

ILLINOIS POLLUTION CONTROL BOARD
May 21, 1992

FRED M. STRUBE and)	
CYNTHIA L. STRUBE,)	
)	
Petitioners,)	
)	
v.)	PCB 91-205
)	(Underground Storage
ILLINOIS ENVIRONMENTAL)	Tank Reimbursement)
PROTECTION AGENCY,)	
)	
Respondent.)	

DIANA M. JAGIELLA, HOWARD & HOWARD, APPEARED ON BEHALF OF PETITIONER;

RONALD L. SCHALLAWITZ, APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by B. Forcade):

This matter comes before the Board on a petition filed on October 31, 1991, by Frank M. Strube and Cynthia L. Strube seeking review of an Underground Storage Tank Reimbursement Determination. The Strubes seek review of the Agency's denial of reimbursement of \$10,355 for above ground resurfacing charges.

BACKGROUND

The Strubes are the owners of property at 700 Spring Street, Peoria, Illinois at which was located Fred Strube's 66 Service Station. (Tr. at 15.) In anticipation of closing the business and selling the property, the Strubes removed five underground storage tanks from the property. (Tr. at 17.) During removal of the tanks, contamination was discovered and the release was reported to the Emergency Services and Disaster Agency. (Tr. at 15.) The Strubes submitted an application for reimbursement to the Agency. (R. at 12.) The Agency after reviewing the application determined that the Strubes were eligible for reimbursement subject to a \$15,000 deductible. (R. at 41.) Upon a review of the invoices submitted to the Agency, it was determined that the \$10,355 for the replacement of concrete was not a reimbursable cost. (R. at 132.) The Agency determined that this was not a reimbursable cost because it was not a corrective action and the costs associated with the replacement of structures is not reimbursable. (R. at 133.)

On October 31, 1991, the Strubes filed a petition for review contesting the Agency's determination that the replacement of concrete is not eligible for reimbursement. A hearing was held on January 29, 1992 in Peoria, Illinois. The Strubes filed a

post hearing brief on March 10, 1992, and the Agency filed its post hearing brief on March 30, 1992. A reply brief was filed by the Strubes on April 8, 1992.

DISCUSSION

The Strubes argue that the guidance manual, distributed to the public by the Agency, provides for the reimbursement of the costs for replacement of the concrete. The Strubes argue that the Agency's position that the reassembly of a driveway would be reimbursable, while repaving of the driveway is not reimbursable, is completely unreasonable. The Strubes further argue that the Agency has failed to adopt rules for the administration of the Underground Storage Tank Fund and the Agency's failure to establish rules should not be used to the detriment of the Strubes. The Strubes argue that the Agency should be required to reimburse the cost of the replacement of concrete because the Agency approved reimbursement to the Strubes in phone conversations and in public statements.

The Agency argues that the cost of replacement of concrete is not a reimbursable expense because it is not corrective action. The Agency also contends that the statute must control and the guidance manual is not a rule. The Agency further argues that the guidance manual does not provide that the replacement of concrete is reimbursable but refers to the "reassembly" of structures.

In addressing the arguments raised by the Strubes and the Agency, the Board looks at the role of the guidance manual, corrective action and the representations made by the Agency.

GUIDANCE MANUAL

The Strubes argue that the guidance manual distributed to the public by the Agency states that the cost for the replacement of concrete is a reimbursable expense. The Agency argues that the guidance manual allows for the "reassembly" of structures and that the replacement of concrete is not a reassembly. The Agency contends that this provision of the manual is intended to allow for reassembly of small structures such as canopies and to prevent people from tearing down their stations, building a new one and expecting the fund to pay for it. (Tr. at 155.) The Strubes argue that "reassembly" of concrete is impractical and not cost effective. (Tr. at 158.)

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 500, Inc. v. IEPA (May 7, 1992), PCB 92-9, _____ PCB _____, 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, as in Platolene, the Board cannot enforce the provisions of the guidance manual and determinations on reimbursement must be consistent with any applicable statutory or regulatory requirements.

In Community Nutrition Institute v. Young (D.C. Cir. 1987), 818 F.2d 943, after finding that an FDA standard could not stand because it was not subjected to the required notice and comment requirements, the court commented on the role of guidance manuals,

Our holding today in no way indicates that agencies develop written guidelines to aid their exercise of discretion only at the peril of having a court transmogrify those guidelines into binding norms. We recognize that such guidelines have the not inconsiderable benefits of apprising the regulated community of the agency's intentions as well as informing the exercise of discretion by agents and officers in the field. It is beyond question that many such statements are non-binding in nature and would thus be characterized by a court as interpretative rules or policy statements. We are persuaded that the courts will appropriately reach an opposite conclusion only where as here, the agency itself has given its rules substantive effect.

The Act "authorizes the Agency to adopt reasonable and necessary rules for the administration of this Section." (Section 22.18b(f).) The Agency has chosen not to promulgate rules pertaining to reimbursement but rather evaluates each application separately on its own merits, on a case by case basis. (Pet. Br. at 39.) The evaluation of the application by the Agency is governed by the requirements of the statute.

CORRECTIVE ACTION

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 Strubes replacement of concrete satisfies the statutory definition of corrective action. The Strubes did not present evidence to show that their replacement of concrete was a corrective action. However, the Strubes do argue that such a strict reading of the statute and the definition of corrective action is contrary to the purpose of the fund as stated in the statute. (Reply Br. at 3.)

Section 22.13(a) of the Act provides that monies from the fund may be used for the following purposes:

* * *

3. to assist in the reduction and mitigation of damage caused by leaks from underground storage tanks,

* * *

5. for payment of costs of corrective action incurred by and indemnification to operators of underground storage tanks as provided in Section 22.18b of this Act.

