

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE PETROLEUM TANK RELEASE COMPENSATION BOARD

In the Matter of Proposed
Adoption of Rules Relating to
the Petroleum Tank Release
Compensation Board.

REPORT OF THE
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Phyllis A. Reha on January 27, 1995, at 9:00 a.m. in the Capitol Ballroom of the St. Paul Radisson Hotel, 11 East Kellogg Boulevard, St. Paul, Minnesota.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20, to hear public comment, to determine whether the Minnesota Petroleum Tank Release Compensation Board (Board) has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of the rules, whether the proposed rules are needed and reasonable and whether or not modifications to the rules proposed by the Board after initial publication are impermissible, substantial changes.

Prentiss Cox, Assistant Attorney General, Suite 200, 520 Lafayette Road, St. Paul, Minnesota 55155, appeared on behalf of the Board at the hearing. Shawn Hooper, Executive Director of the Board; Peter Bratsch, Analyst; Robin Hanson, Petrofund Analyst; John Houck, Petrofund Engineer; Mary Binell, Task Force Member; and John Viea, Task Force Member, appeared on behalf of the Board.

The Board published a dual notice, which allowed for a hearing only if an adequate number of persons requested such a hearing. Over twenty-five persons requested a hearing in this matter. Ninety persons attended the hearing. Eighty-four persons signed the hearing register. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the adoption of these rules. The Administrative Law Judge received 24 written comments on the proposed rules during the posthearing public comment period, ending on February 16, 1995, as established at the hearing. The Board submitted a letter and attached memorandum to the Administrative Law Judge on February 16, 1995. The Board submitted a reply comment on February 24, 1995. The five working-day response period authorized by Minn.Stat. § 14.15, subd.1, ended on February 24, 1995 when the record of this proceeding closed.

The Board must wait at least five working days before it takes any final action on the rules; during that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Board of actions which will correct the defects and the Board may not adopt the rule until the Chief Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Board may adopt the Chief Administrative Law Judge's suggested actions to cure the defects. In the alternative, if the Board does not elect to adopt the suggested actions, it must submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

If the Board elects to adopt the suggested actions of the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, then the Board may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Board makes changes in the rule other than those suggested by the Administrative Law Judge and Chief Administrative Law Judge, then it shall submit the rule, with the complete hearing record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

When the Board files the rule with the Secretary of State, it shall give notice on the day of filing to all persons who requested that they be informed of the filing.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On November 14, 1994, the Board filed the following documents with the Chief Administrative Law Judge:
 - (a) a copy of the proposed rules certified by the Revisor of Statutes;
 - (b) the Statement of Need and Reasonableness (SONAR);
 - (c) the Notice of Hearing proposed to be issued;
 - (d) the Authorizing Resolution of the Board; and
 - (e) the proposed Order for Hearing.
2. On November 29, 1994, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the Department for the purpose of receiving such notice. On December 1, 1994, the Department mailed the Notice of Hearing to those additional persons to whom discretionary notice was provided.
3. On December 5, 1994, the Notice of Hearing and the proposed rules were published at 19 State Register 1265.

4. On January 5, 1995, the Board filed the following documents with the Chief Administrative Law Judge:

- (a) the Notice of Hearing as mailed;
- (b) a copy of the State Register pages containing the Notice of Hearing and its proposed rules;
- (c) the Board's certification that its mailing list was accurate and complete as of November 29, 1994;
- (d) the Affidavit of Mailing the Notice to all persons on the Board's mailing list;
- (e) the Notice to Solicit Outside Information published in the State Register on August 30, 1993, and all materials obtained from that Notice;
- (f) the Affidavit of Additional Mailing; and
- (g) copies of all comments received in response to the Notice of Hearing.

5. Due to the level of interest in these rules and the relative lack of space at the originally noticed hearing location, the Board changed the location of the hearing from the Commerce Building, located at 133 East Seventh Street, St. Paul, to the Radisson Hotel in St. Paul. A notice of the change was mailed to every person responding to the Notice of Hearing. Notice of the change was also posted at the originally proposed hearing location. No persons have complained about the change of location. Holding the hearing in a different location from that identified in the Notice of Hearing is not a defect in this rulemaking.

Small Business Considerations in Rulemaking

6. Minn. Stat. § 14.115, subd. 2, provides that state agencies proposing rules affecting small businesses must consider methods for reducing adverse impact on those businesses. Terry Anderson, Vice President; and Robert C. Maki, Attorney, submitted comments concerning the small business consideration requirement on behalf of Earth Burners Incorporated (Earth Burners). Earth Burners asserted that the Board did not meet its obligations to consider the impact of the rules on small businesses. The impact of the Board's approach to reimbursement, the complexity of the forms and reimbursement rules, and the requirement for change orders when bid amounts are exceeded were cited as examples of costs unfairly burdening small businesses. Earth Burners and James K. Poucher, P.E., President of CleanSoils Inc., disputed the calculation of costs "deemed reasonable" as excluding the reasonable costs of small businesses in rural areas. David Witt of NorthEast Technical asserted that invoicing amounted to an "unfunded mandate" on small businesses. Witt suggested that the Board provide uniform software for use by businesses to prepare the invoices required for reimbursement.

