

ILLINOIS POLLUTION CONTROL BOARD
April 23, 1992

EXPORT PACKAGING CO., INC.,)	
)	
Petitioner,)	
)	
v.)	PCB 91-203
)	(Underground Storage
ILLINOIS ENVIRONMENTAL)	Tank Reimbursement)
PROTECTION AGENCY,)	
)	
Respondent.)	

DAVE COOPMAN APPEARED PRO SE.

RONALD SCHALLAWITZ APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by M. Nardulli):

This matter is before the Board on the October 28, 1991 petition for review filed by petitioner Export Packaging Co., Inc. (Export). Export seeks review pursuant to Section 22.18b(g) of the Environmental Protection Act (Act) of the Illinois Environmental Protection Agency's (Agency) October 2, 1991 decision denying reimbursement from the Underground Storage Tank Fund (UST Fund) for certain costs associated with leaking USTs. A hearing was held on January 22, 1992 in Rock Island, Rock Island County, Illinois, at which one member of the public attended.

FACTS

Export packages service parts, production components and agricultural machines for export. (R. A¹ at 82-83.) On August 7 and 8, 1990, eight USTs were removed from Export's Moline, Illinois facility in the presence of an employee of the Office of State Fire Marshal (Fire Marshal). (R. A at 83.) Three USTs were located on one site and five USTs were located in another site on the same parcel of property. (R. A at 58; R. B at 157.) A release was discovered and proper notification was given to the Emergency Services and Disaster Agency (now called the Emergency Management Agency). (R. A at 83.) On October 11, 1990 all remedial work required by the Agency was completed. (R. A at 83.) On November 23, 1990, Export submitted its application for reimbursement. (R. A at 23-35.) On January 24, 1991, the Agency informed Export that corrective action associated with the five-tank site was not eligible for reimbursement because none of

¹ "R. A at ____" refers to Book A of the Agency record and "R. B at ____" refers to Book B of the Agency record.

these tanks had been registered with the Fire Marshal. (R. A at 88.) However, corrective action associated with the three-tank site was reimbursable subject to a \$10,000 deductible. (R. A at 88.)

On July 3, 1991, the Agency requested more information regarding the three-tank site. (R. A at 90-91.) On July 30, 1991, Export responded with information regarding the sizes of the three-tank and five-tank sites and costs associated with the sites. (R. A at 65-72.) On October 2, 1991, the Agency notified Export that of the \$46,693.91 claimed corrective action costs, \$28,101.34 would not be reimbursed because these costs were associated with the five-tank excavation. (R. A at 94-96.) After applying the \$10,000 deductible, the Agency issued a voucher for \$8,592.57 to Export. (R. A at 78, 94.)

On October 28, 1991, Export filed its petition for review challenging the amount of reimbursed corrective action costs. (R. A at 82-86.)

DISCUSSION

Section 22.18b(d)(4)(C) requires that the applicant seeking reimbursement from the Fund shall provide an accounting of all corrective action costs and demonstrate that the costs are reasonable. (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1022.18b(d)(4)(C).) Here, the question of which costs are reimbursable stems from the fact that at the time excavation and clean up were performed, Export believed both the five-tank site and three-tank site would be eligible for reimbursement. Hence, Export did not keep separate records of the corrective action costs. Export does not challenge the Agency's determination that the five-tank site is ineligible for reimbursement or the application of the \$10,000 deductible. Export also agrees that the corrective action costs of the two sites must be apportioned. However, in apportioning the costs, the parties have arrived at different conclusions as to the amount to be reimbursed. Export contends that it is entitled to a reimbursement of \$16,459 (R. A at 116) compared to the \$8,592.57 reimbursed by the Agency (R. A at 78, 94.) Therefore, the sole issue on appeal is whether the amount of corrective action costs reimbursed by the Agency is correct.

The Agency's final decision on Export's claim for reimbursement states that the following costs are ineligible:

1. \$26,551.34 for subcontractor costs associated with the five tank excavation.
2. \$1,550.00 for personnel costs associated with the five tank excavation. (R. A at 96.)

The record establishes that Export does not challenge the Agency's determination that \$1,550 for personnel costs are not reimbursable. (Tr. 53-55, 83-84, 115.) The parties do not agree on reimbursement of subcontractor costs for excavating, disposing and backfilling the three-tank site.

