BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

DALEE OIL COMPANY,	)	
Petitioner,	)	PCB No. 03-118
v.	)	PCB No. 03-119
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	PCB No. 03-150 (Consolidated)
Respondent.	)	(UST Fund Appeals)

NOTICE

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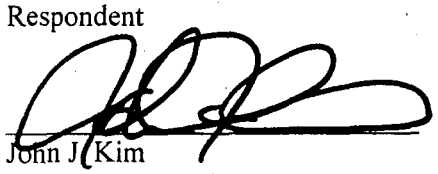
PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board a RESPONSE TO PETITIONER'S BRIEF, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



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Dated: September 30, 2003

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

DALEE OIL COMPANY,	)	
Petitioner,	)	PCB No. 03-118
v.	)	PCB No. 03-119
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RESPONSE TO PETITIONER'S BRIEF

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, John J. Kim, Assistant Counsel and Special Assistant Attorney General, and, pursuant to an order entered by the Hearing Officer dated August 6, 2003, hereby submits its Response to the Petitioner's Brief to the Illinois Pollution Control Board ("Board").

I. BURDEN OF PROOF

Pursuant to Section 105.112(a) of the Board's procedural rules (35 Ill. Adm. Code 105.112(a)), the petitioner bears the burden of proof. The burden of proving that challenged costs in a claim for reimbursement are reasonable and related to corrective action rests solely on the applicant for reimbursement. Richard and Wilma Salyer v. Illinois EPA, PCB 98-156 (January 21, 1999), p. 3; See also, Ted Harrison Oil Company v. Illinois EPA, PCB 99-127 (July 24, 2003), pp. 4-5 (the burden of proof is on the owner or operator of an underground storage tank to provide an accounting of all costs). Here, there are three decisions under appeal, all of which involve the same common issue. Thus, the burden of proving that those decisions involving a modification of costs allowed for a groundwater treatment system were erroneous is upon the Petitioner.

II. STANDARD OF REVIEW

Section 22.18b(g) of the Environmental Protection Act ("Act") provides that an applicant may appeal an Illinois EPA decision denying reimbursement to the Board under the provisions of Section 40 of the Act (415 ILCS 5/40).[1] Pursuant to Section 40 of the Act, the Board's standard of review is whether the application submitted to the Illinois EPA would not violate the Act and Board regulations. Ted Harrison, p. 5. In this situation, the Board's standard of review should be whether the information submitted to the Illinois EPA would lead to a violation of the Act and Board regulations if the reimbursement requested had been granted.

Based on the information within the Administrative Records ("Records") and the testimony elicited at hearing held on July 24, 2003,[2] and applying the relevant law, the Illinois EPA respectfully requests that the Board enter an order upholding the Illinois EPA's decision.

III. FACTS

There are three decisions under appeal by the Petitioner, all involving the same issue. The Petitioner has sought, inter alia, reimbursement of costs associated with a groundwater treatment unit and soil vapor extraction unit ("unit") utilized at the subject site. In each of the decisions under appeal, the Illinois EPA adjusted the amount of money allowed for reimbursement on a monthly basis for the unit. AR 118, pp. 1-4; AR 119, pp. 1-4; AR 150, vol. 1, pp. 1-4.

Specifically, the Petitioner sought reimbursement in the amount of $3,750.00/month for the unit. AR 118, pp. 31, 34, 47, 49; AR 119, pp. 58, 60, 76, 70, 84, 87; AR 150, vol. 1, pp. 47,

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[1] In its brief, the Petitioner seems to argue that the Illinois EPA's reliance upon Section 22.18b(d)(4)(C) of the Act is misplaced, since that section has been repealed. The Illinois EPA acknowledges that Section 22.18b of the Act was repealed, but notes that provisions of that section are nonetheless still applicable here. For a full discussion of this statutory history, the Illinois EPA refers the Board to its discussion at pages 4 through 5 in the Ted Harrison case.

[2] Citations to the Administrative Record will hereinafter be made as, "AR XXX, p. ___." The "XXX" shall refer to either 118, 119 or 150, as in PCB 03-118, 03-119 and 03-150. References to the transcript of the hearing will be made as, "TR, p. ___."

