ILLINOIS POLLUTION CONTROL BOARD
May 7, 1992

PLATOLENE 500, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 92-9
	)	(Underground Storage Tank Fund
	)	Reimbursement Determination)
	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

NICK ANDERSON, APPEARED PRO SE;

TODD RETTIG, APPEARED ON BEHALF OF RESPONDENT.

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

This matter comes before the Board on a petition for review filed by Platolene 500, Inc. (Platolene) on January 9, 1992, pursuant to Ill. Rev. Stat. 1991, ch. 111 1/2, par 1022.18b(g) and 1040. Platolene seeks review of particular costs for which the Environmental Protection Agency (Agency) denied eligibility for reimbursement from the Underground Storage Tank Fund (fund). A hearing was held on March 10, 1992, in Greenup, Illinois. No members of the public attended the hearing. Respondent filed its post-hearing brief on April 3, 1992. Platolene did not file a brief.

FACTS

On April 3, 1990, Platolene, while removing three underground storage tanks from their property, discovered that a release of petroleum had occurred. Platolene notified the Emergency Services and Disaster Agency and began remediation of the property. In May of 1990 Platolene submitted an application for reimbursement to the Agency. (R. at 55.) On December 5, 1991, the Agency informed Platolene that seven cost items were being deducted from the amount requested for reimbursement because the costs were determined to be ineligible for reimbursement. (R. at 417.) The following costs were considered ineligible for reimbursement;

1. $2,821.76, for an adjustment in handling charges.

2. $8,330.00, for costs associated with replacement of concrete and/or asphalt.

3. $5836.00, for tank removal costs because tanks were not removed in response to a release.

4. $995.80, for costs lacking supporting documents.

5. $1,680.00, for laboratory rush charges.

6. $1,970.00, for standby charges.

7. $2,640.00, for costs associated with the analysis of 24 BTEX[1] [sic] samples for which the Agency did not receive the results.

(R. at 419.)

On January 6, 1992, Platolene filed its petition for review of the costs for which reimbursement was not allowed. On January 28, 1992, Platolene filed an amended petition stating the reason it was challenging the Agency's determination that the costs were ineligible for reimbursement. Platolene is not challenging the deduction of the charges associated with the removal of the tanks (Item # 3). The burden of proof is on the petitioner in appeals of reimbursability. (Sections 22.18b(g) and 40(a)(1).) The issue before the Board is whether Platolene has shown that the above costs are eligible for reimbursement from the fund.

DISCUSSION

Replacement of Concrete

Platolene argues that the Agency's guidance manual lists the cost for the replacement of concrete as a reimbursable cost and that they should be allowed to replace the concrete that needed to be removed in order to access the leaking tank and the contaminated soil. (Tr. at 15.) Douglas Oakley, of the Agency, testified that replacement costs for concrete are not reimbursed because replacement of concrete does not constitute a corrective action. (Tr. at 38.) The Agency further argues that the replacement of concrete is not the reassembly of a structure as required by the guidance manual and an in-house decision was made at the Agency not to reimburse concrete replacement costs. (Tr. at 50.)

Section 22.13(a) of the Act provides that monies from the fund may be used for the following purposes:

* * *

[1] The level of Benzene, Ethylbenzene, Toluene and Xylene present in a sample commonly referred to as BETX.

3. to assist in the reduction and mitigation of damage caused by leaks from underground storage tanks,

* * *

5. for payment of costs of corrective action incurred by and indemnification to operators of underground storage tanks as provided in Section 22.18b of this Act.

Section 22.18b(a) of the Act provides that "[a]n owner or operator is eligible to receive money from the Underground Storage Tank Fund for costs of corrective action or indemnification" if they meet the listed requirements. The Agency had determined that Platolene was eligible for reimbursement in June of 1990 and subject to a $10,000 deductible. (R. at 71.)

The arguments raised by Platolene and the Agency give rise to two questions:

(1) What is the role of the guidance manual?
(2) When does corrective action stop and restoration begin?

To answer these questions, the Board first looks at the language of the statute, then at any regulations and next at any applicable prior decisions.

(1) Role of guidance manual:

Section 22.18b(f) of the Act authorizes the Agency "to adopt reasonable and necessary rules for the administration of this Section." While the Agency has not formally adopted any rules on reimbursement, it has published a guidance manual to assist the applicant in understanding the UST program. (Tr. at 29.) The applicable sections from the Spring 1990, "Guidance Manual for Petroleum-Related LUST Cleanups in Illinois" reads as follows (emphasis added):

A. Eligible Costs

The IEPA will only reimburse the owner/operator for the following work <u>related to the study and/or remediation of an UST release</u> if the work is deemed necessary by an Illinois Registered Professional Engineer, and the costs for labor, equipment, materials, overhead and profit are reasonable:

* * *

3. The dismantling and reassembling of structures costing less than $10,000 <u>in response to a reported</u>

release, upon certification by the engineer that removal was necessary to perform remedial action.

