ILLINOIS POLLUTION CONTROL BOARD
June 2, 1994

MYRTLE LANDWEHRMEIER,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 94-55
	)	(UST Fund)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
	)	
Respondent.	)	

MAURICE DAILEY, DAILEY & WALKER, APPEARED ON BEHALF OF PETITIONER;

GREG RICHARDSON APPEARED ON BEHALF OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY.

OPINION AND ORDER OF THE BOARD (by E. Dunham):

This matter comes before the Board on a petition for review filed by Myrtle Landwehrmeier on February 7, 1994, pursuant to Sections 22.18b(g)[1] and 40 of the Environmental Protection Act (Act). (415 ILCS 5/22.18b(g) & 40 (1992).) The petition seeks review of the denial of reimbursement by the Illinois Environmental Protection Agency (Agency) of $5,562.33 related to handling charges, $895.00 for lack of supporting documentation and $1,110.00 for costs which allegedly do not constitute corrective action. The reimbursement determination concerns the site at 3305 West Chain of Rocks Road in Granite City, Illinois.

A hearing in this matter was held on April 8, 1994, in Granite City, Illinois before hearing officer John Hudspeth. No members of the public attended the hearing. Karl Kaiser, project manager for the Agency and David Wrobel of Environmental Operations, the contractor hired by Ms. Landwehrmeier, testified at hearing. The parties elected to present closing arguments on the record and filed no briefs in this matter. At hearing the parties stated that they had reached a stipulation concerning some of the amounts in dispute. The parties submitted a written stipulation to the Board on April 25, 1994. The stipulation indicates that the parties have resolved all of the costs that were denied due to lack of supporting documentation, $11.24 related to handling charges and $75.00 related to the adjustment in costs that were not corrective action. Based on the stipulation, the issues remaining before the Board are related to handling charges and corrective action.

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[1] Section 22.18b(g) of the Act was repealed in H.B. 300 effective September 13, 1993.

The petitioner states that the only notice of the denial for reimbursement received by the petitioner was the invoice voucher (Rec. at 40) which provides no explanation of the amount of the deductions except the standard deductible. (Tr. at 7.) Therefore, the petitioner argues that until a copy of the record is received there is no way to determine precisely what is objectionable to the Agency. (Tr. at 8.)

In Pulitzer v. IEPA (December 20, 1990), PCB 90-142, the Board held that the Agency's denial of eligibility for the Fund must comport with the requirements of Section 39(a) of the Act. Consequently, an Agency statement denying reimbursement from the Fund on the basis of unreasonable costs must also comply with the dictates of Section 39(a). (Paul Rosman v. IEPA (December 19, 1991), PCB 91-80.) Such information is necessary to satisfy principles of fundamental fairness because the applicant has the burden of proof before the Board to demonstrate that the regulatory and statutory bases for denial are inadequate to support that denial. (Technical Services Co. v. IEPA (November 5, 1981), PCB 81-105.) Therefore, an applicant is entitled to a statement detailing the reasons for denial and the statutory and regulatory support for such denial. (Pulitzer v. IEPA (December 20, 1990), PCB 90-142.)

In this case, the Board must decide if the invoice voucher and attachment are sufficient to inform Ms. Landwehrmeier of the basis of the Agency's denial. The invoice voucher indicates the amounts deducted from the amount requested for reimbursement and references Attachment A for each deduction. Attachment A provides a statement of the reason for the deduction and references the applicable statutory section in support of the reason.

The Board finds that the invoice voucher and attachment minimally satisfies the requirements of Section 39(a) in that it provides the reason for denial and the statutory support for the denial. The Board agrees with petitioner that a more detailed explanation of the charges not allowed and the calculations used to determine the amount deemed to be non-reimbursable would be beneficial. Section 39(a) of the Act requires that the statement of denial from the Agency include

* * *

3. the specific type of information, if any, which the Agency deems the applicant did not provide the Agency and:

4. a statement of specific reasons why the Act and the regulation might not be met if the [reimbursement was] granted. (Emphasis added.)

(415 ILCS 5/39(a) (1992.)

Greater specificity in the denial letter would improve the applicant's ability to determine whether the reimbursement should be appealed and would aid the applicant, the Board and the Agency in perfecting the record once appeal is taken.

