ILLINOIS POLLUTION CONTROL BOARD
August 26, 1993

CHUCK AND DAN'S AUTO SERVICE,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 92-203
	)	(UST Fund)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

GERALD A. DRENDEL AND EDWARD F. KELLY APPEARED ON BEHALF OF THE PETITIONER; AND

TODD RETTIG APPEARED ON BEHALF OF THE RESPONDENT.

OPINION AND ORDER OF THE BOARD (by C.A. Manning):

This matter is before the Board on a petition for review filed December 14, 1992, by Chuck and Dan's Auto Service (petitioner) pursuant to Section 22.18b(g) of the Environmental Protection Act (Act). (415 ILCS 5/22.18b(g) (1992).) Petitioner seeks review of the Illinois Environmental Protection Agency's (Agency) November 10, 1992, partial denial of reimbursement from the Underground Storage Tank Fund (Fund). Petitioner appeals the Agency's denial of reimbursement for certain costs associated with underground storage tank (UST) removal and site remediation. A public hearing was held, pursuant to Sections 22.18b(g) and 40(a)(1) of the Act, on February 10, 1993, in Ottawa, LaSalle County. No members of the public participated in the hearing.

In dispute are the following costs denied by the Agency in the final determination letter: (1) $17,758.74 deduction for handling charges in excess of 15%[1]; (2) $3152 deduction for

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[1]Attachment A to the Agency's final determination letter indicates that $17,848.14 was disallowed for an adjustment in tank removal costs. (R.1 at 154.) However, at hearing, this amount was reduced to $17,758.74 by stipulation of the parties. (Pet. Br. at 1.) Handling charges were incurred in this case when the general contractor, P & P Consultants, (P&P) added a 53% handling charge markup to a subcontractor charge of $45,361.66. (Tr. at 143 and Joint Exhibit #1.) The total handling charges requested for reimbursement by P & P Consultants were $24,079.84, which represents approximately 53% of the total subcontractor charges. (Id.) The Agency denied $3817 for the subcontractor total as ineligible tank removal costs (R.1 at 154; Joint Exhibit #1) and calculated a 15% handling charge on the new total of $41,544.66. The Agency reimbursed $6231.70, and disallowed

underground storage tank removal costs[2]; (3) $355 deduction for mileage charges; (4) $65 deduction for shipping charges; and (5) $3000 deduction in personnel costs associated with preparation of the reimbursement application. (Pet. Br. at 1-2.)

For the reasons stated below, the Board affirms the Agency's denial of $17,758.74 in handling charges, $355 in mileage charges, $65 in shipping fees, and $3000 in personnel costs. The Board hereby reverses the Agency's denial of $3152 in tank removal costs.

BACKGROUND

Petitioner owns and operates a service station (Chuck and Dan's Auto Service) located at 713 East Main Street in Streator, Illinois. Petitioner applied for and received from the Office of State Fire Marshal (OSFM), a tank removal permit to remove six underground storage tanks. The tank removal permit was issued on April 18, 1990 (R.2. at 8 and 74), and on May 14, 1990, Feken Excavating Company pulled three 1,000-gallon gasoline USTs, one 8,000-gallon gasoline UST, one 1,000-gallon heating oil UST, and one 550-gallon waste oil UST. (Tr. at 13-14.) The heating oil tank was not registered and therefore the heating oil tank was ineligible for reimbursement, and is not the subject of this appeal. (R.1 at 29.)

A representative from OSFM was on-site during the May 14th tank removal. (Tr. at 14). According to the hearing testimony of Mr. Chuck Liebhart, co-owner of Chuck and Dan's, OSFM Officer Logan instructed Liebhart to call in an incident number to the Illinois Emergency Disaster Relief Agency (ESDA) (now Illinois Emergency Management Agency (IEMA)). (Id.) ESDA received notification via a completed Incident Report (Incident Number 901287) transmitted by facsimile copy on May 14, 1990 at 2:06 p.m. (R.2 at 2.) The Incident Report indicated there had been a leak or spill; gasoline, fuel oil and waste oil were the products involved in the tank removal; and the material was in semi-solid form. (Id.) The record demonstrates that at least four of the six USTs experienced a leak. (R.1 at 30 and Tr. at 12-14.)

In the fall of 1990, petitioner hired P & P Consultants (P & P) to conduct remediation. (Pet. Br. at 3.) P & P obtained soil samples from the UST excavation zone and determined that soil in

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$17,758.74.

