ILLINOIS POLLUTION CONTROL BOARD
February 16, 1995

CLARENDON HILLS BRIDAL CENTER (LEARSI AND COMPANY, INC.),	)	
Petitioner,	)	
v.	)	PCB 93-55 (UST Reimbursement)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

JAMES P. O'BRIEN AND ROBERT M. BARATTA, JR., CHAPMAN & CUTLER, APPEARED ON BEHALF OF PETITIONER;

JAMES G. RICHARDSON AND JOHN BURDS APPEARED ON BEHALF OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY.

OPINION AND ORDER OF THE BOARD (by M. McFawn):

On March 18, 1993 petitioner Learsi and Company filed a petition seeking review of an underground storage tank reimbursement determination issued by the Illinois Environmental Protection Agency (Agency). Petitioner seeks review of the Agency's denial of reimbursement from the Leaking Underground Storage Tank (LUST) Fund of $331,404.05 in costs.

BACKGROUND

Petitioner is the former owner of a strip mall located at 445 Ogden Avenue, Clarendon Hills, Illinois, known as the Clarendon Hills Bridal Center (the site). In September 1990, petitioner was seeking to sell the site, and hired Mostardi-Platt Associates (Mostardi-Platt) to conduct a phase II environmental assessment. The phase II assessment revealed that a portion of the site, constituting approximately 850 cubic yards of soil, was contaminated by petroleum, although no underground storage tanks (USTs) were discovered at the site at that time. (Pet. Br. at 1-2.)

Remediation of the site began in October 1990. Subsequent investigation revealed that the extent of contamination was much greater than originally estimated by Mostardi-Platt, and revealed the presence of three USTs. Upon discovering the USTs, petitioner notified the Emergency Services and Disaster Agency (ESDA) on October 12, 1990 that a release had occurred at the site. In November 1990, petitioner submitted a corrective action plan to the Agency in order to qualify for reimbursement from the LUST Fund. The plan was approved by the Agency in January 1991.

(Pet. Br. at 3-4.)

During the remediation process, a fourth UST was discovered at the site. Eventually, the four USTs were removed, and all of the contaminated soil was excavated, transported from the site, and disposed of. The remaining soil satisfied the Agency's established cleanup objectives. The Agency issued a clean closure letter for the site, and petitioner sought reimbursement of its corrective action costs from the LUST Fund. (Pet. Br. at 5-6.)

On January 24, 1991, the Agency made a preliminary determination that petitioner was eligible to access the UST Fund subject to a $100,000 deductible. (Rec. vol. A at 25.) On September 3, 1992, the Agency received petitioner's completed application requesting reimbursement from the UST Fund. (*See* Pet. Ex. 17 at 1.) The Agency issued its final determination of eligibility on February 18, 1993, and issued a clarification on April 29, 1993. The parties agree that the issues in this appeal are framed by the February 18, 1993 final determination letter, as clarified by the Agency's April 29, 1993 letter. (*See* Pet. Br. at 7; Resp. Br. at 3.) A hearing in this matter was held on November 17, 1993, which was continued on the record on the following dates: November 18, 1993, December 15, 1993, and January 19, 1994.

RULE OF GENERAL APPLICABILITY

To be deemed reimbursable from the UST Fund, remediation costs incurred must be corrective action costs. Section 57.2 of the Environmental Protection Act (Act) (415 ILCS 5/57.2 (1992)) now defines corrective action cost as "activities associated with compliance with the provisions of Section 57.6 [early action] and 57.7 [investigation and remediation] of this Title." In October 1990, corrective action was defined as:

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

(Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1022.18(e)(1)(C) (repealed).)

Determining whether costs are corrective action costs is a two-part inquiry: first, it must be determined whether the costs are incurred as a result of action to "stop, minimize, eliminate,

or clean up a release of petroleum," and second, it must be determined whether those costs are "the result of activities such as tank removal, soil remediation, and free product removal." Costs must satisfy both requirements to be deemed reimbursable as corrective action. (Enterprise Leasing Co. v. Illinois Environmental Protection Agency (April 9, 1992) PCB 91-174, 132 PCB 79, 83.)

At the time of petitioner's reimbursement application, Section 22.18b(d)(4)(C) of the Act provided:

> 4) Requests for partial or final payment for claims under this Section shall be sent to the Agency and shall satisfy all of the following:
>
> . . . .
>
> C) The owner or operator provided an accounting of all costs, demonstrated the costs to be reasonable, and provided either proof of payment of such costs or demonstrated the financial need of joint payment to the owner or operator and the owner's or operator's contractor in order to pay such costs.

(Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1022.18b(d)(4)(C) (repealed).)

In Platolene 500, Inc. v. IEPA (May 7, 1992) PCB 92-9, 133 PCB 259, the Board held that the burden of meeting these requirements is on the party seeking reimbursement. (Id. at 8.) The burden is thus on the party seeking reimbursement to demonstrate that the remediation costs were for corrective action costs and were reasonable.

DISCUSSION AND DECISION

Petitioner seeks review of a total of $331,404.05 in costs. The Agency denied reimbursement of these costs on the following grounds: (1) costs lacking documentation; (2) costs for activities which did not constitute corrective action; (3) costs which were incurred prior to notification of ESDA; (4) costs which petitioner failed to demonstrate were reasonable; and (5) costs which constituted legal defense costs. Each of these grounds will be examined separately.

