ILLINOIS POLLUTION CONTROL BOARD
July 24, 2003

TED HARRISON OIL COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 99-127
	)	(UST Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

STEPHAN F. HEDINGER OF HEDINGER LAW OFFICES APPEARED ON BEHALF OF PETITIONER;

DANIEL P. MERRIMAN OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by G.T. Girard):

Ted Harrison Oil Company (petitioner) seeks review of a determination by the Illinois Environmental Protection Agency (Agency) denying reimbursement for costs associated with the remediation of leaking underground storage tanks at petitioner's facility in Virginia, Cass County. For the reasons discussed below, the Board finds that the record supports the petitioner's requests for reimbursement for an additional $116,297.82.

PROCEDURAL BACKGROUND

On March 1, 1999, Ted Harrison Oil Company (petitioner) and the Agency filed a joint motion to extend the appeal period in this underground storage tank appeal. On April 26, 1999, petitioner filed a petition for review (Pet.) of a January 25, 1999 decision by the Agency denying petitioner reimbursement for certain costs associated with the remediation of a leaking underground storage tank. Hearings were held on May 16, 2000, and November 6, 2002, before then Board Hearing Officer Steven Langhoff.[1] The petitioner filed a brief (Br.) on February 3, 2002, and a reply brief (Reply) along with a motion to file *instanter* on May 15, 2003. The Agency filed a brief (Ag.Br.) and a motion to file *instanter* on March 28, 2003. The Board grants the petitioner's motion to file *instanter*. However, the hearing officer had amended the briefing schedule so that the Agency's brief was filed on the due date, therefore, the Agency's motion to file *instanter* is moot.

[1] The transcript from the November 6, 2002 hearing will be cited as "Tr. at __"; the Agency technical record will be cited as "Tech. R at ___"; the Agency fiscal record will be cited as "Fiscal R. at ___".

FACTS

On March 26, 1992, a release from an underground storage tank was reported at petitioner's facility at the northwest corner of Routes 78 and 125 in Virginia, Cass County. Tech. R. at 342, 619. The tanks were removed on October 29, 1992, and the petitioner submitted a remediation strategy for the site. Tech. R. at 681, 992. Rapps Engineering and Applied Science (Rapps) authored the corrective action plan (Tech. R. at 989) and the corrective action completion report (Tech. R. at 334).

The corrective action plan proposed a "rolling" excavation where the impacted soils would be excavated in stages. Tech. R. at 1000. The proposal included collecting closure soil samples at each excavation stage, overnight analysis of the soils, and, then, upon verification of closure, that part of the excavation would be backfilled. Id. The process would continue until all impacted soils were removed. Id. The purpose of keeping the excavation area small was to provide more slope stability, and to present less hazard to site workers or the public than large excavations that are open for extended periods of time. Id. The corrective action plan also proposed excavating all accessible impacted soils during a single period of field work and equipment mobilization, with a temporary stockplile of petroleum impacted soils placed at a separate land treatment site. Tech R. at 1003.

According to the corrective action completion report, the excavation of petroleum impacted soils at the site was supervised by HES. Tech. R. at 347. Soil excavation was conducted from September 5, 1996 through October 15, 1996. Id. Approximately 10,060 cubic yards of petroleum impacted soil was excavated from the site. Id. In general, the excavation followed the rolling excavation model proposed in the corrective action plan. Tech. R. at 348. However, water began to slow the project due to precipitation and the depth of the excavation, which reached 28 feet in some locations. Id. On October 1, 1996, a dam was constructed in the excavation to control the water, and the last load of soil was removed on October 15, 1996. Id.

