ILLINOIS POLLUTION CONTROL BOARD
December 19, 1991

PAUL ROSMAN,	)	
	)	
Petitioner,	)	
	)	PCB 91-80
v.	)	(UST Reimbursement Determination)
	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

R. DELACY PETERS, JR., JONES, WARE & GRENARD APPEARED ON BEHALF OF THE PETITIONER, and

RONALD L. SCHALLAWITZ APPEARED ON BEHALF OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY.

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

This matter is before the Board on a petition for review filed on May 13, 1991 by Paul Rosman ("Rosman") pursuant to Section 22.18b(g) of the Environmental Protection Act ("Act") seeking review of the Illinois Environmental Protection Agency's ("Agency") denial of certain costs in regards to Rosman's application for reimbursement from the Underground Storage Tank Fund ("Fund"). Hearing was held on September 5, 1991 in Chicago, Illinois.

FACTS

Rosman owned and operated a gasoline dispensing station for 38 years, until 1986. From 1986 until 1989, Rosman leased the station. The station was eventually sold in November of 1990 after at least two potential sales failed to close (Tr. at 30.) The record states that the underground storage tanks ("USTs") were pulled on December 13, 1989 as a result of a contract and offer pending as of October 31, 1989. (R. at 19-23.) Subsequent to the removal of the tanks, the contractor informed Rosman that a release of petroleum had occurred.

As a result of this information, Rosman notified the Emergency Services and Disaster Agency (ESDA) and initiated a full-scale cleanup. The total remediation costs incurred by Rosman amounted to $107,638.82. (R. at 63.) On August 13, 1990, Rosman filed his application for reimbursement with the Agency. On September 7, 1990 the Agency notified Rosman he was eligible for reimbursement from the Fund and, further, his deductible was $10,000. (R. at 41.) This letter indicated that the eligibility determination and the appropriate deductible were based on a review of the application for reimbursement only. The letter stated that "the corrective action costs will be reviewed separately to

determine if they are allowable". (R. at 41.)

On April 10, 1991, the Agency sent Rosman a letter stating that it had "completed its review of the claim for reimbursement of corrective action costs from the Illinois Underground Storage Tank Fund". (R. at 63.) Noting that the total sum of the invoices presented by Rosman amounted to $107,638.62, the Agency reimbursed $92,550.42. In arriving at this amount, the Agency subtracted the $10,000 deductible, $500 for charges incurred prior to the notification of ESDA, and $4,588.40 for the initial tank removal costs. In regards to the tank removal, the Agency stated that the owner failed to provide a demonstration that the costs were reasonable as submitted and cited Section 22.18b(d)(4)(C) of the Act [Ill. Rev. Stat. 1989, ch. 111-1/2, par. 1022.18b(d)(4)(C)] as its authority.

On May 13, 1991, Rosman appealed the Agency's decision. The case was accepted by the Board and hearing was held on September 5, 1991 in Chicago, Illinois.

At hearing, Rosman testified that he solicited several bids and received four estimates, three of which were substantially higher than the actual expenditure ultimately made. (Tr. at 23-25.) Accordingly, Rosman contends that his actions surrounding the removal of the tanks were reasonable and, therefore, recoverable under Section 22.18b(d)(4)(C) of the Act. Given the language and the statutory citation of Section 22.18b(d)(4)(C) within the Agency's April 10, 1991 letter, Rosman alleges this is all he need prove in order to be entitled to reimbursement.

The Agency, on the other hand, maintains that the "reasonable" test in 22.18b(d)(4)(C) consists of two stages. First, the Agency must consider whether the money was spent in relation to corrective action. Second, there must be an assessment of whether those costs were reasonable. This test is admittedly an Agency interpretation. (Tr. at 13.)

In the case at bar, the Agency attempted to prove that Rosman's removal of the tanks did not meet the definition of corrective action and were therefore non-reimbursable. On cross-examination of Rosman, for example, counsel for the Agency sought to establish that Rosman had removed the tanks pursuant to a real estate contract. The petitioner objected on relevancy grounds and the objection was sustained. Regardless of the ruling, however, the record clearly states that Rosman removed the tanks due to a pending real estate contract. (R. at 19-24.) The Board will therefore consider this information.

As its only witness, the Agency put on Christopher L. Nifong, an Agency employee who was responsible for reviewing the costs of Rosman's application. Mr. Nifong testified that Rosman was not reimbursed for his tank removal because the expenditures were not

associated with corrective action. (Tr. at 86.) However, petitioner's counsel made a motion to strike this testimony, which the hearing officer granted. (Tr. at 104.) The hearing officer held that the "testimony that has been elicited regarding the fact that the Agency's decision was based upon the fact that this was a planned removal is not relevant to the Agency's determination that the costs in the amount of $4,588.40 were not reasonable. So I am going to grant the motion to strike." (Tr. at 104.) Consequently, the Agency was left with no witness, but merely an offer of proof.