1) Costs Lacking Documentation

Of the $331,404.05 in costs denied by the Agency, $298,786.98 were denied as lacking supporting documentation under Section 22.18b(d)(4)(C). (See Pet. Ex. 17 Attachment A at para. 2.) $251,173.78 of these costs represent costs incurred by

petitioner pursuant to its contract with Accurate Pump and Tank (Accurate). $206,245.53 of that amount was based solely upon a per cubic yard rate. The remaining $44,928.25 attributed to Accurate was supplemented by Agency billing forms which included a time and materials breakdown of included costs. The remaining costs represent costs incurred by petitioner for work done by four subcontractors.

a) Accurate Pump and Tank

Petitioner contends that the Agency is improperly denying reimbursement of costs paid to Accurate because petitioner failed to demonstrate that the costs satisfied a two-part test requiring that they either be: 1) submitted on Agency forms which require a time-and-materials breakdown, or 2) competitively bid, with at least three bidders, where the lowest bid is chosen. (Pet. Br. at 7.) Petitioner asserts that this test is merely an Agency policy, and that there is nothing in writing which indicates that such a breakdown was required. (Pet. Br. at 9.) Petitioner asserts that its contract with Accurate was based on a per-cubic-yard rate, not a time and materials basis, as would be required by the Agency forms. (Pet. Br. at 8.) Petitioner contends that contracting on a per-cubic-yard basis was a standard industry practice. (Pet. Br. at 10; *see* testimony of John Hayes Tr. at 4.1.)

The Agency asserts that the supporting documentation petitioner provided for these costs did not meet the requirements of Section 22.18b(d)(4)(C). (*See* Pet. Ex. 17 Attachment A at para. 2; Resp. Br. at 6.) Although Accurate provided invoices for the costs, the Agency asserts that the invoices did not contain sufficient information to demonstrate that the costs were reasonable. (Resp. Br. at 8.) The Agency asserts that a per-cubic-yard rate alone does not provide the information necessary for the Agency to determine whether the costs that went into the rate were appropriate and reasonable, and that a time and materials breakdown is necessary for the Agency to make this determination. The Agency points out that it did allow reimbursement of those costs where petitioner demonstrated the costs were reasonable response costs in Agency forms with a time and materials breakdown. (Resp. Br. at 9.)

We find that the Agency is properly requiring applicants to the Fund to demonstrate that submitted costs are properly reimbursable. As stated above, based on Board precedent, the burden is on applicants to demonstrate that incurred costs are related to corrective action, properly accounted for, and reasonable. The Agency has not limited petitioner to a demonstration of reasonableness based on time and materials. Rather, the Agency would allow petitioner to demonstrate the reasonableness of corrective action costs through a competitive bidding process. Thus, the Agency has expanded, not restricted,

the means by which a party can demonstrate the reasonableness of costs.

Competitive Bidding. Petitioner asserts that the Accurate costs should be reimbursed because petitioner obtained two bids for the work. (Pet. Br. at 12.) Petitioner contends that it received a bid from Mostardi-Platt for $90 per cubic yard, and a bid from Accurate for $64 per cubic yard, which petitioner accepted, and which was subsequently reduced to $60 per cubic yard.

Mr. David Israel, the principal of Learsi, testified at hearing that Mostardi-Platt submitted the $90 per cubic yard bid. (Tr. at 192.) As further support for the $90 per cubic yard bid, petitioner attempted to introduce into evidence at hearing a hand-written note written on the cover of a soil boring investigation. The hearing officer denied its admission on the grounds that it constituted hearsay. (Tr. at 194-196.)

Mr. Israel also testified that Mr. John Hayes of GSC Environmental obtained a $64 per cubic yard bid from Accurate Pump & Tank on behalf of petitioner. (Tr. at 198.) As evidence of this bid, at hearing petitioner introduced into evidence the contract with Accurate. (Pet. Ex. 1.) This contract had not been submitted to the Agency prior to the Agency's final determination. (Tr. at 33.) Mr. Israel further explained that the rate was later reduced to $60 per cubic yard when petitioner realized that the extent of contamination was greater than initially estimated; no documentation was submitted to the Agency indicating this change in rate.

In response, the Agency asserts that none of this evidence that petitioner proceeded under a competitive bid process was submitted to the Agency prior to the Agency's final determination. (Resp. Br. at 15, Tr. at 643-644.) The Agency asserts that it received neither the $90 per cubic yard rate nor the $64 per cubic yard rate bid prior to its final determination. The Agency further contends that the hand-written note does not contain sufficient information to constitute a bid. Finally, the Agency contends that three bids are generally required under a competitive bid process in order to demonstrate that the lowest bid was reasonable. (Resp. Br. at 15; Tr. at 642.)

While it may be possible for a claimant to demonstrate that a two-bid competitive bidding process is reasonable, we find that petitioner did not do so in this case. Petitioner did not submit any information to the Agency concerning a competitive bidding process prior to the Agency's final determination. Furthermore, even if the evidence concerning the $90 per cubic yard rate is considered despite its inadmissibility as hearsay, that information is simply insufficient to demonstrate that it constituted a competitive bid. Finally, petitioner had not even

submitted evidence of the bid it ultimately accepted prior to the Agency's final determination. We find that petitioner did not provide sufficient evidence of a competitive bid process to the Agency to demonstrate that the costs paid to Accurate were reasonable.