(footnote).

A structure means anything above grade, including but not limited to:
-pad
-paving (concrete or asphalt)
-curbs-signs
-buildings
-canopies
-support columns
-support beams

The guidance manual is provided by the Agency for assistance in complying with the statutory requirements related to LUST clean ups. The guidance manual can not be given the same force as a rule or regulation, since the guidance manual has not been subjected to the applicable notice and comment requirements of the Illinois Administrative Procedure Act (APA). The guidance manual must be consistent with the statute and cannot alter or supersede the requirements of the statute. A state agency cannot impose by regulation or practice requirements inconsistent with the statute conferring authority on it. (Hernandes v. Fahner (1985), 135 Ill.App.3d 372, 381-382, 481 N.E.2d 1004, 1011, See also EPA v. John Vander (1991), 219 Ill.App.3d 975, 579 N.E.2d 1215.)

The guidance manual states that reimbursement is only allowed for work related to the study and/or remediation of an UST release. This statement in the guidance manual correlates to the provision of the statute of allowing reimbursement only for corrective action.

The guidance manual clearly describes concrete as a structure and states that the dismantling and reassembly of structures are eligible costs. However, to be entitled to reimbursement the dismantling or reassembling must be certified as necessary by an engineer, must be in response to a release and the work related to the study or remediation of the release. There is nothing in the statute or regulations that directly addresses the guidance manual requirements concerning the removal and reassembly of structures. The statute does not detail specifics for reimbursement but instead leaves the requirements for reimbursement to the Agency to develop.

The Agency could have promulgated its own regulations on the subject of which costs are reimbursable. In fact, Section

22.18b(f) of the Act explicitly authorizes the Agency to "adopt reasonable and necessary rules for the administration of [the Fund]." Moreover, Section 3.09 of the Administrative Procedure Act, Ill. Rev. Stat. 1989, ch. 127, par. 1003.09, defines a "rule" as follows:

> "Rule" means each agency statement of general applicability that implements, applies, interprets, or prescribes law or policy, but does not include (a) statements concerning only the internal management of an agency and not affecting private rights or procedures available to persons or entities outside the agency, (b) informal advisory rulings... (c) intra-agency memoranda or (d) the prescription of standardized forms.

The guidance manual is clearly an Agency statement of general applicability. It implements a policy of the Agency and is not a statement dealing with the internal management of the Agency. The guidance manual does affect the rights and procedures available to people and entities outside the Agency. Therefore the guidance manual is a rule according to the APA definition. Courts have declared rules invalid which have not been promulgated in conformity with the requirements of the APA and filed with the Secretary of State. Ill. Rev. Stat. 1985, ch. 127 par. 1004(c), See Senn Park Nursing Center v. Miller (1984), 104 Ill.2d 169, 470 N.E.2d 1029 and Kaufman Grain Co. v. Director of the Department of Agriculture (1989), 179 Ill. App. 3d 1040, 1047, 534 N.E.2d 1259. Since the guidance manual is a rule that was not promulgated according to the APA, and is of the type the courts have found invalid, the Board is not bound by the manual, and the manual has no legal or regulatory effect in this proceeding.

Looking at the guidance manual by itself, the language could arguably be read as providing that the cost of the replacement of concrete is eligible for reimbursement. While Platolene argues that they relied on this interpretation in submitting their application for reimbursement, the Board cannot enforce the provisions of the guidance manual for the reasons expressed above. Furthermore, a look at the statute will show that this provision of the guidance manual conflicts with the requirements of the statute. Therefore, in reviewing the Agency's determination, the Board next looks to the statute to see if the Agency's interpretation is correct.

(2) Corrective action or restoration:

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.

Corrective action as defined in the Act relates to actions that are taken to control or clean-up a release. Restoration is defined as the act of bringing back to an original condition. The American Heritage Dictionary, Second College Edition (1985).

In the process of removing underground storage tanks and the subsequent remediation of the site there are a variety of tasks to be performed. Some of the functions can clearly be classified as either corrective action or restoration. For other functions determining if it is corrective action or restoration may not be as obvious. In reviewing Platolene's application the Agency viewed the initial destruction of the concrete as part of corrective action and the replacement of the concrete as not corrective action. (Tr. at 38.)