50, 62, 65, 77, 80, 93, 97, 108, 111, 121, 124, 137, 140, 153, 156, 168, 171, 183, 186. The Illinois EPA reduced the per month allowance to $2,457.31/month. AR 118, p. 4; AR 119, p. 4; AR 150, vol. 1, p. 4. The difference between the amount sought by the Petitioner and the amount approved by the Illinois EPA is $1,292.69/month. In PCB 03-118, there were two months for which reimbursement was sought for the unit (October and November 2001). AR 118, pp. 31, 34, 47, 49. In PCB 03-119, three months were sought for reimbursement for the unit (July, August and September 2001). AR 119, pp. 58, 60, 67, 70, 84, 87. Finally, in PCB 03-150, 10 months were sought for reimbursement for the unit (November or December 2001, and January through September 2002). AR 150, vol. 1, pp. 47, 50, 62, 65, 77, 80, 93, 97, 108, 111, 121, 124, 137, 140, 153, 156, 168, 171, 183, 186. The amounts deducted in the final decisions under appeal reflect the number of months sought for reimbursement multiplied by $1,292.69/month.

IV. THE PETITIONER FAILED TO DEMONSTRATE THE COSTS IN QUESTION ARE REASONABLE

The Petitioner has failed to demonstrate that the monthly rate sought for reimbursement for the unit is reasonable, as required pursuant to Section 22.18b(4)(d)(C) of the Act. The Petitioner relies on two arguments in its brief, one being testimony presented in the form of an offer of proof and the other a more general argument regarding market or industry standards. Both arguments fail on the merits and should not be considered or, at best, should be discounted.

A. The Petitioner's Offer of Proof Should Not Be Admitted

In its brief, the Petitioner argues that certain calculations described by one of its witnesses should be taken into consideration as a demonstration that the monthly rate sought for the unit is reasonable. Petitioner's Brief, pp. 3-4. However, the testimony upon which those arguments are based was elicited at the hearing in the form of an offer of proof. TR, pp. 36-38.

The objection made by the Illinois EPA at hearing was that the document that was the subject of the testimony contained information that was never presented to, or made available to, the Illinois EPA at any time up to the dates of the decisions in question. TR, pp. 27-35. During the hearing, counsel for the Petitioner did not make any arguments as to why the information contained in the document should be considered by the Board or otherwise admitted into evidence. The information in question was not found in any of the submittals prepared by the Petitioner for the Illinois EPA's review, and therefore the Illinois EPA had no way to know the information. In fact, there is no evidence that the Illinois EPA had ever seen the information in question on the document until it was provided at hearing. Similarly, the testimony of Joseph Kelly as elicited by the Petitioner described figures and calculations that had never been disclosed to the Illinois EPA. Indeed, Mr. Kelly admitted that if the information was not provided with the specific breakdown of calculations and other factors, it would be impossible for the Illinois EPA to determine the Petitioner's consultant's overhead calculations or its amortization terms. TR, pp. 45-46.

It is well-settled that the Board's review of a final decision by the Illinois EPA should be limited to the information before the Illinois EPA during the period of review and up to the date of the decision itself. Typically, information or evidence that was not before the Illinois EPA at the time of its decision is not admitted at hearing or considered by the Board. Community Landfill Company and City of Morris v. Illinois EPA, PCB 01-170, p. 4 (December 6, 2001).

In the instant case, the principle repeated by the Board in the Community Landfill case is applicable. The Illinois EPA did not know what the period of time for amortization of the down payment for the unit, the Illinois EPA did not know the overhead percentage applied to the site's costs by the Petitioner's consultant, and generally speaking the Illinois EPA did not know the

specific calculations employed by the Petitioner's consultant to reach the monthly rate of $3,750.00/month. Since this information was not before the Illinois EPA at the time of its decision, the Hearing Officer properly excluded the testimony at hearing but did allow the Petitioner to make an offer of proof. The Petitioner has offered no explanation in its brief as to why the offer of proof should be admitted, and the only explanation provided at hearing was that the information was used for "demonstrative" purposes. TR, p. 29. That is a weak explanation, since there was nothing demonstrative about the document or the testimony; rather, both the document and the testimony sought to present information to the Board for consideration that was not before the Illinois EPA at the time of its decisions. The Board should therefore not only uphold the Hearing Officer's decision to exclude the document and testimony, but it should also accordingly strike or not consider the arguments in the Petitioner's brief based on the offer of proof testimony.