[2]Attachment A to the Agency's final determination letter indicates that $3,817.00 was disallowed for an adjustment in tank removal costs. (R.1 at 154.) However, at hearing, this amount was reduced to $3152 by stipulation of the parties. (Pet. Br. at 1.)

the UST tank farm area had BETX in excess of IEPA LUST clean-up objectives. (R.2 at 30.) On April 1 and 2, 1991, P & P, Feken Excavators, Azzereli Trucking Company and Tobey's Construction Company conducted on-site remedial excavation activities involving: (1) attempting to establish a clean zone; (2) field screening with a Photovac Micro-Tip (PID); and (3) excavating and transporting contaminated soil for disposal at Livingston Landfill in Pontiac, Illinois. R.2 at 31. P & P collected 12 verification soil samples and laboratory analysis showed that all samples were below IEPA LUST site cleanup objectives for BTEX BETX. (R.2 at 31.)

Petitioner submitted an application for reimbursement of corrective action costs on February 5, 1992, requesting a total reimbursement of $83,301.50. (R.1 at 146.) The Agency notified petitioner on March 20, 1992 that Chuck and Dan's Auto Service was eligible to seek reimbursement and that a deductible of $10,000 would be applied to any reimbursement received. (R.1 at 29.) On July 2, 1992, the Agency sent an information request to petitioner regarding personnel charges associated with submission of the reimbursement application, and personnel charges accumulated after May 5, 1991. (R.1 at 148.) On November 10, 1992, the Agency rendered a final determination granting reimbursement of $48,216.36, denying reimbursement for the five cost items at issue herein. (R. at 152-54.) Petitioner is appealing the Agency's partial denial of reimbursement.

SUMMARY OF RELEVANT TESTIMONY

A. Handling Charges

The Agency denied reimbursement of handling charges totaling 53% which P & P Consultants had applied to subcontractor costs. The Agency reduced the handling charge to 15%, disallowing $17,758.74. At hearing, Carney Miller, operations manager for P & P, testified on behalf of petitioner that 53% handling charges were reasonable. Though he testified 53% was "customary", he was unable to state that 53% handling charges were reasonable relative to P & P. He said, "I guess we're dealing with the issue of reasonable here and that's a judgment call. Everybody has their own opinion of what's reasonable." (Tr. at 90.) Petitioner offered no explanation of how the 53% was derived, or what expenses it covered. Miller testified the handling charge was "the difference between the actual amount billed to P & P versus the amount billed to the owner/operator," (Tr. at 88-89.) that the 53% was actually paid by petitioner to P & P Consultants and the charge had been paid one year prior to the petitioner seeking reimbursement from the Agency. (Tr. at 86-7 and R.1 at 34, 36, 38 and 40.) It was Miller's testimony that the handling charge amount is whatever the "market will bear." (Tr. at 86-7.)

Greg Thompson, president of Ecology Services, Inc., also testified on behalf of the petitioner. Thompson was offered as an expert in the field of environmental clean-up for his opinion that the handling charge fees submitted by petitioner were reasonable. (Tr. at 108-11.) In his career, Thompson submitted approximately 100 applications for reimbursement (Tr. at 108.) and reviewed fees from a dozen consulting firms (Tr. at 110.) In preparing for the hearing, Thompson reviewed the handling charge figures as submitted by P & P; however, Thompson did not review any of the underlying technical documentation. It was Thompson's testimony that the handling charge is "what the market will bear" (Tr. at 125 and 131) and, the rate consists of "personnel, overhead and profit." (Tr. at 126). And, that in the instant case, the 53% submitted for reimbursement was "reasonable and customary." (Tr. at 126.)

Douglas E. Oakley, Agency Supervising Accountant, testified on behalf of the Agency that prior to 1990 the Agency allowed reimbursement of a 5% handling charge, based on the markup of its regular state contracts. (Tr. at 163.) After informal meetings with various representatives of industry, owners and operators, petroleum marketers and consultants, the Agency instituted a practice of reimbursing up to a 15% handling charge. Oakley stated that after "seminars...where you just meet with people, you discuss things, and you get an idea of what's going on in the industry" he concluded that 15% was considered a fair handling charge in relation to the market place price and was considered at or near industry standards. (Tr. at 162-164.) On cross examination, Oakley admitted that they did not use computer programs or mathematical models to determine the 15% figure although they do use computer generated programs to determine what is reasonable for other costs. (175-176.) On re-direct Oakley stated "I can't honestly say if it [the 15% figure] was an industry standard. I believe it was at or near industry standards." (Tr. at 179.) Oakley testified that the 15% handling charge was arrived at for policy purposes, to "have some sort of guideline as opposed to chaos." (Tr. at 171.) Oakley testified that the Agency began to include the 15% handling charge language on the reimbursement forms in the Winter or Spring of 1991. (Tr. at 166.)

