ILLINOIS POLLUTION CONTROL BOARD
June 3, 1993

STATE BANK OF WHITTINGTON,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 92-152
	)	(UST Fund)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

EDWARD W. DWYER AND KATHERINE D. HODGE APPEARED ON BEHALF OF THE PETITIONER; AND

DANIEL P. MERRIMAN APPEARED ON BEHALF OF THE RESPONDENT.

OPINION AND ORDER OF THE BOARD (by J. Anderson):

This matter is before the Board on the October 13, 1992 petition of the State Bank of Whittington (Bank). The Bank requests review of the September 14, 1992 decision of the Illinois Environmental Protection Agency (Agency) regarding reimbursement of corrective action costs from the Leaking Underground Storage Tank Fund (Fund).[1] The Bank appeals the Agency's denial of reimbursement for certain costs incurred by the Bank in response to a release of petroleum from its four underground storage tanks (UST).

Hearing was held on December 16, 1992 in Benton, Franklin County; no members of the public testified. The Bank and the Agency filed post-hearing briefs on February 16 and April 20, 1993 respectively. On May 5, 1993, the Bank filed a post-hearing reply brief.

PENDING MOTIONS

The Board will first address two pending motions.

Bank's Second Motion to Supplement

On March 11, 1993, the Board granted the Bank's February 16, 1993 motion to supplement the record. On May 3, 1993, the Agency filed a response to the Board's March 11 order to supplement the

[1] On September 23, 1992, the Agency issued another letter correcting a computation that changed the actual amount requested for reimbursement from $660,001.35 to $623,220.10. That the September 14, 1992 letter constitutes the Agency's final decision is not in dispute. (Ex. F; Joint Ex. I.)

record, in which it declined to file two original color photographs, asserting policy and statutory reasons. On May 5, 1993, the Board found the Agency's response unpersuasive and ordered the original photographs to be filed. On May 10, 1993, the Agency complied by filing a further response and the Bank's original and complete December 19, 1993 Corrective Action Report containing the two color photographs on p. 18. The complete original report is hereby received into evidence. (Copies of the report are found in Agency Rec. Technical File Part 2 at 171-271.)

On May 5, 1993, the Bank filed a second motion to supplement the Agency record. The motion accompanied the Bank's reply brief. On May 17, 1993, the Agency filed a response in opposition. On May 25, 1993, the Bank filed a reply to the Agency's response. The requested supplement concerns certain records related to the UST appeal pending before the Board of DJM Oil Company, Inc. (DJM). (DJM Oil Company, Inc. v. IEPA, (October 29, 1992) PCB 92-163.) The DJM site is adjacent to the Bank's site in Benton. The Bank requests that the record be supplemented with a) certain pages of DJM's December 10, 1991 reimbursement application, and b) the September 25, 1992 final Agency determination of DJM's application for reimbursement, of which the Bank requests the Board to take official notice. Both documents accompany the motion.

The Bank asserts that the supplemented information will render incorrect the impression, given by the testimony of Agency witness Ms. Becky Lockhart and in the Agency's brief, that roller compactor charges are not corrective action and have never been reimbursed. Counsel for the Bank, who is also counsel for DJM in DJM's appeal, states that the motion to supplement is necessary because the Agency has failed to timely file the DJM record with the Board. The Bank asserts that the open waiver in the DJM appeal had not relieved the Agency from its obligation to file the record within 14 days, or November 11, 1992. The Agency has yet to file the DJM record.

The Agency asserts in opposition that: a) such materials were not part of the Agency's actual administrative record in the instant appeal; b) the Bank did not provide a supporting affidavit; and c) the Agency did not consider, and should not have considered, such matters as evidence. The Agency further argued that such extrinsic evidence should not be offered as collateral impeachment or as a matter of estoppel.

Regarding collateral impeachment, the Agency argues that "extrinsic evidence (evidence other than that coming from the witness on cross examination) may not be introduced to impeach a witness if a matter is considered collateral [citation ommitted]." (Agency Resp. in opposition at 3,4). Also, the Agency argues that, while extrinsic evidence may be introduced to

contradict a witness, it may not relate solely to collateral matters [citation omitted]." The Agency further argues that, absent a request by the Bank for leave to reopen the proofs and submit additional evidence - which the Bank did not make - the proper time to have offered such material to impeach was at hearing when the Agency witness testified and where the issue could have been properly aired, not at this stage of the proceeding.

Regarding estoppel, the Agency asserted that the Board rejected the the same position argued by the Bank in Southern Food Park, Inc. v. IEPA (December 17, 1992), PCB 92-88. The Agency further argued that the Board has previously held that the issue is whether the disputed item passes the two-part corrective action test, not whether the Agency has ever previously reimbursed such an item. In support the Agency additionally cited Strube v. IEPA, (May 21, 1992) PCB 91-20; Platolene 500 v. IEPA, (May 7, 1992) PCB 92-9; and Enterprise Leasing v. IEPA, (April 9, 1992), PCB 91-174.

In the interests of bringing this dispute to resolution, the Board will accept the Bank's May 25th reply even though the reply lacks a request for leave to file a reply pursuant to 35 Ill. Adm. Code 101.241 (c). In essence, the Bank requests that the Board accept an accompanying affidavit, which the Bank explains was omitted from its second motion to supplement by inadvertance because of attorney's haste to timely file the Bank's reply brief. The Bank also asks that the Board consider whether the Agency's response to the second motion to supplement is properly supported by affidavit as required by 35 Adm. Code 101.242(a) and (b), in that there are certain facts asserted which are not of record, and requests that the Board strike the Agency's response. Also in the interests of bring this dispute to resolution, the Board will accept the Agency's response.

