

ILLINOIS POLLUTION CONTROL BOARD
July 9, 1992

BURWELL OIL SERVICE, INC.,)	
)	
Petitioner,)	
)	
v.)	PCB 92-42
)	(Underground Storage Tank Fund
ILLINOIS ENVIRONMENTAL)	Reimbursement Determination)
PROTECTION AGENCY,)	
)	
Respondent.)	

DISSENTING OPINION (by B. Forcade and R.C. Flemal):

We respectfully dissent from the July 9, 1992, opinion and order in this proceeding in which the majority fails to address the issue of whether Burwell Oil can access the Underground Storage Tank Fund (UST Fund) at all. We dissent for reasons previously expressed in our dissenting opinion in Clinton County Oil Co., Inc., Hoffman/Meier's Shell and Clarence Meir v. Illinois Environmental Protection Agency, PCB 91-163 (Dissenting Opinion, March 24, 1992).

Here, in an effort to prove that they had no constructive knowledge of a petroleum leak prior to July 28, 1989, Burwell has provided ample evidence to conclude that the tanks removed in September 1988 did not in fact leak. The Board should allow the Agency to evaluate this newly produced evidence and reach the conclusion that the tanks were not responsible for the leak. Accordingly, Burwell is not eligible for any reimbursement for the removal of these tanks. Instead, the majority precludes the Agency from reevaluating its position based on newly presented evidence. This means, in effect, that if a petitioner can hide the information from the Agency long enough, the petitioner may prevail in reimbursement decisions. There is no indication Burwell did so, but others may. We do not believe this to be a proper procedure.

As we stated in our Clinton County dissent:

We believe that the majority, in the interest of procedural "correctness" and an intense desire to recognize procedural limitations upon the Illinois Environmental Protection Agency, ignores a most key element in this case; that the facts in the record alone support a finding that the petitioner is ineligible to access the UST Fund, irrespective of the issue of whether the Agency can change its own eligibility determination. (Emphasis in Original)

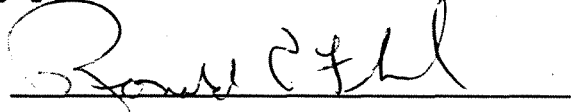
The majority interpretation creates a problem from two perspectives. First, the majority precludes the Agency from reevaluating the new evidence asserting that it would constitute a prohibited "reconsideration" and it would violate fundamental fairness to allow the Agency to cite a new basis for its decision. Second, the majority will not allow this Board to evaluate the newly presented evidence because it applies to a legal theory not cited in the Agency's denial letter. This is a classic Catch-22 situation.

Such an interpretation might have merit if Board review were limited to the existing factual paper record and legal briefs from the parties. However, as long as the Board hearings allow new evidence in the form of testimony and documents, problems will surface.

It is important to remember that the money in the UST fund is taxpayers' money. It is derived from a gasoline tax pursuant to Ill. Rev. Stat. 1991, ch. 120 par. 428a. We are reluctant to give away taxpayers' money to people who do not meet the statutory criteria to receive that money, simply because the Agency made a different decision before it had access to this newly presented evidence. Accordingly, we dissent.

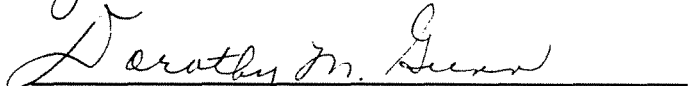


Bill S. Forcade
Board Member



Ronald C. Flemal
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above dissenting opinion was filed on the 15th day of July, 1992.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board