<u>Per-Cubic Yard Rate.</u> Petitioner also argues that it demonstrated that the $64 per cubic yard rate was a reasonable per-cubic-yard rate. (Pet. Br. at 12-13.) In support of this proposition, petitioner presented the testimony Mr. John Hayes, an environmental consultant who was employed by GSC Environmental, a consulting firm petitioner retained to provide technical assistance with the remediation project. Mr. Hayes testified that $64 per cubic yard constituted a reasonable rate (Tr. at 50), and testified that the work was actually performed. Accurate provided invoices for the work performed which were submitted to the Agency. Petitioner also offered the testimony of Steven E. Nelson, an independent environmental contractor, who testified as to the reasonableness of the $64 rate. (Tr. at 373.)

The Agency asserts that the supporting documentation for the denied costs did not meet the requirements of Section 22.18b(d)(4)(C) and failed to establish that the costs billed to petitioner were reasonable. The Agency does not dispute that a common industry practice is to contract for excavation, removal and disposal of contaminated soil on a per-cubic-yard basis. However, the Agency asserts that a per-cubic-yard rate alone in not sufficient to demonstrate that the rate is reasonable; it must be supported by a time and materials breakdown of the costs included in the per-cubic-yard rate. Mr. Doug Oakley testified on the Agency's behalf that a time and materials breakdown is necessary for the Agency to determine the reasonableness of remediation costs, such as personnel costs, equipment costs, and profit. (Resp. Br. at 14; Tr. at 644-647.)

Furthermore, the Agency asserts that it is commonly known in the industry that a per-cubic-yard rate is insufficient to demonstrate reasonableness of costs. In fact, the Agency points out that petitioner's own expert witness, Mr. John Hayes, testified that a per-cubic-yard rate alone does not demonstrate that the rate is reasonable, and that it is commonly known in the industry that the Agency requires a time and materials breakdown of the costs included in the per cubic yard rate. (Resp. Br. at 13-14; Tr. at 386-389, 426.)

We affirm the Agency's denial of reimbursement of the $206,245.53 sought by petitioner which was not supported by a time-and-materials breakdown. These costs were not identifiable or supported by anything more than the total amount represented as paid in the inventory of checks and the total amount of the Accurate invoices.

Additional Accurate Costs. The Agency denied an additional $44,928.25 in costs charged by Accurate for failure to submit proper documentation. Although these additional costs were identified in billing forms which provided a time-and-materials breakdown, the Agency denied reimbursement for the following reasons:

1) $1,625.00 for a duplicate billing form for February 6, 1991, where two billing forms were submitted for the same personnel on the same date;

(2) $318.75 reported on a February 6, 1991 billing form where the weekly worksheet did not support the information contained on the summary sheet;

(3) $40.00 reported on a billing form for the period of January 28, 1991 through February 5, 1991, which contained a mathematical error;

(4) $195.00 reported on a billing form for the period of June 3, 1991 through June 30,1991, where the drill rig hours on the weekly work sheet did not support the drill rig hours on the summary sheet;

(5) $42,749.50 reported on a billing form from Accurate for work performed by Terry Robb Cartage, where Accurate billed petitioner and added a 15 percent service charge, despite the fact that petitioner had been billed directly.

(Resp. Br. at 17.)

Petitioner provided no additional argument that these costs should be reimbursed, relying instead on its argument that the entire amount should be reimbursed based on the reasonableness of the per-cubic-yard rate. Therefore, we uphold the Agency's determination denying reimbursement of these costs.

In sum, we find that petitioner did not demonstrate the reasonableness of the $206,245.53 in submitted costs which were not supported by a time and materials breakdown. We further hold that these costs were not shown to be reasonable through a competitive bidding process. Furthermore, the additional costs attributed to Accurate in the amount of $44,928.25 are denied for lack of evidence and argument by petitioner. We therefore uphold the Agency's determination denying reimbursement of these combined costs.

b) Investigation Costs of Mostardi-Platt

Petitioner seeks review of the Agency's denial of $3,277.00 in costs incurred for work performed by Mostardi-Platt.

Petitioner provided the Agency with an invoice for $6,554.00, and a check for $3,277.00, half the amount. Petitioner claims that the other half was deducted from the sales escrow in connection with the sale of the site, since the total cost was split equally between petitioner and the purchaser. (Tr. at 237 - 238.) Petitioner asserts that it is therefore entitled to reimbursement of $3,277.00. (Pet. Br. at 26-27.)

The Agency denied the costs associated with soil contamination investigation performed by Mostardi-Platt on the grounds that these costs lacked supporting documentation. The Agency asserts that the invoice submitted is a lump sum bill, and that it cannot determine what services comprised the investigation, the personnel involved and their qualifications, or the rate at which the services or personnel were billed. (Resp. Br. at 19.)

We find that petitioner has not provided sufficient documentation to demonstrate that these costs constituted reasonable corrective action costs. Petitioner's arguments concerning payment of the invoice do not address the reasonableness of the costs contained in the invoice. Accordingly, we affirm the Agency's denial of $3,277 in costs paid to Mostardi-Platt.

c) Consultant/Oversight Costs of Sun Eco Systems, Inc.

Petitioner seeks reimbursement of $300 for costs paid to Sun Eco Systems, Inc. (Sun Eco) for consulting and oversight services. Petitioner asserts that it submitted an invoice from Sun Eco which stated that it was for an on-site project overview on November 1, 1990. (Pet. Br. at 28; Pet. Ex. 15; Ag. Rec. Vol. B at 172.) Furthermore, Mr. Israel, the principal of Learsi, testified at hearing that a consultant named Philip Mode was "brought in to assess the whole situation" when the project was beginning. (Tr. at 243-244.)