B. Tank Removal

The Agency denied $3152 for costs associated with tank removal on the basis the tank removal was not corrective action. At hearing, Victor Chuckwudebe, an Agency accountant for the LUST section, testified that the tank removal costs were denied because the tank pull was not in response to a leak, but was instead a "planned" tank removal. (Tr. at 154.)

Co-owner of Chuck and Dan's, Chuck Liebhart's testimony indicated there were several reasons for conducting tank removal.

Liebhart testified that on March 14, 1990, a "Mr. Kirk" from the OSFM made a site visit to Chuck and Dan's Auto Service. While on the premises, Kirk performed a stick test to determine whether the USTs contained water. (Tr. at 29-30.) Kirk advised Liebhart that at least one tank was taking on water and was probably leaking. It was Liebhart's testimony that Kirk advised him to pump the tanks that evening, and that he recommended the tanks be removed. Liebhart also testified that Henry Araujo, the local fire chief, visited the premises a few days later to see if the tanks had been pumped out or removed. (Tr. at 40.)

However on the application for tank removal submitted to the OSFM, petitioner indicated the reason for the tank pull was that Chuck and Dan's did "not wish to update with new leak protection equipment". (R.2 at 74; Tr. at 34.) The Agency also received correspondence from petitioner in response to the Agency's Notice of Release letter explaining, "[r]emoval was requested as we did not wish to update with new leak protection equipment. We were not aware of leaking tanks at the time of request for removal." (R.2 at 7; Tr. at 32.)

At hearing, Liebhart explained, that at the time the application for a tank removal permit was filed, they [Chuck and Dan's] "didn't feel" the tanks were leaking. (Tr. at 35.) He stated they only had Kirk's "word" there was a leak. (Tr. at 34.) On cross-examination, when asked why petitioner followed Kirk's suggestion to remove the tanks when he did not believe they were leaking, Liebhart testified tanks were moved because Kirk indicated "he was going to follow-up and that we had to take this course of action." (Tr. at 34-36.)

C. Mileage Charges

The Agency denied $1.00 per mile mileage costs requested by petitioner for reimbursement, for a total of $355, reducing the reimbursable amount to $.50 per mile. At hearing, Chukwudebe testified for the Agency that the Agency has determined a $.50 per mile rate is the maximum reasonable charge. Chukwudebe indicated that in his experience he has never seen an approval for more than $.50 per mile. He testified that some people request $.21, $.25 or $.30 per mile, and therefore the Agency feels $.50 is reasonable. (Tr. at 155.)

On behalf of the petitioner, Miller testified that $1.00 per mile was a customary and usual charge in December of 1990 for the environmental clean-up industry. Also on behalf of petitioner, Thompson testified that all costs as billed were reasonable, but he did not specifically address the mileage costs or unequivocally state they were reasonable or customary. (Tr. at 117.)

D. Personnel Charges

The Agency denied $3,000 in personnel charges associated with preparation of the reimbursement application. Miller unequivocally testified on behalf of petitioner the personnel charges comprising the $3,000 were for personnel costs incurred in preparing submittals to the Agency. (Tr. at 59.)

For the Agency, Kyle Rominger, project manager for the Agency's LUST section, testified he reviewed the reimbursement forms submitted by petitioner and made the $3,000 deduction. He stated that the Agency did not consider these costs to be associated with corrective action. (Tr. at 185-187.)