Douglas Alan Stahman, Hydrogeologist for West Central Environmental Consultants (WCEC), asserted that the proposed rules will be an improvement to large corporate responsible parties (RPs) and harmful to independent service stations, homeowners, and nonfuel businesses. Thomas A. Greene, P.E., owner of Applied Engineering, and Gary Turgeon, Director of Business Development for Dahl & Associates, Inc., asserted that the rules will significantly add to the

administrative burden on small businesses. James K. Poucher, P.E., President of CleanSoils Inc., maintained that the rules support consultants over small business contractors. George C. LaValley, P.E. for the Duluth Missabe and Iron Range Railway Company (Duluth Missabe), has asserted that the Board has proposed rules that:

will make more stringent compliance or reporting requirements for small businesses and will impose more complicated reporting requirements for small businesses in direct conflict with 14.115 Subdivision 2 (a) and (c) .

Duluth Missabe Comment, at 1 (emphasis in original).

The particular problem cited by Duluth Missabe is the requirement for a new billing system that will be required of all contractors to allow the RP to obtain reimbursement from the Board. The Board acknowledged at the hearing that the invoice system proposed for the contractors is presently used by Amoco Oil when it hires its independent contractors. Amoco Oil can offer incentives to contractors in terms of volume and certainty of payment that are not available to small businesses. The invoice system is comprised of ten pages identifying particular tasks, the units for each task, the “maximum level of effort,” the level of the persons performing task, proposal totals, and invoice totals. The instructions require the RP to attach invoices, explanations of differences between proposal totals and any actual costs that exceed those totals, and any change orders issued. Portions of the invoice are “blacked out” to preclude claiming costs for certain service at higher levels of reimbursement.

The Board discussed its consideration of alternatives for small businesses in the SONAR. There is a recitation of the factors listed in the small business portion of the Administrative Procedure Act, followed by this statement:

In drafting the proposed rules, the Board has reviewed carefully the provisions of Minnesota Statutes § 14.115, subd. 2. The necessity for costs to be reasonable is mandated by statute and therefore may not be modified or ignored for small businesses. Notwithstanding this broader consideration, the Board believes that the proposed rules will have no negative effect on small businesses as defined in Minn. Stat. § 14.115 (1992) and that the proposed fee schedules and requirements for proposals, bids, change orders, and invoices do not represent a burdensome compliance standard or reporting requirement for small businesses. On the contrary, by lending uniformity to the scope of remedial assessment activities and their associated costs and by stipulating the appropriate qualifications for tasks performed, the proposed rules encourage small businesses to compete with their larger counterparts for Petrofund-reimbursable contracts.

With respect to Minn. Stat. § 14.115, subd. 2, clauses (a) through (c), it is not possible to carry out the statutory intent nor is it in the best interests of all parties concerned to establish less stringent compliance or reporting requirements or schedules for small businesses, or to consolidate or simplify such reporting requirements. With respect to clause (d) of Minn. Stat. § 14.115, subd. 2, the Board has determined that the establishment of performance standards to replace

design or operational standards would not apply to the proposed rules. Finally, with respect to clause (e) of Minn. Stat. § 14.115, subd. 2, since the majority of entities affected by the proposed rules would fall within the definition of small businesses under § 14.115, and in light of the need for the rules, discussed above, exemption of small businesses from the operation of the proposed rules would not be feasible or consistent with the statutory purposes furthered by the rules.

SONAR, at 35-36.

The Board is correct that exempting small businesses from the cost limitations would defeat the purpose of the rules. The Board is expressly authorized to determine the form in which eligible costs are documented. Minn. Stat. §§ 115C.07, subd. 3, and 115C.09, subd. 1(b)(1). The invoice suggested by the Board is ten pages long. While small businesses would incur costs to change to the invoice as their sole method of accounting, there is no requirement that they do so. Small businesses, or any business for that matter, can prepare the mandated form invoice in addition to that business' established system. While this duplication is a burden, the burden is not excessive. The contents of the form invoice aid in informing consultants, contractors, and RPs when additional information and explanation are needed in the bidding and application processes. The benefits to small businesses outweigh the costs. The Board has met the requirements of Minn. Stat. § 14.115 in considering the impact of the rules on small businesses.

Although the Board has met the requirements of Minn. Stat. § 14.115 in considering the impact of the rules on small business it is not prohibited from reevaluating this issue in light of the comments made at the hearing. A possibility that the Board might consider to reduce the costs on small businesses is the categorical exemption from the uniform invoice requirements for remediation efforts below a certain dollar level. Another alternative is the establishment of "safe harbors" for cleanup costs that would receive expedited treatment. Several commentators asserted that the Board does not promptly act on reimbursement requests. If certain volumes of contaminated earth are authorized for expedited treatment at a specified price, the market would be encouraged to meet that price. Rather than a standard invoice with every likely task being listed, a "short form" could be established for the most common costs. The common characteristics of many small business claims provides a source for the Board to choose what items should go on this simpler form. The Board could follow the suggestion of a commentator to provide uniform software for use on the computers owned by businesses.

Fiscal Notice.

7. Minn. Stat. § 14.11, subd. 1, requires the preparation of a fiscal notice when the adoption of a rule will result in the expenditure of public funds in excess of \$100,000 per year by local public bodies. The notice must include an estimate of the total cost to local public bodies for a two-year period. The proposed rules govern the reimbursement of costs incurred by any RP, including local public bodies. The fiscal note requirement arises when the rules would increase costs to "local public bodies." While some local public bodies have asserted that the proposed rules will reduce their reimbursement unfairly, the rules do not require any expenditure on their part within the meaning of Minn. Stat. § 14.11, subd. 1. There is no evidence that the

proposed modifications would shift any costs to local units of government. The proposed rules will not require increased expenditures by local governmental units or school districts in excess of \$100,000 in either of the two years immediately following adoption, and thus no notice is statutorily required.

Impact on Agricultural Land.

