ILLINOIS POLLUTION CONTROL BOARD
August 24, 1995

EUGENE W. GRAHAM,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 95-89
	)	(UST Fund)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

JAMES P. O'BRIEN AND JEREMY A. GIBSON OF CHAPMAN AND CUTLER APPEARED ON BEHALF OF PETITIONER;

MELANIE A. JARVIS AND JOHN BURDS APPEARED ON BEHALF OF RESPONDENT.

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

On March 10, 1995, Eugene W. Graham, owner of the Libertyville Citgo (Graham), filed a petition for review of the Illinois Environmental Protection Agency's (Agency) Underground Storage Tank Fund (UST Fund) reimbursement determination regarding the facility's tanks located at 109 South Milwaukee Ave., Libertyville, Lake County, Illinois. Graham filed the petition for review pursuant to Section 57.8(i) and 40(a) of the Environmental Protection Act (Act) and 35 Ill. Adm. Code 732.602(h) of the Board's regulations. (415 ILCS 5/57.8(i) and 5/40(a) (1994).) This matter was accepted for hearing at our March 16, 1995 meeting.

On March 20, 1995 the Agency filed a motion to dismiss the petition for review for lack of subject matter jurisdiction. On March 28, 1995, Graham filed a response to the motion to dismiss and a motion for leave to amend its petition. The Board, in an order dated April 20, 1995, granted Graham's motion for leave to amend its petition and found the Agency's motion to dismiss moot. Graham filed an amended petition on May 5, 1995, thereby causing the statutory decision deadline to be September 5, 1995. A hearing was held on May 10, 1995, before hearing officer June C. Edvenson. Pursuant to the briefing schedule established by the hearing officer, Graham filed its post-hearing brief on June 2, 1995, the Agency filed its post-hearing brief on June 19, 1995 and a Supplemental Record as ordered by the hearing officer, and Graham filed its reply brief on June 23, 1995.

Background

Eugene Graham is the owner and operator of a gasoline station located at 109 South Milwaukee Avenue, Libertyville, Lake County, Illinois (the site). (Amend. Pet. at 1.)[1] A release from the USTs at the site was reported to the Illinois Emergency Management Agency on or about February 10, 1993. (Amend. Pet. at 1.) Graham states that on or about May 6, 1993, it filed a UST corrective action plan (Corrective Plan) with the Agency. (Amend. Pet. at 1.) On June 14, 1993, the Agency approved the Corrective Plan and Graham began implementation of that Corrective Plan pursuant to the Illinois UST program in effect until September 13, 1993. Governor Edgar signed P.A. 88-496, Illinois' new UST program on September 13, 1993 causing the new Title XVI, Sections 57 through 57.17 of the Act to become effective and replaced the prior State program. However, the new program provides that a release that is reported prior to the effective date is to be administered pursuant to the old UST program unless an applicant specifically opts into the new program under Section 57.13 of the Act. (415 ILCS 5/57.13 (1994).) Graham has not opted to proceed under the new UST program pursuant to Section 57.13 of the Act. The new law specifically provides that even if the election is made, corrective action performed prior to the change in law is to be reimbursed under the old UST program.

Graham filed an eligibility and deductibility determination with the Illinois Office of the State Fire Marshal (OSFM) on November 29, 1993 for reimbursement from the UST Fund. (Amend. Pet. at 1.). On December 16, 1993 the OSFM determined that Graham was eligible for reimbursement from UST Fund.

On November 9, 1994, Graham submitted to the Agency a request for reimbursement from the UST Fund for the amount of $73,770.95. (Rec. at 118.) The Agency, on February 6, 1995, sent Graham its final determination which included an Attachment A explaining why certain costs were denied reimbursement. On March 1, 1995 the Agency sent another letter to Graham stating that "[t]his letter recendes (sic) the Agency's letter dated 2/6/95" and also includes an Attachment A which explains which costs were denied. On March 10, 1995, Graham filed this appeal to review the Agency's determination denying certain costs as explained in Attachment A.

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[1]The amended petition will be referenced as "Amend. Pet. at"; the petitioner's post-hearing brief will be referenced as "Brief at "; the respondent's post hearing brief will be referred to as "Brief at "; the petitioner's reply brief will be referenced as "Reply at " and the record in this matter will be referred to as "Rec. at ".

