistered tanks is not reimbursable in accordance with Section 22.18b(a)(4).

In Village of Lincolnwood v. IEPA June 4, 1992, PCB 91-83, __ PCB___ and City of Lake Forest v. IEPA June 23, 1992, PCB 92-36, __ PCB___, the Board enforced the statutory requirement of Section 22.18b(a)(4) that a tank must be registered to be eligible for reimbursement. Based on the facts of this case and the arguments presented by Martin it is evident that further discussion of this requirement is needed.

Section 22.18b(a) specifies the requirements that must be meet to be eligible to receive monies from the fund. All six of the listed requirements must be satisfied for eligibility. The tank referenced in Section 22.18b(a)(4) is the leaking tank that is the source of the contamination. To be eligible for reimbursement from the fund the costs of corrective action must be incurred as a result of a release of petroleum from an underground storage tank (Section 18b(a)3) and the tank must be registered. (Section 18b(a)4.)

Corrective action is defined in Section 22.18(e)(1)(C) of the Act as:

> ...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 and groundwater remediation and monitoring, exposure assessments, the temporary or permanent relocation of residents and the provision of alternate water supplies.

The removal of the tanks satisfies the definition of corrective action in that the tanks were removed to clean up a release of petroleum. To be eligible for reimbursement the corrective action must be related to a leak from a registered tank. The removal of the unregistered tanks would need to be corrective action to clean up a release of petroleum from the seven registered tanks to be eligible for reimbursement.

Mr. Mehrens testified as follows on the source of the leak:

> I would also like to say, I don't know for certain that there's a release - - I mean which tank actually had a release. In other words, I can't say that these nine tanks caused the release or these seven tanks caused the release.
>
> Tr. at 82.

In the application for reimbursement Martin noted "it is not known at this time which tank system is responsible for the release." (Tr. at 90, R.A at 4 - 8, 11, 12.) The contamination at the station encompassed a large portion of the station. (R.B at 114.) Most of the tanks were pitted and/or contained holes. (R.B at 103.)

The burden of proof in appeals of reimbursement determinations is on the petitioner. (Sections 22.18b(g) and 40(a)(1).) Martin has failed to show that the corrective action cost of removing the unregistered tanks was a corrective action related to the remediation of a leak from a registered tank. Martin is unable to determine the source of the petroleum leak. (Tr. at 82.) The abandoned tanks contained holes as did the tanks in use. (R.B at 103.) The reason for taking the nine tanks out of service was that they were "no longer needed for operation." (Tr. at 94, R.A at 9, 10, 13 - 19.) Martin did not offer any evidence that indicates that the leak of petroleum was not from any of the abandoned tanks.

Under a different fact situation where it could be proven that the removal of the unregistered tank was a corrective action associated with leakage exclusively from a registered tank, the cost would be eligible for reimbursement. The Agency argues that allowing reimbursement for the removal of unregistered tanks as corrective action in the remediation of other tanks would obviate the registration requirements of Section 22.18b(a)(4). (Tr. at 174.) The Board believes that the above interpretation of the statute will have no effect on the need for tanks to be registered. Registration of the tank is required to be eligible for reimbursement from the fund for corrective actions related to the registered tank.

Where active UST systems are operated near closed tanks or in multi-tank systems it can be difficult to accurately determine which tanks caused the contamination or what degree of contamination is related to each leaking tank. Where registered and unregistered tanks are located at a common site it may be necessary to apportion the costs of corrective action accordingly. The Agency approved reimbursement for the removal and disposal of the soil around the unregistered tanks. (Tr. at 174.) Given the facts of the case and the difficulty in determining the sources of the contamination the Board finds this to be a reasonable method of apportioning costs.

This opinion constitute's the Board's findings of facts and conclusions of law in this matter.

ORDER

The Board affirms the Agency denial of reimbursement of $27,043.50 for concrete replacement because it is not corrective action. The Board also affirms the denial of reimbursement of $19,519.84 for the removal of unregistered tanks because the removal of the tanks was not proven to be corrective action to clean up a release of petroleum from a registered tank.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (Ill. Rev.Stat. 1991, ch. 111 1/2, par 1041) provides for appeal of final orders of the Board within 35 days. 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 above opinion and order was adopted on the 13th day of August, 1992, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board