8. Minn. Stat. § 14.11, subd. 2 (1988), imposes additional statutory notice requirements when rules are proposed that have a "direct and substantial adverse impact on agricultural land in the state." The statutory requirements referred to are found in Minn. Stat. §§ 17.80 to 17.84. The proposed rules will have no substantial adverse impact on agricultural land within the meaning of Minn. Stat. § 14.11, subd. 2 (1988).

Nature of the Proposed Rules and Statutory Authority

9. Minn. Stat. § 115C.07, subd. 3(a) requires the Board to adopt rules governing procedures, applications, and costs for reimbursement from the Petrofund. The Board has proposed rules to govern the procedure by which remediation costs for spills incurred by RPs are reimbursed. The rules also establish "maximum costs" for certain services. The Board has the general statutory authority to adopt these rules. The question of specific statutory authority for particular rule provisions will be examined where appropriate.

Reasonableness of the Proposed Rules

10. The question of whether a rule is reasonable focuses on whether it has a rational basis. The Minnesota Court of Appeals has held a rule to be reasonable if it is rationally related to the end sought to be achieved by the statute. Broen Memorial Home v. Minnesota Department of Human Services, 364 N.W.2d 436, 440 (Minn.App. 1985); Blocker Outdoor Advertising Company v. Minnesota Department of Transportation, 347 N.W.2d 88, 91 (Minn.App. 1984). The Supreme Court of Minnesota has further defined the burden by requiring that the agency "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of the action to be taken." Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984). In support of the adoption of the proposed rules, the Board staff has prepared a Statement of Need and Reasonableness (SONAR) for the rule. The staff supplemented the SONAR with a presentation made at the public hearing in this matter. The Board staff also supplemented the hearing presentation with written comments submitted after the hearing. This Report will not discuss each rule part, or each change proposed by the Board from the rules as published in the State Register. The Report will focus on those provisions that the Administrative Law Judge or members of the public questioned. Persons or groups who do not find their particular comments in this Report should know that each and every suggestion has been carefully read and considered. A part not commented on in this Report is hereby found to be needed and reasonable and does not exceed the statutory authority for the promulgation thereof. It is further found that on those parts not commented on, the Board has documented its need and reasonableness with an affirmative presentation of facts. Any change not commented upon is found not to constitute a substantial change.

Proposed Rule 2890.0010 - Definitions

11. As originally proposed, definitions of “clear and convincing evidence,” “prima facie unreasonable,” and “reasonable evidence” were to be included in the Board’s rules. These definitions were widely criticized by the public both at the hearing and in written comments. Based on these comments, the Board recommended deleting the definitions for “clear and convincing evidence” and “reasonable evidence.” Board Comment, at 28-29. The Board chose to retain “prima facie unreasonable” for use in the rules. The definition proposed for that term is “unreasonable absent proof beyond a reasonable doubt.”

William M. Burns, of Hanft, Fride, O’Brian, Harries, Swelbar & Burns, P.A., on behalf of Lakehead Oil, asserted that the Board’s approach to reimbursement claims was inconsistent with the reimbursement statute. Donna Strusinski argued that RPs would be required to hire criminal attorneys to present claims for reimbursement to the Board, since only those attorneys are familiar with the standard of proof required. This argument actually understates the case. As proposed in these rules, a claimed cost would be unreasonable absent the RP showing that the cost was reasonable beyond a reasonable doubt. To use the criminal law analogy, a defendant would have to prove his innocence beyond a reasonable doubt to a jury composed of prosecutors. While such a feat is theoretically possible, most defense attorneys would find the task highly improbable.

Minn. Stat. § 115C.09, subd. 1(a) requires the Board to provide to RPs partial reimbursement of reimbursable costs. Subdivision 1(b) authorizes reimbursement of “corrective action costs,” costs RPs are legally obligated to pay, and up to 180 days of interest costs. Subdivision 3 requires that 90 percent of the reimbursable cost be paid to RPs, provided that the Board may only reimburse costs that were actually incurred and reasonable. Minn. Stat. § 115C.09, subd. 3(a) and (b). The effect of requiring RPs to prove their costs reasonable beyond a reasonable doubt removes the statutory requirement that reasonable costs actually incurred be reimbursed at a rate of 90 percent. Imposing such a standard is beyond the statutory authority of the Board, since that standard is contrary to the requirements of Minn. Stat. § 115C.09, subd. 3.

To cure this defect, the Board must impose a standard that is consistent with the statutory scheme. Demonstrating that costs are reasonable by a preponderance of the evidence is consistent with the language of the statute. The preponderance of the evidence standard (showing that the weight of the evidence favors one result over another) is the normal standard in civil law where monetary issues are at stake. The next higher standard, clear and convincing, is limited to attorney discipline matters and certain evidentiary issues. The clear and convincing standard is too high to be consistent with the statutory scheme for the Petrofund. Any standard lower than preponderance of the evidence would also conflict with Minn. Stat. § 115C.09 by reimbursing RPs who have not shown that their costs are reasonable.

The Administrative Law Judge suggests that the Board adopt the following language to cure this defect to the proposed rules:

“Prima facie unreasonable” means unreasonable absent proof by a preponderance of the evidence.

This language cures the defect in the proposed rules and is not a substantial change.

Proposed Rule 2890.0070 - Eligible Costs

12. The Board has proposed a new subpart to the existing rule part 2890.0070 that requires the applicant for reimbursement to maintain the documentation for incurred costs. The rule was not controversial, but the subpart provides a list of records with the phrase “includes, but are not limited to ...” This open-ended list is a defect in the proposed rules. The usual way to correct the defect is to replace the offending phrase. In this case, the language could read:

It is the responsibility of the applicant to obtain and maintain all records that document incurred costs. Among the records required are all invoices, time records, equipment records, receipts, proposals, for consultant services, and bids for contractor services.