Without addressing the other arguments, the Board denies the Bank's second motion to supplement as untimely. The Bank does not explain why it is first raising this issue at this time, particularly in that it was aware of the DJM documents well before the December 16, 1992 hearing at which the now-challenged testimony took place.

Agency Motion to Strike

On May 17, 1993, the Agency moved to strike portions of the Bank's reply brief. On May 25, 1993, the Bank filed a response to the Agency's motion to strike. The response accompanied the Bank's May 25th reply. The portions the Agency requests be striken are a) references to, and a request that the Board take judicial notice of, transcripts containing the hearing testimony of Agency employee Mr. Doug Oakley in Southern Food Park, specifically citing to the Bank's reply brief at 6, 7, and fn. 3;

and b) the Bank's discussion of the DJM Oil Company material referenced above, specifically citing to the Bank's reply brief at 13.

Regarding the DJM discussion in the Bank's reply brief, for the reasons the Board expressed in response to the Bank's second motion to supplement, the Board grants the Agency's motion to strike.

Regarding the transcripts of Mr. Oakley's testimony in Southern Food Park, the controversy in the instant case evolved from a discussion in the Agency's post-hearing Brief. The Bank asserts in its reply brief (at 5, 6.) that the discussion should be stricken in that it has implied, without factual basis or citation to the record, that the Bank's consultant is taking unfair advantage of an unsophisticated Bank as well as the Fund. The Bank specifically quoted the following language on pp. 21 and 22 of the Agency's post-hearing Brief as the basis for its protest:

> Beyond a reasonable amount representing fairly the administrative and procurement and oversight costs of an owner or operator, handling charges represent profit to the contractor. The profit motive acts as an incentive to the contractor to take as great an advantage of the opportunity as possible. Usually owners and operators never see the amount actually paid to the subcontractor for the work performed. They do, however, see an amount attributed to the subcontractors by the contractor which, for all but experienced and commercially sophisticated owners and operators is unknown to them to contain a contractor mark up, or handling charge. Since the amount of the subcontractor bills are attributed to subcontractors who never dealt with the owner or operator, an owner's or operator's expressed concerns over high prices may be directed away from the contractor, who can merely shrug and reply that it's a costly business.
>
> . . .
>
> The strong influence of the profit motive may result in a contractor unreasonably maximizing its profits at the expense of the UST Fund (and hence, the taxpayers).

The Bank asserts that the above quote is factually at odds with how the handling charges were itemized in the instant appeal. The Bank further states that it is the Agency that offered Mr. Douglas Oakley's testimony in Southern Food Park, and that his testimony would show that the Agency will reimburse handling charges if they are hidden in another reimbursable category.

In its response the Bank also requests that the Board consider whether the Agency's motion to strike is properly supported by affidavit, because the motion contains facts asserted which are not of record and are unsupported by affidavit as required by 35 Ill. Adm. Code 101.242(a) and (b), and also requests that the Board strike the Agency's motion. Again, in order to bring this dispute to resolution, the Board will accept the Agency's motion to strike.

In resolving this issue, the Board need not recount the Bank's and the Agency's supporting arguments for taking or not taking judicial notice of the transcripts in Southern Food Park. In reviewing the record now before us, the Board agrees with the Bank insofar as it cannot find any evidence whatsoever that would justify the Agency's inclusion of the discourse quoted above. The Board finds unacceptable what must be viewed as an attempt by the Agency to insinuate that its description of an owner's inexperience and a contractor's bad faith conduct applies to the Bank and to the Bank's contractor. Therefore, the Board strikes all discussion of this subject matter from the Agency's brief as well as from the Bank's reply brief.

DENIED COSTS APPEALED

The reimbursement denied is listed in 11 paragraphs contained in Attachment A of the Agency's September 14, 1993 letter. (Pet. Exh. E.) The Bank appeals reimbursement denials as specified paragraphs 2, 6, 7, 8, and 10 of Attachment A, summarized as follows:[2]

Paragraph 2 - $1,917.34, handling charges.

Paragraph 6 - $7,050.00, costs associated with roller/compactor charges.

Paragraph 7 - $5,459.81, surveying costs.

Paragraph 8 - $3,047.50, nuclear density testing charges.

Paragraph 10 - $1,771.25, ARDL (the Bank's engineering consulting firm) personnel costs associated with seeking reimbursement from the fund.

BACKGROUND

[2] At hearing, the Agency stipulated that costs contained in paragraph 1 (tank removal costs), paragraph 3 (laboratory rush charges), and paragraph 4 (personnel charges incurred after notification to the Illinois Emergency Management Agency) were reimbursable. The remaining paragraphs were not appealed. (Jt. Exh. 2; Tr. at 5, 7, 262; Pet. at 7-9.)

