ILLINOIS POLLUTION CONTROL BOARD
July 30, 1992

SMITH OIL COMPANY OF KANKAKEE,	)	
Petitioner,	)	
v.	)	PCB 91-243
	)	(Underground Storage Tank
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	Fund Reimbursement Determination)
Respondent.	)	

CLAYTON L. LINDSEY APPEARED ON BEHALF OF THE PETITIONER.

DANIEL P. MERRIMAN AND RONALD L. SCHALLAWITZ APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by G. T. Girard):

On December 9, 1991, petitioner, Smith Oil Company of Kankakee (Smith Oil) filed a petition for review of an Illinois Environmental Protection Agency (Agency) decision of November 4, 1991, denying Smith Oil access to the Underground Storage Tank Reimbursement Fund (Fund). The Agency denied the petitioner's request for reimbursement because the "owner or operator failed to demonstrate the tanks were installed in accordance with OSFM [Office of State Fire Marshal] regulations". (R. at 98.)[1]

On February 9, 1992, a hearing was held in Joliet, Will County, Illinois. On April 16, 1992, petitioner filed its brief; on May 20, 1992, respondent filed its brief and on June 3, 1992, petitioner filed its reply.

For the reasons enunciated below, the Board finds that Smith Oil is eligible for reimbursement for corrective action costs from the Underground Storage Tank Fund. The Agency's determination is therefore reversed.

BACKGROUND

Smith Oil is a corporation which owns and operates several convenience stores/gas stations in and around Kankakee County.

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[1] The record, also known as "Joint Exhibit 1", will be cited to as "R. at ___"; the transcript will be cited to as "Tr. at ___"; the petitioner's brief will be cited as "Pet. Br. at ___"; the respondent's brief will be cited as "Res. Br. at ___"; petitioner's exhibits will be cited as "Pet. Exh."; and respondent's exhibits will be cited as "Res. Exh.".

(Res. Br. at 5.) Smith Oil began construction of another facility in Wilmington, Illinois at the intersection of Route 53 and West River Road in 1990. (Tr. at 22.) Smith Oil hired "D" Construction to construct the buildings at the site and Pemco Service Company (Pemco) was hired to install three underground storage tanks for use in Smith Oil's facility. (Tr. at 24.)

The three tanks arrived at the site and were unloaded on March 22, 1990. The tanks were stored on site until the tanks were installed on April 9 and 10, 1990. The tanks were strapped together and chocked with tires for storage. On April 9, the tanks were air and soap tested by Mr. Michael Bargmann, maintenance man for Pemco. No defects were noted (Tr. at 162-169). Excavation of the tank bed was begun on April 9 and completed on April 10 (Pet. Exh. 6 and 7).

Bargmann testified that when he arrived at work on April 10, he observed that the 12,000 gallon tank had been moved 20-30 feet from the previous day's position (Tr. at 173). Inquiry determined that "D" Construction employees had rolled that tank by hand (Tr. at 174). Bargmann took "special care to look it over again" and did not see anything wrong with the tank (Tr. at 174-175, 205, and 228-229). In addition, Everett Leasure, a civil engineer with "D" Construction testified that he was aware that the 12,000 gallon tank had been rolled by hand (Tr. at 254-255). He examined all three tanks on April 10, before they were placed in the hole, and did not observe any damage to the tanks (Tr. at 241).

The three tanks were placed in the ground on April 10, 1990. In addition to the contractors on site, Mr. Thomas Maher with the OSFM Division of Fire Prevention was present at various times during the installation. However, Mr. Maher was not present throughout the entire day. (Tr. at 131.) In addition, Mr. Maher's testimony indicates that he did not directly observe every phase of the tests run on the tanks prior to installation. Mr. Maher did testify that he did not observe any physical damage to the tanks and he so indicated on the field inspection log. (Tr. at 149; R. at 81, 82.)

After installation the tanks were filled with gasoline on April 10 and April 11. Stick readings were taken on the 12,000 gallon tank on the evening of April 10 after initial delivery of product and on the morning of April 11 before more product was placed in the tank. Both stick readings were 69, thus product did not leak out of the tank overnight. (Pet. Br. at 6, Tr. at 45-48). Because the facility was still under construction, the piping and pumps were not installed with the tanks and no gas was pumped from the tanks.