The corrective action plan proposed a land treatment system for petroleum-impacted soils. Tech. R. at 1002-1004. The corrective action plan included the development of a land treatment cell on rural property owned by Mr. Harrison and his wife (Tr. at 143, 150) located approximately two miles northeast of the contaminated site. Tech. R. at 344. Harrison Oil received a permit (No. 1995-084-DE/OP) to conduct landfarming at the treatment cell on June 6, 1995. Tech. R. at 344. Mr. Harrison had access to the necessary equipment and personnel to perform the work. Tech. R. 344. Contaminated soil was hauled to the treatment cell where it was tilled many times with a Bobcat, and disked with a tractor and disk. Tr. at 144; Tech. R. at 344. The land treatment system relied on volatilization and biodegradation to treat the soils impacted by the leaking petroleum products. Tech. R. at 1004

Harrison Environmental Solutions (HES) employees consisted of Mr. Harrison and his daughter, Ms. Lori Harrison. Tr. at 143, 152. HES employees performed various duties at the site including supervising the removal of petroleum impacted soils at the site. Tech. R. at 53-328, 347, 354; Fiscal R. at 28-29. Specifically, the duties of the HES employees included being on the site from at least 8 a.m. until 4 p.m., acting as safety officers, maintaining the road to avoid dust, and supervising removal of contaminated soil. Fiscal R. at 28-29. In order to

perform these duties, HES employees attended training classes, were licensed by the Office of State Fire Marshal, and had been tested by OSHA. Tr. at 147.

Petitioner submitted four separate requests for reimbursement to the Agency. Tech. R. at 808; 1026, 1029, 1143. The fourth reimbursement request submitted on June 22, 1998, included costs incurred during the time period August 1996 through May 1998 (Pet. at Exh. 2, p. 1) and is the request at issue in this appeal. Petitioner requested reimbursement for $335,058.65 in expenses. Pet. at Exh. 2, p. 1. On January 25, 1999, the Agency allowed reimbursement for $214,354.27. Fiscal R. at 33-34. A description of the deductions, which total $120,704.38, is given in Attachment A of the Agency's January 25, 1999 letter. Fiscal R. at 35-36.

In Item #1, the Agency deducted $52.34 for an adjustment of handling charges. Item #2 was a $125.22 deduction for various costs that lacked supporting documentation. Item #3 deducted $116,732.82 in costs that the Agency maintained were not reasonable. This included: a $435 math error with a specific Prairie Analytical invoice; $80,141.50 for work performed by HES; a $2,906.25 deduction from all Prairie Analytical invoices because 24-hour lab turnaround was not justified; and a $33,250.07 deduction because HES added a 15 percent primary contractor markup to all invoices whereas the Agency considered RAPPS to be the primary contractor. Item #4 deducted $3794.00 for costs that the Agency asserted were not for corrective action. Fiscal R. at 35-36.

At hearing, on November 6, 2002, testimony was provided by Douglas Oakley (manager of the leaking underground storage tank unit for the Agency), Valerie Davis (project manager with the Agency), Cathy Elston (an accountant employed by the Agency in the leaking underground storage tank unit), and Ted Harrison. Mr. Oakley testified about the procedures followed by the Agency when reviewing a request for reimbursement. Mr. Oakley explained that Agency staff conducts a fiscal review to make sure the costs are eligible, reasonable and associated with corrective action. Tr. at 13. Mr. Oakley stated that a technical review is performed on all claims that have incident numbers ten years old or older to: (1) make sure the costs are associated with an Agency -approved corrective action; (2) ensure that the corrective action plan was followed; and (3) ensure that clean up levels have been meet. Tr. at 16-17. Mr. Oakley also explained that the technical reviewer could make suggestions about the reasonableness of costs and the technical reviewer could "trump" the fiscal reviewer. Tr. at 17-18. Mr. Oakley indicated that the Agency had in-house guidelines which were used to help determine reasonableness. Tr. at 20-21.

In this case, Ms. Elston performed an initial fiscal review of the request for reimbursement and determined that more information was necessary for the review. Tr. at 29, 117; 117-124. The Agency sent a letter to petitioner asking for additional information, prior to the technical review. Fiscal R. at 13; Tr. at 32-33; 117-124. The petitioner sent additional information to the Agency by letter dated December 16, 1999. Fiscal R. at 44-257; Tr. at 125-126. Upon receipt of the additional information, the reimbursement package was forwarded to Ms. Davis, for technical review. Tr. at 127.