Handling Charges

The $5,562.33 not allowed for reimbursement by the Agency represents the difference between the amount Environmental Operations billed for the equipment and the amount calculated by the Agency for use of the equipment based on the actual invoice plus a handling charge of 15%. There is also a discrepancy between the number of days billed by Environmental Operations for some pieces of equipment and the number of days shown on the invoices from the rental company.

Environmental Operations charged the time and material rate for the use of the various pieces of equipment. (Tr. at 31.) This is the rate that the company has determined to be a standard rate and lists that rate on a time and material schedule. (Tr. at 31.) The company considers this to be a competitive rate. (Tr. at 32.) These charges include costs of overhead, insurance, technical experience for use of equipment and profit. (Tr. at 45.) Concerning the discrepancy in the days that some of the equipment was used, Environmental Operations contends that it received a bonus of one free day from the renter of the equipment as an incentive for future business. (Tr. at 37.) Environmental Operations contends that the reimbursement should be for its usual and customary rate, which is reflected in the billings submitted to the Agency. (Tr. at 82.)

Based on the rental invoices, the Agency determined the cost of renting the equipment and then added a 15% markup. (Tr. at 60.) The Agency only allowed for the actual cost of renting the equipment on a daily basis. The Agency maintains that the 15% is a standard percent that the Agency allows for markup on equipment charges or materials that are purchased. (Tr. at 14.) The Agency views the difference between the rental invoice and the amount billed by Environmental Operations to be profit and argues that this represents an excessive charge. (Tr. at 82.)

The Board has, on at least three occasions, addressed the issue of the Agency's reduction of handling charges in excess of 15%. In all three cases the Board affirmed the Agency's reduction of handling charges to 15% of the total subcontractor cost or field purchase. In each case, the Board weighed the evidence offered by the petitioner during the UST appeal hearing to determine whether the handling charges were "reasonable as submitted," and concluded the petitioner failed to demonstrate that the requested handling charge was reasonable. The Board affirmed the Agency's downward adjustment of three separate handling charges of 46.4%, 46% and 16%, to a flat 15% in State

Bank of Whittington v. IEPA (June 3, 1993) PCB 92-152, the Agency's handling charge reduction from 58% to 15% in Beverly Malkey v. IEPA (March 11, 1993), PCB 92-104, and the Agency's adjustment to 15%, disallowing $2821.76 in handling charges, in Platolene 500, Inc. v. IEPA (May 7, 1992), PCB 92-9.

In addition, the Act has been amended to limit the amount of handling charges. Effective September 18, 1992, P.A. 87-1171, amended Section 22.18b(i)(2) and created a sliding scale of the percent allowable for a handling charge. Subcontract or field purchases of $5,000 and under will have handling charges reimbursed at a rate of 12%, and costs in excess of $5,000 will have handling charges reimbursed at a percent which decreases as the costs increase.[2] While new Section 22.18b(i)(2) is not directly applicable to this case because the effective date is several months subsequent to the petitioner filing the reimbursement application, the Board is persuaded that new Section 22.18b(i)(2) reflects a prevailing belief, at least in the legislature, that handling charges within the 12% and under range are acceptable.

The Third District Appellate Court of Illinois recently held, in an unpublished opinion, that the Board's reliance on the Agency's 15% limitation on handling charges constituted reliance on a standard which the Agency improperly promulgated. (Chuck and Dan's Auto Service v. IEPA (No. 3-93-0751 May 19, 1993), PCB 92-203.) In that case, however, "...the Agency stipulated that [the contractor's] invoices contained reasonable charges, including handling charges." (p. 7). In Landwehrmeier, there is no stipulation as to the reasonableness of the charges billed by Environmental Operations. Where there is a dispute whether

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

i.1. For purposes of this Section, "handling charge" means administrative, insurance, and interest costs and a reasonable profit or procurement, oversight, and payment of subcontracts and field purchases.

2. Handling charges are eligible for payment only if they are equal to or less than the following amounts:

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

charges are reasonable, the Board must make a *de novo* review of the record before the Agency.

