

ILLINOIS POLLUTION CONTROL BOARD  
December 18, 2003

DALEE OIL COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 03-118
	)	PCB 03-119
ILLINOIS ENVIRONMENTAL	)	PCB 03-150
PROTECTION AGENCY,	)	(UST Fund)
	)	(Consolidated)
Respondent.	)	

CURTISS W. MARTIN OF SHAW & MARTIN, P.C., APPEARED ON BEHALF OF PETITIONER; and

JOHN J. KIM, SPECIAL ASSISTANT ATTORNEY GENERAL, DIVISION OF LEGAL COUNSEL, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by A.S. Moore):

These consolidated appeals concern leaking underground storage tanks (USTs) at a gasoline service station in Okawville, Washington County. Petitioner, DaLee Oil Company (DaLee), sought reimbursement from the State's UST Fund for the costs of a remediation system. The system is being used at the site to clean up contaminated soil and groundwater.

The reimbursement requests at issue were made to respondent, the Illinois Environmental Protection Agency (Agency), and covered three time periods during the cleanup. In three final decisions, the Agency granted only partial reimbursement to DaLee for the costs of the remediation system. The Agency denied DaLee approximately \$19,000 in claimed costs. DaLee petitioned the Board to review the Agency's decisions.

For the reasons below, the Board affirms the Agency. In this opinion, the Board first addresses this case's procedural history and several preliminary motions. The Board then sets forth the relevant statutory framework and the facts of this case. Lastly, the Board discusses the issue presented on appeal and the Board's ruling.

**PROCEDURAL MATTERS**

After the Board extended the appeal periods, DaLee, on May 12, 2003, timely filed three appeals of Agency decisions with the Board, along with a motion to consolidate the appeals. *See* 415 ILCS 5/40(a)(1) (2002); 35 Ill. Adm. Code 105.402. The Board assigned dockets PCB 03-118, PCB 03-119, and PCB 03-150 to the appeals. On May 15, 2003, the Board accepted the appeals for hearing and granted DaLee's motion to consolidate the appeals.

On July 18, 2003, the Agency filed the record of each of its three decisions, with motions for leave to file the records *instanter*. In each of its three motions, the Agency states that record-filing was delayed because the Agency was negotiating with DaLee and discussing ten related UST Fund appeals, each of which had been set for hearing in July 2003 and involved the same environmental consultant. Of the ten appeals, the Agency explains, six had been resolved or would warrant staying the hearings. Motions to File *Instanter* at 2. DaLee did not respond to any of the motions for leave to file *instanter* and therefore waives any objection to the Board granting them. See 35 Ill. Adm. Code 101.500(d). The Board grants the Agency's motions.<sup>1</sup>

On July 24, 2003, Board Hearing Officer Carol Sudman held a hearing on the consolidated appeals. DaLee presented one witness at hearing: Mr. Joseph Kelly, Chief Financial Officer with United Science Industries, Inc., the environmental consultant of DaLee. The Agency likewise presented one witness at hearing: Mr. Brian Bauer, a project manager with the Agency who reviewed DaLee's reimbursement requests. DaLee offered two exhibits at hearing, marked as Exhibit 1 (a "lease breakdown") and Exhibit 2 (affidavit and statement of attorney fees), but only the latter was admitted after the Agency objected to admission of Exhibit 1. The hearing officer allowed testimony corresponding to Exhibit 1 only as an offer of proof, which the Board discusses below. The Agency offered no exhibits at hearing.<sup>2</sup>

The hearing officer issued a hearing report on August 6, 2003, which found neither witness' credibility to be at issue. Hearing Report at 1. DaLee filed its post-hearing brief on September 5, 2003, and the Agency filed its response brief on October 1, 2003.<sup>3</sup>

### **STATUTORY FRAMEWORK**

The State's UST Fund was created under the Environmental Protection Act (Act) (415 ILCS 5 (2002)) in the 1980s. The Fund may be accessed by eligible UST owners and operators to help pay for the environmental clean up of leaking petroleum USTs. In addition, the UST Fund is used to satisfy federal financial assurance requirements of owners and operators. See P.A. 84-1072 (eff. July 1, 1986); see also 415 ILCS 5/57.11 (2002). The UST Fund consists of monies received as fees under the Gasoline Storage Act (430 ILCS 15/4, 5 (2002)) and the Motor Fuel Tax Law (35 ILCS 505 (2002)).