On April 25, 1990, a stick reading on the 12,000 gallon tank indicated that there had been a loss of product. According to

Mr. Wayne Kasper, Vice-President of Smith Oil, the loss was estimated at 1200 gallons out of the nearly 12,000 gallons of product placed in the tank on April 10 and 11. (Tr. at 97). Pemco, on behalf of Smith Oil, notified the Emergency Service and Disaster Agency and hired P&P Consultants, Inc. (P&P) to handle the clean-up of the site.

P&P recommended that the remaining product in the tank be removed and the tanks uncovered. Pemco proceeded to remove the product and remove the tanks. Upon removal of the tank, a crack was found in the 12,000 gallon tank (Tr. at 195 and 272) which was responsible for the leaking product.

On May 4, 1990, Mr. Dennis Pingel, a representative from Owens Corning, the manufacturer of the tanks, arrived to examine the tank. After examining the tank Mr. Pingel decided to repair the tank on site. After repairing the tank, Mr. Pingel presented Mr. William Von Drehle, owner of Pemco a "field agreement" to sign. Mr. Von Drehle signed the agreement which indicated that the tank had been damaged when installed. (R. at 51.)

Smith filed a petition seeking reimbursement for corrective action costs associated with the removal of the leaking tank. The petition was filed with the Agency on December 9, 1991. On November 4, 1991, the Agency denied the claim for reimbursement because the Agency determined that Smith Oil had not demonstrated that the tanks had been properly installed. (R. at 98.)

DISCUSSION

Before discussing the merits of this case, the Board will first address the side issue concerning what version of Section 22.18b(c) applies in this case. The Agency has correctly stated the Board's previous holdings on this issue. The Board will apply the version of the law which existed at the time the Agency received the application for reimbursement. (See First Busey Trust & Investment Co. v. IEPA, PCB 91-213 (February 27, 1992.) Thus, the Board will apply Section 28.18b(c) as amended by Public Act 87-323 effective September 6, 1991.

Section 22.18b(c) provides, in part, that:

> no owner or operator is eligible to receive money from the [leaking underground storage tank] Fund for costs of indemnification or corrective action for any underground storage tank installed after July 28, 1989, unless the owner or operator demonstrates to the Agency that the tank was installed and operated in accordance with rules adopted by the Office of the State Fire Marshal. For

> purpose of this subsection, certification by the Office of the State Fire Marshal that the underground storage tanks were installed in accordance with those rules, shall be prima facie evidence that the owner or operator so installed such underground storage tanks. (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1022.18b (c).)

The Agency relies on two arguments in support of its denial of eligibility. The first argument is that the OSFM did not certify that the tanks were properly installed; and the second is that even if the OSFM did certify the installation, the Agency has sufficiently rebutted the prima facia case and shown that the tanks were not properly installed. (Res. Br. at 4.)

Smith Oil maintains that OSFM did certify that the tanks were properly installed. Smith Oil further maintains that even if the inspection log is not a "certification", then the inspection log should be sufficient to create the prima facie case permitted under Section 22.18b(c). (Pet. Br. at 3.) In addition, Smith Oil points out that a second document entitled "Notification for Underground Storage Tanks" (R. at 76-78) is the primary document relied upon by the OSFM in determining proper installation and therefore should be acceptable as certification by the OSFM. (Pet. Br. at 3, 4; Tr. at 363.)

The Board must first determine whether or not the OSFM "certified" that the tanks were properly installed. Both Mr. Maher and Ms. Betty Carlisle (a supervisor in the Division of Petroleum and Chemical Safety with OSFM) testified that the OSFM does not "certify" proper installation of tanks, in that a certificate is not mailed back to the owner or operator by the OSFM. (Tr. at 143 and 360.) However, Mr. Maher did testify:

> Q. Do your regulations provide -- have a procedure whereby you provide a certificate or certification that the installation is done, that all aspects of the installation was done properly and correctly?
>
> A. No, sir. This is all that goes from the field inspector to our office as a permanent file and to my knowledge there is no other paperwork.
>
> The contractor who in this case was Pemco didn't even get any paperwork back from us saying that everything's okay and, you know, you are going to get a final certificate of occupancy or whatever it might be. We don't do that.
>
> It's either done or it's not done.

Q. Even though the Environmental Protection Act talks about the Office of the State Fire Marshall [sic] certification, the Office of the State Fire Marshall [sic] doesn't provide certifications?