The Agency denied the $300 in costs paid to Sun Eco on the grounds that petitioner failed to provide sufficient documentation. The Agency asserts that the Sun Eco invoice did not indicate who performed the service, their area of practice or expertise, their billing rate, or the specific services provided. (Resp. Br. at 18.)

We find that petitioner did not provide the Agency with sufficient documentation of the services performed and associated costs for the Agency to determine whether they constituted reasonable corrective action costs. Accordingly, we affirm the Agency's denial of $300 for costs paid to Sun Eco Systems, Inc.

d) Ashly Trucking Company

Petitioner seeks reimbursement of $7,670.00 in costs paid to Ashly Trucking Co. (Ashly). Petitioner asserts that it submitted invoices indicating that the charges were for trucking services, and specified the cost per load. (Pet. Br. at 23; Ag. Rec Vol. B at 151 - 160.) Petitioner also provided cancelled checks totalling $7,670.00, the full amount of the invoice. (Pet. Br. at 24; Ag. Rec Vol. B at 165 - 167.) Petitioner further asserts that the testimony of Mr. Israel and Mr. Hayes at hearing demonstrated that the costs were reasonable. Mr. Hayes had testified that he was present at the Site when Ashly was delivering the backfill, and expressed his opinion that the rates charged by Ashly were reasonable. (Tr. at 105.) Mr. Israel had testified about payment of the invoices and debiting of the appropriate account. (Pet. Br. at 23, Tr. at 235 - 236.)

The Agency denied $7,670.00 in costs paid to Ashly based on lack of supporting documentation. (Resp. Br. at 17-18.) The Agency asserts that, although the submitted invoices provided information such as dates, ticket numbers, truck numbers, and units, the Agency's accountant, Ms. Levine, could not determine what service had been provided. (Tr. at 439-440.) She therefore could not determine whether the costs were reasonable, or were in fact corrective action costs. Furthermore, the Agency asserts that the petitioner never informed the Agency of the purpose of the costs prior to its final decision. (Resp. Br. at 18.)

We find that petitioner failed to provide documentation that the costs paid to Ashly were reasonable corrective action costs. While petitioner demonstrated at hearing that the costs were for transportation of backfill, this demonstration was not made to the Agency prior to its final determination, and the Agency was therefore justified in finding that the costs were not adequately documented.

In several prior UST Fund reimbursement cases, beginning with Sparkling Spring Mineral Water Co. v. Illinois Environmental Protection Agency (August 26, 1993) PCB 92-203, and continuing through Chuck & Dan's Auto Service v. Illinois Environmental Protection Agency (August 26, 1993) PCB 92-203, the Board has admitted evidence which was not contained in the Agency record. This evidence was admitted because the Agency had not promulgated regulations identifying for petitioners the type of information necessary to complete a reimbursement application. The Board reasoned that without such regulations, petitioners could not anticipate what information the Agency would require, and therefore petitioners should be allowed to supplement the record in order to clarify why a disputed cost should be reimbursed. This was a departure from the evidentiary rule applied in permit appeal cases, wherein the Board reviews only the record below. (Sparkling Spring Mineral Water at 4, *citing* Joliet Sand & Gravel

v. PCB, 163 Ill.App. 3d 830, 516 N.E.2d 955, 958 (3d Dist. 1987).)

However, the facts in the present case warrant the application of the evidentiary rule followed in permit appeals. Notwithstanding the absence of Agency regulations, petitioner knew or was obligated to know that, at a minimum, it was required to demonstrate that the disputed cost was for corrective action. Section 22.18(b) of the Act clearly states that an owner or operator can only recover from the Fund the costs of corrective action. The initial burden on the party seeking reimbursement is to demonstrate that the remediation costs satisfy the definition of corrective action. (Platolene 500, Inc. v. IEPA (May 7, 1992) PCB 92-9, 133 PCB 259 at 7.) The information submitted concerning trucking costs was insufficient to demonstrate that the cost was for corrective action. The invoices submitted contained no information as to what task the truck performed. Such information is critical to the Agency's determination whether a cost is for corrective action. Absent that information, the Agency would have been remiss if it would have released monies from the UST Fund. We therefore affirm the Agency's denial of $7,670.00 in costs paid to Ashly Trucking.

e) August Sievers and Sons Company

Petitioner seeks reimbursement of $3,227.20 in costs paid to August Sievers and Sons Company (Sievers). Petitioner asserts that it submitted an invoice for these costs which specifically states the invoice is for services rendered to "backfill and compact clean fill in tank hole." (Pet. Br. at 24, See Pet. Ex. 4, Ag. Rec. vol. B at 168.) Petitioner also points out that petitioner provided a cancelled check to August Sievers for $3,227.00, the total amount of the invoice. Furthermore, Mr. Israel testified about payment of the invoices and debiting of the appropriate account. (Pet. Br. at 23, Tr. at 232 - 234.)

The Agency denied reimbursement of these costs on the grounds that the bill was a lump sum bill. (Resp. Br. at 19.) The Agency asserts that the invoice does not indicate what type of backfill was used, or what personnel or equipment were needed to perform the work, or the rate at which the work was billed. There was therefore insufficient information to determine the reasonableness of the costs. (See Tr. at 441.)