DISCUSSION

Our initial inquiry is whether the hearing officer's determination to strike Mr. Nifong's testimony was correct. In spite of the fact that the Agency offered no reason or authority for reversing the hearing officer[1], we will do so today. In support thereof, we look to our enforcement rules found at 35 Ill. Adm. Code 103.204 (a) and (b).

> a) The Hearing Officer shall receive evidence which is admissible under the rules of evidence as applied in the Courts of Illinois pertaining to civil actions except as these rules otherwise provide. The Hearing Officer may receive evidence which is material, relevant, and would be relied upon by reasonably prudent persons in the conduct of serious affairs provided that the rules relating to privileged communications and privileged topics shall be observed.
>
> b) When the admissibility of evidence depends upon an arguable interpretation of substantive law, the Hearing Officer shall admit such evidence.

In view of these two provisions, we hold today that the testimony of Mr. Nifong should have been admitted. In supporting the Agency's assertion that costs which are unrelated to corrective action are not reimbursable, a reasonably prudent person would have considered the testimony of the employee who conducted the review, especially if the basis of that reasoning (as is the case here) is contained within the record. Accordingly, we find the Agency's interpretation to be relevant. Moreover, the controversy in the instant case is centered on an "arguable interpretation of substantive law" pursuant to subsection (b). Consequently, the

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[1]The Agency argued that the issue of whether the testimony should be stricken was a factual assessment (Resp. Br. at 5), when in fact, it is purely of a legal nature.

hearing officer should have admitted the evidence.

Having established that Mr. Nifong's testimony should have been admitted pursuant to our rules governing admissible evidence, we now turn to the issue of whether the Agency's 39(a) letter was sufficient so as to conform to the principles of fundamental fairness. In doing so, we stress that the admissibility of evidence and the adequacy of a 39(a) letter are separate issues. For example, the transcript indicates that the hearing officer struck Mr. Nifong's testimony because it did not relate to the denial letter. (Tr. at 133-134.) However, the purpose of a 39(a) letter is to frame the issues on appeal whereas the purpose of 35 Ill. Adm. Code Section 103.204 relates solely to the admissibility of evidence. We can envision circumstances where evidence should be admitted pursuant to our rules but cannot be considered due to principles of fundamental fairness.

Therefore, our next inquiry is whether the Agency's 39(a) letter is sufficient to conform to the precepts of fundamental fairness. In Pulitzer v. IEPA, PCB 90-142 (December 20, 1990), we 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). Such information is necessary to satisfy principles of fundamental fairness because it is the applicant who 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, PCB 81-105 (November 5, 1981). For that reason, an applicant seeking reimbursement from the Fund is entitled to a statement detailing the reasons for denial and the statutory and regulatory support for such denial. Pulitzer v. IEPA, PCB 90-142 at 6, (December 20, 1990).

In Pulitzer, we also stated that:

> Pursuant to Section 39(a) of the Act, where the Agency has determined that permit denial[2] is warranted, the denial statement constitutes the Agency's "final action". Principles of fundamental fairness require that an applicant be given notice of the statutory and regulatory bases for denial of an application of reimbursement and that the Agency be bound on review by those cited bases for denial given in its denial statement. Fundamental fairness would be violated if the Agency were free to cite additional statutory

[2]For purposes of 39(a), a "permit denial" is akin to denial of reimbursement.

> and regulatory reasons for denial for the first time at the Board hearing. The Board concludes that the Agency cannot rely upon those regulations not previously cited in the denial letter as support for its denial of Pulitzer's application for reimbursement.

PCB 90-142 at 7, (October 20, 1990). (Emphasis added.)

Thus we must decide whether the Agency's 39(a) letter is sufficient to inform Rosman of the basis of the Agency's denial. The Agency's letter in pertinent part, states:

> The Agency has completed the review of the claim for reimbursement of corrective action costs from the Illinois Underground Storage Tank Fund. The invoices reviewed covered the period from November 17, 1989 through May 5, 1990. The total amount represented by the above invoices came to $107,637.82.
>
> The deductible amount to be assessed on this claim is $10,000.00, which is being deducted from this payment.
>
> Listed below are costs which are not being reimbursed, including the reason these costs are not being reimbursed.
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> 1. $500.00 for charges incurred prior to the notification made to the Illinois Emergency Services and Disaster Agency. (Ill. Rev. Stat. 1989, Chap. 111-1/2, Para. 1022.18b(d)(4)(D)).
>
> 2. $4,588.40 for an adjustment in tank removal costs. The owner or operator failed to provide a demonstration that the costs were reasonable as submitted. (Ill. Rev. Stat. 1989, Chap. 111-1/2, Para. 1022.18b(d)(4)(C)).

(R. at 63, emphasis added.)

Rosman does not dispute the pre-ESDA costs[3] but maintains that the costs of the tank removal were reasonable pursuant to Section 22.18b(d)(4)(C) of the Act. Section 22.18b(d)(4)(C) states:

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[3]Upon review of the record, the Board notes that the $4,588.40 removal expenditure was incurred on December 13, 1989 - two days prior to the ESDA notification. (Tr. at 96, R. at 62, 74, 75.) On this basis alone, the costs are not reimbursable pursuant to North Suburban Development v. IEPA, PCB 90-109 (December 6 & 19, 1991).

