ILLINOIS POLLUTION CONTROL BOARD
July 9, 1992

BERNARD MILLER,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 92-49
	)	(Underground Storage
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	Tank Fund)
	)	
	)	
Respondent.	)	

BERNARD MILLER and CHARLES MEYER APPEARED ON BEHALF OF PETITIONER; and

JEANNE HEATON and DANIEL P. MERRIMAN 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 March 30, 1992 by petitioner Bernard Miller pursuant to Section 22.18b(g) of the Environmental Protection Act (Act). (Ill.Rev.Stat. 1991, ch. 111½, par. 1022.18b(g).) Miller seeks review of the Illinois Environmental Protection Agency's (Agency) March 5, 1992 partial denial of reimbursement from the Underground Storage Tank (UST) Fund. A hearing was held on June 5, 1992, in Newton, Illinois. No members of the public attended. Neither party chose to file a brief, but relied on closing arguments.

There are two major disputes in this case. The first issue is whether costs incurred in association with a planned removal of USTs are "corrective action" costs and are thus reimbursable by the Fund. The second dispute is whether concrete replacement costs are reimbursable by the Fund.

BACKGROUND

This case involves the removal of USTs and corrective action at a former service station at 704 West Jourdan, Newton, Illinois. (R. A at 17.)[1] Mr. Miller operated the service station with his brother from 1954 until the end of 1988. (Tr. at 40-41.) On December 28, 1990, the Millers entered into a

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

contract for the sale of the property, and on December 31, 1990, applied to the Office of the State Fire Marshal (OSFM) for a permit to remove the existing four USTs. (Tr. at 41; R. B at 61.) The contract required the removal of the tanks. (Tr. at 43-44.) On January 3, 1991, OSFM issued a permit for the removal of the tanks. (R. B at 61.) The Millers retained Charles Meyer, a registered professional engineer with the firm of J.B. Esker & Sons, Inc., to assist in the removal process. (Tr. at 14, 44.)

Preparation for tank removal began on February 6, 1991. A crew from J.B. Esker & Sons removed the concrete slab that covered three of the four tanks and the vent lines. (R. B at 13; Tr. at 16-17.) On February 7, 1991, the vent lines and fill lines were disconnected and the tanks vented by a crew from Petro Maintenance, a subcontractor. When a representative from OSFM arrived, he noted an odor to the soil which had been removed from around the tanks. (Tr. at 23; R. B at 13.) Mr. Meyer testified at hearing that the odor smelled like gasoline, and was coming from the soil, rather than the venting or cleaning processes. (Tr. at 23-24.) Mr. Meyer then notified the Illinois Emergency Services and Disaster Agency (ESDA) that there had been a release of petroleum. (Tr. at 24; R. B at 2, 13-14.) After ESDA was notified, the tanks were removed. (Tr. at 24-25.) Petro Maintenance then cleaned the tanks. All four tanks were removed on February 7, 1991. The hole was backfilled with soil and sand, and the concrete was removed from the site. (Tr. at 25-26.) Replacement concrete pads were subsequently poured in August 1991. (Tr. at 27, 31.)

Mr. Miller originally sent an application for reimbursement from the UST Fund to the Agency on July 22, 1991. That application was returned by the Agency due to incompleteness and for clarification. (R. A at 1,15.) On August 21, 1991, the Agency received Mr. Miller's amended application for reimbursement. (R. A at 16-24.) The invoices submitted in support of the claim for reimbursement covered the period from February 1, 1991 to August 1, 1991, and the total amount requested was $49,961.17. (R. A at 101.) On March 5, 1992, the Agency issued its decision, finding that, after deducting the applicable $10,000 deductible (R. A at 81-82), $32,229.27 was reimbursable. The Agency listed three separate amounts for which reimbursement was denied. (R. A at 101-103.) Mr. Miller filed his petition for review with the Board on March 30, 1992.

DISCUSSION

In his petition for review, Mr. Miller challenged all three items for which the Agency denied reimbursement: $3,725.05 for an adjustment in tank removal costs; $3080.00 for concrete replacement costs; and $926.85 for an adjustment in costs lacking supporting documentation. (Pet. at 1-2; R. A at 103.) However, testimony at hearing indicates that Mr. Miller and the Agency

have reached an agreement on the $926.85 for costs lacking documentation. (Tr. at 57, 79.) Therefore, the Board will address only the challenged costs for tank removal and concrete replacement.