We find that petitioner did not provide the Agency with the information necessary to determine whether the charges for the services which made up the total were reasonable. We therefore affirm the Agency's denial of $3,227.20 for costs paid to August Sievers and Sons Company.

2) Costs Not Considered Corrective Action

a) Pumping and Disposal of Water

After petitioner discovered the USTs at the site, in order to become eligible to seek reimbursement from the UST Fund, petitioner prepared and submitted to the Agency a corrective action plan in the second week of November 1990. The corrective action plan was approved in January 1991. During this time period, 8-10 feet of run-off water collected in the excavation, with a total volume of approximately 80,000 gallons. (Pet. Br. at 15; see testimony of John Hayes, Tr. at 63.) Petitioner seeks reimbursement of $28,655.70 in costs incurred in pumping and disposing of this water as a special waste. (Pet. Br. at 15.)

Petitioner requested approval to discharge the water through the sewer system. (Agency Rec. vol. D at 119.) The Agency informed petitioner that a discharge permit would be needed, and that the permitting process would take approximately 60-120 days. (See Agency Rec. vol. D at 134.) An April 1, 1991 report from GSC Environmental (GSC) directed to Angela Tin at the Agency, indicates that the Village Engineer from the Village of Clarendon Hills would allow the discharge if a permit was obtained from the Agency. (Id.)

Despite the fact that the Agency and Village approved the discharge of the collected run-off to the sewer pending petitioner's receipt of a discharge permit, petitioner elected to have the water pumped out and treated as a special waste. (See Ag. Rec. Vol C pt. 2 at 639.) The April 1, 1991 report from GSC indicates that petitioner elected to pump and treat the water as a special waste in order to avoid the delay associated with obtaining a permit. (Agency Rec. vol. D at 134.)

Petitioner argues that applying for a permit to discharge into a sewer is a very long and costly process, and is not a practical or reasonable alternative for managing rainfall accumulated in an excavation. (Pet. Br. at 17; Tr. at 376.) Petitioner presented the expert testimony of Mr. Nelson that such permit applications are often denied, since there is always the possibility of residual contamination. (Tr. at 376.) Petitioner also argues that the water presented a safety concern since someone could be harmed if they fell into the excavation, and since the sides of the excavation could collapse. (Pet. Br. at 16; Tr. at 67, 375.) Petitioner further states that the costs were corrective action costs since, as admitted by the Agency, the excavation could not proceed with the water in the excavation. (Pet. Br. at 16; see testimony of John Hayes, Tr. at 64, testimony of Jay Hamilton; Tr. at 581.)

The Agency denied reimbursement of these costs, saying that they did not constitute corrective action costs. (Pet. Ex. 17

Attachment A para. 7.) Petitioner's own testing shows that the water was clean, and did not need to be disposed of as a special waste. (See April 1, 1991 Report by GSC to Angela Tin, Ag. Rec. Vol D at 137.) Furthermore, the Agency had agreed to petitioner's request to dispose of the water through the sewer, which would have been less expensive than pumping and treating as a special waste. (See testimony of Steven E. Nelson, Tr. at 403 - 404; testimony of Jay Hamilton at 566.) This would have required that petitioner obtain a discharge permit. The record shows that the Village of Clarendon Hills engineer would allow the discharge of water if such a permit was obtained. The record shows that processing a permit application was expected to take 60-120 days. (R. Vol. D at 134.)

We find unpersuasive petitioner's argument that the water presented a safety concern which required immediate action. The excavation had been fenced, and had already been sitting dormant for approximately two months. Furthermore, the record demonstrates that there was a reasonable and less expensive alternative to pumping and treating the water as a special waste, and that it would have been less expensive to dispose of it through the sewer. The record indicates that the Village Engineer would allow the discharge if approved by the Agency, and that petitioner had obtained Agency approval. Petitioner only needed a discharge permit, which could have obtained in approximately 60-120 days. We find that the Agency properly denied the cost of disposing of this water as a special waste, since disposing of the water as a special waste did not constitute corrective action.

b) Sewer Repair

Petitioner seeks reimbursement of $842.83 incurred in repairing and capping a storm sewer. (Pet. Br. at 19.) Petitioner asserts that these costs constituted corrective action costs, since the repair minimized, eliminated, or stopped the potential flow or migration of contaminants. (Id.) Petitioner points out that Mr. Hamilton admitted under cross-examination that if the storm sewer had been left unrepaired, it was possible that contamination could have entered the storm sewer and migrated to other places on the site, or even off-site. (Pet. Br. at 19, *see* Testimony of Jay Hamilton, Tr. at 598.)

The Agency denied the sewer repair costs on the grounds that they did not constitute corrective action costs. (Pet. Ex. 17 Attachment A para. 8; Testimony of Jay Hamilton at 569.) The Agency asserts that there is no evidence that any contamination ever entered the sewer, and that it is mere speculation on petitioner's part that such migration of contamination could occur. (Resp. Br. at 25.) The Agency also argues that petitioner failed to demonstrate that the sewer was not damaged during petitioner's removal activities. (Id.)