The suggested language corrects the defect and is not a substantial change. The Board could also choose to delete the second sentence altogether. The language is not critical to effectuate the intent of the rule.

Proposed Rule 2890.0071 - Ineligible Costs

13. Proposed rule 2890.0071 makes costs “that do not minimize, eliminate, or clean up a release to protect the public health and welfare or the environment” ineligible for reimbursement. In addition, the proposed rule identifies a list of costs that “include, but are not limited to” and makes those costs ineligible. As with Finding 12, above, that language is a defect. The Board can cure this defect by changing the open-ended language to “Among ineligible costs are:” and retaining the list of items. This modification does not constitute a substantial change.

Item E - Decreased Property Values

14. At the hearing, the Board suggested changing item E to clarify that decreased property value of the applicant is not reimbursable, but third-party liability for a decrease in property value is reimbursable under Minn. Stat. § 115C.09, subd. 1(c). Board Comment, at 1. The change is needed and reasonable to conform the rule to statutory reimbursement standards and does not constitute a substantial change.

Item I - Overtime Pay

15. Based on comments received from contractors and consultants, the Board chose to delete item I, a provision that rendered overtime pay ineligible for reimbursement. The Board accepted the rationale advanced by a number of commentators that overtime can be used to reduce the costs of certain jobs by completing the work and not requiring further travel or risking delays through weather or other sources. Board Comment, at 2. The deletion of the item is needed and reasonable and does not constitute a substantial change.

Item O - Mark-up

16. Robert J. Rykken, P.E., for Nova Environmental Services, Inc.; David Kill, P.E., for Recovery Equipment Supply; Dahl and Associates; John Dustman; and Terry Anderson objected to excluding mark-up as a reimbursable cost, since mark-up is a legitimate cost incurred by consultants and contractors to cover their costs of obtaining and arranging for materials and subcontractors. WCEC indicated that Nebraska expressly allows up to fourteen percent markup for consultants. The Board originally suggested that mark-up represented “undocumented charges added to the actual cost [of materials and services] to perform a task.” SONAR, at 6. At the hearing, the Board acknowledged that mark-up was a legitimate cost, but it was difficult to quantify. Based on comments from the public, the Board chose to delete the prohibition against reimbursing mark-up. The reasonableness standard for cost reimbursement remains to ensure that costs for mark-up are not excessive. The deletion of item O is needed and reasonable to reimburse costs incurred for remediation. The change is not a substantial change.

Item P - Administrative Costs

17. As originally proposed, administrative costs were included in the list of ineligible costs. The item identifying those costs, item P, expressly included “charges for obtaining proposals or bids, accounting for consultant services or contractor services....” Commentators objected to the exclusion of those administrative costs from reimbursement. At the hearing, the Board acknowledged that the costs for bids, proposals, and services were appropriate to include in the reimbursement when incurred in the hiring of a professional to engage in the remediation process. The Board deleted the listing for those costs. Item P is needed and reasonable as modified. The change was suggested by the commentators at the hearing and does not constitute a substantial change.

Proposed Rule 2890.0073 - Definitions Related to Consultant Services

18. The definitions for terms used in the consultant portion of the proposed rules are set out in part 2890.0073. Several commentators suggested including in the consultant portion of the proposed rule definitions for “groundwater sampling analysis” and “soil sampling analysis.” These definitions are currently in the contractor portion of the proposed rule. The Board agreed and moved those definitions from proposed rule 2890.0081, subparts 6 and 14, respectively. The modified rule is needed and reasonable to ensure that costs properly incurred for those services by consultants are reimbursable. The change is not a substantial change.

Proposed Rule 2890.0074 - Written Proposal and Invoice Required for Consultant Services

19. Several commentators suggested that the proposed rule 2890.0074, subpart 1, was unreasonable since some situations are emergencies requiring immediate response. Such situations do not allow RPs to obtain competitive bids. The Board acknowledged that emergencies do require immediate action and modified the rule to exempt emergency services from the prima facie unreasonable characterization. The rule as modified is needed and

reasonable. The new language responds to suggestions by commentators and is not a substantial change.

Proposed Rule 2890.0075 - Reasonableness of Work Performed;
Standard Tasks for Each Step of Consultant Services

20. Subpart 1 of proposed rule 2890.0075 requires the Board to treat as “prima facie unreasonable” any cost incurred for consultants not within the tasks listed in the following five subparts. As originally proposed, this would have effectively limited the work of consultants to the listed tasks and eliminated any innovative approach to remediation, even if that approach was less expensive. Robert Maki, Dahl and Associates, and Donna Strusinski argued that this rule was too restrictive.

With the change required in the definition of “prima facie unreasonable” which allows applicants to prove costs reasonable by a preponderance of the evidence, the rule merely creates a rebuttable presumption that unlisted tasks are not reimbursable. If a consultant has a new approach, that approach may be reimbursed if the applicant proves by a preponderance of the evidence that the costs are appropriate. This new standard of proof now contained in the definition of “prima facie unreasonable” renders subpart 1 reasonable to carry out the Board’s reimbursement function. The rule is needed and reasonable as proposed.