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<sup>1</sup> The Board cites the Agency record in PCB 03-118 as "R118 at \_," the Agency record in PCB 03-119 as "R119 at \_," and the Agency record in PCB 03-150 as "R150 at \_." The Agency record in PCB 03-150 is comprised of two volumes; citations are to volume 1 unless otherwise noted.

<sup>2</sup> The Board cites the hearing transcript as "Tr. at \_."

<sup>3</sup> The Board cites DaLee's brief as "DaLee Br. at \_," and the Agency's brief as "Agency Br. at \_."

In 1993, with P.A. 88-496 (eff. Sept. 13, 1993), the General Assembly amended the Act regarding UST remediation and Fund reimbursement. Among other things, the amendments repealed Section 22.18b on UST Fund eligibility, and enacted new Title XVI, called the Leaking Underground Storage Tank Program (415 ILCS 5/57-57.17 (2002)).

Section 57.13 of the new Title XVI provides that for petroleum releases reported to the State *on or after* the effective date of the amendments (September 13, 1993), the UST owner or operator must proceed under the new Title. *See* 415 ILCS 5/57.13(a) (2002). However, for releases reported *before* September 13, 1993, the UST owner or operator could elect to proceed under the requirements of new Title XVI by submitting a written statement of election to the Agency. *See* 415 ILCS 5/57.13(b) (2002). Absent this written statement, reimbursements would continue to be subject to the requirements of the old law—Section 22.18b. *See Riverview FS v. IEPA*, PCB 97-226, slip op. at 3 (May 3, 2001).

In these consolidated reimbursement appeals, as found below, the UST release was reported in December 1992 (*i.e.*, before Title XVI became effective) and there was no election to proceed under the new law. Accordingly, DaLee’s appeals are governed by the requirements of former Section 22.18b (415 ILCS 5/22.18b (1992), *amended by* P.A. 87-1088 (eff. Sept. 15, 1992) and P.A. 87-1171 (eff. Sept. 18, 1992)). *See Ted Harrison Oil Co. v. IEPA*, PCB 99-127, slip op. at 4-5 (July 24, 2003).

Under Section 22.18b(d)(4)(C) of the Act, the UST owner or operator seeking reimbursement must have “demonstrated that the costs incurred to perform the corrective action were reasonable.” 415 ILCS 5/22.18b(d)(4)(C) (1992), *amended by* P.A. 87-1088 (eff. Sept. 15, 1992) and P.A. 87-1171 (eff. Sept. 18, 1992). Section 22.18b(g) (415 ILCS 5/22.18b(g) (1992)) provided that the UST owner or operator may appeal an Agency decision denying reimbursement to the Board under Section 40 of the Act (415 ILCS 5/40 (2002)), which governs Board review of Agency permit decisions.

Consistent with Section 40 (415 ILCS 5/40 (2002)), the Board must decide whether the application, as submitted to the Agency, complies with the eligibility criteria of the Act. *See Kathe’s Auto Service Center v. IEPA*, PCB 96-102, slip op. at 13 (Aug. 1, 1996); *see also Browning Ferris Industries of Illinois v. IPCB*, 179 Ill. App. 3d 598, 534 N.E.2d 616 (2d Dist. 1989). Further, on appeal before the Board, the Agency’s denial letter frames the issue (*see Kathe’s Auto Service*, PCB 96-102, slip op. at 13) and the UST owner or operator has the burden of proof (*see Ted Harrison Oil*, PCB 99-127, slip op. at 5-6).

### **FACTS**

The leaking UST site is a gasoline service station known as “Rocky’s 66,” located at Route 177 West in Okawville, Washington County. R118 at 1, 4, 6; R119 at 1, 4, 6; R150 at 1, 4, 5. The site had several USTs, including one 6,700-gallon gasoline UST; three 4,000-gallon gasoline USTs; one 2,000-gallon kerosene UST; and one 1,000-gallon gasoline UST. R118 at 63-64; R119 at 43-44; R150 at 28-29.