The February 6, 1995, Agency determination denied reimbursement for costs associated with "...replacement of concrete and/or asphalt." The March 1, 1995, Agency determination also denied the costs associated with the replacement of concrete and/or asphalt. The difference between the two determinations is the amount being deducted from the reimbursement voucher for the concrete and/or asphalt replacement. The February 6 Agency determination deducts $58,172.77 and the March 1 determination deducts $53,988.60 for the replacement of concrete and/or asphalt. It is the denial of the $53,988.60 for the replacement and/or concrete that is at issue before the Board in Graham's appeal. However, at hearing and throughout the briefs in this matter the parties take issue as to which portion of the concrete reimbursement is being sought by Graham.

Site's Corrective Action Plan

The Corrective Plan that was approved by the Agency with conditions establishes on-site bio-remediation as the method of cleanup for the contaminated soil. (Rec. at 169-171.) Graham, pursuant to the Corrective Plan, installed a pump and treat system at the site which would essentially pump clean water above the contaminated soil, wash the soil and treat the contaminated water using bio-remediation. (Rec. at 172-297.) After the clean water is distributed above the contamination, the water migrates through the contaminated soil, and is collected and pumped into a treatment shed located on the site where the bio-remediation takes place. (Rec. at 193.) Once at the treatment shed, micro-organisms are added to the contaminated water in a tank. Once the contaminated water is treated it is re-applied to the contaminated soil and the whole process is repeated until the target levels are reached in the contaminated soil. (Rec. at 196.) The treatment system is located on the eastern half of the site mainly under the gas station's pump islands. Graham placed poly vinyl chloride (PVC) piping three (3) feet under the ground to distribute the clean and treated water to the area of contamination at a rate of five (5) gallons per minute. (Rec. at 193, 194.) A recovery trench is located along the eastern border of the site and is 12 feet deep. (Rec. at 192-194.) Four pumps are located in the recovery trench to pump the contaminated water to the treatment shed. (Rec. at 191.) Concrete has been placed over the entire site. (Petitioner' Exhibit #4, Exhibit #1.) There is no discussion of concrete replacement in the Corrective Plan or the corresponding "Estimated Bio-Remediation Budget". (Rec. at 199.) The budget lists all the costs of remediation from tank removal to final closure report and professional engineer's certification. The budget's estimated total cost is $100,870. (Rec. at 199.) The bio-remediation at the site was estimated to operate for 5 to 6 months. (Brief at 193.)

The Concrete Area

On an Agency form entitled "Underground Storage Tank Program, Request for Payment of UST Corrective Action Costs" (Reimbursement Request) which Graham filed, Joseph Frett & Sons, Inc. is listed as a subcontractor with a corresponding work description of "Concrete/Paving/Build Shed" and an amount for $58,172.77. (Rec. at 303.) Submitted along with the Reimbursement Request was a letter dated December 30, 1993 from Walter Frett of Joseph Frett & Sons, Inc. to Mr. Graham. (Rec. at 304.) The letter states "[p]er your instructions, we have calculated the area that we poured concrete paving to cover the soil reclamation work" and states the calculated amount to be $53,988.60. (Rec. at 304.) The letter does not specify the area where concrete was poured.

Prior to hearing Graham filed the written testimony of Graham's witness, Mr. Ronald Schrack of Schrack Environmental Consulting, Inc. The written testimony was entered into the record at the hearing as Petitioner's Exhibit #4. (Tr. at 32.) Attached to written testimony and designated as "Exhibit 1" was a map which depicted the area of concrete replacement for which reimbursement was being sought by Graham. According to the map Graham sought reimbursement for the cost of the concrete poured on the eastern half of the site. In addition, the written testimony states "...it should be noted that the costs associated with the concrete replacement exclude the costs for replacement of the concrete surface located beneath the canopy and the costs incurred for replacement of the pump islands." (Petitioner's Exhibit #4 at 3.) At hearing Mr. Schrack testified that the concrete under the canopy and the pump islands is not included in the request. (Tr. at 78, 81.) However Mr. Schrack upon cross-examination stated "Based on review of my files, the $53,988.60 in contention here included the area underneath the canopy" and "I stand corrected on my previous testimony based on review of the files." (Tr. at 112.) Mr. Schrack later stated that the statement in Petitioner's Exhibit #4 on page 3 is incorrect and that the amount that is being sought is for the whole area as depicted in the map which is attached and marked as Exhibit 1 to Petitioner's Exhibit #4. (Tr. at 112-114.)