Tank Removal Costs

The Agency denied reimbursement of $3,725.05 in tank removal costs, stating that the tanks were not removed in response to a release, and that therefore the associated costs are not corrective action costs. (R. A at 103.) The Agency pointed to Section 22.18(e)(1)(C) of the Act, which states in part:

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

Mr. Miller argues that the fact that the tank removal was planned should not preclude him from applying for reimbursement for tank removal costs once a release of petroleum was discovered. Mr. Miller notes that the definition of "corrective action" was amended by P.A. 87-323, effective September 6, 1991, to exclude tank removals where permitted for removal prior to discovery of a release. However, Mr. Miller contends that prior to September 6, 1991, such a situation would constitute "corrective action", so that his tank removal costs should be reimbursed.

In response, the Agency points out that it is limited to reimbursing for expenses that constitute "corrective action" under the Act. The Agency notes that OSFM issued a permit for the removal of these tanks on January 3, 1991, and that the application for reimbursement states that the reason for removal was the sale of the property. Therefore, the Agency maintains that the tanks were not pulled in response to a release and thus the tank removal costs do not constitute corrective action.

After a review of the record and the arguments of the parties, the Board partially reverses the Agency's determination that $3,725.05 in tank removal costs are not reimbursable. There are two parts to the Agency's argument that the tank removal costs are not corrective action costs. First, the Agency argues that Section 22.18(e)(1)(C) of the Act excludes this situation from the definition of "corrective action", because Mr. Miller had received a permit from OSFM for removal of tanks before the release was discovered. The Agency is correct that Section 22.18(e)(1)(C), as amended by P.A. 87-323, now specifically states that tank removal is not corrective action if the tank is

removed or permitted for removal by OSFM prior to notification of a release. However, this addition to Section 22.18(e)(1)(C) was approved and effective on September 6, 1991, after the disputed costs were incurred in February 1991, and after Mr. Miller filed his application in summer 1991.[2] The Board has previously determined that statutory provisions in effect on the date of filing of the application for reimbursement are the statutory provisions which govern that application. (Pulitzer Community Newspapers, Inc. v. Illinois Environmental Protection Agency (December 20, 1990), PCB 90-142, slip op. at 4-5.) Therefore, the provisions of P.A. 87-323, including the addition to the Section 22.18(e)(1)(C) definition of corrective action, are not applicable to Mr. Miller's application.

Second, the Agency contends that because the tanks were part of a "planned removal" due to the sale of property, the tanks were not pulled in response to a release, and therefore the tank removal costs are not corrective action. This argument ignores the Board's decision in Enterprise Leasing Co. v. Illinois Environmental Protection Agency (April 9, 1992), PCB 91-174. In Enterprise Leasing, the Board specifically held that the fact that a petitioner had planned to remove tanks does not bar tank removal costs from being reimbursed as corrective action costs when those activities meet the statutory definition. (Enterprise Leasing, slip op. at 5; see also Enterprise Leasing Co. v. Illinois Environmental Protection Agency (June 4, 1992), PCB 91-174.) Therefore, the proper inquiry is whether the tank removal costs meet the definition of "corrective action", as that definition existed when the application for reimbursement was filed, not whether the tank removal was planned.

The definition of "corrective action" as it existed when Mr. Miller filed his application for reimbursement stated:

> "Corrective action" means an action to stop, minimize, eliminate, or clean up a release of petroleum or its effects as may be necessary or appropriate to protect human health and the environment. This includes, but is not limited to, release investigation, mitigation of fire and safety hazards, tank removal, soil remediation, hydrogeological investigations, free product removal, ground water remediation and monitoring, exposure assessments, the temporary or

---

[2] As noted above, Mr. Miller originally sent his application to the Agency on July 22, 1991. That application was returned, and Mr. Miller filed an amended application on August 21, 1991. In this case, it is immaterial which of these dates constitutes the date of filing of the application, because both dates are before the September 6, 1991 effective date of P.A. 87-323.

> permanent relocation of residents and the provision of alternate water supplies. (Ill.Rev.Stat. 1989, ch. 111½, par. 1022.18(e)(1)(C).)