21. The soil and groundwater sampling analyses included in proposed rule 2890.0073 (discussed at Finding, 18, above), were added to subparts 2, 3, 4, 5 and 6. The new language incorporates tasks into the list of work done by consultants that are not prima facie unreasonable. The rule change is consistent with comments received in this proceeding. The subpart is needed and reasonable, as modified. The change is not a substantial change. Similar changes are made to subpart 4 of proposed rule 2890.0076.

Proposed Rule 2890.0076 - Maximum Costs for Consultant Services

22. In proposed rule 2890.0076, consultant costs in excess of those listed in this rule part are considered prima facie unreasonable. Subpart 1 identifies maximum labor charges. Nova Environmental criticized the maximum limitation on system installation oversight, set at twenty-five percent of the contractor’s time, in subpart 1(II). The criticism was based on the Board’s reliance on standards established by Amoco’s standard contracts. Nova Environmental asserts that Amoco has leverage beyond the average consultant to require contractors to redo inadequate work. Clean Soils, Inc. objected to the maximum hourly rates in subpart 2 as excessive. The commentator suggested reducing the rates by half at each level. The Board has declined to change this item, responding generically that the cost maximums were set with input from the industry and the deviation provisions are available when costs legitimately exceed those maximums. If the rule still required the evidentiary standard of beyond a reasonable doubt to establish reasonableness, the maximum hourly rates in subpart 2 would have constituted a defect in the proposed rules. However, with the change in the definition of “prima facie unreasonable” to a preponderance of the evidence standard, the Board’s proposed maximums are reasonable.

23. Daniel L. Sanville, Senior Geological Engineer for Delta Environmental Consultants, Inc., recommended increasing the amount of time allowable for air sparge and soil vapor extraction points due to the importance of the task to achieve successful remediation. A number of commentators suggested increasing the limits on travel time. At the hearing, the Board suggested easing the limits on travel time and vent point installation. In its Comment, the Board suggested changing the maximum cost for project management from 15 percent of total consultant labor charges to 20 percent of those charges. These changes were made in response to comments received from consultants that the proposed limits were too stringent. The new language conforms the rule to the standards suggested by the consultants. The new language is needed and reasonable. The modifications are not substantial changes.

24. The mileage reimbursement figure proposed in subpart 5 is 27 cents per mile. At the hearing, Bob DeGroot, P.E., pointed out that this figure was already obsolete since the U.S. Internal Revenue Service (IRS) has promulgated a rate of 29 cents per mile for 1994. The IRS figure is commonly used as the benchmark for mileage reimbursement by both government and business. The Board acknowledged that its rules should conform to the IRS rate and changed the rule accordingly. The new rule will authorize the current mileage reimbursement rate without any need to update the rule. The rule as modified is needed and reasonable. The change is not a substantial change.

Proposed Rule 2890.0077 - Competitive Bidding Requirements for Consultant Services

25. In proposed rule 2890.0077, competitive bidding is required for all aspects of consultant services, except underground storage tank (UST) removal assessments. In general, the Board is requiring at least two bids on consultant services and the rule promotes the bids being submitted on an “apples to apples” basis. This approach ensures that the low bid is accepted for the work to be performed, not for entering into a contract which will require further modifications. In subpart 6, the Board proposed considering any amount incurred higher than the lowest bid to be prima facie unreasonable, unless the applicant showed by clear and convincing evidence that the selection was justified. The Board listed the relevant factors in making the selection to “include, but not (be) limited to” education, experience, certifications and registrations, health and safety training, insurance, availability, and references.

The “include, but not limited to” language is a defect as discussed at Finding 12, above. Additionally, the wording that considers “total costs for consultant services” as prima facie unreasonable is in conflict with the latter portions of the rules that allow for additional costs not within the originally bid amount. Although the Board changed the title of the rule part to “limit” the effect of the rule to proposals, it is the rule language that controls. The rule language purports to cap the amount reimbursable at the figure established by the lowest bid. The Board has not shown this approach to be needed or reasonable. The Board also deleted the “clear and convincing” standard an applicant must establish to demonstrate that accepting the higher bid is not prima facie unreasonable. Deleting the standard now only requires the applicant to introduce some evidence. The proposed change does not set a level at or above the preponderance of the evidence standard. This evidentiary standard is so low that only the most egregious cases will be precluded by the rule.

To cure these defects, the Judge suggests the following language be used in the rule part:

Where competitive proposals are based on the same technology, and in the case of proposals involving soil borings, substantially similar assumptions as to the number of soil borings, monitoring wells, soil conditions, drilling depth, and sampling intervals, the lowest competitive proposal shall establish the baseline for costs that are not prima facie unreasonable, unless the applicant demonstrates that the services to be performed or the selected consultant's qualifications justify the selection of a higher cost proposal. Among the factors relevant to the qualifications of a consultant are education, experience, certifications and registrations, health and safety training, insurance, availability, and references.

The suggested language clarifies that the applicant doesn't have to accept the lowest cost proposal, but the amount of the lowest proposal sets the baseline of reimbursable costs. The exception to that approach is modified to clearly state that the applicant bears the burden of proving by a preponderance of the evidence that a higher cost proposal was the appropriate one to accept. The list of factors is retained to provide guidance to applicants without using defective language. The suggested language is needed and reasonable and not a substantial change.

Proposed Rule 2890.0078 - Deviations from Standard Tasks and Maximum Costs for Consultant Services

26. Proposed rule 2890.0078 establishes the standards for allowing costs above the maximum costs or tasks beyond those in the proposal to avoid being deemed prima facie unreasonable. With the change of the definition of "prima facie unreasonable" to a preponderance of the evidence standard, much of the impact of this rule part is reduced. However, the need and reasonableness of the provision is not lost, since this part provides a structure to be used by the Board when it considers a request for reimbursement of costs not included in the original proposal.