Ms. Davis performed the technical review and recommended the reductions at issue. Tr. at 100-114. The $80,141.50 charge for work performed by HES was considered unreasonable as

billing for the owner's work. Fiscal R. at 39; Tr. at 107-108. Ms. Davis testified that she was not certain who the owners were and in her notes she was questioning whom the owners were. Tr. at 106. Ms. Davis further indicated that she was not sure what the duties were and who was doing the work. Tr. at 107.

Ms. Davis questioned the 15 percent markup resulting in a sum of $33,250.07 because she had a question about whether or not Rapps was the primary contractor, not HES. Fiscal R. at 39. Ms. Davis testified that this she drew the conclusion that Rapps was the primary contractor from the record, (Tr. at 115) because "[a]ll reports and correspondence has been with RAPPS" (Fiscal R. at 39).

The 24-hour lab turnaround time was also not considered to be justified. Fiscal R. at 39, Tr. at 108-109. Ms. Davis testified that a 24-hour turnaround might be justified where the was a potential danger in leaving the excavation open or where the costs of removing and returning equipment was more than the costs of a 24-hour turnaround. Tr. at 108-111. Ms. Davis also conceded that the information as laid out in the letter included at Fiscal R. 2 might have been sufficient to justify the 24-hour lab turnaround costs. Tr. at 112.

Mr. Oakley testified that the fiscal unit does not generally review the technical record. Tr. at 44, 89. Ms. Davis indicated that the technical unit does have all the records both fiscal and technical when the technical unit performs the review. Tr. at 102-103. The 24-hour turnaround time is an area that the fiscal review staff would ask the technical person if there was a reason for the charges. Tr. at 44.

Mr. Oakley testified that handling charges are not in and of themselves inappropriate and both the statute and the regulations acknowledge handling charges as normal expense incurred during corrective action. Tr. at 73. Mr. Oakley stated that a 15 percent handling charge had been allowed prior to the underground storage tank law changing. Tr. at 45. Mr. Oakley testified that both the technical or fiscal staff could review the 15 percent handling charges and one item the fiscal staff would examine is whether the prime contractor hired subcontractors. Tr. at 45-46. Mr. Oakley indicated that common sense dictates who is the prime contractor. Tr. at 46. In this case because Rapps had submitted "most, if not all" the technical documentation associated with the site and that fact led Mr. Oakley to believe Rapps was the prime contractor. Tr. at 59-60.

Mr. Oakley also testified that the Agency allows reimbursement for the services of a site supervisor and the job description for a site supervisor can be very broad. Tr. at 61. The site supervisor generally supervises the site, orders material and insures that safety measures are maintained. Tr. at 61-62. A site supervisor may also fill in for a job when needed. Tr. at 62. Mr. Oakley indicated that to the best of his recollection, site supervisor's fees could range from $30 to $110 per hour. Tr. at 63-64.

STATUTORY AND LEGAL BACKGROUND

In 1993, the General Assembly repealed Section 22.18b of the Environmental Protection Act (Act) and enacted a new Title XVI regarding UST Fund reimbursement applications and

determinations. 415 ILCS 5/57 (2002). The new law provided that releases reported to the State on or after the effective date of the amendments, September 13, 1993, would proceed under the new Title XVI. 415 ILCS 5/57.13(a) (2002). Owners or operators who reported releases prior to the effective date could choose to proceed under the new Title XVI by submitting a written statement of election to the Agency. 415 ILCS 5.57.13(b) (2002). Without a written statement of election, Section 22.18b would apply. Riverview F.S. v. IEPA, PCB 99-227 (May 3, 2001).