Regulatory Framework

The Board's authority to review the Agency's determination in UST reimbursement determinations arises from Section 57.7(c)(4)(D) and 57.8(i) of the Act. (415 ILCS 5/57.7(c)(4)(D) and 5/57.8(i) (1994).) Section 57.7(c)(4)(D) grants individuals the right to appeal an Agency determination to the Board in accordance with the procedures of Section 40 of the Act. (415 ILCS 5/40 (1994).) Section 57.8(i) of the Act grants parties the right to petition the Board to review the Agency denial or partial payment of a reimbursement request in the manner provided

in Section 40 of the Act. Section 40 of the Act is the general appeal section for permits and has been used by the legislature as the basis for other types of appeals to the Board, including this type of appeal. There is a large body of case law concerning the respective roles of the appealing party, the Agency and the Board under Section 40 appeals. Summarizing those roles and authority, the Board stated in City of Herrin v. Illinois Environmental Protection Agency, (March 17, 1994), PCB 93-195

> Petition for review of permit denial is authorized by Section 40(a)(1) of the Act [415 ILCS 5/40 (a)(1)] and 35 Ill. Adm. Code Section 105.102(a). The Board has long held that in permit appeals the burden of proof rests with the petitioner. The petitioner bears the burden of proving that the application, as submitted to the Agency, would not violate the Act or the Board's regulations. This standard of review was enunciated in Browning-Ferris Industries of Illinois, Inc. v. Pollution Control Board, 179 Ill. App. 3d 598, 534 N.E. 2d 616, (Second District 1989) and reiterated in John Sexton Contractors Company v. Illinois (Sexton), PCB 88-139, February 23, 1989. In Sexton the Board held:
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> > ...that the sole question before the Board is whether the applicant proves that the application, as submitted to the Agency, demonstrated that no violations of the Environmental Protection Act would have occurred if the requested permit had been issued.

Preliminary Issues

The parties raised several preliminary issues before the Board involving evidentiary matters. Graham objects to the Agency's supplement to the record and argues that the site in question should not be compared with the sites outlined in the supplement to the record. (Brief at 12.) Graham argues that to allow the information contained in the Supplement Record to be entered into the record will lead to extensive litigation. (Brief at 12.) Graham also asserts that the information contained in the supplement is irrelevant, that there has been no presentation that these sites are representative, that there is no exclusive inference that can be drawn from the information and that all are distinguishable from Graham's site. (Brief 12-14.) The Board will allow the information contained in the Agency supplemental record to be made part of the record that was responsive to the hearing officer's request since Graham did not object to the submittal of the information as requested by the hearing officer at hearing. The hearing officer requested a "...list of the locations that had approved bioremediation with any reimbursement for associated concrete or other sources."

(Tr. at 269.) Instead the Agency filed lengthy records of sites some of which did not involve concrete reimbursement and their corresponding corrective action plans. As argued by Graham, if the information submitted is substantive it should have been part of the record or presented at hearing. Therefore only the information relating to the location of sites that had approved bio-remediation and whether concrete associated with the site was reimbursed. Any information beyond what was requested by the hearing officer will not be entered into the record.

The Agency has two preliminary objections concerning the testimony of Mr. Schrack, Graham's witness, and the introduction of Attachment A to Petitioner's Exhibit #4. (Brief at 4-10.) The Agency objects to the hearing officer's ruling which denied it the right to voir dire Mr. Schrack prior to his testifying. (Brief at 4.) In particular the Agency argues that it had a right to ask questions of Mr. Schrack concerning his status as a licensed professional engineer. (Brief at 4.) Nevertheless, the Agency further states it was allowed to ask Mr. Schrack those questions upon cross-examination which are reflected on pages 53-55 of the transcript in this matter. (Brief at 4.) In addition to being denied its right to voir dire, the Agency cites to purported conflicting statements made by Mr. Schrack as to his professional engineering license. (Brief at 4-6.) As a result the Agency requests the Board to weigh the testimony given by Mr. Schrack accordingly given these circumstances. (Brief at 4-6.) In addition, the Agency also asserts that Mr. Schrack was not qualified to testify as an expert concerning groundwater remediation because he failed to hold a Class K certification and was not certified pursuant to Section 13(a)(4) of the Act and 35 Ill. Adm. Code 312.102 and 35 Ill. Adm. Code Part 380. (Brief at 6-7.) The Agency requests the Board again to weigh the testimony accordingly given the above information. (Brief at 7.) While we will not overrule the hearing officer's determination regarding voir dire, we will weigh the testimony given by Mr. Schrack accordingly in our consideration of Graham's contention that concrete replacement constitutes corrective action.