DISCUSSION

A. Handling Charges

The petitioner asks this Board to decide whether 53% handling charge costs were "reasonable" as submitted to the Agency. The Agency reduced from 53% to 15%, handling charges which P & P Consultants added to the subcontractor costs sought for reimbursement, disallowing a total of $17,758.74. The Agency denied the handling charges in excess of 15% on the basis the owner or operator failed to demonstrate the costs were reasonable (R.1 at 154; Tr. at 140-44.) citing Section 22.18b(d)(4)(C) of the Act. Section 22.18b(d)(4)(C) provided on the date the reimbursement application was submitted[3]:

> (4) Requests for partial or final payment of claims under this Section shall be sent to the Agency and shall satisfy all of the following:
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> ...
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> (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

[3]The applicable law is the statute in effect on the date of the filing of the application for reimbursement. (First Busey Trust & Investment Co. v. IEPA (February 27, 1992), PCB 91-213, 130 PCB 287; Pulitzer Community Newspapers v. IEPA (December 20, 1990), PCB 90-142, 117 PCB 99.) "However, where a statutory amendment involves prior activity or a certain course of conduct, the law to be applied is the provisions in effect at the time that the course of conduct occurred." (Galesburg Cottage Hospital v. IEPA (August 13, 1992) PCB 92-62, 135 PCB 319.)

costs. (Emphasis added.)

The Board has, on at least three occasions, addressed the issue of the Agency's reduction of handling charges in excess of 15%. In all three cases the Board affirmed the Agency's reduction of handling charges to 15% of the total subcontractor cost or field purchase. In each case, the Board weighed the evidence offered by the petitioner during the UST appeal hearing to determine whether the handling charges were "reasonable as submitted,"[4] and concluded the petitioner failed to demonstrate that the requested handling charge was reasonable. The Board affirmed the Agency's downward adjustment of three separate handling charges of 46.4%, 46% and 16%, to a flat 15% in State Bank of Whittington v. IEPA, (June 3, 1993) PCB 92-152, ___ PCB ___, the Agency's handling charge reduction from 58% to 15% in Beverly Malkey v. IEPA, (March 11, 1993), PCB 92-104, ___ PCB ___, and the Agency's adjustment to 15%, disallowing $2821.76 in handling charges, in Platolene 500, Inc. v. IEPA, (May 7, 1992), PCB 92-9, 133 PCB 259.

The Agency has taken the position, with which the Board is inclined to agree, that at the time the petitioner incurred the handling charges, 15% was a "reasonable" handling charge. The Agency argues that petitioner has done nothing to substantiate the 53% handling charges as being reasonable other than offer the testimony of two witnesses, Carney Miller and Greg Thompson, who agreed a handling charge is whatever the "market will bear", but who could not both agree the handling charge of 53% in this case is reasonable. (Agency Br. at 7.)

The Agency has maintained throughout that 15% is an appropriate amount, and that this figure was arrived at through an examination of the marketplace. In Whittington, the Board held, "[i]n the absence of specificity in the Act or regulation applicable to this proceeding, the Board agrees that establishing the 15% handling charge by basing it on market place practices is a reasonable approach." (Whittington at 11.) The Board relied on Doug Oakley's testimony which indicated that the "15% figure was established as a standard handling charge only after Agency meetings with many persons familiar with the market place." (Id.) Similarly, in the instant case, Oakley, again testified on

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[4] When reviewing UST petitions for review, the Board entertains evidence offered during hearing in addition to that in the Agency record. The Board's willingness to go beyond the Agency record is attributable to the fact that the Agency has in the past, declined to promulgate regulations identifying the type of information necessary to complete a reimbursement application. Sparkling Spring Mineral Water Co. v. IEPA (May 9, 1991, PCB 91-9 at 3-4, 122 PCB 115 and Reichhold Chemicals, Inc. v. IEPA (December 17, 1992) PCB 92-98, at 10, n.10, ___ PCB ___.)

how a 15% handling charge was adopted:

> Initially, it [the handling charge] was 5 percent, that's what we pay on our regular State contracts where we actually hire a firm to go out and clean up a site....By Winter or Spring of 1991, we had done some market samples, we had some meetings with contractors, the petroleum marketers, and so forth, and we determined that 5 percent, in our opinion, was a bit low....So we decided to go with 15 percent which seemed to be a fair and reasonable markup....[W]e had seminars back at that time, and I had lots of phone calls, and I had talked with various consultants, contractors, petroleum markets, and the basic thing that I started hearing was 15 percent seemed to be a fair and reasonable handling charge. (Tr. at 163-64.)