As the Board noted in Enterprise Leasing, this definition presents a two-part test: whether the costs are incurred as a result of action to "stop, minimize, eliminate, or clean up a release of petroleum", and whether the costs are the result of activities such as tank removal. The Board finds that the tank removal costs incurred by Mr. Miller on February 7 (the second day of activities at the site) meet both parts of the definition. Therefore, the Board finds that the tank removal costs incurred on February 7, 1991 are reimbursable as corrective action costs. However, the costs incurred on February 6, the day before the release was discovered, are not corrective action costs and not reimbursable. The record indicates that $984 was incurred on February 6, 1991. (R. A at 93; Tr. 81-83.) Deducting $984 from the $3,725.05 disallowed by the Agency results in $2741.05 in reimbursable tank removal costs.

Concrete Replacement

The Agency also disallowed $3,080.00 in costs associated with the replacement of concrete. The Agency stated in its March 5, 1992 letter that concrete and asphalt are considered "structures", and that costs associated with the replacement of structures are not reimbursable. (R. A at 103.)

Mr. Miller argues that the Agency's guidance manual on UST cleanups states that costs for destruction of structures costing less than $10,000 are reimbursable upon certification that the removal was necessary to perform remedial action. Mr. Miller states that he and his engineer, Mr. Meyer, interpreted this provision to mean that the concrete replacement costs would be reimbursable since the concrete had to be removed to perform remedial action.

In response, the Agency points to this Board's previous decisions in Platolene 500, Inc. v. Illinois Environmental Protection Agency (May 7, 1992), PCB 92-9 and Strubbe v. Illinois Environmental Protection Agency (May 21, 1992), PCB 91-105, for the proposition that in most cases replacement of concrete is not corrective action because it is not an action to minimize, stop, eliminate, or clean up a release of petroleum. The Agency contends that the evidence shows that the concrete was replaced in order to restore the property to its original condition, and not incurred as a response to a release.

After reviewing the record and the arguments of the parties, the Board affirms the Agency's decision that $3,080.00 in concrete replacement costs is not corrective action and therefore not reimbursable by the Fund. As we noted in both Platolene 500

and Strubbe, the Agency's guidance manual does clearly allow for reimbursement for the dismantling and reassembly of structures, and includes concrete or asphalt paving as a structure. However, because the Agency did not promulgate the guidance manual according to the Illinois Administrative Procedure Act, the manual has no legal or regulatory effect in proceedings before the Board. The Board must determine whether concrete replacement is reimbursable by applying the statutory definition of corrective action.

As the Agency correctly points out, in both Platolene 500 and Strubbe the Board found that the replacement of concrete under most circumstances is not corrective action, because it is not an action to stop or minimize a release. However, under certain circumstances concrete replacement costs may be proven to constitute corrective action costs. The specific facts of each case will determine whether concrete replacement is corrective action. In this case, the Board finds that Mr. Miller has presented no evidence that the concrete replacement was an action to stop, minimize, eliminate, or clean up a release of petroleum in order to protect human health and the environment. Instead, the replacement of the concrete in this case restored the facility to its original condition. As the Board stated in Platolene 500, "[w]hile 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." (Platolene 500, slip op. at 7.) Therefore, the Board affirms that Agency's determination that the concrete replacement costs are not reimbursable.

The Board is concerned that the Agency's guidance manual is misleading petitioners to believe that concrete replacement costs (as opposed to reassembly costs) are reimbursable as a matter of course, when in most cases such costs are not reimbursable. This is the fourth case raising this issue that the Board has ruled upon in the past two months. (Platolene 500, Inc. v. Illinois Environmental Protection Agency (May 7, 1992), PCB 92-9; Strubbe v. Illinois Environmental Protection Agency (May 21, 1992), PCB 91-105; and Warren's Service v. Illinois Environmental Protection Agency (June 4, 1992), PCB 92-22.)

CONCLUSION

In sum, the Board finds that $2,741.05 in tank removal costs are corrective action costs and are therefore reimbursable. The Board affirms the Agency's decision that $984.00 in tank removal costs incurred on before the release was discovered, and $3,080.00 in concrete replacement costs, are not reimbursable.

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

ORDER

The Board hereby reverses the Agency's March 5, 1992 determination that $2,741.05 in tank removal costs is not reimbursable. The Agency's determinations that $984.00 in tank removal costs incurred before the release was discovered, and $3,080.00 in concrete replacement costs are not reimbursable are hereby affirmed. This case is remanded to the Agency for disbursement of the $2,741.05 amount, consistent with this opinion and order. This docket is closed.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (Ill.Rev.Stat. 1991, ch. 111½, par. 1041) provides for the appeal of final Board orders. The Rules of the Supreme Court of Illinois establish filing requirements.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 9th day of July, 1992, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board