In this instance, the tanks were removed on June 25 and 26, 1992, (Tech. R. at 0681) and the release was reported prior to the adoption of Title XVI. Petitioner did not choose to proceed under Title XVI of the Act. *See* Ted Harrison Oil Company v. IEPA, PCB 99-127 (Dec. 16, 1999). Therefore, the applicable statutory provision is Section 22.18b of the Act. Section 22.18b was amended by P.A. 87-1088, effective September 15, 1992, and P. A. 87-1176, effective January 1, 1993. The language included in these amendments was not included in the Illinois Compiled Statutes. Therefore, citations to Section 22.18b will be to the language as it amended by P.A. 87-1088 and P.A. 87-1166.

Section 22.18b provides in pertinent part that:

* * *

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

* * *

(C) The owner or operator provided an accounting of all costs, demonstrated that the costs incurred to perform the corrective action were reasonable, and provided proof of payment of the applicable deductible amount under paragraph (3) of subsection (d). The accounting of those costs shall be provided to the Agency on a time and materials cost basis (or other Agency approved accounting methods) on Agency prescribed forms. No handling charge is eligible for payment except for handling charges for subcontracts and filed purchases when the charge does not exceed the amount set forth in subsection (i) of this Section.

* * *

415 ILCS 5/22.18b (1992), as amended by P.A. 87-1088 and 87-1171.

Pursuant to Section 22/18b(g) of the Act (415 ILCS 5/22.18b(g) (1992)), an applicant may appeal an Agency decision denying reimbursement to the Board under the provisions of Section 40 of the Act (415 ILCS 5/40 (2002)). Under Section 40 of the Act (415 ILCS 5/40 (2002)), the Board's standard of review is whether the application as submitted to the Agency would not violate the Act and Board regulations. Browning Ferris Industries of Illinois v. IPCB, 179 Ill. App. 3d 598, 534 N.E.2d 616 (2nd Dist. 1989). Therefore the Board must decide whether or not the application as submitted to the Agency, demonstrates compliance with the Act and Board regulations. Kathe's Auto Service Center v. IEPA, PCB 96-102 (Aug. 1, 1996). Further, the Agency's denial letter frames the issue on appeal. *Id*. Finally, the burden of proof is

on the owner or operator, who must provide an accounting of all costs. Platolene 500, Inc. v. IEPA, PCB 92-9 (May 7, 1992).

DEDUCTIONS AT ISSUE

The petitioner challenges the Agency's decision to deny reimbursement on three specific charges. The first deduction at issue is $2,906.25, for the 24-hour lab turnaround of the analysis of potentially impacted soil. The second deduction at issue is $33,250.07, which represents the denial of the 15 percent handling charge assessed by HES. The third deduction at issue is $80,141.50 in charges for site supervision for the activities performed by HES at the site. The petitioner indicates in the brief that the petitioner seeks review of the Agency's reimbursement decision to deduct $118,465.82 in charges (Br. at 4). However, in the conclusion of the brief petitioner asks that the Board allow an additional $116,297.82 in reimbursement from the Agency (Br. at 13). The petitioner only presents arguments challenging the Agency's decision to deduct charges for the three listed issues which total $116,297.82. Therefore, the Board will consider only $116,297.82 in deducted charges because the petitioner has waived claims to the remaining $2168.00 by not arguing for this additional amount in the briefs.

The following section will address the arguments by the parties on each of these three issues in turn. The summary of the arguments will then be followed by the Board's decision.

24-HOUR LAB TURNAROUND FOR THE ANALYSIS OF POTENTIALLY IMPACTED SOIL ($2,906.25)

Petitioner's Arguments

The petitioner asserts that the Agency agrees that additional charges for expedited lab results are not *per se* unreasonable and can be supported whenever quick turnaround time is warranted for safety concerns. Br. at 6; Reply at 1. The petitioner points out that in her testimony, Ms. Davis provided instances where a 24-hour turnaround charge would not be inappropriate. *Id*. The petitioner argues that the situation at the site supports the need for the 24-hour turnaround and the charges were not unreasonable. Br. at 8.