Subpart 1 - Deviations from Standard Tasks in Proposals Item A - Soil Boring Alternatives

27. Item A of subpart 1 allows alternatives to soil borings where the technology is identified in the proposal and "the Board determines both that the applicant has established by reasonable evidence that the alternative approach" meets the consultant service objectives and the result is lower costs than would be achieved by using soil borings. In its Comment, the Board chose to delete "by reasonable evidence" as the standard to prove that the costs are reasonable. With the modification, the applicant's burden of proof is by a preponderance of the evidence. The item is needed and reasonable, as modified. The change is not a substantial change.

Item B - Additional or Different Consultant Services Costs

28. Consultant services that are not included in the list of authorized tasks are considered prima facie unreasonable under item B, unless those tasks are in the proposal with an

explanation as to why each task is needed. As originally proposed, the rule then requires the Board to determine that these tasks meet the objectives for that class of service and are essential or more cost-effective. The standard of proof proposed was clear and convincing evidence. In its Comment, the Board deleted the “clear and convincing” evidence standard. The only issue raised by the Board’s language is the phrase “the Board determines.” This phrase is vague and suggests that the Board is applying a subjective standard. This defect can be cured by replacing the phrase “the Board determines” with “the applicant demonstrates.” The new language clarifies the rule and does not constitute a substantial change. A similar change is required to item C(2) and item D(4) in this subpart. The same change is required in subpart 2, items (A)(3), B(3), and (C)(4). With the suggested modifications, the rule is needed and reasonable to allow reimbursement for consultant services not included in the authorized list of tasks.

Item C - Additional or Different Consultant Services Costs

29. Where the consultant has incurred a higher number of hours for performing tasks, the increased cost is allowable under the same standards set in item B (discussed in the foregoing Finding). The Board suggested changing the item to include higher dollar costs and using the standard of the costs being “justified by unusual conditions existing at the applicant’s worksite” instead of meeting the objectives of the consultant services. The change is needed and reasonable. The new standard is not a substantial change. The same change was suggested for subpart 2, item B, and is needed, reasonable, and not a substantial change in that item.

Proposed Rule 2890.0079 - Reasonable, Necessary, and Actual Consultant Services Costs

30. The reimbursement of costs for consultant services is limited by proposed rule 2890.0079 to those tasks and costs that were necessary, reasonable, and actually incurred. By operation of the second sentence in the proposed rule part, the Board is precluded from considering as prima facie unreasonable “performance of fewer tasks or lower hours to complete a task than as specified in parts 2890.0075 and 2890.0076.” The two cited rule parts “consider as prima facie unreasonable costs ... in excess of [the amounts specified or the maximum charges listed].” The operation of proposed rule 2890.0079 is inconsistent with the two rules cited. Part 2890.0079 cannot consider prima facie unreasonable costs at the maximum amounts in parts 2890.0075 and 2890.0076, since costs at those maximum amounts are not considered prima facie unreasonable. The Board’s proposed language renders the application of the rules vague and uncertain.

To cure this defect, the Board should delete “fewer” and “lower” and replace them with “those tasks or hours within the limits of parts 2890.0075 and 2890.0076.” The effect of the second sentence in this rule part is greatly reduced by the required reduction of the standard of proof to a preponderance of the evidence. If the Board wishes to leave the burden of proof on the applicant when the claimed costs fall within the standards, the second sentence must be deleted. As discussed in the small business considerations, there is merit to establishing a safe harbor for costs that are unlikely to be disallowed for reimbursement. The Board must decide which approach is better to meet the obligations of the Petrofund. Either approach is needed and reasonable. The modifications discussed are not substantial changes.

Proposed Rule 2890.0080 - Overview of Rules Governing Reasonableness of Costs for Contractor Services

31. The overview of rules governing the reasonableness of costs is proposed rule part 2890.0080. Several commentators objected to the starting date when the requirements of the rule would take effect. To meet the concerns of the commentators the Board deleted the effective dates contained in this rule part and part 2890.0072. The Board modified the effective date provision to apply to “all contracts entered into on or after 60 days after notice of adoption is published in the *State Register*. The changes accommodate the requests from commentators to clarify when contracts are bound by these rules. The changes are not substantial changes.

Proposed Rule 2890.0082 - Maximum Costs for Contractor Services

32. Subpart 1 of proposed rule 2890.0082 requires the Board to consider as prima facie unreasonable costs in excess of those in the contractor bid or listed in *Means Heavy Construction Cost Data*, when conducting the “mobilization; hauling; and cutting, removal, and replacement of concrete and asphalt.” Subpart 2 lists specific maximum costs per item or unit for test pits; excavation; loading; clean fill purchase, transportation, and installation; off-site stockpiling; landfarming; and thermal treatment of contaminated soil. The costs for landfarming are adjusted for differences in the rates available in the county of disposal. The costs for thermal treatment are increased by ten dollars per cubic yard if the treatment facility must operate at a reduced rate of production. Subpart 3 sets the reimbursable cost maximums for drilling and wells as those set in parts 2890.0072 to 2890.0079. For any other contractor services, subpart 4 makes the amount specified in the contractor bid the limit beyond which the Board will consider the cost to be prima facie unreasonable.