Procedural History

The procedural history has a particular bearing on certain issues raised in this case. In March, 1989, the Bank purchased the property (site), located at 200 North Main Street, Benton, Franklin County.[3] From 1938 until 1973, the site had been used for a gas station operation. A building that had been on the site was demolished prior to the removal of the USTs. On April 20, 1989, following an inspection, the Office of the State Fire Marshal (OSFM) ordered four USTs on the site to be registered. On May 5, 1989, the OSFM ordered the Bank to remove the USTs. Between September 22 and September 25, 1989, the four USTs were removed. On September 22, 1989, after a release of petroleum was discovered during the removal of the first three USTs, the Bank notified the Illinois Emergency Management Agency (IEMA) (then called the Emergency Services and Disaster Agency). (Pet. at 1-3; Pet. Br. at 4,5; Agency Br. at 1-3.)

On September 22, 1989, the Bank hired ARDL, Inc., an environmental testing laboratory and consulting firm.[4] Mr. Todd Gentiles, an engineer and field services manager of ARDL, oversaw all aspects of the site remediation, submitted the required plans and reports to the Agency, and prepared the initial reimbursement application and additional reimbursement information when requested by the Agency. The application and additional supplements requested by the Agency were submitted between June of 1991 and January of 1992. (Pet. at 5; Pet. Br. at 5; Tr. at 172-174, 240; Agency Rec. TF at 47, 132.)[5]

By letter of May 22, 1990, the Agency had initially deemed the Bank ineligible to access the Fund due to a determination by the OSFM that the USTs were exempt from registration. However, based on an affidavit of Benton's mayor, the OSFM reversed itself and the Bank reapplied for reimbursement. On September 6, 1991, the Agency notified the Bank by letter that it was eligible for

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[3] The Bank purchased the site from a financial institution, which had taken ownership from the Federal Savings and Loan Insurance Corporation, which, in turn, had taken ownership from another financial institution. (Pet. at 2.)

[4] We note that ARDL also was overseeing remediation of the DJM property, which also belongs to the Bank; the DJM property is located to the north of, and adjacent to, the site at issue here.

[5] The Agency record consists of Part 1, Fiscal File, Books A and B (denoted as FFA and FFB); Part 2, Technical File (denoted as TF); Supplemental Agency Record (denoted as SF) that was stipulated into evidence at the December 16, 1992 hearing; and the Bank's Corrective Action Report (denoted as CAR) containing the original photographs filed pursuant to Board order.

reimbursement but that the deductible would be $100,000. The Bank appealed the deductible to the Board, but withdrew its appeal after the Agency reduced the deductible to $10,000. (See PCB 91-190; Agency Br. at 6, 7; Pet. at 3, 4, Exh. B, C; FFA at 24, 44,45.)

On May 14, 1992, the Agency approved an "interim" reimbursement of $320,000. On August 10, 1992, the Bank filed a complaint in the Circuit Court in Franklin County against the Director and the LUST Fund Manager of the Agency. The complaint included counts requesting mandamus relief and alleging violation of the Administrative Procedures Act for failure to make a final determination. On September 14, 1992, two days prior to hearing on the complaint, the Agency issued its final determination. It is that determination, as further modified by stipulation at the Board's hearing, that is now before the Board. (Pet. at 5, 6, Exh. D, E.)

Site Remediation

The site is bounded on the south and west by two roadways, East Washington Street, which is a city street, and North Main Street, which is Highway 37. To the east is a city alley and to the north is the earlier discussed DJM property, which we note was later excavated under a separate incident number. The remediation at the site involved boundary-to-boundary excavation, with vertical walls, to a depth of 14 feet. A sandstone formation was encountered at the bottom of the excavation. From September 9, 1991 through October 10, 1991, approximately 11,600 tons of contaminated soil were excavated and taken to a landfill. Starting on October 11, 1991 and for ten days thereafter, backfilling took place. The site was filled using 12 to 18 inch lifts, each compacted with a vibratory roller. Nuclear density tests, to assure 95% compaction, were performed on each lift by Holcomb Foundation Engineering, a civil engineering subcontractor. (Tr. at 133-138, 187, 213-219; TF at 62, 76, 135, 152; see CAR photos at 18-20.)

Contamination and Groundwater Concerns

Following the excavation, laboratory analyses of soil samples collected within the excavated area confirmed that soil at the south property boundary and the sandstone formation exceeded the Agency cleanup objectives. The south wall samples also indicated that the contamination had migrated off-site. An unanticipated concern of considerable significance was the presence of groundwater found at 12 feet. Corrective action included the removal of 36,800 gallons of perched water, precipitation and groundwater. (TF at 135, 139, 136, 144.)

Because the soil sampling indicated a potential for groundwater contamination, a groundwater monitoring plan was

established and is still ongoing. The corrective action plan to date does not provide for off-site remediation. Whether such remediation will be necessary will be determined by future groundwater monitoring results. (Bank's Br. at 7; TR at 136.)

HANDLING CHARGES

There are three distinct categories of the disputed $1,917.34 in handling charges.[6] As categorized by the Agency, they are "(a) handling charges associated with denied costs, (b) "duplicated" handling charges, and (c) handling charges in excess of fifteen percent." (Agency Br. at 11.)

(a). Roller/compactor and Nuclear Density Testing Handling Charges

The parties agree that the disallowed $1,123.18 in handling charges is dependent on the outcome of the Board's determination regarding the disallowed roller/compactor and nuclear density testing costs themselves. As addressed later, the Board is reversing the Agency's denial of the roller/compactor and nuclear density testing costs, so the Agency's denial of the associated handling charges here is reversed.

b). 15% Billing by Both Consultant and Subcontractor

The handling charges (also called handling fees) that the Agency disallowed in this category total $735.44.