The petitioner directs the Board to the record for the justification of the 24-hour turnaround. Br. at 7-8. The petitioner specifically directs the Board to the closure report for the facility. *Id*. The closure report indicates that groundwater and precipitation collected in the bottom of the excavation and described the excavation as a "rolling" excavation where the impacted soil is removed and analyzed overnight. Br. at 8 citing Tech. R. at 348. In addition to the closure report, the petitioner asserts that corrective action plan submitted for the site indicated that soil samples would be collected and analyzed overnight. Br. at 8 citing Tech. R. at 1000.

The petitioner further points out that the record includes the corrective action completion report (Reply at 2) that the Agency received on April 2, 1998. Tech. R. at 336. The corrective action completion report includes information on the amount of soil excavation that took place (Tech. R. at 347) and noted that that the amount of soil exceeded earlier estimates. Reply at 2.

The corrective action completion report was reviewed by the Agency and specifically by Ms. Davis according to the petitioner. Reply at 2, citing Tech. R. at 332-333. The corrective action completion report also indicated that corrective action was completed in conformance with the corrective action plan. Reply at 2-3. The petitioner argues that the corrective action plan specifically indicated that soil samples would be collected and analyzed on an overnight basis. Reply at 3, citing Tech. R. at 1000.

Based on the information in the record, the Petitioner argues that the record clearly included justification for the 24-hour turnaround when the Agency denied reimbursement. Br. at 8. Petitioner maintains that no basis for denial existed. However to any extent that further need for explanation was necessary, the Agency should have asked for further clarification on the issue. *Id*. For these reasons, the petitioner argues that the Agency decision should be reversed.

Agency's Argument

The Agency asserts that the record does not justify reimbursement for a 24-hour turnaround in this case. Ag. Br. at 9. The Agency does agree that in certain instances a 24-hour turnaround might be allowed, but just because the Agency may allow reimbursement does not mean the Agency must. *Id*. In response to the citations to the record the petitioner provides in support of the request for reimbursement, the Agency notes that one reference is to a statement by Rapps that water collects in the excavation. Ag. Br. at 11. The remaining references are to statements made by Rapps that informed the Agency that Rapps intended to incur 24-hour turnaround charges. *Id*. The Agency argues that mere statement of intent to incur charges is not the same thing as justifying the reasonableness of the charges.[2] *Id*.

Board Discussion and Findings

After careful consideration of the record in this proceeding, the Board is persuaded by petitioner's arguments that the 24-hour turnaround for the analysis of soil was justified. The record shows both in the proposed corrective action plan (Tech. R. at 1000) and in the corrective action completion action report (Tech. R. at 348) that a "rolling" excavation was planned and executed to maximize public and worker safety, while minimizing equipment mobilization and associated costs. The corrective action completion report also shows that precipitation became a problem during the excavation (Tech. R. at 348), so minimizing the footprint of the excavation reduced the volume of water to be hauled and treated at the land treatment site. The Board finds that the "rolling" excavation and water problems at the site are justification for 24-hour turnaround for the analysis of the impacted soil. Failure to use 24-hour turnaround for soil analysis could have halted work for several days while analysis was performed on the impacted soil and such a delay would have increased the costs of the remediation. Therefore, the Board finds that the Agency denial of reimbursement of $2,906.25 should be reversed.

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[2] The Agency also responds with an argument that states that the petitioner's argument is "tantamount to arguing that the Agency should be estopped from denying reimbursement" because the Agency approved the corrective action plan (*see* Ag. Br. at 11). However, the petitioner does not argue estoppel (*see* Reply at 4); therefore the Board will not address this argument.