In December 1992, a UST leak was reported for this site to the Illinois Emergency Management Agency (IEMA). The site was assigned IEMA incident number 923466. In October 1994, four USTs were removed from the site. R118 at 6; R119 at 6; R150 at 7. No election to proceed under Title XVI of the Act was submitted to the Agency. R118 at 13; R119 at 17. DaLee is identified in its reimbursement applications as the site's UST owner and operator. R118 at 20, 63-64; R119 at 7, 43-44, 48; R150 at 22, 28-29.

DaLee has appealed three Agency decisions. In each decision, the Agency allowed reimbursement for some but not all of the money DaLee sought from the UST Fund. Specifically, the Agency reduced, on a monthly basis, the amount of money that would be reimbursed for costs associated with a combined groundwater treatment and soil vapor extraction unit (unit). The unit was being used at the site to remediate groundwater and soil contamination from the leaking USTs. Tr. at 11; R118 at 1-4; R119 at 1-4; R150 at 1-4.

Two of the three Agency decisions appealed were issued on January 3, 2003. One of those decisions addressed invoices covering two months (October and November 2001), and the other addressed invoices covering three months (July through September 2001). The third Agency decision appealed was issued on February 5, 2003, and addressed invoices covering ten months (November or December 2001, and January through September 2002). R118 at 1-4, 31, 47, 49; R119 at 1-4, 58, 60, 67, 70, 84, 87; R150 at 1-4, 47, 50, 62, 65, 77, 80, 93, 97, 108, 111, 121, 124, 137, 140, 153, 156, 168, 171, 183, 186.

United Science Industries, Inc. (USI), DaLee's environmental consultant, purchased the unit from the manufacturer Carbon Air Environmental Systems for \$83,691, financing \$75,000 of the purchase price through Preferred Capital Corporation. The unit was designed for the DaLee site. USI in turn rented the unit to DaLee for 36 months, the length of time anticipated for using the unit at the site and the length of the financing arrangement with Preferred Capital Corporation. The unit's salvage value was \$1,250. Tr. at 11-19, 24-25; R150, vol. 2 at 145-55.

In the three reimbursement applications prepared by USI, DaLee sought to be reimbursed \$3,750 per month for the unit. The Agency took the units' purchase price, minus its salvage value, and calculated a handling charge of \$6,022.05 using the sliding scale from Section 22.18b(i)(2) of the Act. Tr. at 65-66; R118 at 6, 13, 15, 16, 31, 34, 47, 49; R119 at 6, 25, 58, 60, 67, 70, 76, 84, 87; R150, vol. 1 at 7, 18, 47, 50, 62, 65, 77, 97, 108, 111, 121, 124, 137, 140, 153, 156, 168, 171, 183, 186, vol. 2 at 145-55.

For each of the three reimbursement applications, the Agency reduced the per month allowance of eligible costs to \$2,457.31 (*i.e.*, \$1,292.69 per month less than DaLee requested), stating that DaLee had not demonstrated that the additional applied for costs were reasonable. The \$2,457.31 monthly figure represents the unit's purchase price minus its salvage value (equaling \$82,441), plus the handling charge (equaling \$88,463.05), the sum of which was divided by 36 months (*i.e.*, the expected life of the unit at the site). Tr. at 65-66; R118 at 4; R119 at 4; R150 at 4, 9, 11, 13-16. The total amount deducted in the three final decisions being appealed is \$19,390.35 (the 15 months covered by the invoices, multiplied by \$1,292.69).

## DISCUSSION

The three reimbursement decisions being appealed here present the same issue. The Agency determined that \$1,292.69 of the requested \$3,750 per month for the groundwater treatment and soil vapor extraction unit were ineligible because they were “costs that the owner/operator failed to demonstrate were reasonable,” citing Section 22.18b(d)(4)(C) of the Act. R118 at 4; R119 at 4; R150 at 4. Because petitioner bears the burden of proof on appeal, DaLee has the burden of proving that its reimbursement applications, as submitted to the Agency, demonstrated that the requested costs were reasonable.