The record establishes that the truck logs from River City Excavating indicate that a total of 1,156 cubic yards of soil were removed from both sites and that BFI's logs indicate it received a total of 1,156 cubic yards of soil for disposal. (R. A at 98-101, 104-106, 125; Tr. 26, 28, 73, 74, 102.) The record also establishes that the Jo-Harry Inc. backfilled 1,016 cubic yards of sand for both sites. (R. A at 108; Pet. Ex. 1; Tr. 75) Mr. Coopman, vice president of marketing at Export testified as to how Export arrived at the amount of corrective action costs associated with the three-tank site. (Tr. 19-33.) In an attempt to apportion the costs, Export extrapolated from these total amounts to arrive at the costs associated with the three-tank site. (Tr. 23-27; 102.) Based upon the River City and BFI logs, Export calculated that 712 cubic yards were removed from the three-tank site. (R. A at 116; Tr. 23-24.) Extrapolating from the total amount backfilled by Jo-Harry Inc., Export calculated that 516 cubic yards were backfilled into the three-tank site. (R. A at 108, 116; Tr. 24-25, 28.) Coopman testified that "there is a problem, an obvious difference between the actual and the calculated excavation sizes." (Tr. 33.)

Mr. Kyle Rominger, Agency LUST project manager, testified that he performed a technical review of the bills submitted for reimbursement by Export. (Tr. 65.) In attempting to apportion costs between the two sites so that the five-tank site costs could be deducted, Rominger saw a discrepancy in the total volume hauled from both sites and the size of each site. (Tr. 69.) Based upon drawings submitted by Export, Rominger calculated the size of each site. (Tr. 71; R. A at 117, 121-22.) Rominger calculated the size of the three-tank site to be 786 cubic yards and the five-tank site to be 1,061 cubic yards². (Tr. 75; R. A at 117.) Rominger's calculation of a total of 1,847 cubic yards did not agree with the amount of 1,156 cubic yards hauled away by River City and disposed by BFI, the 1,016 cubic yards filled by Jo-Harry, Inc. (Tr. 75) or the 2,062 total cubic yards calculated by Export in its letter of July 30, 1991 (R. A at 65.). Because the cubic yard figures did not agree, Rominger determined the eligible costs on the basis that three tanks out of eight were

² The Agency admitted at hearing that it had mistakenly calculated the size of the five-tank site to be 3,467 cubic yards (R. 117, 122) when the correct calculation is 1,061 cubic yards. (Tr. 74-75.)

eligible for reimbursement.³ (Tr. 79, 83.) Consequently, 37.5% of the total costs attributed to River City, BFI and Jo-Harry were deemed reimbursable by the Agency. (Tr. 82, 84, 91; R. a at 80; Resp. Ex. 1.) Regarding the ALEX lab fees, Rominger determined that nine tests attributable to the three-tank site at \$120 each were reimbursable. (Tr. 82, 85-86; R. A at 80; Resp. Ex. 1.) Rominger also deducted \$450 from the Alex fees because that amount had already been included in the charge by BFI. (Tr. 82, 85, 88.) Export establishes that it expended \$46,693 for both sites. (Tr. 89.) After subtracting the amount of \$38,101.35 associated with the five-tank site (R. A at 80; Resp. Ex. 1) and the \$10,000 deductible, the Agency determined that Export should be reimbursed \$8,592.57. (Tr. 89; R. A at 78, 94-95.)

The Board concludes that Export failed to demonstrate that its accounting of costs associated with the three-tank site is reasonable. (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1022.18b(d)(4)(C).) The Board's review of the record establishes that Export was unable to explain the inconsistencies which led the Agency to apply a calculation method based upon the number of reimbursable tanks over the total number of tanks. The method of apportioning costs employed by the Agency is reasonable in light of the inconsistencies in Export's claim for reimbursement. Therefore, the Agency's decision is affirmed.

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

ORDER

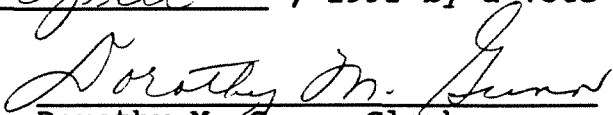
The Agency's decision reimbursing Export Packaging Co., Inc. \$8,592.67 for corrective action costs is affirmed.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1041) provides for the appeal of final Board orders within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

³ The Agency also considered apportioning costs on the basis of tank volume so that 33.3% of the total costs would be reimbursed. (Tr. 91; R. 118.) This method was rejected in favor of reimbursing 37.5% of the total costs. (Tr. 91.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 23rd day of April, 1992 by a vote of 7-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board