ARDL, the Bank's consultant,[7] utilized a subcontractor, Midwest Petroleum, for small item field purchases, e. g., the securing of rock and stone. When the subcontractor submitted its

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[6] Douglas Oakley, of the Agency's Remedial Accounting Procurement Unit in the Bureau of Land testified as to some of what comprised the $1917.34 in handling charges denied, referencing documents in the FFA. In that both parties agreed in their briefs that the following amounts were correct, the Board will not disturb the totals. However, the totals don't "add up", and the Board has noted below at least two amounts that appear to be in error. The Board leaves any corrections to the discretion of the parties: $1123.18 for 15% handling charges associated with roller/compactor charges ($247.50, $810.00 and $65.68); $735.44 for contractor and subcontractor separate billings of 15% ($242.54, $30.60, $407.27 and $55.03); $55.98 (sic) for adjustment in 46% handling charges ($49.61 and $6.37 (sic, see FFA at 186)) and $7.12 for adjustment in 16% handling charge. (Tr. at 21-28; Bank's Br. at 8; Agency's Br. at 18.)

[7] ARDL is sometimes referred to in this record as the Bank's consultant and sometimes as the contractor.

field purchase bills to ARDL, it included its 15% handling charge. These Midwest Petroleum's billings, including the 15% handling charge, were paid by ARDL. Then ARDL added its 15% handling charge to the Midwest Petroleum bill. (For example, see FFA at 159.) The Agency subtracted from Midwest Petroleum's bill its 15% handling fee and adjusted ARDL's computation of its 15% handling fee accordingly.

The essence of the dispute between the Bank and the Agency is whether both ARDL and Midwest Petroleum can add handling fees. The Agency asserts that combined they exceed the Agency's 15% limit and that these charges are duplicate charges.

We will first summarize the basis for the Agency's policy regarding the 15% rate.

There is no dispute that the Agency had no statutory guidance regarding the handling charge rate.[8] At hearing, Mr. Oakley testified that at some unstated point in time the Agency's policy was to pay a five percent handling charge, based on the markup of its regular state contracts. Then the Agency met with various representatives of industry, owners and operators, petroleum marketers and consultants to determine what was a fair handling charge in relation to the market place price. As a result of these "market place" discussions, the Agency changed its policy and established the 15% level. Mr. Oakley stated that it was possible that the Agency paid more than 15% on the basis of competitive bidding, but he wouldn't know what those handling charges were because "it wouldn't be apparent". (Tr. at 35; also Tr. at 28-34.)

Next, we will summarize the "duplicate charges" dispute.

The Agency asserts that it was Agency policy that a 15% handling charge was reasonable for the prime contractor on both subcontracts and field purchases. The Agency argues that it never intended that there be two 15% handling charges on the same item, in effect more than doubling the handling charge for Midwest Petroleum's field purchases. The Agency stated that, even though neither handling charge exceeded 15%, the total was unreasonable. (Tr. at 37; Agency's Br. at 17.)

The Bank argues that:

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[8] Section 22.18b(i)(1) and (2) of the Act (P.A. 87-1171, HB 4039, eff. September 18, 1992) newly defines handling charges, and establishes a sliding scale of the percent allowable handling charge, with the percent allowable decreasing as the costs increase. Both briefs alluded to the new language to support certain of their positions, but neither argued that it was applicable to this proceeding.

> The problem with labeling this 15% handling charge as a "double markup" is that it ignores the very standard contracting and subcontracting business practice which the Agency has identified as the basis for its limiting handling charges to 15%...The application of a flat 15% handling charge inherently assumes there is one "tier" of billing, e.g., the consultant orders supplies from a vendor and seeks a 15% handling charge for carrying these costs. However, in the case of contractors, subcontractors and even sub-subcontractors, there can be two, three or more tiers of parties carrying costs. At each level, costs are incurred in administering subcontracted work, such as arranging for purchases and for carrying subcontract and field purchase debt. (Bank's Br. at 9.)

The Agency responds that:

> At first blush this does not sound unreasonable, but in theory the practice of contract "stacking" could go on ad infinitum....None of the contracting parties [in an example given by the Agency] charge more than fifteen percent(15%), but the total handling charge imposed upon the owner/operator - which does not represent actual corrective action work done at the site - exceeds 100%. (Agency's Br. at 16, 17.)

The Bank replies that, insofar as the Agency is implying that there is "double dipping" in the Bank's example, this is not true:

> ARDL assumed that a handling charge of 15% applied by the subcontractor (e.g. "Midwest Petroleum") was reasonable and acceptable to the Agency. ARDL, as the contractor, incurred certain costs to review the subcontractor billings, evaluate charges, prepare billings and, most importantly pay the subcontractor while bearing the cost of carrying the money until reimbursement is received from the UST Fund. Similarly, the subcontractors incurred certain costs beyond actual bills for materials, as did ARDL. Proper materials must be selected, picked-up and/or delivered, items require storage until use, and the items must be paid for at the time of delivery or pick-up....Midwest Petroleum and ARDL each attempted to cover their respective administrative costs. (Bank's reply Br. at 10.)

The Bank asserts that the result of the Agency's argument is that:

> ...the contractor can pay the subcontractor's handling charge and operate his own business at a loss, or the contractor can keep the 15% and not pay the subcontractor's general and administrative overhead at the risk of being

unable to locate a subcontractor willing to bid. Petitioner submits that it is "reasonable" to reimburse the general and administrative overhead costs of both the contractor and the subcontractor. (Bank's reply Br. at 10, 11.)

