

ILLINOIS POLLUTION CONTROL BOARD
July 7, 1995

R.P. LUMBER COMPANY, INC.,)
)
 Petitioner,)
)
 v.)
)
)
OFFICE OF THE STATE)
FIRE MARSHAL,)
)
 Respondent.)

PCB 94-184
(UST - Fund)

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

This matter is before the Board on a May 1, 1995 Motion for Summary Judgment filed by petitioner R.P. Lumber Company, Inc. (R.P.)¹. R.P. requests that the Board reverse the Office of the State Fire Marshal's (OSFM) deductibility determination at issue in this case.

On May 31, 1995 the OSFM filed a Response to Motion for Summary Judgment. On June 5, 1995 R.P. filed a Motion to Leave to File Reply to OSFM's May 31, 1995 filing. The Board hereby grants R.P. Lumber's June 5, 1995 Motion for Leave to File Reply and accepts its Reply to Response to Motion for Summary Judgment.

BACKGROUND

At issue is an "L" shaped property located at 514 E. Vandalia, Edwardsville, Madison County, Illinois. (Pet. at 1; MSJ at 2.)² The entire property was owned until 1986 by Illinois Lumber Company (Illinois Lumber). (MSJ at 3.) R.P. acquired the property in separate stages from 1986 to 1994, and currently owns the entire "L" property. (Resp. Res. at 2.)

¹ The summary judgment motion was accompanied by a motion to file instanter, which was granted by Board order of May 11, 1995. By the same order the Board granted OSFM a fourteen-day period to respond to the summary judgment motion.

² Petitioner's June 27, 1994 Petition for Review will be cited as "Pet. at ___."; petitioner's May 1, 1995 Motion for Summary Judgment will be cited as "MSJ at ___."; the Agency record will be cited as "R. at ___."; respondent's Response to Interrogatories will be cited as "Res. Inter. at ___."; and respondent's Response to Motion for Summary Judgment will be cited as "Resp. Res. at ___".

R.P. purchased the first portion of the "L" property on September 26, 1986, the second portion on April 14, 1988, the third portion on December 31, 1991, and the fourth and final portion in December 1994. (Resp. Res. at 2.) The September 1986 and April 1988 purchases were made from Illinois Lumber; the December 1991 and December 1994 purchases were made from the Bank of Alton, which had foreclosed upon Illinois Lumber's interest. (MSJ at 3.)

Prior to any of the purchases by R.P., Illinois Lumber had on April 14, 1986 registered one underground storage tank (UST) on the "L" property; this tank is hereinafter referred to as UST #1. Based upon the 1986 registration of UST #1, OSFM designated the Illinois Lumber site with facility number 6-015341. (MSJ at 3.)

On October 10, 1991, a release from UST #1 was reported to the Illinois Emergency Management Agency (IEMA). (MSJ at 3.) On the same day the Bank of Alton removed UST #1. (MSJ at 3; R. at 35.) The location of UST #1 was in the fourth parcel of the "L" property, that parcel purchased by R.P. in December 1994.

In 1992 two additional USTs were discovered. Both were located on the parcel of the "L" property purchased by R.P. in September 1986. (MSJ at 3.) The first, known hereinafter as UST #2, was a 500-gallon tank containing petroleum products; UST #2 had been taken out of use prior to January 1, 1974. (MSJ at 1.) Upon discovery of UST #2, R.P. notified OSFM, which assigned the facility number 6-031455 and issued a permit for removal of the tank. (MSJ at 2.) Additionally, according to R.P., R.P. was told by the OSFM that the UST #2 "tank need not be registered". (Id.)

On December 3, 1992, while removing UST #2, R.P. discovered UST #3, a 550-gallon tank. Thereafter on December 16, 1992, R.P. submitted paperwork to the OSFM to register UST #2³, noting that UST #3 had been taken out of operation on September 1, 1977. (Id.)

A permit for removal of UST #3 was issued on January 15, 1993, and UST #3 was removed on February 18, 1993. (MSJ at 2.) During the removal of UST #3 a "significant release of petroleum was discovered from the tanks"; R.P. notified IEMA, which issued incident number 92-3437 to the release. (Id.) This release of petroleum at UST #3 is at issue in R.P.'s petition for review.