We find that petitioner has demonstrated that the repair and capping of the sewer constituted corrective action. Petitioner was not required to demonstrate that migration had occurred in order for the repair to be considered corrective action. Petitioner could demonstrate that the costs were corrective action costs by showing that the sewer created the potential for migration of contaminants. We hold that petitioner is entitled to reimbursement of $842.43 incurred in the repair and capping of the sewer.

c) Site Sweeping

Petitioner asserts that the $349.20 incurred for sweeping the site should have been reimbursed, since they constitute mitigation of a safety hazard. (Pet. Br. at 19 - 20.) Petitioner further argues that some of the soil removed in sweeping the site may have been affected by contamination, even if the levels were below cleanup objectives. (Pet. Br. at 19.)

The Agency denied reimbursement of the site sweeping costs on the grounds that they did not constitute corrective action costs. (Pet. Ex. 17 Attachment A para. 8.) The Agency asserts that there is no evidence that sweeping and cleaning the site stopped, minimized, eliminated or cleaned up the release of petroleum at the site. (Resp. Br. at 25.) The Agency asserts that the Enterprise Leasing test focuses on whether the activity itself is corrective action, not whether it is the result of corrective action, and that petitioner has failed to demonstrate that the activity is corrective action. (Id.)

We find that petitioner failed to demonstrate that the costs incurred to sweep and clean the site were corrective action costs. There is no evidence that sweeping and cleaning the site stopped, minimized, eliminated, or cleaned up the release of petroleum. The safety hazards presented by a "dirty, disorganized site" are not the kinds of risks the LUST Fund was intended to address. Sweeping the site constitutes a restorative action, beneficial to the property owner and society, and not a corrective action, stopping or minimizing a release of petroleum.

d) Demurrage

Petitioner asserts that it should have been reimbursed for $280 in demurrage costs, paid to Beaver Oil Company, Inc., which were billed at $70 per hour for four hours. (Pet. Br. at 20 - 21; Ag. Rec. Vol. C pt. 2 at 688, 691.) Petitioner asserts that the demurrage fees were charges for the time a truck was required to stay at the site while it was removing water from the excavation. (Pet. Br. at 20; Testimony of John Hayes, Tr. at 88-89.)

The Agency denied reimbursement of the demurrage costs on the grounds that they did not constitute corrective action costs. (Pet. Ex. 17 Attachment A para. 9.) The Agency defines demurrage costs as "a charge assessed for detaining a freight car, truck, or other vehicle beyond the free time stipulated for loading or unloading." (Resp. Br. at 25.) In her testimony, Grace Levine referred to demurrage fees as "standby charges." (Tr. at 467.) The Agency asserts that Beaver Oil Company, Inc., which assessed the fees, interpreted demurrage fees in the same manner. The Agency points out that an October 30, 1990 Beaver Oil invoice for a load of oil, water and sludge, and a load of heavy mud, charged no demurrage fee for loading these substances, so that the term demurrage cannot refer to the time spent actually pumping out the materials. (Resp. Br. at 26; Agency Rec Vol. C pt. 2 at 684.)

Furthermore the Agency asserts that, if demurrage charges were in fact costs incurred for the time the material was actually being removed, the demurrage fees do not correlate with the amount of materials removed. For example, the pumping of 2000 gallons of used oil and water incurred two hour of demurrage fees, while the pumping of 3000 gallons and 5500 gallons incurred only one hour each of demurrage fees. (Resp. Br. at 26; see Ag. Rec. Vol. C pt. 2 at 688, 691.) The Agency acknowledges that, pursuant to Platolene 500, Inc. v. IEPA (May 7, 1992) PCB 92-9, certain standby charges can be related to corrective action. However, the Agency asserts that petitioner did not provide sufficient details concerning the delays to justify reimbursement.

We find that petitioner has failed to demonstrate that the demurrage fees were corrective action costs. Petitioner has failed to explain the inconsistencies which would result if its definition were adopted. Furthermore, petitioner has failed to adequately explain the delays in order to justify reimbursement. We therefore affirm the Agency's denial of $280 for demurrage costs.

e) Lost Barricades

Petitioner asserts that it should be reimbursed $180 incurred for lost barricades. (Pet. Br. at 21.) Petitioner asserts that these costs were incurred as part of the corrective action at the site. (Id.) The Agency denied these costs on the grounds that they do not constitute corrective action costs. (Pet. Ex. 17 Attachment A para. 10.) At hearing, Ms. Grace Levine testified that equipment rental is reimbursable, but equipment purchase is not, since equipment purchase is not necessary for corrective action. (Tr. at 467 - 468.)

We affirm the Agency's denial of $180 for lost barricades, on the grounds that these costs do not constitute corrective action costs.

f) Parking Lot Lighting

Petitioner seeks reimbursement of $10,127.46 in costs incurred in replacing parking lot lighting fixtures. (Pet. Br. at 25 - 26.) The Agency denied these costs on the grounds that they do not constitute corrective action costs. (Pet. Ex. 17 Attachment A para. 11.)

Paragraph 11 of the Agency April 29, 1993 clarification only states that $127.46 is denied in reimbursement. (Pet. Ex. 17 Attachment A para. 11.) Petitioner asserts that the Agency should be bound by the $127.46 figure, pursuant to Clinton Co. Oil Co. v. Illinois Environmental Protection Agency (March 26, 1992, and June 4, 1992) PCB 91-163. Furthermore, petitioner contends that the dismantling and reassembling of the lights was necessary to perform the remedial action at the site. (Pet. Br. at 26; *see* testimony of John Hayes, Tr. at 79.)