> ...The owner or operator provided an accounting of all costs, demonstrated the costs to be reasonable and provided either proof of payment of such costs or demonstrated the financial need for joint payment to the owner or operator and the owner's or operator's contractor in order to pay such costs...

(Emphasis added.)

Based on the provision cited by the Agency, Rosman maintains that the cost of the tank removal is reasonable in that four estimates were received and Rosman used the lowest bid. Conversely, the Agency asserts that the costs are inherently unreasonable because they are outside the scope of corrective action. For the following reasons, we find that the Agency's argument does not violate the principles of fundamental fairness.

It is well-settled that the information in the denial statement frames the issues on review. Centralia v. IEPA, PCB 89-170 at 6 (May 10, 1990); City of Metropolis v. IEPA, PCB 90-8 (February 22, 1990). As mentioned above, this information is necessary because the burden of proof is on the petitioner to prove that the Agency's denial reason was insufficient to warrant affirmation. If the petitioner is unaware of the issues, the proceeding would be fundamentally unfair. In the instant case, the Agency did not categorically state that reimbursement was being disallowed because the tank removal did not constitute corrective action.

Yet the Agency's September 7, 1990 letter granting Rosman's eligibility stated that "(t)he above decision is based on a review of the Application for Reimbursement only, the corrective action costs will be reviewed separately to determine if they are allowable." (R. at 41, emphasis added.) Further, the denial letter of April 10, 1991 stated that "(t)he Agency has completed the review of the claim of reimbursement of corrective action costs..." (R. at 63, emphasis added.) Finally, the reimbursement form which Rosman or his agent filled out is entitled "Reimbursement for UST Correction Action Costs". We find that a sufficient nexus exists between reasonable costs as articulated in Section 22.18b(d)(4)(C) and costs associated with corrective action. We also note that the Agency did not cite additional statutory or regulatory bases for its denial, but instead attempted to define the scope of what is "reasonable". Accordingly, we find that the Agency's denial letter, although poorly articulated, is not fundamentally unfair.

There is little doubt that the denial letter could have been framed more precisely. The Agency could have simply cited 22.18b et. seq., and stated that the costs were unreasonable as submitted

because they were unrelated to corrective action. A quick review of the statute reveals many sections which state that only corrective action costs can be reimbursed. (See, e.g., Sections 22.18b, 22.18b(b), 22.18b(c), 22.18b(d)(2), 22.18b(d)(3)(D), 22.18b(d)(3)(E).) Additionally, the Agency could have cited the definition of corrective action. However, the Board does not find that the Agency's failure to be more specific resulted in a denial of fundamental fairness. Therefore, we hold today that the Agency's denial letter comports with the dictates of Section 39(a).

Our final inquiry remains an assessment of the Agency's central argument; namely, whether the removal of the tanks did not constitute corrective action. While 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. Instead, the relevant inquiry is whether a tank removal always constitutes corrective action. We hold today that it does not. Corrective action is defined within 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 investigation, mitigation of fire and safety hazards, tank removal, soil remediation, hydrogeological investigations, free product removal, groundwater remediation and monitoring, exposure assessments, the temporary or permanent relocation of residents and the provision of alternate water supplies.

Ill. Rev. Stat. 1989, ch. 111-1/2, par 22.18(e)(1)(C).

In the case at bar, Rosman, by his own admission[4], removed the tanks due to a pending real estate contract. This is not an action to "stop, minimize or eliminate...a release of petroleum". Irrespective of the existence of the Fund, Rosman would have removed his tanks in order to sell the property. Had he removed the tanks and found no release, he would not have been reimbursed. We find today that the only way tank removal can be classified as corrective action is if that removal was undertaken in response to a preidentified release. Because Rosman's activity in the instant case does not meet this standard, it follows that his tank removal does not comprise corrective action.

In making this determination, we recognize that "corrective

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[4]Although Rosman did not fill out his application to the Fund personally, his agent did and he signed it. (Tr. at 27.)

action" includes "tank removal" by statutory definition. Reading the entire definition in context, however, it is clear that tank removal, release investigation or those other specified activities found within the definition must be an action to "stop, minimize, eliminate or clean up a release of petroleum..." In this case, the evidence demonstrates that Rosman's removal of the tanks was not for this purpose. Rather, the tanks were removed in order to expedite a real estate transaction. Accordingly, we find merit in the Agency's argument and hold today that a tank removal does not, in and,of itself, always constitute corrective action.

ORDER

For the reasons stated herein, the April 10, 1991 decision of the Agency denying Rosman's tank removal costs ($4,588.40) is hereby affirmed.

IT IS SO ORDERED.

Board Members J. Anderson and B. Forcade concurred.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1989 ch. 111-1/2, par. 1041, provides for appeal of Final Orders of the Board within 35 days. The rules of the Supreme Court of Illinois establish filing requirements.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 19th day of December, 1991 by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board