If the Board somehow does decide that it will allow the testimony and resulting arguments, then the Illinois EPA can only respond that it did not have any of the information in question before it at the time of its decision and therefore could not possibly have taken it into account. Since the information was not included with any request for reimbursement of costs for the unit's monthly rate, then the Petitioner failed to meet its burden of providing an adequate demonstration that the cost (i.e., the monthly rate) was reasonable. Whether the Petitioner's arguments regarding the consultant's calculations are at all persuasive after the fact are not relevant to the question of whether the applications as submitted contained adequate information to support the requested monthly rate. The Board should uphold the Hearing Officer's decision and disregard the testimony, and resulting arguments in Petitioner's briefs, regarding the Petitioner's consultant's calculations.

B. The Petitioner's Argument That Industry Standards Support The Request Is Unfounded And Without Merit

The other argument proffered by the Petitioner in support of its request that the Illinois EPA's decisions be overturned is that the costs sought for the unit's monthly rate are "well within the industry standard for rental charges of a Unit of this type." Petitioner's Brief, p. 4. It should first be noted that this statement, made by Mr. Kelly at hearing, was based on some inquiries of other industry professionals. Id. There is no information in any of the applications for payment submitted by the Petitioner's consultant to that effect, and such testimony of Mr. Kelly arguably is akin to the testimony described above, in that the substance of the testimony was not before the Illinois EPA at the time of its decisions. For that reason alone the testimony, and resulting argument, should be disregarded.

Reliance on Mr. Kelly's testimony forms the basis for the Petitioner's argument that the requested cost of the unit was reasonable. The Petitioner states that the "testimony of Mr. Kelly, the only witness with the experience and information necessary to determine the reasonableness of the charges for the Unit involved in this case, proved that the reasonable charge in the industry for a unit of this nature is the $3,750.00 per month requested by DaLee rather than the $2,457.31 approved by the Agency." Petitioner's Brief, p. 6.

Looking at the specific testimony of Mr. Kelly, there is no reason to give the weight accorded by the Petitioner to the testimony. The Petitioner argues that Mr. Kelly is the only witness with the experience and information necessary to determine the reasonableness of the unit's charges. However, Mr. Kelly testified that he only had prior involvement with similar types of equipment in "about eight other sites." TR, p. 16. That is not a broad and diverse background that confers the ability of Mr. Kelly alone to determine what is or is not reasonable

for the unit's cost. In fact, Mr. Kelly testified that he based reasonableness on two factors; namely, what the market bears and recouping his company's costs. TR, p. 58.

However, that method of determination is inconsistent with both the Act and common sense. There is no provision in Section 22.18b of the Act that "reasonableness" is determined solely by what the market will bear. While industry standards should be taken into account to some extent, the vague reference to what the market will bear has no definitive standard or explanation. Further, there is a serious question as to whether Mr. Kelly has a sufficiently broad background to determine what the market will actually bear for this type of unit. Mr. Kelly's other stated factor is recouping his company's costs. In this case, the purchase price for the unit in question $83,691.00. AR 150, vol. 2, pp. 151-152. If Mr. Kelly's company received the requested $3,750.00/month for 36 months as requested, then a total of $135,000.00 would be paid for the unit. This would represent a difference of $51,309.00, which Mr. Kelly would apparently consider to be his company "recouping" its costs. Put another way, if the consulting company purchased the unit for $83,691.00, then was paid $135,000.00 for the purchase price, it would recover over 61% of the actual purchase price. It would be difficult to imagine that any overhead costs would come anywhere close to that difference.