DaLee does not argue that the Agency used the wrong purchase price, salvage value, or lease term for the unit, or that the Agency miscalculated the handling charge. Instead, DaLee argues that different calculations, presented by DaLee for the first time at the Board hearing, demonstrate that the \$3,750 monthly rate requested was reasonable. DaLee Br. at 3-5. The calculations purportedly reflect the environmental consultant’s overhead costs as applied to the site and amortization of the unit. When the Board hearing officer upheld the Agency’s objection to introducing these calculations, DaLee presented the information as an offer of proof through its witness, Mr. Kelly of USI, and Exhibit 1. Tr. at 27-38.

Board hearings in appeals of UST Fund decisions are based exclusively on the record before the Agency at the time the Agency issued its decision. *See* 35 Ill. Adm. Code 105.412. Accordingly, the Board hearing merely affords petitioner the opportunity to challenge the Agency’s reasons for its decision, not to introduce evidence not presented to the Agency. *See Alton Packaging Corp. v. PCB*, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987); *see also Community Landfill Co. & City of Morris v. IEPA*, PCB 01-170 (Dec. 6, 2001), *aff’d sub nom.* 331 Ill. App. 3d 1056, 772 N.E.2d 231 (3d Dist. 2002).

The Agency objected to the overhead and amortization figures and calculations and related testimony because the information had not been presented to the Agency in the reimbursement applications before the Agency’s final decisions. Agency Br. at 4. DaLee cites no authority and makes no argument for the proposition that the Board should consider this information despite its absence from the reimbursement applications submitted to the Agency. Nor does DaLee dispute that the information it seeks to have entered into evidence through the offer of proof was in fact not presented to the Agency. The Agency did not have these figures and calculations when it made the reimbursement determinations now on appeal. The Board finds that the hearing officer properly refused to admit this information into evidence at hearing and denies DaLee’s offer of proof. The Board will therefore not consider this information or Dalee’s related arguments in ruling on these appeals.

The materials DaLee did submit to the Agency in the reimbursement applications simply referred to the proposed \$3,750 monthly rate for the unit, without any explanatory breakdown of how the consultant arrived at the figure. Tr. at 66. Mr. Kelly conceded that without the calculations, the Agency could not determine USI’s overhead or amortization terms. Tr. at 45-46. In short, the applications, as submitted, did not contain adequate information to support the requested monthly rate. The Agency’s eligible rate of \$2,457.31 per month was based on the information in DaLee’s reimbursement applications and the Act’s allowable

handling charges—total purchase price for the unit as documented by USI, discounted by the unit's salvage value as described by the consultant, allowing for the statutory handling charge (415 ILCS 5/22.18b (1992), *amended by* P.A. 87-1171 (added subsection (i)(2)) (eff. Sept. 18, 1992)), and then dividing that amount by the unit's 36-month anticipated life, also as described by the consultant. Tr. at 65-66; R150, vol. 2 at 145-55.

The Board finds that DaLee has failed to prove that the Agency erred in any of the three decisions under appeal. *See Ted Harrison Oil*, PCB 99-127, slip op. at 5-6; *Salyer v. IEPA*, PCB 98-156, slip op. at 3 (Jan. 21, 1999); *see also* 35 Ill. Adm. Code 105.112(a) (petitioner has the burden of proof). In each of the three decisions, based on the application before it, the contents of which DaLee is responsible for, the Agency properly reduced the allowed reimbursement.

### **CONCLUSION**

DaLee failed to demonstrate that the monthly rate it sought for reimbursement of the soil and groundwater remediation unit was reasonable, as required by Section 22.18b(d)(4)(C) of the Act. The Board therefore affirms the Agency's decisions reducing the monthly rate of the unit eligible to be reimbursed from the UST Fund.

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

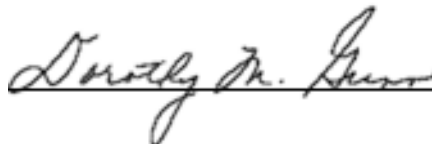
### **ORDER**

The Board affirms the Agency's decisions and dismisses DaLee's appeals in PCB 03-118, PCB 03-119, and PCB 03-150.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2002); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on December 18, 2003, by a vote of 5-0.



Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board