15 PERCENT MARKUP ASSESSED BY HES AS A HANDLING CHARGE ($33,250.07)

Petitioner's Arguments

The petitioner argues that the basis for denial of reimbursement for the 15 percent markup is unmistakably that the Agency believed that Rapps was the primary contractor and not HES. Br. at 8; Reply at 5. The petitioner asserts that that belief is contrary to the record and the Board should overturn the Agency's denial. Br. at 8. The petitioner maintains that the Agency reviewers assumed that Rapps was the primary contractor while the record reveals that Rapps did not hire or pay subcontractors. Br. at 8-9. Petitioner maintains that the record discloses that HES performed these duties and that HES and only HES sought handling charges for the services. Br. at 10; Reply at 5. Petitioner concedes that many of the invoices from subcontractors were addressed to the owner and not to HES. Reply at 7. However, petitioner argues that nothing in the Act or regulations requires the invoices be directed to the primary contractor and that in any event the invoices were also not directed to Rapps. *Id.*

More specifically, the petitioner points in the record to the corrective action completion report as evidence that HES was the primary contractor. Reply at 7. The petitioner concedes that the Agency's brief (at page 15) correctly quotes the corrective action completion report; however, the petitioner argues that the Agency did not include the prior sentence. Reply at 7. The petitioner quotes the corrective action completion report, which indicates that HES supervised excavation of petroleum impacted -soil. Reply at 7, citing Tech. R. at 347. Further, the petitioner points to other portions of the corrective action completion report which reference duties performed by HES. Reply at 7.

Petitioner cites to the Agency brief wherein the Agency concedes that in an earlier reimbursement decision for this site, the Agency approved these handling charges to be paid to HES. Reply at 8, citing to Ag. Br. at 18, footnote 20. Petitioner argues that the Agency has failed to explain how the two nearly identical situations differ and how the first warranted reimbursement but not the second. Reply at 8.

The petitioner also argues that even if HES was not a primary contractor, HES may also seek reimbursement for handling charges. Br. at 10. The petitioner argues that in State Bank of Whittington v. IEPA, PCB 92-152 (June 3, 1993), the Board reversed an Agency denial of a handling charge for a contractor who reviewed a subcontractor. Br. at 10. Based on that case, petitioner asserts that the Agency cannot deny reimbursement for handling charges for people who are not primary contractors. Br. at 10.

In the reply, petitioner argues that the only reason for the denial of reimbursement is that the Agency believed Rapps and not HES was the primary contractor. Reply at 6. The petitioner argues that the denial letter frames the issues on appeal. *Id*. The mere referencing of Section 22.18b(d)(4)(C) of the Act in the denial letter does not allow the Agency to argue that all the statutory elements were not met, when a denial reason is also more specifically stated. *Id.*

Agency's Arguments

The Agency argues that the 15 percent markup charged by HES was not justified based on the record so even if the Agency mistakenly believed that Rapps was the primary contractor that belief was irrelevant. Ag. Br. at 12-24. The Agency cites the language of Section 22.18b(d)(4)(C) of the Act for support that the charges must be adequately documented and justified. The Agency further maintains that handling charges are not a mere markup on everyone's bill. Ag. Br. at 13. The Agency argues that the handling charges represent the actual costs incurred by the prime contractor for procuring, administering and paying subcontracts as well as reasonable compensation to the prime contractor for the procurement of expendable resources to be used. Ag. Br. at 13.

The Agency asserts that in the denial letter the stated statutory denial reason was that the owner/operator failed to demonstrate that the costs were reasonable pursuant to Section 22.18b(d)(4)(C) of the Act. Ag. Br. at 14-15. The Agency acknowledges that the denial letter also states that the 15 percent markup may only be taken by the primary contractor "which was Rapps;" however the Agency asserts the language was merely "surplusage" and unnecessary. Ag. Br. at 15. Furthermore, the Agency argues that the record is unclear as to the identity of the primary contractor. *Id*. The Agency opines that the burden is on the applicant to demonstrate that the handling charges were reasonable and related to corrective action. Ag. Br. at 18. The Agency cites to several pages of the record where Rapps submitted materials to the Agency on behalf of the owner but the Agency maintains the only documentation from HES was the invoices "submitted in the reimbursement packages prepared by Rapps." Ag. Br. at 15.