Also as a preliminary matter the Agency requests that Attachment A, the Sol-Mar article, be stricken from the record. (Brief at 10.) The Agency argues that Graham failed to produce all the information requested by the hearing officer concerning the background of the authors of the article, that the article was not before the Agency upon making its determination and that Mr. Schrack never reviewed the article prior to the hearing. (Brief at 7-9.) The Agency argues pursuant to Clarendon Hills Bridal Center v. Illinois Environmental Protection Agency, (February 16, 1995), PCB 93-55; and Kathe's Auto Service Center v. IEPA (May 18, 1995), PCB 95-43, the information should not be considered since it is evidence that came after the Agency's determination. (Brief at 9-10.)

The Board will admit Petitioner's Exhibit #4 Attachment A. The information contained in Attachment A is the type of evidence allowed in prior UST Fund reimbursement cases. In Sparkling Mineral Water Co. v. IEPA(August 26, 1993) PCB 92-203, and Chuck & Dan's Auto Service v. IEPA (August 26, 2993) PCB 92-203, the Board allowed petitioners to supplement the record with information which was not contained in the Agency record so that petitioners could clarify why a disputed cost should be reimbursed. More recently, in Clarendon Hills, the Board followed the evidentiary rule applied in permit appeals and excluded the information petitioner sought to introduce because the petitioner had failed to meet its initial burden that the remediation costs satisfy the definition of corrective action. (Platolene 550, Inc. v. IEPA (May 7, 1992) PCB 92-9, 133 PCB 259 at 7.) In Clarendon Hills, the information petitioner sought to introduce was critical to prove that the disputed cost was for corrective action. The record before the Agency contained only an invoice with no information about what task was performed. Here, Attachment A contains evidence to support Graham's proposition that the moisture level of the soil must be maintained in order for the bio-remediation to be effective. This is not the type of information necessary for the Agency to make its initial determination as to whether the installation of the concrete was part of corrective action. Rather, this type of evidence may explain if oxygen/moisture is relevant when utilizing this type of micro-organisms. Therefore, the Board will allow the evidence. The Board, however, is concerned that Graham failed to provide all of the requested information concerning the authors of the article as requested by the hearing officer, and will weigh Attachment A accordingly.

Arguments

Graham argues that this site is using bio-remediation where the contaminated soil is left on-site thereby requiring the replacement of the concrete as a necessary part of corrective action. (Brief at 11.) Graham states that the relevant definition of corrective action set forth at Section 22.18(e)(1) reads:

> ...an action to stop, minimize, eliminate, or clean up a release of petroleum or its effects as may be necessary or appropriate to protect human health and the environment. This includes but is not limited to, release response investigation, mitigation of fire and safety hazards, tank removal, soil remediation, hydrogeological investigations, free product removal and groundwater remediation and monitoring, exposure assessments, the temporary or permanent relocation of residents and the provision of alternate water supplies.

Graham asserts that the installation of the concrete at its site meets the definition because it "... serves 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." (Brief at 12.)

Graham states that the concrete is relatively impermeable and limits surface water intrusion which minimizes migration of the contaminate and reduces the cost of the bio-remediation pump and treat system because of the over-all lower water flow. (Brief at 12.) Additionally, Graham asserts that the concrete is necessary for the maintenance of the moisture/oxygen level of the soil so that the micro-organisms function properly. (Brief at 13, Reply at 11-12.) Graham also states that besides controlling the moisture level, the concrete also serves to protect human exposure to the contaminated soil and waters during the remediation process, protects the structural integrity of the pump and treat system that is in place, and prevents fugitive emissions. (Brief at 13-14, Reply at 10-11.) Graham concludes that, since the site is utilizing bio-remediation as the method for corrective action, and the concrete is necessary based on the above reasons to conduct the bio-remediation at the site, the concrete is a necessary part of corrective action at the site and is therefore reimbursable. (Brief at 16, Reply at 17.)