The Strubes characterize the purpose of the fund as a "broad remedial purpose" which requires that reimbursement be available for reasonable site restoration expenses. (Reply Br. at 3.)

The Board does not see the fund as having such a broad purpose. The Board believes that allowing the fund to reimburse for reasonable restoration expenses is contrary to the statutory definition of corrective action.

AGENCY REPRESENTATIONS

The Strubes argue that the Agency represented that the replacement of concrete would be reimbursed in phone conversations with Cindy Strube and at a workshop on the UST program.

Mrs. Strube talked with Doug Oakley of the Agency on February 27, 1991. Mrs. Strube described her conversation with

Mr. Oakley as follows:

- A. I asked him about the concrete work because of switching contractors. And he told me to submit the bill.
- Q. Did you refer to repaving the driveway when you were talking with Mr. Oakley?
- A. Yes.
- Q. Did Mr. Oakley tell you during that conversation that repaving the driveway was not an expense eligible for reimbursement from the UST fund?
- A. No.
- Q. Did you have any conversations with Mr. Oakley after that time?
- A. Yes.
- Q. When was the next time you talked to Mr. Oakley?
- A. On March 8 of 1991, 10:45 a.m., Florida time. I asked him again about the concrete to make sure because of switching contractors. He said no problem, but it had to be on their billings.

* * *

- Q. ...After you talked to Mr. Oakley the second time, did he tell you that repaving the driveway was not an expense eligible for reimbursement from the fund?
- A. No.

(Tr. at 31 - 33.)

Mr. Oakley testified concerning his phone conversations with Mrs. Strube as follows:

- Q. Do you remember any specific conversations concerning the replacement of concrete?
- A. It may have been mentioned, but I don't remember specifics.
- Q. If you recall, do you remember if she asked you specifically and directly whether or not the cost of repaving whether or not the costs of repaving or replacing the concrete would be a reimbursable expense?

A. I don't recall.

Q. Do you give definitive answers over the telephone as to whether a particular cost is reimbursable or not in the course of your job?

A. No.

Q. Why not?

A. There's too many variables involved. The laws change, prices you know. It's just -- basically, what we do is we ask them to submit the billings; and we look at the billings. And then we make our determination.

Q. To the best of your recollection or memory, did you ever tell Mrs. Strube that the Agency would reimburse concrete replacement for the resurfacing of her gas station for the underground storage tank fund?

A. No.

(Tr. at 100 - 101.)

Jim Ketchum of the Agency also testified as to the Agency's policy of not making pre-determinations of reimbursements of costs.

Q. Do you ever recall over the telephone giving definitive determinations or preliminary determinations of eligibility of costs?

A. No. We usually or always refrain from doing so. And our typical response is submit it and we'll look at it which does them justice because in choosing that route they'll have the right later to make an appeal on the decision.

(Tr. at 129.)

Mrs. Strube testified that she spoke with the Agency concerning the replacement of concrete and they told her to submit the bill. She did not testify that anyone at the Agency made a positive statement that the cost would be reimbursed. She stated that the Agency did not inform her that the cost of repaving the driveway would not be reimbursed. The testimony shows that the Agency did not make any representation on reimbursement but merely requested that the bills be submitted for the Agency's review. There is no evidence in the record to show that the Agency represented to Mrs. Strube that the cost for replacement of concrete would be reimbursed from the fund.

The Agency was aware that the Strubes planned to repave the driveway but did not inform Mrs. Strube whether the cost of repaving would be reimbursed. Because the Agency has not promulgated rules concerning which cost are reimbursable the Agency is not in a position to make pre-determinations on reimbursement of specific costs.

The Strubes also argue that Bur Filson of the Agency, at a workshop held in October, 1991 in response to a question from the floor, stated that repaving was an eligible cost for reimbursement. (Tr. at 79.) While the Strubes were not present at the workshop, Mike Hoffman of Environmental Science and Engineering, a sub-contractor on the project, did attend the workshop. The site was repaved in July of 1991 (Tr. at 23) and the conference occurred in October of 1991. (Tr. at 79.)

The testimony of Agency personnel that were present at the workshop disagree with Mr. Hoffman as to exactly what question was asked and what Mr. Filson's response meant. Mr. Filson did not testify at the hearing. Because Mr. Filson did not testify, the statement cannot be used to represent a position of the Agency. Further, the repaving at the Strube's station took place three months prior to the workshop. Therefore, the representation at the workshop was not a factor in the Strubes' decision to replace the concrete.

The Board finds that the evidence presented concerning the representations of the reimbursement of the cost of concrete replacement does not show that the Agency informed Mrs. Strube that the cost was reimbursable. The evidence merely shows that the Agency requested that the bills for the concrete be submitted for review. Also as previously discussed, allowing for the reimbursement of an action which is not a corrective action would be in violation of the statute.

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 Strubes have not shown that the replacement of concrete at their station was a corrective action. The Agency did not inform the Strubes about the reimbursement for costs associated with repaving but requested that the bills be submitted for review. Therefore, the Board finds that the Strubes are 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.

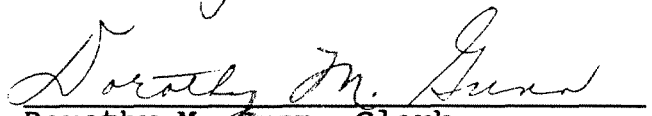
ORDER

The Board affirms the Agency determination that the Strube's 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 21st day of May, 1992, by a vote of 7-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board