

ILLINOIS POLLUTION CONTROL BOARD  
May 5, 1993

PRINCETON/BECK OIL )  
COMPANY, )  
 )  
Petitioner, )  
 )  
v. ) PCB 93-8  
 ) (UST Fund)  
ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY, )  
 )  
Respondent. )

DANIEL J. McFADDEN, VALLEY PETROLEUM EQUIPMENT MAINTENANCE CO.,  
APPEARED ON BEHALF OF PETITIONER, and

TODD F. RETTIG APPEARED ON BEHALF OF RESPONDENT.

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

This matter is before the Board on a petition for review filed January 8, 1993 by Princeton/Beck Oil Company (Beck) pursuant to Section 22.18b(g) of the Environmental Protection Act (Act). (415 ILCS 5/22.18b(g) (1992).) Beck seeks review of a December 4, 1992 Illinois Environmental Protection Agency (Agency) decision disallowing some costs for which Beck sought reimbursement from the Underground Storage Tank (UST) Fund. A hearing was held on March 24, 1993, in Princeton, Illinois. No members of the public attended.

The only issue remaining in dispute is whether \$1780 in equipment and labor costs associated with compaction of backfill is reimbursable from the UST Fund.

BACKGROUND

Beck owns an auto truck plaza on Interstate 80 in Princeton, Illinois. On January 30, 1992, Beck became aware of a release of petroleum. Beck notified the Emergency Services and Disaster Agency (ESDA)<sup>1</sup> of that release on January 31, 1992. (Exh. A.)<sup>2</sup> There are nine USTs at the site. Beck began corrective action on February 21, 1992 by removing three of the tanks. As part of the

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<sup>1</sup> ESDA is now known as the Emergency Management Agency.

<sup>2</sup> Beck's application for reimbursement, which was not included in the Agency record, will be indicated by "Exh. A", the Agency Record, Technical File, will be indicated by "R. A", and the Agency Record, Fiscal File, will be denoted by "R. B."

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initial activity, Beck removed those three tanks, stockpiled contaminated soil, and placed backfill in the excavation hole next to a building to provide "needed support for the foundation" of the building. (R. A at 8.) Eventually, all nine tanks were removed. (Tr. at 27.) Beck submitted an application for reimbursement to the Agency, and on June 5, 1992, the Agency determined that Beck was eligible to access the Fund, subject to a \$10,000 deductible. (R. A at 73.)

During the spring and summer of 1992 Beck submitted various billing forms to the Agency for reimbursement. On December 4, 1992, the Agency issued its final reimbursement determination letter. (R. A at 145-148.) In its decision, the Agency made seven adjustments to the amount of reimbursement requested by Beck. Beck had requested reimbursement of \$175,719.15, and the Agency allowed reimbursement of \$155,755.15. (R. A at 145-148.) Beck then filed this appeal with the Board.

#### ISSUE

Beck originally contested all seven adjustments to its requested reimbursement. At hearing, Beck agreed not to contest \$120 of the first adjustment of \$657 due to a math error, and not to contest the third adjustment of \$31 in manifesting costs. (Tr. at 5; Pet. Br. at 1-2.) In its brief, the Agency states that after considering the hearing testimony, it agrees not to contest adjustments 4, 5, 6, and \$80.55 of 2. (Agency Br. at 2.) The Agency then states that the remaining issue is adjustment 7 of \$1780 in equipment and labor costs associated with compaction of backfill. (Agency Br. at 2.)

Initially, the Board notes that the Agency does not address, in its brief, the \$537 remaining in adjustment 1 or the \$18 remaining in adjustment 2. In its brief, Beck states that "item 2 should be \$18.00." (Pet. Br. at 1.) Thus, the Board finds that Beck and the Agency agree that the amount of adjustment 2 should be \$18, instead of \$98.55, for an adjustment in handling charges. As to the remaining \$537 of adjustment 1, the Board construes the Agency's statements in its brief to recede from contesting that \$537. Thus, the Board's review is limited to adjustment 7: \$1780 in equipment and labor costs associated with compaction of backfill.

The Agency denied reimbursement of \$1780 in equipment and labor costs associated with compaction of backfill. The Agency found that those costs are not corrective action costs, and therefore are not reimbursable. The Agency stated that one of the eligibility requirements for accessing the UST Fund is that the costs incurred were corrective action costs which were incurred as a result of a release of petroleum from a UST. (R. A at 148.) The statutory definition of "corrective action" states in part:

"Corrective action" means 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, groundwater remediation and monitoring, exposure assessments, and the provision of alternate water supplies. (415 ILCS 5/22.18(e)(1)(C) (1992).)

Beck notes that the Agency adopted emergency rules in October 1992, stating that backfill and compaction costs are ineligible for reimbursement, but contends that it performed the work six months before those rules were adopted. Beck maintains that the Agency's guidance manual includes placement of backfill material as an eligible cost, and argues that if placement of backfill material is reimbursable, then compaction of that material should also be reimbursable. Beck contends that compaction of backfill material is a mandatory construction practice for excavations as deep as the one in this case. Beck argues that failure to compact would endanger the structure next to the excavation, and would be hazardous to traffic as the material settled on its own.