Additionally, Graham argues that the situation at this site can be distinguished from the established case precedent where reimbursement for concrete replacement has been repeatedly denied. In fact, Graham argues that the request for reimbursement for the concrete in this matter is consistent with the precedents set forth in Platolene 500, Inc. v. Illinois Environmental Protection Agency, (May 7, 1992), PCB 92-9; Strube v. Illinois Environmental Protection Agency, (May 21, 1992), PCB 91-205; Strube v. Illinois Pollution Control Board, 242 Ill.App.3d 822, 610 N.E.2d 717 (3rd Dist. 1993); Warren's Service, Inc. v. Illinois Environmental Protection Agency, (June 4, 1992), PCB 92-22; Miller v. Illinois Environmental Protection Agency, (July 9, 1992), PCB 92-49; Ron's Interstate Sunoco v. Illinois Environmental Protection Agency, (July 9, 1992), PCB 92-200; Southern Food Park, Inc. v. Illinois Environmental Protection Agency, (March 3, 1994), PCB 92-200; and Enterprising Leasing Co. v. Illinois Environmental Protection Agency, (April 9, 1992), PCB 91-174. (Brief at 14-15, Reply 5-9.) Graham argues that the Board recognized that each case may have specific fact situations that would determine whether reimbursement is appropriate. (Reply 7-10.) Graham asserts that "[a]ll response actions could be characterized as 'restoration' because they restore a property to pre-release conditions; all such actions benefit the owner or operator and increase the value of the property." (Reply at 7.) Graham states that "...the distinguishing characteristics of the actions are reimbursable is that they *also* do something to contain or clean up a petroleum

release *in addition* to restoring pre-release conditions." (Reply at 7.) Graham argues that this site is distinguishable from the sites involved in the above-mentioned cases because the contamination remains on-site, and surface water infiltration may jeopardize the bio-remediation process, and unlike the sites in the cases mentioned above where the contaminated soil had been removed or met the clean up levels. Furthermore, Graham argues that since the contamination remains on-site during the remediation process, the concrete meets the statutory definition of corrective action and is reimbursable. (Reply 8-12.) Graham also asserts pursuant to Martin Oil Marketing #64 v. Illinois Environmental Protection Agency, (August 13, 1992), PCB 92-52, that the use of the concrete was implied in the Corrective Plan. (Reply at 16.)

Finally, Graham seeks to be reimbursed for the costs of pursuing this action. (Amend. Pet. at 4.) However, Graham does not argue any law which supports the imposition of its costs against the Agency. Graham merely requests in its prayer for relief that it be awarded costs. (Amend. Pet. at 4.)

The Agency argues that the concrete was restoration of the site and not corrective action. The Agency states that the Board should apply the reasoning of Enterprising Leasing Company v. IEPA, (April 9, 1992), PCB 91-174 and Platolene 500 v. IEPA, (May 7, 1992), PCB 92-9 to the facts of this case and that the burden is on Graham to demonstrate that circumstances exist at its site to demonstrate the concrete is corrective action and not restoration. (Brief at 10-13.) The Agency, citing to the Board's analysis in those two cases, states that Graham has failed to demonstrate that its site's circumstances allow for concrete to be part of the corrective action and therefore is not reimbursable. (Brief at 13.) In addition, the Agency compares the circumstances in this case to those in Southern Food Park where the Board denied reimbursement for concrete replacement. The Agency argues that the situations are the same and therefore the Board should find that the concrete is not part of corrective action. (Brief at 13-18.)

The Agency also asserts that the concrete is not necessary for corrective action at the site. The Agency argues that concrete "...is not impervious to water and is subject to the same seasonal heaving and thawing as is soil, and is subject to cracks." (Brief at 13.) The Agency also states that Graham's concern about surface water infiltration is invalid since the bio-remediation method is constantly inundating the contaminated soil with water. (Brief at 14.) In addition the Agency states that, since the bio-remediation method is forcing water through the contaminated soil, the spread of the contamination may happen with or without the concrete. (Brief a 14.) Finally, the Agency states that Graham's own witness, Mr. Schrack, recognized that a portion of the concrete located under the canopy where the

gasoline pumps are located was primarily for restoration purposes and not corrective action. (Brief at 28.) The Agency concludes that the primary purposes of the concrete was restoration. (Brief at 30.)