³ R.P. does not claim that UST #2 was actually ever registered by the OSFM.

On March 15, 1994 R.P. filed a Reimbursement Eligibility and Deductibility Application (Pet. at 2) with the OSFM pursuant to Section 57.9(c)(1) of the Act (415 ILCS 5/57.9(c)(1)) to access the Illinois Underground Storage Tank Fund (Fund) with respect to the release from UST #3, incident number 92-3437 (MSJ at 3.).

The OSFM issued a final deductibility determination letter on March 29, 1994 and re-issued the letter on May 20, 1994 after the OSFM discovered that the March 15th letter was lost in the mail. (Resp. Res. at 2.) Both letters found R.P. eligible to seek reimbursement from the Fund for UST #3, incident number 92-3437, subject to a \$100,000 deductible.⁴ (Pet. at 2; Resp. Res. at 2.) The OSFM determined this deductible because "no UST on petitioner's site at the time of the removal/release was registered prior to July 28, 1989." (Resp. Res. at 3.)

STATUTORY FRAMEWORK

Section 57.9(b) of the Act states in relevant part:

- b. An owner or operator may access the Underground Storage Tank Fund for costs associated with an Agency approved plan and the Agency shall approve the payment of Costs associated with corrective action after the application of a \$10,000 deductible, except in the following situations:
1. A deductible of \$100,000 shall apply when none of the underground storage tanks were registered prior to July 28, 1989, . . .
 2. A deductible of \$50,000 shall apply if any of the underground storage tanks were registered prior to July 28, 1989, and the State received notice of the confirmed release prior to July 28, 1989.
 3. A deductible of \$15,000 shall apply when one or more, but not all, of the underground storage tanks were registered prior to July 28, 1989, and the State received notice of the confirmed release on or after July 28, 1989.

(415 ILCS 5/57.9(b) (1992).)

⁴ The OSFM also determined R.P. was ineligible to seek indemnification associated with the UST #1.

"Site" is defined in the Act as:

any single location, place, tract of land or parcel of property including contiguous property not separated by a public right-of-way.

(415 ILCS 5/57.2 (1992).)

DISCUSSION

R.P. argues that the application of the \$100,000 deductible is inappropriate and a \$15,000 deductible should apply. (MSJ at 4.) R.P. claims that in 1986 when Illinois Lumber registered UST #1, the property included the entire "L" shaped tract, including the portion where the unregistered USTs #2 and #3 were located. (MSJ at 4-5.) R.P. asserts that the definition of "site" in the Act means that the Illinois Lumber/R.P. Lumber property constitutes a single site for the deductible provisions of the Fund because the entire "L" shaped property constituted a single tract of land in 1986 when UST #1 was registered, and is again owned by a single owner in 1995. (MSJ at 6.) Additionally, R.P. asserts that at all times the portions of the tract have remained contiguous and have never been separated by a public right-of-way. (MSJ at 7.)

The OSFM claims the \$100,000 deductible amount was issued because no USTs on petitioner's site at the time of removal/release were registered until after July 28, 1989. (Resp. Res. at 3; Res. Inter. at 1.) The OSFM argues that a "UST located on the portion of property obtained by petitioner in December of 1994 was registered on April 14, 1986, but at the time of the release for which petitioner seeks to access the UST fund, this property was owned by the Bank of Alton". (Resp. Res. at 3.)

The OSFM concludes that "(t)he tank referenced was not and has never been owned by R.P. Lumber, therefore, it would not affect the deductible assigned to the R.P. Lumber facility" because the applicant for the deductible must be the owner or operator of the UST for which eligibility has been applied. (Res. Inter. at 2 citing 415 ILCS 5/57.9) The OSFM argues that R.P. cannot legally claim ownership of tanks owned by another party. (Res. Inter. at 3.) According to the OSFM, at the time of removal and discovery of the release, at the time of application to the Fund, and at the time when the deductibility determination was made, no UST at the site was registered prior to July 28, 1989. (Resp. Res. at 3.)

Illinois Lumber reported the release from UST #1 on October 10, 1991. (MSJ at 3.) The Bank of Alton subsequently acquired

that tank and the property on which it was located through foreclosure. The Bank of Alton then removed the UST from the property on October 10, 1991. UST #1 was registered, leaked and removed prior to R.P. acquiring that portion of the property. R.P. did not purchase the property on which registered UST #1 was located until December 1994. (MSJ at 3.)