In response, the Agency argues that this issue can be decided by a straightforward application of the Board's corrective action "formula." The Agency notes that the Board has previously held that in order to determine whether a given activity is corrective action, the Board must determine whether the activity was intended to stop, minimize, eliminate, or clean up a release of petroleum, and whether the activity was of the type contemplated by the statutory definition, i.e. release investigation, mitigation of fire and safety hazards, tank removal, etc. The Agency contends that Beck's compaction of backfill fails the first part of the formula. The Agency maintains that Beck's compaction of backfill was for the sole purpose of shoring up the foundation of a building on the premises, and not to minimize, eliminate, or clean up a release of petroleum. The Agency states that compaction of the backfill at the facility did not affect, in any way, the amount of contamination at the facility, and thus argues that the compaction fails the first part of the corrective action formula. Therefore, the Agency contends that the costs associated with compaction are not reimbursable from the Fund.

After a review of the record and the arguments of the parties, the Board concludes that the costs associated with compaction of backfill are not corrective action costs. The Agency correctly points out that determining whether costs were incurred as a result of corrective action is a two-step inquiry:

first, whether the costs were incurred as a result of action to stop, minimize, eliminate, or clean up a release of petroleum, and second, whether those costs are the result of activities such as tank removal, soil remediation, and free product removal. Both requirements must be met in order for costs to be reimbursed as corrective action. (Enterprise Leasing Co. v. Illinois Environmental Protection Agency (April 9, 1992), PCB 91-174, slip op. at 5.)

We do not believe that compaction of backfill, under the facts presented here, meets the first part of the test. Beck's witness testified that the backfill was compacted to provide a solid foundation for a nearby building. (Tr. at 36.) The compaction is analogous to the replacement of concrete. These actions restore the facility to its original condition. While such restoration may be beneficial to the property owner and society, it does not stop, minimize, eliminate, or clean up a release of petroleum. As the Agency points out, the compaction of backfill at the facility did not affect the amount of contamination. The Board has previously held that in most cases the replacement of concrete is not corrective action, and is not reimbursable. (See, e.g., Southern Food Park, Inc. v. Illinois Environmental Protection Agency (December 17, 1992), PCB 92-88; Platolene 500, Inc. v. Illinois Environmental Protection Agency (May 7, 1992), PCB 92-9.) The appellate court has upheld the Board's finding that replacement of concrete is not corrective action. (Strube v. Illinois Pollution Control Board, No. 3-92-0468, slip op. at 6-7 (3d Dist. March 15, 1993).) Because we find that compaction of backfill in this case is analogous to the replacement of concrete, since the compaction served to restore the property, we find that the compaction does not meet the first part of the corrective action test. Thus, those costs are not reimbursable.

The Board is cognizant of Beck's argument that although the Agency's October 1992 emergency rules do not allow for recovery of compaction costs, the Agency's guidance manual did allow recovery for backfill, and thus Beck contends that compaction costs should be allowed. However, this Board has previously held that the guidance manual is a rule which was not properly promulgated by the Agency pursuant to the Administrative Procedure Act, and that therefore the manual has no legal or regulatory effect in proceedings before the Board. (Platolene 500, Inc. v. Illinois Environmental Protection Agency (May 7, 1992), PCB 92-9, slip op. at 5; Strube v. Illinois Environmental Protection Agency (May 21, 1992), PCB 91-205, slip op. at 2-3.) The proper inquiry in determining whether an activity is corrective action is whether that activity meets both parts of the statutory definition. Because we have determined that compaction of backfill in this case does not meet that definition, the costs are reimbursable.

CONCLUSION

In sum, the Board finds that \$1780 in equipment and labor costs for compaction of backfill are not corrective action, and thus are not reimbursable from the Fund.

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

ORDER

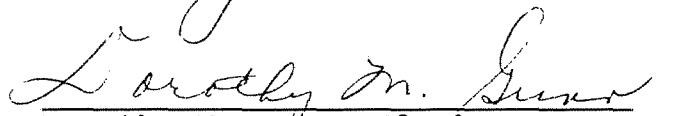
The Board hereby affirms the Agency's December 4, 1992 determination that \$1780 in equipment and labor costs associated with the compaction of backfill are not corrective action costs, and thus are not reimbursable. The Agency has agreed not to contest adjustments 4, 5, 6, and \$80.55 of adjustment 2, and the Board has construed the Agency's brief as receding from contesting \$537 of adjustment 1. Beck has agreed not to contest \$120 of adjustment 1, and not to contest adjustment 3.

This case is remanded to the Agency for disbursement of the additional \$8015 amount, consistent with this opinion and order. This docket is closed.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41) provides for the appeal of final Board orders. The Rules of the Supreme Court of Illinois establish filing requirements. (But see also 35 Ill. Adm. Code 101.246 "Motions for Reconsideration" and Castenada v. Illinois Human Rights Commission (1989), 132 Ill.2d 304, 547 N.E.2d 437; Strube v. Illinois Pollution Control Board, No. 3-92-0468, slip op. at 4-5 (3d Dist. March 15, 1993).)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 5<sup>th</sup> day of May, 1993, by a vote of 5-0.

  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board