In response to Graham's request for its costs for bringing this action, the Agency argues that Graham has not provided any authority which supports its claim, that the definition of corrective action does not include legal defense costs, and that the Board determined in Clarendon Hills that it would not allow legal costs which were not corrective action. (Brief at 33.) The Agency asserts that Graham has not demonstrated that the legal costs in this case are corrective action. (Brief at 33.)

Discussion

In applying the definition of corrective action to the replacement of concrete, the Board has determined that the replacement of concrete under most circumstances does not constitute corrective action. However, it is the particular facts surrounding the activity and the purpose of the activity that will ultimately determine whether it constitutes corrective action.

We find that it is not reasonably apparent from the facts in this case that the concrete was part of the corrective action plan. We disagree with Graham's argument that pursuant to Martin Oil Marketing #64 v. Illinois Environmental Protection Agency, (August 13, 1992), PCB 92-52, it was reasonably apparent that installation of the concrete was part of the plan. It may be apparent that if Graham was to utilize the site as a gasoline dispensing station, concrete/asphalt would have to be replaced at the site. It is not reasonably apparent that the concrete was part of corrective action plan which included an estimated budget and the cost for the replacement of concrete was not included. In addition, the estimated budget for the whole corrective action plan was $100,770 and the cost for the concrete was roughly half. Nevertheless the Board also stated in Martin Oil Marketing #64 that whether an activity was included or not included as part of the corrective action plan does not alone decide the issue. (Id. at 3.) The issue is to be decided upon a determination of whether the action is corrective action.

In this case the Board must interpret the statutory language as applied to the circumstances of Graham's site in order to determine whether the concrete is corrective action that is reimbursable under the Act. Section 22.18(e)(1)(c) of the Act has been interpreted by the Board on several occasions. In Enterprising Leasing Co. and Platolene the Board established the following:

The definition of corrective action consists of two

> inquiries: whether the costs are incurred as a result of action to "stop, minimize, eliminate, or clean up a release of petroleum", and whether those costs are the result of such activities as tank removal, soil remediation and free product removal. When reviewing reimbursement determinations the proper standard is to apply the statutory definition of corrective action.

In Enterprising Leasing Co. the Board stated that "[b]oth requirements must be met in order for costs to be reimbursed as corrective action." (Enterprising Leasing Company v. IEPA, (April 9, 1992), PCB 91-174, page 5.) In addition in Southern Food Park, Inc. v. Illinois Environmental Protection Agency, (March 3, 1994), PCB 92-200; the Board examined the petitioner's "main intent" in the context of determining whether concrete replacement satisfied the corrective action test established in Platolene and Enterprising Leasing. (See Chuck and Dan's Auto Service v. Illinois Environmental Protection Agency, (August 26, 1993), PCB 92-203.) In State Bank of Whittington v. Illinois Environmental Protection Agency, (June 3, 1993), PCB 92-152, the Board reversed the Agency's determination that roller/compactor and nuclear density testing charges were not corrective action. In that case the petitioner not only demonstrated that the roller/compactor and nuclear density testing were corrective action for the site, the petitioner also argued that they were the best alternative. (Id. at 15.) As with concrete, roller/compactor activity was usually denied as being restoration and not corrective action, but the Board found, based on the evidence presented by the petitioner, the roller/compactor activity met the two-part test of Platolene,and Enterprising Leasing. Thus Graham must demonstrate that the activity meets the two-part test in order for the cost of the concrete to be reimbursable.

The appellate court in Strube v. Illinois Pollution Control Board, 242 Ill. App.3d 822, 610 N.E.2d 717, 851 (3rd Dist. 1993), held that the purposes of the UST Fund are narrow. The Act establishing the UST Fund limits reimbursement to those actions which remediate or stop, eliminate, and minimize the contamination. The UST Fund was not developed to reimburse operators for the costs of restoration as a result of remediation at the site. Accordingly the Board does not believe that any or all actions that may contribute to cleaning up or containing a petroleum release constitute corrective action. If that were the case, it could be argued that erection of a building foundation over the contamination at the site is arguably part of the corrective action. When applying the analysis of Platolene, Enterprising Leasing and Southern Food Park, the Board will consider the motivating circumstances of why that particular activity was chosen or if an alternative could have been utilized

but for the restoration purposes.[2]

The first question before the Board in determining whether the concrete is corrective action at the site is whether the concrete stops, minimizes, eliminates, or cleans up a release of petroleum. Graham has presented several possible reasons why a relatively impermeable layer may be part of the corrective action at the site to control the emissions from and the migration of the contamination in the soil.