The Agency also appeared to argue that: a) the use of the Agency's "Subcontractor Summary" forms incorrectly identified the field purchases as a subcontract[9]; and b) in that the materials were used by Midwest Petroleum on the job, such labor costs were properly billed to ARDL as part of Midwest's subcontract, and ARDL appropriately assessed a handling charge; however it was not appropriate for both to receive the maximum allowable handling charge on the materials purchased. (Agency Br. at 17,18.)

The issue before us is one of reasonableness, as regards: the Agency's limiting the handling charge to 15%; its disallowance of a handling charge claim by the subcontractor; and whether ARDL's and Midwest Petroleum's handling charge claims were duplicates or were based on each one's overhead.

As regards the Agency's 15% limit per se, at least in this handling charge dispute category, there seemed to be no argument that 15% reflected practices in the market place. We also note that it was the Agency witness, Mr. Doug Oakley, who testified that the 15% figure was established as a standard handling charge only after Agency meetings with many persons familiar with the market place. In the absence of specifity 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. The issue here is whether the Agency, solely as a matter of policy and intent, can deny access to the 15% handling charge to persons other than the prime contractor. The Board concludes that it is inconsistent for the Agency, as a matter of policy, to allow a 15% handling charge on the basis that this fairly reflects overhead costs in the market place, and then turn around and deny the 15% handling charge to some persons simply because they are not the prime contractor. The Board also is persuaded, and so finds, that the record supports the subcontractor's handling charges as based on overhead costs separate from that of ARDL's.

Therefore, the Board reverses the Agency's denial of reimbursement of Midwest Petroleum's handling charges.

c). Handling charges in excess of 15%

There were three billing submittals in this category. The

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[9] We note that the Agency's reimbursement form for subcontractors includes the statement: "The IEPA will pay no more than a 15% handling charge." (FFA at 79.)

Agency in all cases reduced the handling charges to 15%. They were reduced from 46.4%, 46% and 16.4% respectively, resulting in a disallowance of $49.61, $6.37 and $7.12 respectively. The Agency suggested that the 16.4% appeared to be a mathematical error and the Bank did not discuss the issue. Mr. Todd Gentles of ARDL testified that the 46% handling charges resulted from internally audited general and administrative costs plus a small fee on small purchases, which was company policy at the time.[10] Gentles was unable to answer what constituted a small purchase, and what the cutoff point was. He noted that he thought it could be as high as $5000, but that that determination is made by the firm's business manager. (Tr. at 178, 179, 253.)

Mr. Gentles also testified that the company's small purchase policy was established years earlier, when it handled small projects, and then carried over to the LUST program on small purchases. The policy was developed at a time prior to the onset of the high-cost LUST remediation projects and before the company used outside subcontractors. (Tr. at 252,253.)

The Agency argued that this testimony was insufficient to establish that the 46% handling charge was reasonable. The Board agrees and so finds. Mr. Gentles explained generally what ARDL's policy was, but he was unable to provide with any specificity how that policy was applied by his firm, certainly in a LUST setting.

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[10] Between the time of the filing of the Bank's and the Agency's post-hearing briefs, the Board decided the case of Beverly Malkey, as Executor of the Estate of Roger Malkey, d/b/a/ Malkey's Mufflers v. IEPA, (March 11, 1993), PCB 92-104. The Agency quoted the Board's holding on p. 3 of its opinion:

> [the consultant]...provided no documentation to support his claim. Petitioner never submitted actual handling charges by any other in the industry. (See, Enterprise Leasing v. IEPA (April 9, 1992), PCB 91-72, 132 PCB 79.) ... The Board finds that petitioner did not carry its burden of demonstrating that the handling charges of 58% were reasonable. (Agency Br. at 20.)

The Bank conceded Malkey established a new element of proof in demonstrating charges to be reasonable. However, the Bank had viewed that it had the burden to prove that the handling charges as requested by petitioner were reasonable, and had no way of knowing that the Board would require evidence of various industry handling charges. The Bank asserts that Malkey is not applicable to the instant appeal, in that the Bank had no way to present such evidence at this stage without opening the record of the proceedings to address the Malkey holding. The Board need not find that Malkey is controlling, in that the Bank has not met its burden of proof based on the record here.

Therefore, the Board affirms the Agency's denial of reimbursement of handling charges in excess of 15%.

CORRECTIVE ACTION ISSUES

The remaining issues involve whether the activities for which reimbursement is sought constitute corrective action, rather than whether the charges were reasonable.

"Corrective action" is defined in Section 22.18(e)(1)(C) of the Act as follows:

> "Corrective action" means an action to stop, minimize, eliminate, or clean up a release of petroleum or its effects as may be necessary or appropriate to protect human health and the environment. This includes, but is not limited to, release response investigation, mitigation of fire and safety hazards, tank removal, soil remediation, hydrogeological investigations, free product removal, groundwater remediation and monitoring, exposure assessments, and the provision of alternate water supplies. 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. Corrective action does not include legal defense costs. Legal defense costs include legal costs for seeking payment under Section 22.18b.
> (415 ILCS 5/22.18(e(1)(c) (1992).)