Further evidence that 15% is more likely to be in the neighborhood of a "reasonable" handling charge than 53%, is the adoption by the Illinois legislature of P.A. 87-1171. Effective September 18, 1992, P.A. 87-1171, amended Section 22.18b(i)(2) and created a sliding scale of the percent allowable for a handling charge. Subcontract or field purchases of $5,000 and under will have handling charges reimbursed at a rate of 12%, and costs in excess of $5,000 will have handling charges reimbursed at a percent which decreases as the costs increase.[5] While new Section 22.18b(i)(2) is not directly applicable to this case because the effective date is seven months subsequent to the petitioner filing the reimbursement application[6], the Board is

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[5]New Section 22.18b(i) provides:

> i.1. For purposes of this Section, "handling charge" means administrative, insurance, and interest costs and a reasonable profit or procurement, oversight, and payment of subcontracts and field purchases.
>
> 2. Handling charges are eligible for payment only if they are equal to or less than the following amounts:

Subcontract or Field Purchase Cost	Eligible Handling Charges as a Percentage of Cost
$1 - $5000	12%
$5,001 - $15,000	$600+10% of amt.over $5,000
$15,001 - $50,000	$1600+8% of amt.over $15,000
$50,001 - $100,000	$4400+5% of amt.over $50,000
$100,001 - $1,000,000	$6900+2% of amt.over $100,000.

[6]See infra at 6, n. 3.

persuaded that new Section 22.18b(i)(2) reflects a prevailing belief, at least in the legislature, that handling charges within the 12% and under range are more acceptable than handling charges in the 50% range.

Petitioner in the instant case has not satisfied its burden of proof in demonstrating that the handling charge of 53% is reasonable. The petitioner offered the testimony of Greg Thompson, the president of Ecology Services, as evidence that 53% is "reasonable and customary" for the industry; however, no testimony or documentation was offered as to exact rates. Neither Thompson nor Miller presented any testimony on how 53% is determined individually for P & P Consultants, Inc. Further, Miller was unable to state with any degree of certainty that 53% is reasonable, specifically for P & P consultants. In fact, there is a distinct absence in the record of any proof to illustrate 53% is other than, simply, what the "market will bear."

The Board affirms the Agency's denial of $17,758.74 in handling charges in excess of 15%.

B. Tank Removal

Petitioner also asks that the Board review the Agency's denial of $3152 for costs associated with tank removal.[7] The Agency cited the following as a basis for denial in its final determination letter:

> The tanks were not removed in response to a release. Therefore, the associated costs are not corrective action costs. Corrective action does not include removal of an underground storage tank if the tank was removed or permitted for removal by the Office of the State Fire Marshal prior to the owner or operator providing notice of a release of petroleum in accordance with applicable notice requirements. (Section 22.18(e)(1)(C) of the Illinois Environmental Protection Act). One of the eligibility requirement for accessing the UST Fund is that the costs

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[7]It is unclear from the record whether this amount was incurred for the removal of all six USTs, the four nonleaking USTs, or for costs associated with the removal of the nonleaking tanks. The Agency does not distinguish this figure at hearing or in its post-hearing brief, and the record is unclear. In Lynch v. IEPA (November 19, 1992) PCB 92-81, 137 PCB 165, the Board recognized that although six tanks were removed, only one tank was leaking. The Board indicated it would have been willing to deny tank removal costs for the nonleaking tanks, however the Agency failed to raise the issue. Therefore, the Board reversed the Agency's denial of the full tank removal cost amount.

> incurred were corrective action costs or indemnification costs which were incurred by the owner or operator as a result of a release of petroleum, but not including any hazardous substance from an underground storage tank. (Section 22.18b(a)(3) of the Illinois Environmental Protection Act). (R.1 at 154.) (Emphasis added.)

The Agency basis for denial is a retroactive application of a statute amended subsequent to the petitioner incurring tank removal costs. P.A. 87-323 amended Section 22.18(e)(1)(C) to include the underscored portion in the Agency's basis for denial, effective September 6, 1991. If this case were being decided under new Section 22.18(e)(1)(C), petitioner would have no basis to appeal - having obtained a removal permit prior to notifying ESDA; however, the tank removal costs were incurred on May 14, 1990, one year and four months prior to September 6, 1991, the effective date of P.A. 87-323. The Board recognizes that the reimbursement application was not submitted to the Agency until February 4, 1992, after the effective date of P.A. 87-323. The statutory amendment involves prior activity or a certain course of conduct, therefore, the applicable law is the statute in place at the time of tank removal. (Cottage Hospital at 4-5; Pulitzer Community Newspapers, Inc. v. Illinois Environmental Protection Agency (December 20, 1990), PCB 90-142, 117 PCB 99.) (See also infra, at 6, n. 3.) The Board finds the Agency's denial of tank removal costs in the amount of $3152 based on new Section 22.18(e)(1)(C) is an unlawful retroactive application P.A. 87-323. (Cottage Hospital at 2 (September, 1990); Lynch at 2 (May 10, 1991).) The Board must still determine whether the tank removal constituted "corrective action" pursuant to the Act.