Given the legislature's intent to limit future cases to 12% or less for handling charges, the Board holds that the use of 15% is perhaps slightly generous, but not unreasonable in this case.

Section 22.18b(d)(4) of the Act requires the applicant to show that the costs incurred were reasonable. Environmental Operations has not persuaded the Board that the facts in this case are such that handling charges in excess of 15% are reasonable. While Environmental Operations claims that the billings represent usual and customary charges that are competitive with the charges in the area, they have not provided any evidence to substantiate this claim. Specifically, Environmental Operations failed to explain how its equipment fees are reasonable and competitive in the marketplace. Environmental Operations stated that the rates that they charge are flat rates, regardless of the rate paid to the rental outlet that provided the equipment. Mr. Wrobel of Environmental Operations stated that: "As a matter of fact, in the wintertime we sometimes get a 50 percent discount because the equipment is not being used." (Tr. at 47) In this case, that discount was realized by Environmental Operations, but the State UST Fund is asked to pay at the flat, fixed rate charged by Environmental Operations. Accordingly, the record does not support a finding that the charges by Environmental Operations are reasonable.

The Board finds that the Agency's use of a 15% handling charge on the actual charge for the rental of the equipment is reasonable based on the record in this case. Therefore, the Board affirms the Agency's adjustment to these charges and the Agency's denial of reimbursement of $5,551.09[3] related to this adjustment.

Corrective Action

The Agency deducted $1,035.00 for items that were not considered to be corrective action. This amount was the charge for the hauling and disposal of concrete. The charge for hauling away the concrete was $900.00 plus a 15% handling charge for a total of $1,035.00. (Tr. at 68.)

The Agency contends that the concrete constitutes clean debris and would not have to be transported to a landfill. (Tr. at 25.) The Agency contends that such material could be used as backfill. (Tr. at 25.) Therefore, the Agency argues that the

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[3] The amount of $5,551.09 represents the $5,562.33 denied by the Agency less $11.24 which the parties reached an agreement on in the stipulation.

hauling of the concrete is not corrective action because it was not part of the efforts to minimize the effects of the release at the site. (Tr. at 25.) While the Agency states that it is up to the owner/operator and its consultant to do what they feel is necessary with the clean debris, (Tr. at 72) the Agency contends that landfilling the concrete was overkill because the debris could have been used for fill. (Tr. at 81.) Environmental Operations contends that the removal of the concrete was necessary to access the tanks and once the concrete is broken up it must either be removed from the site or piled up to be handled at a later date. (Tr. at 82.)

When reviewing reimbursement determinations the proper standard of review is to apply the statutory definition of corrective action. (Platolene 500, Inc. v. IEPA (May 7, 1992), PCB 92-9.) Corrective action is defined in Section 22.18(e)(1)(C) of the Act as:

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

Removal of concrete has been reimbursed by the Agency. (Warren's Service v. IEPA (June 4, 1992), PCB 92-22.) The removal of concrete satisfies the definition of corrective action because in most cases, it is necessary to access the leaking tank and the contaminated soil to perform remediation. Therefore, the removal of concrete is an integral part of the remediation operation. Since the removed concrete must be properly disposed, the Board views the disposal of the concrete as part of the remediation process.

The Agency argues that it was "overkill" to landfill the concrete and that the concrete could have been used as fill. The Board recognizes that the contractor had several options for the disposal or reuse of the concrete. However, the Agency has failed to show how the landfilling of the concrete in this case was unreasonable or contrary to any statutory provision. Therefore, the Board finds that the cost of the disposal of concrete were costs incurred as a part of corrective action and should be reimbursed.

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

ORDER

For the reasons stated herein, the Board affirms the Agency's denial of excessive handling charges in the amount of $5,551.09 and reverses the Agency's denial of reimbursement of costs for the disposal of concrete in the amount of $1,035.00. The Agency is hereby ordered to reimburse Ms. Landwehrmeier for the disposal of concrete.

IT IS SO ORDERED.

C. Manning concurred.

Section 41 of the Environmental Protection Act, (415 ILCS 5/41 (1992)), provides for appeal of final orders of the Board within 35 days of the date of service of this order. The Rules of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill. Adm. Code 101.246, Motion for Reconsideration.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 2nd day of June, 1994, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board