ILLINOIS POLLUTION CONTROL BOARD
June 4, 1992

ENTERPRISE LEASING COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 91-174
	)	(Underground Storage
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	Tank Fund)
	)	
Respondent.	)	

ORDER OF THE BOARD (by J. Theodore Meyer):

This matter is before the Board on the Illinois Environmental Protection Agency's (Agency) May 18, 1992 motion for reconsideration. The Agency asks the Board to reconsider its April 9, 1992 decision in this appeal. Enterprise Leasing Company (Enterprise) filed its response to the Agency motion on May 28, 1992. The Board grants reconsideration so that it can clarify its April 9 decision and respond to the Agency's arguments.

The Agency seeks reconsideration of the Board's April 9 decision that $27,871.68 for costs associated with tank removal is reimbursable by the Underground Storage Tank Fund. The Agency contends that the Board's decision in this case is inconsistent with its prior decision in Rosman v. Illinois Environmental Protection Agency (December 19, 1991), PCB 91-80. Additionally, the Agency argues that the tank removal in this case does not constitute "corrective action" under the statute. (Ill.Rev.Stat. 1989, ch. 111 ½, par. 1022.18(e)(1(C).) Enterprise responds in opposition to the Agency's motion, contending that the Board's April 9 decision correctly focused on whether the tank removal costs met the statutory definition. Enterprise maintains that those costs do meet the definition of "corrective action".

As stated in our April 9 decision, the Board believes that the Agency has read the decision in Rosman too narrowly. Rosman turns on whether the tank removal met the statutory definition of "corrective action", and that is the inquiry which was the focus of the April 9 decision in this case. However, the Agency continues to focus instead on other language in the Rosman opinion, which is included in the discussion of tank removal as corrective action. As the Board stated in our April 9 decision, the inclusion of the statement in Rosman that tank removal is corrective action only when in response to a preidentified release was erroneous. The Agency's interpretation ignores the Board's statement in Rosman that:

> [w]hile the Agency equates costs which are not related to corrective action with a "planned removal", we fail to see the correlation. Simply because a tank removal is planned does not rule out the possibility of corrective action.
> (Rosman at 7.)

As the Board stated on April 9, the heart of the inquiry in Rosman was whether the tank removal constituted "corrective action". That was the focus of the Board's determination in this case. The fact that the result in Rosman was different than the result in this case does not mean that the cases are inconsistent.

The Agency also contends that Enterprise's removal of its tanks did not constitute corrective action under the statute. The Agency argues that Enterprise's actions fail the first part of the two-step test: whether the actions were for the purpose of stopping, minimizing, eliminating, or cleaning up a release of petroleum. The Agency maintains that because Enterprise had planned on removing the tanks, the tank removal costs fail that test. Although the Agency recognizes that Enterprise undertook other remedial activities after discovering a release, the Agency asserts that it was never supplied with a breakdown of costs associated with remedial activities (as opposed to strict tank removal costs) prior to the Agency's final decision on August 15, 1991.

The Board rejects the Agency's claims. First, the Agency continues to argue that because Enterprise had planned on removing the tanks, the tank removal costs do not meet the first test under the definition of corrective action. This argument ignores the Board's previous finding, both in Rosman and in this case, that simply because a tank removal is planned does not exclude the possibility of that removal meeting the definition. The Agency's argument is circular: despite the Board's holding that a tank removal may constitute corrective action even if it is planned, the Agency continues to assert, without more, that the Board's decision was wrong because a planned tank removal cannot constitute corrective action.

Second, the Agency's contention that it was not supplied with a breakdown of costs of remedial activities prior to its final decision on August 15, 1991, is simply not true. In fact, the Agency itself noted in its initial brief that it requested a further breakdown of costs on June 6, 1991, that it waited until August 1, 1991 for a response to that request, that it sent a voucher to the Comptroller's office on August 8, 1991, and that it received Enterprise's response to the request on August 9, 1991. The Agency stated that it did not consider this response because the voucher had already been sent to the Comptroller's office. On August 15, 1991, the Agency sent a letter to

Enterprise informing it of the Agency's decision on the application for reimbursement. This chronology is included in the Agency's brief (Br.at 3), and was testified to at hearing by Julie Hollis, an Agency employee. (Tr. at 95-97.) For the Agency to now assert that it did not receive a reply to its request for additional information until after August 15, 1991 is untrue and inconsistent with the Agency's previous testimony and arguments in this case. Although this misstatement does not have great bearing on the outcome of this case, the Board is nevertheless concerned by the representation.[1]

The Board reaffirms its April 9, 1992 decision that $27,871.68 for costs associated with tank removal is reimbursable by the Underground Storage Tank Fund.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 4th day of June, 1992, by a vote of 7-0.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

[1] The Board is also concerned with the propriety of the Agency's refusal to consider information it received before it issued its final decision on August 15, 1991. If the Agency's decision cannot be changed after the voucher is sent to the Comptroller's office, the voucher should not be sent until after the Agency's letter is written.