Under the facts of this case, actions that occurred prior to backfilling the excavation site would be considered as corrective action, and those actions which occurred after backfilling would be considered restoration. The majority of the actions that Platolene performed between the time that the contamination was discovered until the site was backfilled were intended to stop, minimize, eliminate or clean-up the release of petroleum. The excavation site was filled only after all contamination had been removed from the site. Once the contamination was removed the actions by Platolene were no longer related to the clean up of the release but were intended to restore the property to its original condition. Backfilling the site would be considered corrective action even though it occurred after the contamination had been removed because it is an action necessary to protect human health and the environment. (Section 4(v)(4).) Leaving the excavation site open creates a potential hazard. The Board notes that these general rules will not universally apply to all factual situations and that the particular facts surrounding the action and the purpose of the action will ultimately determine whether that action is corrective action or restoration.

In Enterprise Leasing Company v. IEPA (April 9, 1992), PCB 91-174, _____PCB____, the Board determined that the proper inquiry to be made in determining reimbursability is whether the activity meets both parts of the statutory definition of

corrective action. The definition of corrective action consists of two inquiries: whether the costs are 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 such activities as tank removal, soil remediation and free product removal. (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1022.18(e)(1)(C).) When reviewing reimbursement determinations the proper standard is to apply the statutory definition of corrective action. The replacement of concrete under the facts presented in this case does not satisfy the definition of corrective action.

Platolene has presented no argument to show that their replacement of concrete satisfies the statutory requirements for corrective action required for reimbursement. Platolene's replacement of the concrete was not an action to stop, minimize, eliminate, or clean up a release of petroleum, nor did it protect human health or the environment. The act of installing concrete is not an action comparable to the acts specified in the statute as eligible for reimbursement.

Actions such as the replacement of concrete by Platolene serve to restore the facility to its original condition. While restoration actions may be beneficial to the property owner and society, they do not serve to stop or minimize the leak or protect human health or the environment.

Doug Oakley described the fund as an evolutionary process where determinations are made "in-house" as to certain costs. (Tr. at 50.) Instead of promulgating rules on UST reimbursement the Agency chose to develop the UST reimbursement program by establishing "in-house" procedures and through the adjudication of contested cases. Basically, this consists of the Agency rendering its decision, which is then appealed to the Board.

The Agency interprets statutory language and applies it to a particular set of facts in determining which costs are eligible for reimbursement. When the Agency's decision is appealed to the Board, the Board determines whether the Agency's application of the statute was correct. The Board interprets the statutory language as it applies to the set of facts of the appealed case, i.e. adjudicating the contested case. While this is an acceptable procedure for interpreting the statute and establishing Agency policy, it places the applicant in the difficult position of working with a program that is not well defined and constantly changing. The applicant must depend on the statute, Agency personnel and opinions from adjudicated cases to determine the policies relating to the UST program. The lack of specific guidelines for the UST fund increases the confusion of the applicant and complicates the reimbursement program. The applicant is forced to proceed with the remediation of the site, uncertain as to which costs are reimbursable.

The Board affirms the Agency determination that the cost of the replacement of concrete is not a reimbursable item since the replacement of concrete is not a corrective action. The guidance manual is a rule according to the APA definition. Since the guidance manual was not adopted according to APA requirements, the guidance manual has no legal or regulatory force or effect.

Costs Lacking Supporting Documents

The Agency contends that Platolene did not supply sufficient documentation to show that $995.80 worth of charges listed on various invoices were reasonable. The invoices submitted by Platolene included an invoice that charged for work performed after the invoice date, (R. at 251, 252), an invoice for work at another site (R. at 403) and an overcharge for manifests obtained from the Agency. (R. at 184.)

When requesting reimbursement from the fund, the owner or operator must provide an accounting of all costs, demonstrate the costs are reasonable and provide either proof of payment or demonstrate financial need for joint payment. (Section 22.18b(d)(4)(C).) The documents submitted regarding the above charges do not show that the costs are reasonable. In fact, the documents on their face represent these costs as unreasonable. Platolene did not present any testimony at hearing explaining why these costs should be considered reasonable. Platolene has not shown the $995.80 in costs to be reasonable, therefore reimbursement will not be allowed.

The Agency also deducted $2,640.00 for costs associated with 24 BETX samples because the results from the samples were not submitted to the Agency. The invoices submitted to the Agency show that 30 BETX samples were sent for analysis (Tr. at 398, 400) but results from only 6 of the samples were received by the Agency. (Tr. at 81.) The results from the samples are necessary for the Agency to verify that the tests were performed and to determine if the costs were reasonable. Platolene was unable to explain what happened to the test results or why they were not submitted to the Agency. The Agency's denial of reimbursement of the cost for the tests on the 24 samples for which result were not received, is affirmed.