Means Data

33. Mike Malinkowski objected to the Board’s reliance upon the *Means Heavy Construction Cost Data* analysis of costs to determine what cost maximums should be imposed on contractors. Malinkowski asserted that the *Means* guide is an appropriate tool for large jobs, but failed to adequately consider the increased costs of small jobs, such as those occurring at individual service stations or small leak sites. The cost maximums are not absolute in the rule. With the modification to the definition of “prima facie unreasonable,” the rule does not prohibit contractors from explaining why a cost exceeds the “maximum” listed in the rule. The RP can make the choice based on bids and experience as to which contractor will conduct the remediation. Reliance upon the *Means* guide is both needed and reasonable.

Land Farming Costs

34. Dean Anderson of North Star Reclamation, objected to the \$20 per cubic yard cost established in the rule for landfarming contaminated soil at sites in some counties of Minnesota. North Star cites sampling and remediation costs for a hypothetical job of 55 cubic yards of contaminated soil. According to the commentator’s figures, almost all of the \$20 per cubic yard amount would be taken up by MPCA imposed sampling and remediation costs. The hypothetical estimate does not account for the reduction in costs resulting from sampling

multiple landfarming sites at the same facility. The Board is not obligated to set costs by the impact of the rule on each individual job, but rather, the normal operation of average facilities in the land farming business. The Board has shown its per cubic yard fee structure to be needed and reasonable.

Thermal Treatment Costs

35. Earth Burners objected to the amounts set in the rule as maximums for the cost per cubic yard of thermal treatment for contaminated soil. Subpart 2 sets the standard amount at \$40 per cubic yard and \$50 per cubic yard if the facility is operating at a reduced rate of production. Earth Burners estimated its average charge per cubic yard at \$75.00 for 1993 and 1994. The Board analyzed applications for reimbursement from 1991-1994 that contained costs for thermal treatment. The analysis made no attempt to adjust the figure for overcharging by applicants or contractors. Board Exhibit 21. The result of the analysis was provided at the hearing, broken down by regions within Minnesota. The average charge, broken down by region, is as follows:

Region	Average Charge per Cubic Yard
1	\$71.43
2	\$34.99
3	\$34.50
4	\$36.55
5	\$39.13
Metro	\$37.56

Board Exhibit 21.

The analysis arrived at two statewide averages. Including all thermal treatment contractors in the state, the statewide average charge was \$41.51 per cubic yard. Excluding data from one particular thermal treatment contractor, the statewide average drops to \$38.27. *Id.* Based on the Board's figures, that contractor charges approximately \$76.73 per cubic yard. A cost assessment performed for the MPCA and the Department of Commerce by Terracon, a company contracting with the state, arrived at an average cost estimate of \$40.00 per cubic yard. Earthburner Anderson Comment, Attachment M, Table E-2.

Earth Burners asserts that the nature of the soil treated in its area, northeastern Minnesota, is significantly different and warrants a higher cost charge per cubic yard than the \$40.00 proposed in the rule. The Board has shown that \$40.00 per cubic yard is an appropriate level for a charge not presumptively unreasonable. Any contractor with a higher charge can demonstrate the reasonableness of that charge to the RP who will decide whether to use that contractor's service and advance that reasonableness claim to the Board in the application process. The Board's maximums for thermal treatment are needed and reasonable.

36. Subpart 4 contains the "including, but not limited to," language that is a defect in the proposed rule. See Finding 12, above. To cure this defect, that language must be removed.

A suitable replacement would be “such as.” The modified language is needed and reasonable. The modification is not a substantial change.

Proposed Rule 2890.0083 - Competitive Bidding Requirements for Contractor Services

37. Under subpart 1 of proposed rule 2890.0083, applicants are required to obtain at least two bids on a form prescribed by the Board from contractors who are registered with the Board. Subpart 2 requires cost per cubic yard bids for hauling; excavation; clean fill purchase, transportation, and installation; off-site stockpiling; landfarming; and thermal treatment of contaminated soil. Subpart 3 purports to make amounts in excess of the lowest qualified bid prima facie unreasonable. Subpart 3 has the same defect as proposed rule 2890.0077, subpart 6. Other rule parts make clear that the rule should set a baseline standard and allow upward deviations. The language in Finding 21, above, can be used to correct this defect.

38. Unlike proposed rule 2890.0077, subpart 6, subpart 3 does not allow an applicant to show why the baseline bid should be higher than the low bid. There is nothing in the SONAR to explain why the lowest bid amount is not expressly required to be accepted in the consultant rule, while that requirement is implicit in the contractor rule. See SONAR, at 22-23. The same considerations apply to contractors and consultants. Subpart 3 is unreasonable, as proposed, for treating consultant bids differently than contractors without explanation. The Board has not shown that such differential treatment is necessary. To cure this defect, the same factors in proposed rule 2890.0077, subpart 6, must be incorporated in this rule. The subpart, as modified, is needed and reasonable. The change is not a substantial change.

Proposed Rule 2890.0084 - Deviations from Maximum Costs for Contractor Services

39. Deviations from the maximum contractor costs established in these rules are permitted by proposed rule 2890.0084. The standards for approving these deviations in the bid, as set forth in subpart 1, are the same as for consultant costs in proposed rule 2890.0078, subpart 1(B). The same changes were proposed to this rule by the Board and the rule part has the same defect as proposed rule 2890.0078, subpart 1(B). To cure this defect, the Board should make the same changes required of that item as noted at Finding 28, above.

40. Subpart 2 sets the standards for approving costs above the amount bid based on unexpected circumstances. The language is the same as that for consultant costs in proposed rule 2890.0078, subpart 2. The same changes to that subpart were proposed by the Board for this subpart. The rule language has the same defects and must be modified as indicated at Finding 28, above.