The Board has held that, in order for an action to constitute corrective action, and thus the costs incurred to be reimbursable, the action must fulfill both aspects of the "corrective action" definition, i. e.: (1) it is "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"; and, (2) such action "includes, but is not limited to, release investigation, mitigation of fire and safety hazards, etc. (See Enterprise Leasing Company v. IEPA (April 9, 1992), PCB 91-174.) We note that this holding has been referred to variously as the Enterprise Leasing test, the "two-pronged" test, or "two-step" test. We will refer to this as the two-step test.

Roller/compactor and Nuclear Density Testing Charges

Ms. Lockhart testified for the Agency regarding the Agency's denial of reimbursement of $7050.00 in costs of roller-compacting the backfill and $3047.40 in costs of nuclear density testing.

At the time of hearing, she has been a project manager for the past two years in the Agency's LUST program, and made the decision to disallow the Bank's roller/compactor and nuclear density testing charges. Ms. Lockhart testified that she performed two reviews of the technical file, in December 1991 and on May 12, 1992. Ms. Lockhart did not believe that the activities fulfilled the first step of the two-step corrective action test. Regarding safety concerns, she testified that compacting clay along the boundary abutting the state highway would depend on how close it was, and whether the excavation was shored pursuant to OSHA requirements.[11] She did not think the excavation had been shored. She was not sure it needed to be in order to support the highway, explaining that she wasn't on site and thus did not know exactly how close it was to the highway. She also testified that the phrase in the corrective action definition "...or clean up a release of petroleum or its effects ..." meant environmental, not structural, effects. (Tr. at 40, 41, 46, 49-51, 61, 71-73; FFB at 210, 211.)

Ms. Lockhart testified that each decision is site specific, but that she had never seen a case where she has allowed roller/compaction and nuclear density testing as corrective action costs. She had reviewed 120 sites, and while all of them used excavation and soil removal, she did not remember whether any of them involved compaction costs or whether reimbursement was requested. A primary factor she considered in making her decision in this case was that the compaction appeared

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[11] In relation to the safety issue, both parties support their positions by reference to the Bank's alleged obligations pursuant to certain requirements of the federal Occupational Safety and Health Administration (OSHA) and of the State's Adjacent Landowner Excavation Protection Act. The Agency argued that safety factors were not corrective action because the Bank was already obliged to do what it did. (See. e. g. Agency's Br. at 32-34; Bank's Reply Br. at 14-16.) Whatever the compliance requirements may be in these documents - they are not part of the record - they would not in any event be relevant to our consideration here. Questions of compliance with these statutes or regulations are within the purview of those who administer them, not the Agency. See Rockford Drop Forge Company v. Illinois Environmental Protection Agency, (December 20, 1990), PCB 90-46, fn. at 7; The Grigoleit Company v. Illinois Environmental Protection Agency, (June 4, 1992), PCB 90-135, fn. #9 at 10.) In like manner, we find nothing in the corrective action definition that allows a charge to be reimbursed simply because it is required by another statute or regulation. If an action meets the definition of corrective action it may be reimbursed whether or not it is required by another law. If it does not meet the definition, it may not be reimbursed even if required by another law.

to have occurred because the Bank intended to put a building on the site. She stated that, having never seen compaction costs before, she discussed it with others, and was told that "the frequence (sic) was done to put new buildings on the site." (Tr. at 56.) Ms. Lockhart also stated that her review included a June 12, 1992 letter from the Bank president, Mr. Steve Swinney, stating that the Bank intended to construct a new building on the "sites", and she believed the letter was referring to the Bank's site and the DJM facility to the north. (TF2 at 80; Tr. 56, 57, 92-93, 103.)

Ms. Lockhart stated that she did not look at other factors, such as groundwater conditions or other site specific issues in reaching her decision. (Tr. at 59-61.)

Mr. George Glass testified for the Agency regarding his site visits. He had been a project manager for about two-and-one-half years and worked out of the Agency's Marion office. He approves the corrective action plans after reviewing them for any deficiencies regarding sufficiency of information and relevance to remediating the site. The first of his visits to the Bank's site occurred after the tanks had been removed. He reviewed the excavation with regard to the extent of the contamination and the cleanup objectives. If, as here, contamination is identified at the boundary of a site, and further excavation is not feasible, because of a street or other structures, then, based on further testing, he confers with the owner/consultant doing the remedial work as to the safety of proceeding further, and discusses Agency concerns regarding devising a suitable alternative course of remediation proposed. He does not review reimbursement applications, and any recommendations he would have made to Ms. Lockhart would have concerned only the physical aspects of the cleanup, not questions related to reimbursement. He has overseen remediation for about 200-250 sites. He was aware of one other site in Carbondale where compaction activities occurred, but was not aware of whether reimbursement was requested. (Tr. 105-119, 133, 155-157, 159-161.)

Mr. Glass testified as to his ongoing interaction with the consultant regarding the boundary contamination, the odor and visual stain problems on the sandstone floor and the presence of groundwater. He stated that monitoring wells were automatically required in situations such as this when contamination goes off site. (Tr. at 142-158.)

Regarding safety concerns at the west and south wall boundary excavations, Mr.Glass testified that there was a potential that the soil would sluff off, and agreed that it could "affect the lateral subjacent support of that adjoining highway." (Tr. at 158.)

Mr. Gentles testified that he is a petroleum engineering

graduate from the University of Missouri, Rolla, has been employed by ARDL for eleven years, and presently administers all ARDL's consulting projects related to environmental work. He has been involved with about 50 UST sites. Mr. Gentles' oversight remediation responsibilities at the Bank site included the investigation and remediation regarding the backfilling activities. He oversaw the taking of samples for lab analysis to determine whether cleanup objectives had been achieved. (Tr. at 168-173.)