Rush Charges

The Agency, prior to hearing reviewed the charges for rapid turnaround for results from lab tests on soil samples and determined that $220.00 of the charges are eligible for reimbursement; therefore the amount in dispute for rush charges is reduced to $1,460.00. Becky Lockart, of the Agency, testified that the Agency considers rush charges reimbursable when they are taken to show whether the clean up objectives have been satisfied for closure. (Tr. at 27.) She further testified that the Agency

does not reimburse for rush charges when the samples are taken from groundwater monitoring wells or soil borings because they are not considered reasonable. (Tr. at 28.) Platolene argues that the rapid turnaround on some of the samples was requested to prevent delay on the project and avoid problems associated with stopping work until the test results are received. (Tr. at 17.)

While the Board agrees with Platolene that circumstances may require that test results be received as quickly as possible, Platolene did not provide any details as to the specific reasons that rapid turnaround was required for these samples. The costs for laboratory rush charges will not be reimbursed because Platolene did not show that the charges were reasonable due to the conditions at the clean-up site.

Standby Charges

The $1,970.00 adjustment for standby charges are for costs associated with idle equipment or trucks that were parked at the site. (Tr. at 35.) Ron Beavers, of Armor Shield, the contractor for Platolene, testified that the standby charges resulted from rainy weather and things not moving along at the site. (Tr. at 18.) He further testified that if the equipment was not left waiting on site, the subcontractor would have charged for travel time in returning the equipment to the subcontractor's facility and bringing it back to the site when needed. (Tr. at 19.) The Agency argues that these costs are not sufficiently linked to corrective action and are not reasonable.

The Board finds that standby charges can be related to corrective action. The procurement of trucks and equipment are required to perform the excavation and to transport contaminated soil. The scheduling of equipment will not always coincide with the completion of work at the site. Under these circumstances the equipment must stand idly by waiting until the equipment is needed. Whether the standby charges are reasonable depends on the amount of standby charges and the particular conditions at the site. However, Platolene failed to provide specific details of the delays to justify the hours of standby charges on the invoices submitted to the Agency. The invoices submitted by Platolene list in excess of 40 hours for stand-by equipment. Some pieces of equipment are charged for 12 hours of stand-by time in one day. Platolene did not reveal any specific circumstances explaining the hours of standby charges to show that they were reasonable.

Handling Charges

Handling charges are figured at 15% of the total reimbursable costs. The $2821.76 deduction in handling charges is due to the costs that the Agency found to be ineligible for reimbursement. The handling charge must be adjusted to reflect

the $220.00 in laboratory rush charges that the Agency determined to be reimbursable. Therefore Platolene should be reimbursed the $220.00 for the rush charges plus $33.00 in handling charges.

CONCLUSION

For a cost to be eligible for reimbursement from the fund, the cost must be related to a corrective action and the applicant must provide the necessary documentation to show that the cost is reasonable. The Board finds that Platolene's replacement of concrete was not an action to stop, minimize, eliminate or clean up a release of petroleum and therefore it does not constitute a corrective action. The Board finds that Platolene's cost for the replacement of concrete is not related to corrective action and therefore is not a reimbursable cost. The Agency has reviewed the laboratory rush charges and determined that $220.00 of the charges are reasonable; therefore Platolene is entitled to reimbursement for this cost plus a 15% handling charge. Platolene has failed to prove that the other contested costs are reasonable. Therefore these costs are not reimbursable and the Agency's denial of reimbursement of these costs is affirmed.

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

ORDER

The Board finds that Platolene did not meet its burden of proof in showing that the challenged costs were related to corrective action and reasonable. Therefore, the Board affirms the Agency's denial of reimbursement for the cost of concrete replacement, for costs lacking supporting documents, for standby charges and the cost of test for which results were not submitted to the Agency. The Board partially affirms the Agency's denial of rush charges and handling charges and instructs the Agency to reimburse Platolene for a portion of these charges as stated by the Agency at hearing. This matter is remanded to the Agency to reimburse Platolene for $220.00 in rush charges plus the 15% handling charge for the rush charges that the Agency has determined to be eligible for reimbursement.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (Ill.Rev. Stat. 1991 ch. 111 1/2, par 1041) provides for the appeal of final orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 7th day of May, 1992, by a vote of 7-0.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board