To be fair, there were certain financing charges that the consultant apparently took into account in reaching its requested figure of $3,750.00/month. Mr. Kelly testified that the consultant had to pay approximately $2,677.00/month to its financier for 36 months. TR, p. 57. Even under that viewpoint, there was a difference of over $1,000.00/month in what was sought for reimbursement and what was owed to the financier. That difference multiplied by 36 months (the stated anticipated life of the unit and period for financing) would result in a difference of

over $36,000.00 between what was paid to the financier and what was received in reimbursement.

The Petitioner did not successfully argue that the costs sought for reimbursement were reasonable. The consultant for the Petitioner testified that despite the large difference in what was paid to the financier for the unit and what would have been received in reimbursement (had the total amount sought been approved), the determinative factor in whether the unit's cost was reasonable was what the market would bear and whether the consultant's costs would be recouped. The consultant never specifically defined what costs needed to be recouped, and there was no comprehensive testimony regarding industry standards other than Mr. Kelly's testimony, which was limited at best. The Petitioner failed to provide any information within the applications for reimbursement that substantiated their claims for the monthly rate, and the only explanation offered by Mr. Kelly at hearing was that the market would bear the cost and it would be sufficient to allow for a recouping of the consultant's (undefined) costs. That explanation is simply insufficient, and the Board should not accord any weight to the argument.

V. THE ILLINOIS EPA'S DECISION WAS BASED ON THE APPLICATIONS

The calculations employed by the Illinois EPA were based entirely on the information provided within the applications for payment, and were consistent with the Act's guidelines. Brian Bauer of the Illinois EPA testified that the figure used by the Illinois EPA was based on the total cost of the unit (as documented by the supplier, Carbonair), the salvage price, the appropriate handling charge allowed by Section 22.18b(i)(2) of the Act, and the term of 36 months provided by the Petitioner's consultant. TR, pp. 65-66; AR 150, vol. 2, pp. 151-152, 154-155. Interestingly, Mr. Kelly testified that he relied in part on the information provided by Carbonair when determining whether he thought the requested rate was reasonable. The

difference between Mr. Kelly's calculations and Mr. Bauer's calculations is that Mr. Kelly's included factors not provided to the Illinois EPA at the time of its decisions, and that Mr. Bauer's comported with not only common sense but the Act's guidelines. Mr. Bauer's calculations resulted in the Illinois EPA taking into account the documented total purchase price of the unit in question, discounting that purchase price by the salvage value described by the Petitioner's consultant (AR 150, vol. 2, pp. 154-155), allowing for the statutory handling charge, and then dividing that final amount by the time period provided by the Petitioner's consultant as the anticipated life of the unit (AR 150, vol. 2, pp. 154-155).

The Illinois EPA argues that the methodology employed by its reviewer was fair and appropriate, took into consideration the awarding of a handling charge (which includes an allowance for overhead), and did not unfairly reward or penalize the Petitioner's consultant in its leasing of the unit to the Petitioner. To the contrary, if the amount sought for reimbursement were awarded, the Petitioner's consultant would stand to gain an inappropriate windfall.

VI. CONCLUSION

For all the reasons and arguments included herein, the Illinois EPA respectfully requests that the Board affirm its decisions under appeal. The Petitioner failed to present applications that contained information adequate to support the requested monthly rate. The Illinois EPA's calculations in determining a reasonable rate were appropriate and sound, given that they were based on the information provided by the Petitioner and statutory guidelines for handling charges.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent,

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217/782-5544, 217/782-9143 (TDD)
Dated: September 30, 2003

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on September 30, 2003, I served true and correct copies of a RESPONSE TO PETITIONER'S BRIEF, by placing true and correct copies in properly sealed and addressed envelopes and by depositing said sealed envelopes in a U.S. mail drop box located within Springfield, Illinois, with sufficient First Class Mail postage affixed thereto, upon the following named persons:

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Chicago, IL 60601

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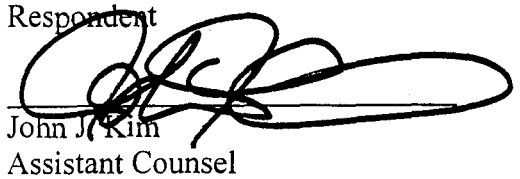
Respondent



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