Mr. Gentles testified that he would have advised the degree of compaction of the soils regardless of the Bank's future building plans. He stated that a lesser degree of compaction at the site can create a tendency for the contaminants to bleed into the backfill area, and that the contamination was confirmed as going off the site. He also stated that the structural integrity of the side walls, particularly those on the west and south walls, was a major concern. He testified that Highway 37 was within eight to ten feet from the property line, with city utilities underneath the street. He also stated that a main water line feeds down the east alley and through Washington Street. His concern was that highway traffic could cause sluffing and subsidence over time, causing lateral movement that would tear up the highway and fracture the underground utilities. He was also concerned about personal injury, in that the site could have gradually subsided from six inches to two feet without the compaction. The nuclear density testing was undertaken to achieve as much as possible the permeability values, if not the full cleanup objectives, of the natural soils that had been removed. He stated that, as an engineer, he was concerned that the backflow migration of subsurface waters would cause the recontamination of the soils, and asserted that the compaction would very much minimize this problem. He stated that the Agency requested the monitoring wells because of its concern about the impact of the site on the groundwater system. (Tr. at 185-196, 220, 221.)

Mr Gentles also stated that he did not recommend use of a geomembrane liner. He asserted that, although there was lesser cost using a liner without compaction, with compaction testing there was lesser migration of contaminants. He testified that with the soil types in Illinois there is more benefit from actual compaction than from a liner, which also could be damaged in the process of backfilling and such damage would not be evident. (Tr. at 227,228.)

We have reviewed the record and the arguments presented. In their arguments, both parties cite to Platolene 500 v. IEPA (May 7, 1992), PCB 92-9, a case which involved concrete replacement. Platolene distinguished between corrective action and restoration, and stated that which one applies is determined by the particular facts surrounding the action. (Also see Strube v.

IEPA (May 21, 1992), PCB 91-205.) Both parties also refer to a "safety hazard" exception, citing to Platolene. The Bank states, "Platolene 500, Inc., provides a 'safety hazard exception'". (Bank's Reply Br. at 14.) The Board notes that Platolene provides no such exception. The word "safety" appears only one time in Platolene, and that is within a quotation on page 6 to Section 22.18(e)(1)(C) of the Act, which is the section defining corrective action. We also take note of a more recent Board holding, in Princeton/Beck Oil Company v. IEPA (May 5, 1993), PCB 93-8. Beck involved compaction of a backfill. The Agency argued that the sole purpose of Beck's compaction of backfill was to shore up the foundation of a building on the premises, pointing out that the compaction did not affect the contamination. The Board agreed with the Agency that, under the facts presented, Beck did not meet the first part of the two-step test, and found that the backfill in that case was analogous to the replacement of concrete. (Ibid. at 3, 4.)

The facts here are quite distinguishable from the other cases. Here, the post-excavation environmental concerns are evident, and the Agency shared those concerns. Indeed, only future results from the monitoring wells will show whether the boundary-to-boundary roller/compaction and the nuclear density testing were sufficient to prevent further contamination. The Agency record and the testimony show the growing, and often unexpected, environmental and safety problems as the remediation progressed. The Agency did not present any testimony addressing its actual reimbursement decision that took into consideration the actual conditions specific to the site; the testimony shows that the decision that these activities did not constitute corrective action was based solely on the Agency's observations that such compaction is unusual and usually is for the purpose of providing building support. In so stating, we note that the record indicates that Ms. Lockhart was mistaken (as the Bank argues without Agency rebuttal, see Bank's Br. at 17; Bank's reply Br. at 19) when she testified that Mr. Swinney's June 2, 1992 letter indicating planned construction was part of her technical review, in that this letter was not in the record at the times she testified her reviews occurred, namely in December, 1991 and on May 12, 1992.

We conclude, and so find, that the roller/compaction and nuclear density costs meet the two-part test in the definition of corrective action. More specifically, the Bank took these actions 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", and the actions are of the type contemplated by the statute.

Therefore, the Board reverses the Agency's denial of the reimbursement of the Bank's costs for the roller/compaction and nuclear density tests. As earlier discussed, the Agency's denial

of the accompanying handling charges are reversed as well.

Surveying Costs

The $5459.81 in survey costs for which the Agency denied reimbursement were commissioned and paid for by the Bank, not ARDL's engineer, Mr. Gentles. (FFA 214-228.) A Real Estate Plat of Survey and Property Line Agreement was performed by Lawrence A. Lipe and Associates, Consulting Engineers (surveyor). The survey encompassed the Bank site, the DJM property north of the Bank, and property across the alley to the east of the Bank site. Included is a property line agreement between the owners to the east and the Bank. (TF at 172; Agency Br. at 41.)

Ms. Lockhart testified that the Agency did not require surveys,[12] and to her knowledge the Agency had never reimbursed for survey costs. She acknowledged that ARDL appeared to rely on the survey to conduct its corrective action, but that the "physical act of performing a survey is not corrective action" (Tr. at 70). She stated that surveying costs do not meet the first part of the two-part test of corrective action and are thus not reimbursable. (Tr. at 61-70; FFB at 211.)