The Agency argues there are multiple reasons proffered by petitioner for tank removal. And that due to this variety of reasons, this may be the appropriate case in which to extend the "main intent" test recognized by this Board in Southern Food Park v. IEPA, (December 18, 1992) PCB 92-88, ___ PCB ___, and find that the tank removal was not corrective action. Essentially, the Agency argues that Southern Food Park stands for the proposition that a fact-specific analysis requires examination of the motive, or "intention" driving the tank removal. According to the Agency, if the action did not occur primarily for the purpose of responding to a petroleum release, the costs should not be reimbursable. The Agency suggests there are at least three reasons which prompted tank removal, and that the Board should determine which one is the "main intent": (1) the USTs were no longer needed (petitioner's cited reason on the reimbursement application (R.1 at 3-9)); (2) petitioner did not want to update the USTs with new leak protection equipment (petitioner's response to an Agency Notice of Release asking petitioner to explain why the tank removal permit was obtained (R.2 at 6.)); or (3) a representative of the OSFM informed petitioner the USTs should be removed because they were probably

leaking (petitioner's testimony at hearing (Tr. at 16-17.)). (Agency Br. at 8.). The Agency's position is that because the tank removal was planned, the main intent could not be for corrective action.

Petitioner's position is that during tank removal, a release of petroleum occurred, that this release was reported to ESDA, and at a minimum, petitioner was responding to the visit of an OSFM official who recommended the USTs be removed. (See generally Pet. Br. at 5-6.) The gravamen of petitioner's argument, is essentially, the tank removal costs could be nothing but a response to a release of petroleum under the definition of corrective action in the Act.

The Board disagrees that it is appropriate to extend the "main intent" test to a "planned" tank removal case. In five UST appeals, this Board has specifically addressed the issue of reimbursing the costs associated with tank removal when the original intent may not have been to "respond" to a release of petroleum. (Paul Rosman v. IEPA, (December 19, 1991) PCB-91-80, 128 PCB 253; Enterprise Leasing Co. v. IEPA, (April 9, 1992) PCB 91-174, 132 PCB 79; Bernard Miller v. IEPA, (July 9, 1992) PCB 92-49, 135 PCB 53; Galesburg Cottage Hospital v. IEPA, (August 13, 1992) PCB 92-62, 135 PCB 319; and James Lynch v. IEPA, (November 19, 1992), PCB 92-81, 137 PCB 165.)

Of these five UST appeals, Rosman is the only case in which the Board affirmed the Agency's denial of tank removal costs, and did so, not because the petitioner conducted a "planned" tank removal, but because the tank removal was not "corrective action" under Section 22.18(e)(1)(C). In fact, in Rosman the Board held "[w]e find today that the only way tank removal can be classified as corrective action is if that removal was undertaken in response to a pre-identified release." (Rosman at 7.) And, concerned that the Rosman holding might be read too narrowly, the Board held in Enterprise that inclusion of a requirement that the release be pre-identified was "erroneous." (Enterprise at 5.) The Board stated, "the Board does not believe that tank removal must be a result of a pre-identified release in order to constitute corrective action. The proper inquiry is whether the activity meets both parts of the statutory definition of corrective action." (Enterprise at 5.) Enterprise re-emphasized that even in Rosman, the important issue was that the Board felt the tank removal activities did not satisfy the corrective action definition in Section 22.18(e)(1)(C).

In the instant case, the Board is presented with analogous circumstances to those in the prior planned tank removal cases. In Miller, Cottage Hospital and Lynch, tank removal was planned or permitted for a reason other than responding to a release of petroleum. In Miller a tank removal permit was obtained to comply with a real estate contract. (Miller at 3.) In Cottage

Hospital the tanks were pulled based on a business decision that the gasoline lines at a service station had failed a tightness test, and petitioner would cease leasing the property. (Cottage Hospital at 1-2.) In Lynch, the petitioner removed USTs which had been taken out of service. (Lynch at 1-2.) Here, petitioner conducted tank removal under a removal permit and initiated the removal for a reason other than having "actual knowledge" of a pre-identified release of petroleum. The Board finds that it is well-settled that the "planned" nature of the tank removal is not material and it is irrelevant which reason for tank removal was "primary". The relevant inquiry is whether the tank removal constitutes "corrective action" as set out in the Act.