A. No, sir. This is public information, so if someone was interested in this case, Pemco, they could come to our office for me or see me in the field. There's a copy machine. "Hey, I'm done with it, here's a copy of it."

Q. But all this is, the document, page 81 or 82, the record, is a report of your inspection?

A. That's all it is. (Tr. at 143-144.)

In addition Ms. Carlisle testified that:

Q. With respect to the notification which was on page 78 of the record, and I took it back away from you again, but that's the one where the installer certifies that they're a certified installer, that the work on the manufacturer's installation checklists has been completed and so forth.

Now, is that the primary certification that the Fire Marshall [sic] relies upon in determining proper installation?

A. Yes, it is.

Q. Because the Fire Marshall [sic] certifies the installers?

A. Right.

Q. And then they certify that they did it right?

A. That's true. (Tr. at 363.)

Smith Oil argues:

> Section 1022.18b(c) specifically contemplates that the OSFM will perform the necessary inspections of the installation process. Respondent readily admits that the IEPA does not, and did not in this case, perform an inspection during the installation process. Tr. 387. This task has been specifically assigned to the OSFM. Tr. 149. Most importantly, the Underground Storage Tank

> Certification List is the best evidence that the OSFM has to indicate that the installation was done properly. Tr. 149. This document serves as the OSFM's verification of proper installation. Tr. 362.

The Agency's argument seems to rely on the word "certification" and what that word means. The Agency also relies on the statements made by the witnesses from OSFM that the OSFM does not "certify" installation. The OSFM does not send out to owners and operators a "certificate" stating that the tanks are properly installed. The OSFM relies on the inspection log and the certificate filed by the installer to establish that the tanks are properly installed. The record clearly indicates that the OSFM inspector believed the tanks were properly installed. In fact, the OSFM inspector filed a "field inspection log" which indicated that the tanks had been properly installed. (R. at 81; Tr. at 117.) Although Mr. Maher had left the response area for the question concerning installation pursuant to the manufacturer's instructions blank, he testified that omission was an error on his part. (Tr. at 150.)

In addition to the inspection log, Pemco filed with OSFM the certification of compliance (R. at 78) which indicated that the work had been completed pursuant to OSFM's regulation. As previously stated Ms. Carlisle indicated that the certification of compliance is the primary certification relied upon by OSFM in determining proper installation. (Tr. at 363). Therefore, the record clearly shows that the OSFM accepted that the tanks were installed pursuant to the OSFM regulations on installation. As the documents discussed above appear to be sufficient certification for the OSFM, the Board will not find that such documentation is insufficient. Therefore, the Board finds that the OSFM did certify that the tanks were properly installed.

Although the Board is directed by Section 22.18b(c) of the Act to defer to the OSFM in what constitutes certification of proper installation, that same section gives the Agency authority to introduce additional evidence in a determination for reimbursement from the Fund. Section 22.18b(c) of the Environmental Protection Act states that, "certification by the Office of State Fire Marshal that the underground storage tanks were installed in accordance with those rules, shall be prima facie evidence that the owner or operator so installed such underground storage tanks". In the instant case, the Board finds that proper installation of the tanks was certified by the OSFM. Therefore, we must now address any additional evidence on the record which would rebut the prima facie evidence of proper installation established by OSFM certification.

The Agency argues that it has additional evidence that the 12,000 gallon tank was improperly installed and damaged during

installation. The Agency further argues that Section 40(a)1 of the Act places the burden of proof on the petitioner to demonstrate compliance with OSFM rules, incorporating manufacturer's installation instructions (Respondent's Post-Hearing Brief at 36). Regulations specifying that tanks be installed in accordance with manufacturer's instructions include 35 Ill. Adm. Code 731.120(d); 41 Ill. Adm. Code 170.50(e), 170.65(c), 170.420(d), and 170.440(e).

The Agency has presented undisputed evidence that the 12,000 gallon tank was rolled about 20-30 feet on the ground (Tr. at 173-174 and 254-255) which is contrary to the manufacturer's installation manual. (Res. Exh. 3 at 2.) However, the manufacturer's instructions also require that certain tests be performed on the tanks prior to the tanks being placed in the ground. One of those tests requires covering the entire exterior of the tank with soap and examining the surface for air bubbles. (Res. Exh. 3 at 2.) Such a test may require rolling the tank (Tr. at 171 and 203-204). Also, according to the manufacturer's installation manual, single-wall fiberglass tanks eight feet in diameter or less, "may be manually unloaded from the truck at jobsite by the O/C TANKS trained truck driver." (Res. Exh. 3 at 2). This means that the tanks are unloaded by rolling them off the truck, which occurred at this jobsite. (Tr. at 102). Therefore, the prohibition against rolling tanks does not seem to be an absolute requirement. Since the tank in question was only rolled about one revolution (the circumference of an eight-foot tank is about 25 feet), this action alone does not seem sufficient to override the OSFM certification that the installation met their rules.