Mr. Gentiles testified that he was aware of a survey being conducted. The Bank's purpose, to his knowledge, was to find out the true boundaries of the site. Mr. Gentles testified that he had never ordered a survey for any other remediation project, but that he had never before conducted a boundary-to-boundary excavation, adjacent to roads and water and sewer utilities. He asserted that even if the Bank had not commissioned the survey, he still would have done so for this site. He wished to keep the DJM cleanup distinct; the survey assisted in remediation decisionmaking, including the question of off-site remediation; and it was an important tool for addressing safety considerations. (Tr. at 198, 199, 202, 203, 240, 250, 251, 261; TF 55.)

The Agency argued that requesting reimbursement for surveyor costs is analagous to Mr. Gentles' use of the Joint Utility Location Information for Excavators (JULIE) map and the United States Geological Survey (USGS) topographical map; the fact that such documents are used does not make the government's costs reimbursable as corrective action. (The Agency also refers to Mr. Swinney's June 2, 1992 letter, which requested an Agency

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[12] There was considerable discussion as to whether questions on the Agency's reimbursement forms required a survey to properly respond to them. As the Board has earlier held, the Board does not weigh the contents of such Agency documents in reaching its UST determinations. (Russell L. Bacon v. IEPA (December 17, 1992), PCB 92-111.)

sign-off regarding corrective action at the Bank site in order to complete a real estate closing for the DJM site, which was necessary to construct its new building. Ms. Lockhart did not testify about this. The Board will not give weight to this argument for this reason as well as for our reasons expressed earlier - that this letter was not before Ms. Lockhart during her review.) (Agency Br. at 40-43; TF at 79, 80.)

The Bank argues that the survey of the neighboring areas was valuable in remediation decisionmaking. The Bank argued that conducting and relying on the survey were activities that directly related to soil remediation, and as such constituted reimbursable corrective action. (Bank's Br. at 20-22.)

While the Agency's attempt to compare a government map with a privately conducted survey map is off-point, it does articulate, even if indirectly, what concerns the Board.

The record is clear that the Bank, not ARDL, commissioned and paid for the survey. As this opinion earlier states, ARDL was the Bank's engineering firm throughout the clean-up, starting from September 22, 1989. Mr. Gentles testimony leaves no suggestion that the Bank ever even discussed the survey with him, much less what he thought it should consist of. The scope of the survey, which included the boundaries of three properties, surely went beyond the uses articulated by Mr. Gentles. Even if the survey might have been valuable for separate billing purposes related to the cleanup of the two sites, this would not support the argument that the survey constituted corrective action.

We do not dispute that Mr. Gentles made good use of the survey, or that he felt the need to rely on a survey. However, the record persuades the Board that the Bank conducted the survey for other purposes, and was made available to Mr. Gentles in the same manner as would any other useful Bank document. The corrective action needs appear to have played little, if any, role in the rationale for commissioning the survey, including its scope. In so saying, we do not wish to imply that survey costs could not constitute corrective action in another factual situation. Here, however, the nexus between the particular survey undertaking and the corrective action undertaking is unacceptably remote. Under these circumstances the Board concludes, and so finds, that the costs of the survey do not meet the first step of the two-step test. The survey was not "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".

Therefore, the Board affirms the Agency's denial of of reimbursement of the Bank's survey costs.

Costs associated with Seeking Reimbursement from the Fund

The issue related to the denial of reimbursement for the Bank's personnel costs of $1771.25 for preparing the application is not a difficult one to define. Essentially, the question is, do ARDL's costs for preparing reimbursement packages constitute corrective action. The Bank presents essentially two arguments: 1) that it is a costly undertaking because much of the cost is incurred in response to the Agency's format/information requirements and subsequent requests for large amounts of information; and b) that the Agency had been reimbursing these costs since the inception of the reimbursement program, and then abruptly reversed its policy. (Bank's Br. at 23, 24.)

The Agency argues that the notion that reimbursement of costs is somehow associated with what remediation services are to be performed is incorrect. The Agency also contends that, what may be reimbursable from the Fund for documentation costs is not determined on the basis of whether the Agency required it. (Agency Br. at 43-45.)

The Board finds that 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.)

Therefore, the Board affirms the Agency's denial of reimbursement for the Bank's costs associated with seeking UST Fund reimbursement.

CONCLUSION

For the reasons expressed above, the Board affirms the Agency's denial of reimbursement to the Bank for: handling charges in excess of 15%; surveying costs, and costs associated with seeking reimbursement from the Fund. For the reasons expressed above, the Board reverses the Agency's denial of reimbursement to the Bank for: 15% handling charges related to roller/compactor and nuclear density testing costs; 15% handling charges of the contractor/subcontractor; and costs associated with roller/ compaction and nuclear density testing.

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

ORDER

The Board hereby affirms the Agency's September 14, 1992 determination to deny reimbursement to the State Bank of Whittington for:

1) $55.98 in handling charges in excess of 15%. (But see footnote #6.)

2) $5,459.81 in surveying costs.

3) $1,771.25 in personnel costs associated with seeking reimbursement from the Fund.

The Board hereby reverses the Agency's September 14, 1992 determination to deny reimbursement to the State Bank of Whittington for:

1) $1,123.18 in handling charges associated with roller/compactor and nuclear density testing charges.

2) $735.44 for contractor/subcontractor 15% handling charges.

3) $7,050.00 and $3,047.50 in costs associated with roller/compactor and nuclear density testing charges, respectively.

IT IS SO ORDERED

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".)

J. Theodore Meyer concurs

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 3rd day of June, 1993, by a vote of 6-0 .

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board