Board Discussion and Findings

Before deciding whether or not the 15% handling charge (for a total of $33,250.07) should be reimbursed to petitioner, the Board must clarify the framework for appeal of an Agency denial. The Board notes that the petitioner argues that the Agency cannot rely on all the statutory provisions in a general citation to the statute if a more specific denial reason is given. *See* Reply at 6. The Board disagrees. The Agency's denial letter frames the issue on appeal. Although a specific denial reason is often given, any failure to meet the requirements of the Act is an appropriate reason for denial. In this case, the petitioner must demonstrate that the request for reimbursement if granted would not violate the Act (*see* Kathe's Auto Service Center) and failure to make such a demonstration would be the appropriate denial for reimbursement.

The Board finds that the petitioner has demonstrated that the request for reimbursement will not violate the Act. The record in this case establishes that the primary contractor was HES. The record shows that only HES sought a handling charge for dealing with subcontractors. HES supervised various stages of site remediation (s*ee* Tech. R. at 347) and nothing in the record refutes that HES was the primary contractor. The record does indicate that the Agency was confused as to the identity of the primary contractor and the notation by the Agency that Rapps was the primary contractor clearly establishes the thought process the Agency used in denying the reimbursement. As a general rule, only the primary contractor may assess a handling charge and the Agency believed that to be Rapps. However, the Agency's confusion does not override the evidence that HES performed duties of a primary contractor.

The Agency further argues that the costs are not justified and that the bills from the subcontractors were sent to the owner and not HES. However, the bills were not sent to Rapps either, and yet the Agency assumed Rapps was the primary contractor. The record sufficiently demonstrates the role HES provided in the remediation of the site, which included overseeing the site and the subcontractors. The Board finds that the record supports the petitioner's request for $33,250.07 in handling charges incurred by HES. Therefore, the Board overturns the Agency's decision denying reimbursement in that amount.

SITE SUPERVISOR CHARGES FOR HES ($80,141.50)

Petitioner's Arguments

The petitioner maintains that there is no basis in the record for the Agency's determination that the site supervisor charges were unreasonable. Br. at 11. The petitioner points out that Mr. Oakley agreed that an owner could seek reimbursement for site supervisor activities, and the costs for such activities could range from $30 to $110 per hour. *Id.* The only reason for the finding that the costs were unreasonable was because Ms. Davis thought the charges might have been for activities by the site owner, according to petitioner. *Id.*

The petitioner argues that the involvement of HES was discussed in the technical documentation. Br. at 11. The petitioner cites to the "Treatment Cell Construction Report" (Tech. R. at 10), and the "Corrective Action Completion Report" (Tech. R. at 61-328 and 342, 347, 348, 354). Br. at 11-12. These pages in the record reflect activities performed by HES, according to the petitioner, and the activities were consistent with the initial plan for the site as outlined in the cover letter accompanying the 1994 corrective action plan (Tech. R. at 989-990). Br. at 12.

In the reply, the petitioner also points to the fiscal record that includes a document prepared by the Agency detailing the hours worked by HES employees. Reply at 10, citing Fiscal R. at 15-27. The petitioner argues that this information joined the pages of material in the technical record delineating the activities and duties of HES employees, including "hundreds of pages of manifests" signed by HES employees. Reply at 11. Petitioner argues that the job descriptions of both Ted and Lori Harrison are consistent with the duties a site supervisor might undertake based on Mr. Oakley's testimony. Reply at 11-12. Furthermore, the petitioner asserts that the job descriptions of Ted and Lori Harrison are more detailed than those provided by Rapps. Reply at 12, citing Fiscal R. at 146-147