41. The Board accepted suggestions from commentators that applicants be allowed to hire contractors who charge or bid in excess of the maximum amounts listed in proposed rule 2890.0082 when the bid expressly states the amounts are above the maximums, the reason, and the Board determines by reasonable evidence that: 1) a bid within the maximum could not be obtained; 2) a search for bids was made but resulted in no bid resulting in a comparable service at less expense; and the contracted service was essential to properly complete the corrective action. The rule as modified is found to be needed and reasonable.

Proposed Rule 2890.0085 - Reasonable, Necessary, and Actual Costs

42. Proposed rule 2890.0085 expressly provides that the rules on contractor costs do not authorize reimbursement of costs not actually incurred. Wayne L. Olson, P.E., Carlton County Highway Engineer, and Scott Hoch, Superintendent of Schools for Independent School District No. 93, asserted that the competitive bid requirements of Minn. Stat. § 471.345 should supersede the proposed rule. In essence, the commentators' argument is that, as public bodies, the amounts arrived at by competitive bidding under the statute should stand as the amount reimbursed by the Board. The reduction of the amount claimed results in a shifting of the tax burden from the state Petrofund to the local property taxpayer.

The proposed rule is consistent with the limitations of Minn. Stat. § 115C.08, subd. 4(a(3)). There is nothing in Minn. Stat. § 471.345 that affects the right to reimbursement of a public body for remediation costs. Under the commentator's approach, the Board would be obligated to reimburse public bodies for ninety percent of the lowest competitive bid, no matter what the amount of the bid was. The Board lacks the statutory authority to reimburse money for costs claimed but not actually incurred, even if the tasks are listed in the Board's rule. The Board is not obligated to exempt from the maximum cost approach to reimbursement consultants and contractors who perform services for public bodies.

Proposed Rule 2890.0086 - Invoice

43. Proposed rule 2890.0086 requires that the Board consider as prima facie unreasonable any cost incurred for contractor services not billed on an invoice prescribed by the Board. The Board cites Minn. Stat. § 115C.07, subd. 3(c) as the reason for the rule. SONAR, at 34. The statute cited requires the Board to adopt emergency rules that conform the bid format, invoice format, and application format that are consistent with each other. The statute does not require that the invoice be the only document that can be used to apply for reimbursement. Neither does this rule part. However, the Board is authorized to set the standards for invoices used to support an application. The rule establishes a preference for using the prescribed invoices from contractors. While the risk of noncompliance falls on applicants, they are in a position to contractually require contractors to submit the proper invoice. Requiring such an invoice is needed and reasonable to enable the Board to more efficiently assess whether costs are reimbursable. The reasonableness of the provision on small businesses not now using this system is discussed under the discussion of the impact of the rule on small businesses at Finding 6, above.

Professional Qualifications

44. Dan Bigalke, P.E., of Arden Environmental Engineering, Inc.; urged the Board to amend six provisions in the rules to clarify that only professional engineers are authorized to perform certain functions that are eligible for reimbursement. The Board perceived its role as facilitating the greatest allowable flexibility in staff. As pointed out by the Board, only work performed in accordance with all other laws and rules is reimbursable. Any work performed by persons not properly licensed, certified, or registered cannot be reimbursed. The rules are not

unreasonable for failing to specify when professional engineers are required to perform certain tasks.

Public Competitive Bidding Process

45. Clean Soils, Inc. urged the Board to move away from a bidding process controlled by consultants to a system of dividing labor between consultants and contractors. Under the system suggested, consultants on a job could not provide any contractor services required on that same job. Clean Soils, Inc. maintains that this approach would result in more competitive bidding since consultants could not provide contractor bids on jobs where they were providing consultant services. In its Reply Comment, the Board declined to adopt this suggestion. The Board's experience with public bidding indicates that it does not significantly reduce costs, it actually increases costs. Reply Comment, at 5. The system of controls adopted by the Board in these rules should curb any abuses relating to costs.

Double Jeopardy

46. Donna Strusinski asserted that a form of "double jeopardy" takes place when the MPCA issues administrative penalty orders (APOs) and monetary fines when leaks or spills occur. The imposition of reductions in reimbursement by the Board is, according to Strusinski, a second punishment for the same offense. The MPCA and the Board have different functions and different jurisdictions. The Board cannot issue penalties beyond reducing the amount of the reimbursement. The authority under which the Board reimburses or declines to reimburse an RP for costs incurred for remedial actions is not the same authority under which the MPCA imposes penalties. There is no double jeopardy defect in the rule.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Minnesota Petroleum Tank Release Compensation Board (the Board) gave proper notice of this rulemaking hearing.
2. The Board has substantially fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subs. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule so as to allow it to adopt the proposed rules.
3. The Board has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i) and (ii), except as indicated at Finding 11.
4. The Board has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii), except as noted at Findings 12, 13, 25, 28, 30, 36, 37, 38, 39 and 40.

5. The additions and amendments to the proposed rules which were suggested by the Board after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 14.15, subd. 3, and Minn. Rules 1400.1000, subp. 1, and 1400.1100.

6. The Administrative Law Judge has suggested language to correct the defects cited in Conclusions 3 and 4, as noted at Findings 11, 12, 13, 25, 28, 30, 36, 37, 38, 39 and 40.

7. Due to Conclusions 3, 4 and 6, this Report has been referred to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3.

8. Any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

9. A Finding or Conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Board from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rules be adopted except where otherwise noted above.

Dated this ____ day of March, 1995.

PHYLLIS A. REHA
Administrative Law Judge

Reported: Tape Recorded; No Transcript.