ILLINOIS POLLUTION CONTROL BOARD
November 18, 1993

RON'S INTERSTATE SUNOCO,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 92-200
	)	(UST Fund)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by R.C. Flemal):

On November 5, 1993 the Illinois Environmental Protection Agency (Agency) filed a motion for summary judgment in this proceeding. On November 15, 1993 Ron's Interstate Sunoco (Ron's) filed a motion to file instanter and memorandum of law in opposition to the Agency's motion for summary judgment.

The Board first addresses Ron's motion to file instanter. The motion indicates that Ron's attorney has changed his business address[1] and that the Agency's motion for summary judgment was mailed to Ron's attorney's prior business address. Ron's argues that if its memorandum is late as a consequence of the mailing problem, it is at most one day late. The Agency mailed its motion on November 4, 1993. It was received by Ron's attorney four days after mailing on November 8, 1993, completing service. Seven days from November 8, 1993, the date of service, is November 15, 1993. The memorandum was filed on November 15, 1993. Therefore, the Board finds that the memorandum is timely filed. (See also, 35 Ill. Adm. Code 101.144 and 241.) The motion to file instanter is denied as moot.

We now turn to the motion for summary judgment. The uncontested facts are that Ron's discovered releases from two petroleum underground storage tanks (USTs) and the Emergency Services and Disaster Agency was notified of the release on August 23, 1991. (R. 3, 14-15.) The sole issue is whether certain costs submitted for concrete removal and replacement are related to corrective action taken at the site.

Agency argues that concrete replacement at this site did not constitute corrective action and presents a series of opinions and orders where the Board has found that concrete replacement

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[1] No change of address was filed with the Board.

under certain circumstances does not meet the definition of corrective action.

In reply, Ron's argues that the "replacement of the concrete did not constitute an 'improvement' on the owner's property, but rather, restored the drive to the condition it was in prior to the waste removal project." (Ron's memorandum at 2.) Ron's further argues that it relied to its detriment on the Agency's "policy manual" that the replacement of the concrete would be reimbursed.

As to the removal of concrete, the Agency alleges that the bills for removal of the concrete indicate that the destruction of the concrete occurred June and July 1992[2], after the engineer certified on May 20, 1992, that the cleanup objectives have been met for the site. Ron's replies that in order to remove the leaking tanks, existing concrete had to be removed.

In Platolene 500, Inc. v. IEPA (May 7, 1992), PCB 92-9, 133 PCB 259, and in Strube v. IEPA (May 21, 1992), PCB 91-105, 91 PCB 205, aff'd Strube v. PCB (3rd Dist. 1993), 242 Ill. App. 3d 822, 610 N.E. 2d 717, the Board found that the guidance manual was a rule which was not promulgated according to the Administrative Procedure Act 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. Ron's has presented nothing which would persuade the Board from departing from its prior position on the issue of the guidance manual.

The Environmental Protection Act limits reimbursement to costs of corrective action. (415 ILCS 5/22.18b(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. (415 ILCS 5/22.18(e)(1)(C), see Enterprise Leasing Company v. IEPA (April 9, 1992), PCB 91-174, 132 PCB 87.) 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, minimize, eliminate, or clean up a release of petroleum. (Platolene 500, Inc. v. IEPA (May 7, 1992), PCB 92-9, 133 PCB 259, 265.) The particular facts surrounding the

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[2] Items 1 and 3 contained in the Agency's motion, totalling 5919.51, with the 15% handling charge (Agency motion at 2-3; R. at 128-129.)

action and the purpose of the action will ultimately determine whether that action is a corrective action. (Ibid. at 264.)

The facts in this case presented in the summary judgment and memorandum in opposition do not support a finding that the replacement of concrete was a corrective action. In fact, Ron's states that replacement of the concrete was to "restore the drive to the condition it was in prior to the waste removal project" (Ron's memorandum at 2), not to stop, minimize, eliminate or clean up the release, or for the tank removal, soil remediation, and free product removal. Thus, the replacement of the concrete was done as a part of improvements made after corrective action was complete.

The Board finds that genuine issues of material fact remain surrounding whether the removal of concrete at this site constituted corrective action. The bills for concrete removal are dated July 1992 (R. at 123-129), after certification of the completion of remediation was signed on May 14, 1992 (R. at 97), However, the facts are not clear on the actual dates of concrete removal, or whether the removal of the concrete was part of the corrective action taken at the site.

Upon review of the facts and law presented in the motion for summary judgment and memorandum in opposition, the Board grants the Agency's motion for summary judgment solely as it pertains to the issue of the replacement of concrete. The Board denies the Agency's motion for summary judgment as it pertains to the removal of concrete at this site. This matter shall proceed in accordance with this order and the hearing schedule established by the hearing officer.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 18th day of November, 1993, by a vote of 5-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board