Section 22.18(e)(1)(C) of the Act provided at the time the tank removal costs were incurred that, "corrective action" was:

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

From the definition, the Board developed a two-part corrective action inquiry for reviewing reimbursement decisions:

> "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 activities such as tank removal, soil remediation, and free product removal." (Enterprise at 5; see also Rosman at 7-8[8].)

The Board finds in the instant case, petitioner's tank removal costs were associated with corrective action. At the time of the tank removal the two-part corrective action test specifically allowed for an activity such as "tank removal" and the action here clearly was part of stopping, minimizing, eliminating or cleaning up a petroleum release. The

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[8]The two-part corrective action inquiry was formerly adopted in Enterprise; however, the Board introduced the test in Rosman by recognizing that even though "tank removal" was provided for in the corrective action definition, a nexus was required between the tank removal and a release of petroleum. Rosman at 8. The tank removal must be an action to "stop, minimize, eliminate or clean up a release of petroleum...." (Id.)

reimbursement application, inclusive of the incident report, indicates that a petroleum release did in fact occur, and that remediation of the site ensued. "Planned" tank removal has been repeatedly addressed by this Board, and in this instance, the Board has been presented with no reason to depart from the Rosman line of cases. The Board finds that the tank removal satisfies the two-part corrective action test.

The Agency's denial of $3152 in tank removal costs is hereby reversed.

C. Mileage Charges

Petitioner asks that this Board reverse the Agency's denial of $1.00 per mile mileage charge. The Agency reduced the petitioner's requested amount by $.50 per mile, denying $355.00 in mileage charges. The Board denied the reimbursement of $1.00 per mile in Malkey on the basis the petitioner failed to demonstrate $1.00 per mile was reasonable. (Malkey at 5-6.) Similarly, the testimony of petitioner here on the issue of reasonableness is unpersuasive.

The Board affirms the Agency's denial of $355 in mileage charges.

D. Shipping Fees

The Agency determined that $65.00 in costs associated with shipping fees were ineligible for reimbursement based on petitioner's failure to provide adequate documentation. Petitioner did not brief this issue. The Board finds that petitioner has failed to meet its burden of proof and affirms the Agency's decision denying $65.00 in shipping fees.

E. Personnel Fees

Finally, the petitioner asks that the Board reverse the Agency's final determination denying $3000 in personnel costs associated with preparation of the reimbursement application submittal to the Agency. This issue was before the Board in State Bank of Whittington. In Whittington, the Board held:

> The definition of corrective action does not encompass the recovery of moneys from the Fund. Costs of corrective action involve abating a release of contamination. Costs of applying for reimbursement from the Fund involve who pays. Whether or not the Fund existed, corrective action would be required. Seeking monies from the Fund is not required. We find nothing in the definition of corrective action that links those actions with actions taken to seek access to the Fund. We particularly reject the notion that corrective action strategies can be dictated by whether the costs are reimbursable from the Fund. We also note that the Board has previously found that the Agency's prior actions, if in error, are properly remedied by correcting the error, not perpetuating it. (Chemrex, Incorporated v. IEPA (February 4, 1993), PCB 92-123.)

(Whittington at 20.)

In light of State Bank of Whittington, the Board affirms the Agency's denial of $3000 in personnel costs attributable to preparation of the reimbursement application.

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

ORDER

1. The Board hereby affirms the Agency's November 10, 1992 final determination to deny reimbursement to petitioner, Chuck & Dan's Auto Service for:

   A. $17,758.74 in handling charges in excess of 15%.

   B. $355.00 in mileage costs not constituting corrective action.

   C. $65.00 in shipping fees not constituting corrective action.

   D. $3000.00 in personnel charges incurred in the preparation of the reimbursement application submittal.

2. The Board hereby reverses the Agency's November 10, 1992 final determination to deny reimbursement to petitioner for:

   A. $3152.00 in tank removal costs.

IT IS SO ORDERED.

M. Nardulli dissented.

Section 41 of the Environmental Protection Act, (415 ILCS 5/41 (1992)), 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".)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 26th day of August, 1993, by a vote of 5-1.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board