Graham's argument that the moisture and/or oxygen content of the soil must be maintained in order for the micro-organisms to effectively treat the contaminated soil, is inconsistent with the description of how the system operates. According to the explanation given the micro-organisms are added to the contaminated water in a tank located in a shed and are not added directly to an unsaturated area of the soil where the moisture/oxygen content becomes relevant. While it is true that the treated water is recirculated into the area of soil contamination, the bio-remediation process is designed and operated to take place in the tank in the treatment shed, where the micro-organisms are initially added.

Furthermore, the protection of the pump and treatment system from vehicular traffic only becomes necessary when restoring the site as a gasoline dispensing station and is not in relation to stopping, minimizing or eliminating the contamination. Graham does set forth some arguments that a relatively impermeable layer, such as the concrete, may minimize fugitive emissions and direct human contact. However, corrective action for these two concerns, i.e. the concrete, only becomes necessary for purposes of restoring the property as a gasoline dispensing station while the remediation process is still on-going.

The second question before the Board is whether the costs

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[2]The Board in adopting regulations pursuant to Section 57.14(b) of the Act in Regulations of Petroleum Leaking Underground Storage Tanks, 35 Ill. Adm. Code 732, R94-2(a) established a list of activities at 35 Ill.Adm. Code 732.605 which are eligible for reimbursement as corrective action based on the new definition of corrective action at Section 57.2 of the Act. (415 ILCS 5/57.2 and 5/57.14(b)(1994).) The Board's regulations under the new UST program would allow "...costs for destruction and replacement of concrete, asphalt and paving to the extent necessary to conduct corrective action and if the destruction and replacement has been certified as necessary to the performance of corrective action by a licensed Professional Engineer." Those actions must also be contained in the corrective action plan and budget. (See 35 Ill. Adm. Code 732.601.)

associated with the concrete are the result of tank removal, soil remediation and/or free product removal. Graham does not argue that the costs of the concrete are the result of tank removal or free product removal. Instead, Graham argues that the cost of the concrete is the result of the on-going soil remediation. We disagree that the cost of the concrete is the result of the on-going soil remediation. Graham has failed to demonstrate that the concrete is necessary part of the soil remediation plan. The pump and treat system as designed, approved by the Agency, and operated provides the necessary corrective action. The concrete is not necessary for soil remediation. Instead the restoration of the site as a gasoline dispensing station drives the necessity of utilizing the concrete. As such we find that the cost of the concrete is not the result of soil remediation at the site but is the result of restoration of the site. Unlike the petitioner in State Bank of Whittington, Graham has not shown that the concrete is necessary for corrective action at this site or in the alternative that it is the best alternative for corrective action purposes for this site. Therefore pursuant to the test established in Platolene, Enterprising Leasing and Southern Food Park, the concrete is not reimbursable.

The Board finds the main purpose of the replacement of the concrete is to restore the site as a gasoline dispensing station. The corrective action plan did not include the concrete as part of the plan; the budget attached to the corrective action plan did not include the cost of the concrete; and the necessity of the concrete is directly related to the use of the site as a gasoline dispensing station, and not to the soil remediation at the site which was to last 5 to 6 months. The narrow legislative purpose of the UST Fund is reimbursement of costs directly related to corrective action at the site and not for the costs attributed to the restoration of the site. The fact that an action may partially contribute to corrective action while primarily having a restoration role does not make it necessary for corrective action at a particular site. Based on these facts, we find Graham has not met the two-part test and therefore the costs associated with the concrete are not reimbursable.

For the reasons stated above we affirm the Agency's denial of the costs associated with the concrete. Since we affirm the Agency's determination, petitioner's request for costs is moot.

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

ORDER

For the forgoing reasons, the Board affirms the Agency's March 1, 1995, determination that replacement of concrete by the petitioner, Eugene Graham, is not a reimbursable expense.

IT IS SO ORDERED.

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

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 24th day of August, 1995, by a vote of 7-0.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board