Agency's Arguments

The Agency asserts that the record does not support the reimbursement of the site supervisor charges. Ag. Br. at 24-25. The Agency recites the evidence in the record regarding the charges by HES for site supervision prior to the additional information that was provided by the applicant. Ag. Br. at 24-25. The Agency argues that the evidence is insufficient to justify reimbursement for the activities by HES at the site. *Id.* The Agency maintains that a statutory prerequisite to reimbursement is that the applicant must provide an accounting of all costs and

demonstrate that the costs incurred to perform corrective action was reasonable. Ag. Br. at 25, citing 415 ILCS 5/22.18b(d)(4)(C) (1992). The Agency cites to Clarendon Hills Bridal Center v. IEPA PCB 93-55 (Feb. 16, 1995) as support for the Agency's argument. The Agency maintains that in Clarendon Hills the Board found that "lump sum" invoices were inadequate documentation for the Agency to determine whether the costs incurred were for corrective action and were reasonable. Ag. Br. at 25. Because the burden is on the applicant, the Agency maintains that the denial of reimbursement based on HES's lump sum invoice was appropriate.

The Agency asserts that even with the additional information delineating the activities at the site by HES, the record does not support reimbursement. Ag. Br. at 26. The Agency argues that many of the items included in the additional information were not corrective action and those that were corrective action were not sufficiently documented. *Id*. The Agency again argues that a flat rate invoice covering a multitude of tasks is lump sum billing and as such is inappropriate. Ag. Br. at 27.

Board Discussion and Findings

The Agency and the petitioner agree that the costs associated with site supervision are appropriate for reimbursement. In this case, the Agency argues that the costs were not justified and that HES provided only a "lump sum" invoice. The Board disagrees. The record includes an invoice which lacks detail (Fiscal R. at 58); however the record also includes a more detailed billing explanation at LFR 134 (Fiscal R. at 256, 15-27; Pet. at Exh. 8). In addition, at the Agency's request, HES provided a two-page summary of the duties performed by HES employees at the site. Fiscal R. at 28-29.

The Board finds that the record shows that HES performed substantial work at the site (*see* Tech. R. at 61-328 and 342, 347, 348, 354). For example, the corrective action completion report stated that "[t]he excavation of petroleum impacted soils at the subject property was supervised by Harrison Environmental Solutions." Tech. R. at 347. In addition, the record clearly establishes that the remedial activities were conducted at two sites (Tech. R. at 344, 619) approximately two miles apart (the contaminate site and the landfarming site) which justifies the activities of two site supervisors. This information, along with the testimony by Mr. Oakley that a potential charge of $30 to $110 per hour was appropriate for a site supervisor, convinces the Board that the record is sufficient to support the petitioner's request for reimbursement. The Board finds that the record supports $80,141.50 as reasonable costs for site supervision duties performed by HES at the site. Therefore, the Board overturns the Agency's decision denying reimbursement for $80,141.50 for site supervision charges.

CONCLUSION

The Board finds that the record does support the petitioner's request for reimbursement of $2,906.25, for the 24-hour lab turnaround of the analysis of potentially impacted soil. The Board further finds that the record supports the petitioner's request for reimbursement of $33,250.07, which represents the denial of the 15 percent handling charge assessed by HES. Finally, the Board finds that the record supports the petitioner's request for reimbursement of

$80,141.50 in charges for site supervision for the activities performed by HES at the site. Thus, the Board reverses the Agency's determination denying reimbursement for $116,297.82.

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

ORDER

The Board reverses the Agency's denial of reimbursement to Ted Harrison Oil Company and directs the Agency to provide reimbursement to Ted Harrison Oil Company for:

1. $2,906.25, for the 24-hour lab turnaround of the analysis of potentially impacted soil;

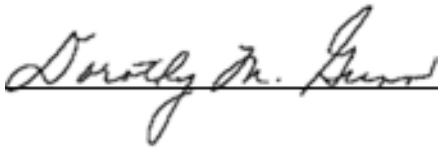
2. $33,250.07 for the 15 percent handling charge assessed by Harrison Environmental Solutions; and

3. $80,141.50 in charges for site supervision for the activities performed by Harrison Environmental Solutions at the site.

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 5/31(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 July 24, 2003, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board