The Agency asserts that the $127.46 figure was an obvious typographical error, and that it intended to deny the full amount. (Pet. Br. at 27.) The Agency states that it would have been impossible for it to have separated $127.46 out of the total, since petitioner provided only a lump sum bill. The Agency further points out that total amount to be reimbursed listed in both the April 29, 1993 and the reimbursement voucher prepared for the site confirm that $10, 127.46 was the appropriate figure. The Agency argues that it should not be bound by such an obvious typographical error. The Agency further argues that Clinton County Oil does not address typographical errors, and that it is therefore inapplicable and does not require that the Agency be bound by such an error.

The Agency asserts that, pursuant to Platolene 500, Inc. v. IEPA (May 7, 1992) PCB 92-9, it is clear that installation of the parking lights constituted a restorative action, and did not constitute corrective action to stop or minimize a release of contamination. (Resp. Br. at 27 - 28.) The Agency states that t would have paid for dismantling of the light poles and their reassembly if the dismantled components had been used. (Resp. Br. at 27 - 28; Testimony of Jay Hamilton, Tr. at 574 - 575.)

We find that the Agency is not bound by an obvious typographical error in its clarification letter. There is no danger that petitioner would have been misled to believe that only a portion of the costs were denied, since petitioner provided only a lump sum bill, and did not provide the Agency with a breakdown of costs. Furthermore, we find that the Agency is correct in characterizing these costs as restorative actions, which pursuant to Platolene 500, are not reimbursable. Installation of the lights did nothing to stop minimize or prevent a release of petroleum. Accordingly, these costs were properly denied.

3) Pre-Notification Expenses

The Agency denied a total of $14,213.96 in costs which were incurred prior to notification of ESDA (pre-notification expenses): $5,330.58 in costs associated with consulting services provided by GSC, and $8,883.38 for work performed by Accurate. (Pet. Ex. 17 Attachment A para. 3.) The Agency asserts that, pursuant to Section 22.28b(d)(4)(D) of the Act, costs incurred prior to notification of ESDA are not eligible for payment.

Petitioner asserts that the Agency is improperly relying on language which does not appear in the Act until the remediation at the site had been completed - language which became effective September 6, 1991 (Pub. Act 87-323). (Pet. Br. at 22-23.)

The statutory language in effect at the time petitioner submitted its application read:

> (4) Request for partial or final payment for claims under this Section shall be sent to the Agency and shall satisfy all of the following:
>
> . . .
>
> (D) The owner or operator notified the State of the release of petroleum in accordance with applicable requirements;

Petitioner asserts that this requirement was eventually satisfied, and that the costs should therefore be reimbursed. (Pet. Br. at 22 - 23.)

As the Board explained in North Suburban Development Corporation (December 19, 1991), PCB 91-109, 128 PCB 263, 272:

> Contrary to North Suburban's assertions [the revised language of Pub. Act 87-323] does not reflect a new statutory initiative to exclude pre-notification expenses. The old language would have excluded all remediation costs when ESDA was not notified within 24 hours, even if ESDA was notified more than 24 hours later but before remediation costs were incurred. The new language makes it clear that costs incurred after notification can be compensated even if the 24-hour notification requirement is not met. Since pre-notification costs are excluded under both the old and the new statutory language, this argument is misplaced.

(See also Kronon Motor Sales, Inc. v. IEPA (January 9, 1992), PCB 91-138, *affirmed* 609 N.E. 2d 678.)

We find that this explanation is applicable and petitioner's argument is without merit. We therefore affirm the Agency's denial of the pre-notification expenses.

4) Manifest Charges $37.50.

Petitioner seeks reimbursement of $42.50 for the preparation of five special waste manifests by Beaver Oil. (Pet. Br. at 18.) Petitioner asserts that the $37.50 charge reflects the charge for the execution, filling out and processing of the waste manifest that is required to accompany the special waste. (Pet. Br. at 18; see Testimony of John Hayes, Tr. at 89.) Beaver Oil charged petitioner $8.50 per manifest for this service. (Pet. Br. at 18; Ag. Rec. Vol C pt. 2 at 684, 688, 691.)

The Agency allowed reimbursement of $5 and denied reimbursement of $37.50 of these charges (Pet. Ex. 17 Attachment A para. 6), allowing only $1 per manifest, which is the price the Agency charges for the actual manifest document. (Resp. Br. at 23.) The Agency asserts that the information contained in each manifest appears to be the same on each form, and should have only taken 2-3 minutes to complete. (Resp. Br. at 24.) The quantity of substance on each form is hand-written, and the only other information that changed between forms were signature and date. (Id.) Furthermore, the information could have been completely handwritten, requiring even less effort. (Id.) The Agency also points out that other companies that completed the manifests did not charge a completion fee. (Id.) The Agency asserts that charging a fee to complete the manifest is not reasonable in light of the minimal efforts required to perform the task. (Id.)

We find that petitioner failed to demonstrate that this cost was reasonable as submitted. We agree with the Agency that the minimal efforts required to complete the form do not justify the $8.50 per manifest fee. The Agency's denial of $37.50 is affirmed.

5) Handling Charges

The Agency denied $253.42 associated with the handling charges for certain subcontracted services related to site sweeping and sewer repair, ($1,192.03), lost barricades ($180) demurrage costs ($280) and manifest costs ($37.50). (Pet. Ex. 17 Attachment A para. 1.) Because we have affirmed the Agency's denial of the site sweeping costs, lost barricade costs and demurrage costs, we affirm the Agency's denial of the related handling costs. Because we have reversed the Agency's denial of $842.83 in sewer repair costs, we reverse the Agency's denial of the related handling costs. Petitioner is entitled to reimbursement of $127.25 in handling costs.