The record does not contain any other clear evidence that the tanks were not handled according to OSFM regulations. Other issues of non-compliance raised by the Agency, such as using mechanical equipment to move the tanks (Respondent's Post Hearing Brief at 33) or the necessity to anchor the tanks in the hole because of high water (Respondent's Post-Hearing Brief at 28) were not sufficiently substantiated in the record before the Board.

The final issue raised by the Agency is the contention that the 12,000 gallon tank was damaged during installation. The major pieces of evidence are two documents signed by Mr. Von Drehle, owner of the tank installer Pemco. The first was a "field agreement" signed on May 4, 1990 at the request of Owens/Corning field representative, Mr. Pingel, after the tanks were repaired. Notes on the form stated that the tank had been "damaged during installation". (R. at 51). However, at the hearing, Mr. Von Drehle testified that Mr. Pingel told him that the tank had been damaged by a backhoe. (Tr. at 293). Von Drehle stated, "...I just didn't think that he [Mr. Pingel] was right, but there was nothing I could do about it, he's the Owens Corning

man...." (Tr. at 296).

The second document was an application to remove the underground storage tank received by the OSFM Division of Petroleum and Chemical Safety on June 20, 1991. Mr. Von Drehle signed Smith Oil Vice-President Kasper's signature on the application on behalf of Smith Oil (Res. Exh. 1; Tr. at 74-75, 78-79, 87, 93-94). On the form it stated that the reason for removal of tanks was that the tank in question "was hit with backhoe". (Res. Exh. 1). However, at the hearing, Mr. Von Drehle stated that when he signed the document, he was still relying on the opinion of Owens/Corning field representative Mr. Pingel. Mr. Von Drehle expressed doubt about Mr. Pingel's opinion (Tr. at 299-300).

Since Pemco is an interested party, Mr. Von Drehle's conflicting testimony does not provide solid evidence in this case. Likewise, Mr. Pingel, as a representative of the tank's manufacturer, should not be relied upon for unbiased evidence that the tank was damaged when installed. When investigating the cause of the release, Mr. Carney Miller of P&P reported that Mr. Pingel was the only person who suggested that the tank had been damaged by a backhoe. (Tr. at 329-330). Mr. Pingel did not observe the installation. Four witnesses to the installation process (Bargmann, Kasper, Leasure, and Maher) testified at the hearing that the tank was not damaged during installation and was not contacted by a backhoe. (Tr. at 39, 116, 149, 164, 179 and 240). In the absence of other evidence, we cannot disregard the petitioner's suggestion "that O/C Tank's willingness to point fingers at the installation process is attributable to a concern that a defective seam could place responsibility for the release on O/C Tanks." (Tr. at 318-319).

The Board hereby reverses the Agency's determination denying Smith Oil eligibility to access to the underground storage tank fund. Because the Agency made no determination as to the deductible which will apply to Smith Oil as well as the reasonableness of the corrective action costs incurred by Smith Oil, the Board remands this matter to the Agency for such a determination in accordance with Section 22.18b(d)(4)(C) of the Act. This docket is closed. Petitioner is free to seek Board review of the Agency's final determination of the reasonableness of costs under a separate docket.

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

ORDER

The Agency's determinations that Smith Oil is not eligible for reimbursement from the Fund is reversed. This matter is remanded to the Agency for a determination of the deductible

which will apply to Smith Oil as well as the reasonableness of the corrective action costs incurred by Smith Oil. This docket is closed; however, petitioner is free to seek Board review upon the Agency's final determination of the reasonableness of costs.

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. (But see also 35 Ill. Adm. Code 101.246, Motions for Reconsideration, and Castenada v. Illinois Human Rights Commission (1989), 132 Ill.2d 304, 547 N.E.2d 437).

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, do hereby certify that the above opinion and order was adopted on the 30th day of July, 1992, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board