R.P. is correct in its assertion that Section 57.9(b) does not limit the deductibility to the entity which owned the UST at the time of registration. The fact that R.P. was not the actual entity who registered UST #1 is not dispositive of this matter. The OSFM explains that its determination is not based on the fact that R.P. did not own the property when UST #1 was registered in 1986, but rather on that fact that R.P. never owned the tank at facility number 6015341, UST #1. (Res. Inter. at 3.) The property on which UST #1 was located was owned by someone other than R.P. from 1986 to December 1994.

The Act states that "(a)n owner or operator may access the Underground Storage Tank Fund for costs ..." subject to a \$15,000 deductible when "...one or more, but not all, of the underground storage tanks were registered prior to July 28, 1989...". (415 ILCS 5/57.9(b), 57.9(b)(3) (1992).) R.P. was not the owner or operator of UST #1, nor was it the owner or operator of UST #1's site, until after the OSFM made its final determination. The applicant for the deductible must be the owner or operator of the UST on which Fund eligibility has been determined. R.P. cannot benefit from a \$15,000 deductible based upon a tank at a site which it did not own when it applied for Fund reimbursement for a release at another site. Accordingly in this matter, where none of the tanks were registered prior to July 28, 1989, the applicable deductible is \$100,000.

In addition, Section 57.9(b) refers to a "site". The integrity of the original "site" was not restored until R.P. purchased the final piece which previously contained UST #1. R.P. cannot claim in March of 1994 that the site was restored to its original composition before the final piece was purchased in December 1994. The only indication the OSFM had of R.P.'s intention to purchase the final piece of property was a letter received on July 23, 1993 which stated that "it is the intention of R.P. Lumber to acquire the 4th, which is the final, portion of the site from the Bank of Alton." (Record at 33.) The OSFM cannot reasonably rely on R.P.'s "intention" to perform in the future. Under the facts before the OSFM and the Board, the integrity of the site was not restored prior to the OSFM's deductibility determination.

It is well established that an administrative agency has no inherent authority to amend or change its decision and may undertake reconsideration only where authorized by statute. (Clinton County Oil Co., Inc., Hoffman/Meier's Shell and Clarence

Meier v. IEPA, PCB 91-163, (March 26, 1992); Reichold Chemicals Inc. v. PCB (3d Dist. 1991), 204 Ill. App. 3d 674, 561 N.E.2d 1343.) Although the Board possess such power, the appellate court has held that the Agency has no such reconsideration powers. (Reichold, 561 N.E.2d 1343.) Here the OSFM deemed R.P. eligible to access the Fund with a \$100,000 deductible in March 1994. The fact that R.P. went and purchased a registered tank site in December 1994, after the OSFM made its final deductibility determination, does not alter the outcome. The OSFM has no power to reconsider its final decision.

Although at times the OSFM incorrectly interprets R.P.'s position, the Board is persuaded that if R.P. were allowed to benefit from the \$15,000 deductible, the OSFM would be placed in the exacting position of determining whether or not every site applying for access to the Fund was once part of a larger site which contained a UST registered prior to July 28, 1989 and may in some future time be restored. The Board notes that the OSFM postulates that had the release from R.P.'s UST #3 occurred after December 1994, R.P. would have been eligible for the \$15,000 deductible. (Resp. Res. at 7.)

CONCLUSION

The Board hereby denies R.P. Lumber's motion captioned Motion for Summary Judgment, which text moves for partial summary judgment.

R.P. Lumber has requested this matter be set for hearing for other issues raised in this case. It appears the only outstanding argument is the Forms Management Program Act (20 ILCS 435/4(a)) issue raised in the Amended Petition filed on April 26, 1995. In light of today's action, the Board believes this issue may not warrant going to hearing in this matter. Therefore if R.P. Lumber wishes to proceed to hearing on this or any other theory raised in the pleadings thus far, the Board directs petitioner to brief why such issues are appropriate for hearing at this stage. Such brief shall be filed, if one is not received, on or before August 6, 1995.

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 16 day of July, 1995, by a vote of 7-0.

Dorothy M. Gunn
Dorothy M. Gunn, Clerk
Illinois Pollution Control