6) Legal Fees of Ross & Hardies

The Agency denied reimbursement of $68,679.55 in costs paid to the law firm of Ross & Hardies on the grounds that they constituted legal defense costs. (Pet. Ex. 17 Attachment A para. 5.) Paragraph 5 of the denial letter further states that, pursuant to Section 22.28b(e)(1)(C) of the Act, legal defense costs include legal costs for seeking payment under Section 22.18(b). Petitioner is appealing the denial of $10,000 of these costs which were incurred in connection with petitioner's appeal of the Office of the State Fire Marshal's revocation of the registration of the tanks at the site. (Pet. Br. at 28 - 29; see testimony of David Israel, Tr. at 206 - 207, 251 - 252.)

Petitioner asserts that these costs are not legal defense costs as defined in 35 Ill. Adm. Code 731.192, which defines legal defense costs as:

> any expense that an owner or operator or provider of financial assurance incurs in defending against claims or action brought,
>
> > By USEPA or the State to require corrective action or to recover the costs of corrective action;
> >
> > By or on behalf of a third party for bodily injury or property damage caused by an accidental release; or
> >
> > By any person to enforce the terms of a financial assurance mechanism.

(Note: this regulation was repealed in April, 1992.)

Petitioner relies on City of Roodhouse v. IEPA (September 17, 1992) PCB 92-31, wherein the Board took notice of the definition of the term "legal defense costs" contained in 35 Ill. Adm. Code 731.192 for guidance in interpreting its meaning in the UST reimbursement context. (See City of Roodhouse at 19.)

The Agency responds that City of Roodhouse is distinguishable, in that the costs in that case were found to be corrective action costs. (Resp. Br. at 23.) The Agency asserts that in the present case, the costs were not corrective action costs, in that they were not incurred 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. The Agency points out that petitioner was required to clean up the site whether or not petitioner was entitled to access the Fund. (Id.)

We affirm the Agency's denial of these costs on the grounds that they were legal defense costs which did not constitute

corrective action costs. In City of Roodhouse, the Agency had denied reimbursement of legal costs connected with obtaining an alternate water supply, which was specifically listed as corrective action. Here, Petitioner seeks reimbursement for costs incurred in obtaining registration of tanks, an activity which is not corrective action. We distinguish Roodhouse on the grounds that, in Roodhouse, the legal costs were incurred in connection with corrective action costs. In the present case, the legal costs incurred in appealing the registration of tanks with the OSFM clearly do not constitute corrective action costs, in that they are not incurred to stop, minimize, eliminate, or clean up a release of petroleum or its effects. Therefore, we find that it is inappropriate to apply the definition contained in 35 Ill. Adm. Code 731.192. Furthermore, The Agency's April 29, 1993 clarification letter informed petitioner that the costs were being denied because they did not constitute corrective action costs, and that legal costs incurred in for seeking payment under Section 22.28(b) were not reimbursable as corrective action costs. While the standard language contained in the April 29, 1993 incorrectly referenced language contained in Section 22.28(e)(1)(C) which was not in force at the time petitioner submitted its application in order to support the denial, the fact that this was not a reimbursable cost was entirely correct.

CONCLUSION

For the reasons set forth above, we find that the Agency properly denied reimbursement of $330,434.37 of the $331,404.05 in contested costs. We further hold that petitioner is entitled to additional reimbursement of $969.68: $842.43 for costs incurred in the repair and capping of the sewer, and $127.25 for handling charges on those sewer repair costs.

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

ORDER

1. The Board hereby affirms the Agency's February 18, 1993 final determination, as clarified by its April 29, 1993 letter, in denying reimbursement to petitioner, Learsi, for the following costs:

   A. $298,786.98 for costs lacking supporting documentation;

   B. $28,655.70 for costs associated with clean water pumping, since these costs are not corrective action costs;

   C. $349.20 for costs incurred for site sweeping, since these costs are not corrective action costs;

D. $280.00 for costs associated with demurrage, since these costs are not corrective action costs;

E. $180 for costs associated with lost barricades, since these costs are not corrective action costs;

F. $10,127.46 for costs associated with wiring lights; since these costs are not corrective action costs;

G. $14,213.96 for costs incurred prior to notification of ESDA;

H. $37.50 for manifesting costs, since petitioner failed to demonstrate that the costs were reasonable;

I. $126.17 for handling charges on denied costs; and

J. $10,000 in legal defense costs for which petitioner sought review.

2. The Board hereby reverses the Agency's February 18, 1993 final determination, as clarified by its April 29, 1993 letter, in denying reimbursement to petitioner for the following costs:

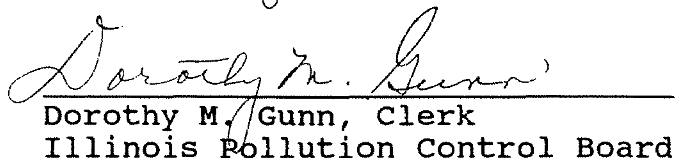
A. $842.43 for costs incurred in the repair and capping of a sewer; and

B. $127.25 for handling charges on those sewer repair costs.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1992)) provides for the appeal of final Board orders within 35 days of the date of service of this order. The Rules of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill. Adm. Code 101.246. "Motions for Reconsideration".)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 16th day of February 1995, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board