

Mr. Ayers hired a consulting firm, Beling Consultants, to direct the removal of the tanks and remediation of the site. At the instruction of the consulting firm, concrete was broken and removed to allow for access to contaminated soil. (Tr. at 12.) The concrete was hauled away to another site for disposal. After reaching the excavation limit, new tanks were installed and washed rock for compaction was placed over the new tanks. (Tr. at 14-15.) Finally, concrete was poured on top of the washed rock. (Tr. at 15.)

In February of 1991, Mr. Ayers submitted an application for reimbursement from the fund, requesting \$45,956.46. (R. at 64; Pet. at 2.) On January 23, 1992, the Agency notified Mr. Ayers that a \$10,000 deductible was applied and reimbursement would be forthcoming for \$28,092.12. The difference of \$5,595.94 was disallowed because the Agency declined to reimburse for the replacement of the concrete. (Pet. at 3.)

DISCUSSION

The sole issue raised by this petition is whether or not the costs incurred in the replacement of concrete are reimbursable. (Tr. at 6.) This issue has been squarely before the Board on two previous occasions in the cases Platolene 500, Inc. v. IEPA (May 7, 1992), PCB 92-9, _____ PCB _____ and Strube v. IEPA (May 21, 1992), PCB 91-205, _____ PCB _____.) In both Platolene and Strube the Board held that the replacement of concrete is not corrective action and the Agency properly denied reimbursement. The facts in this case present no new material which would convince the Board that replacement of concrete is a reimbursable costs. Therefore, for the following reasons the Board upholds the Agency's denial of reimbursement.

The petitioner maintains that the guidance manual allows for reimbursement of concrete. (Tr. at 28, 37.) When asked why the concrete was replaced the petitioner stated:

- A Because we had to have a concrete driveway back in there again.
- Q Did some Agency or body tell you you had to do that?
- A No, you just don't run a gas station on gravel.
- Q Why is that?
- A For one thing I don't think the tanks would hold up.
- Q The ---
- A I was under the assumption that we could replace it just right back the way it was.

Thus, the petitioner is arguing that replacement of concrete was necessary for safety.

When asked specifically if the guidance manual stated that pouring new concrete to replace the removed concrete was reimbursable, the petitioner replied:

A The way I read it, read the manual, is when they say the concrete was covered as a structure, they said structures are covered for dismantling and mantling. Concrete is a structure. But I suppose I could have re-mantled the old concrete but it would have taken twice as much money.

Q But, in fact, you destroyed the old concrete?

A Right.

Q It wouldn't have been possible for you to reassemble it?

A I suppose if you could have cut it in big squares, knowing the technicality, it would have cost a bundle. But I suppose it could have been done.

Q It didn't say repaving or pouring down new concrete was a reimbursable expense?

A No, it didn't.

The Agency maintains that the replacement of concrete is not corrective action and is therefore not reimbursable. The Agency through cross-examination distinguishes between replacement and reassembly. (Tr. at 28-29.) The Agency also points out that reimbursement was given for removal of the concrete.

The guidance manual clearly allows for reimbursement for the dismantling and "reassembling of structures" and includes paving (concrete or asphalt) as a structure. There is no provision in the statute that deals with the replacement or reassembly of structures.

In Platolene and in Strube, the Board found that the guidance manual was a rule which was not promulgated according to the Administrative Procedure Act (APA) and therefore the manual has no legal or regulatory effect in proceedings before the Board. Therefore, the Board cannot enforce the provisions of the guidance manual and determinations on reimbursement must be consistent with any applicable statutory or regulatory requirements.

The statute limits reimbursement to costs of corrective action. (Section 22.18b(a).) The definition of corrective action consists of two inquiries: whether the costs are incurred as a result of an 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. (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1022.18(e)(1)(C), see Enterprise Leasing Company v. IEPA (April 9, 1992), PCB 91-174, _____PCB_____.) In applying this 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, because it is not an act to stop or minimize a release. (Platolene 500, Inc. v. IEPA (May 7, 1992), PCB 92-9, _____PCB_____.) However, the Board does believe that under certain circumstances the replacement of concrete may be proven to be a corrective action. (Ibid. at 6.) The particular facts surrounding the action and the purpose of the action will ultimately determine whether that action is a corrective action. (Ibid. at 6.)

The facts in this case do not support a finding that the replacement of concrete was a corrective action. In fact, Mr. Ayers testified that placing concrete over the new tanks was necessary for safety reasons, not to further remediate the leaking tanks. Thus, the replacement of the concrete was done as a part of improvements made after corrective action was complete.

CONCLUSION

The guidance manual has no legal force or effect because it was not promulgated according to the requirements of the APA. Corrective action is an action to stop, minimize, eliminate or clean up a release of petroleum. The petitioner has not shown that the replacement of concrete at the station was a corrective action. Therefore, the Board finds that the petitioner is not eligible for reimbursement of the cost of replacement of concrete pursuant to the statute.

This opinion constitutes the Board's finding of facts and conclusions of law in this matter.

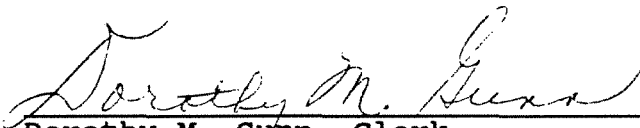
ORDER

The Board affirms the Agency's January 23, 1992, determination that the petitioner, Warren's Service, cost of replacement of concrete is not a reimbursable expense because the repaving did not constitute a corrective action.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (Ill.Rev.Stat. 1991, ch. 111 1/2, par. 1041) provides for the appeal of final orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

I, Dorothy Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 4th day of June, 1992, by a vote of 7-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board