

ILLINOIS POLLUTION CONTROL BOARD  
June 3, 1993

SHELL OIL COMPANY, )  
 )  
Petitioner, )  
 )  
v. ) PCB 92-154  
 ) (UST Fund)  
ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY, )  
 )  
Respondent. )

S. L. HARRIS OF MID CONTINENT REAL ESTATE, F. T. KATIC, HEALTH, SAFETY AND ENVIRONMENTAL REPRESENTATIVE OF THE CHICAGO SOUTH DISTRICT, AND L. L. ALLEN, ENVIRONMENTAL ENGINEER, APPEARED ON BEHALF OF PETITIONER;

J. G. RICHARDSON APPEARED ON BEHALF OF RESPONDENT.

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

This matter is before the Board on an October 19, 1992, appeal pursuant to Section 22.18b(g) of the Illinois Environmental Protection Act (Act) by Shell Oil Company (Shell Oil) of an Underground Storage Tank (UST) Fund reimbursement denial rendered by the Illinois Environmental Protection Agency (Agency) on September 11, 1992. Hearing was held in Chicago, Cook County, Illinois on December 22, 1992, at which no member of the public attended. A waiver of deadline for final Board action until June 6, 1993, was filed by Shell Oil pursuant to section 101.105 of the Act on January 6, 1993. Shell Oil filed its brief on January 29, 1993. The Agency filed its brief on May 10, 1993, and Shell Oil filed a reply brief on May 14, 1993.

For the reasons given below, the Board finds that Shell Oil is eligible for reimbursement for corrective action costs from the UST Fund. The Agency's determination is therefore reversed. The case is remanded to the Agency to determine applicable deductible and reasonableness of costs.

FACTS

The tanks in question are located at a service station at 701 Burlington Road, Western Springs, Cook County, Illinois (Rec.

0143-0045

at 12)<sup>1</sup>. At hearing, the parties agreed to stipulate the factual basis of the Agency record (Tr. at 5-6), and the Agency repeated that the statement of facts presented by Shell Oil is acceptable. (Res. Br. at 1.) The following facts from the record are not disputed:

1. Shell Oil owned three underground storage tanks which stored gasoline at the Western Springs location and registered those tanks with the Office of State Fire Marshal (OSFM) on April 25, 1986 (Rec. at 12-13).
2. A hydrogeological site assessment was initiated by Shell in 1987 pursuant to selling the service station site to the existing dealer, James Benak. (Rec. at 58.)
3. During the site assessment, 4 inches of free product was discovered in ground water at the site and was reported to the Illinois Emergency Service and Disaster Agency on October 29, 1987, by S. C. Lewis, Shell Project Engineer, as Incident Number 871760. Remediation activities commenced by Shell immediately. (Rec. at 58.)<sup>2</sup>
4. Shell Oil sold the service station property to the dealer, James Benak, on March 18, 1988 (Rec. at 58).
5. Shell transferred ownership of the three underground storage tanks to Mr. Benak on January 9, 1989 (Rec. at 58), and OSFM was notified of Mr. Benak's ownership on January 9, 1989 (Rec. at 14).
6. On July 24, 1992, Shell Oil filed its application for reimbursement with the Agency (Rec. at 1-8).
7. By letter dated September 11, 1992 (Rec. at 55-56), the Agency notified Shell Oil:

"You are ineligible for reimbursement from the Fund for the following reason(s): Shell

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<sup>1</sup>The Agency Record will be cited as "Rec. at \_\_\_\_". The hearing transcript will be cited as "Tr. at \_\_\_\_". Petitioner's brief and Reply Brief will be cited as "Pet. Br. at \_\_\_\_" and Pet. Rep. Br. at \_\_\_\_, respectively. Respondent's Brief will be cited as "Res. Br. at \_\_\_\_".

<sup>2</sup>Shell Oil noted in Petitioner's Brief filed January 29, 1993, that corrective action began on November 11, 1987, but this was not specified in the Agency Record stipulated at hearing on December 22, 1992.

Oil is not the registered owner or operator of the tanks."

#### ISSUE

The sole issue in this case is whether or not Shell Oil is eligible for reimbursement from the UST Fund for corrective action costs incurred even though the tanks in question were transferred to new ownership on January 9, 1989, between the notification of release on October 29, 1987, and the application to the Agency for reimbursement from the UST Fund on July 24, 1992.

Under Section 22.18b of the Act (415 ILCS 5/22.18b) an "owner" or "operator" satisfying certain specified requirements is eligible to receive money from the UST Fund. "Owner" and "operator" are defined in Section 22.18(e)(1)(B) by cross-reference to Subtitle I of the federal Hazardous and Solid Waste Amendments of 1984. The federal definitions appear in 42 USCS (May 1992 Cum. Supp.), Section 6991 (3) and (4). For a UST in use after November 8, 1984, or brought into use after that date, "owner" means any person who "owns" such UST. "Operator" means any person in control of or having responsibility for the daily operation of the UST.

The Board finds that when the release from the tanks was reported on October 29, 1987, Shell Oil was the owner of the tanks. Further, the Board finds that Shell Oil was the owner of the tanks when corrective action commenced in November 1987. According to Section 22.18b, Shell Oil would clearly meet the ownership eligibility requirements to receive reimbursement for the corrective actions taken if the tanks in question had been owned by Shell on July 24, 1992, when application for reimbursement was filed with the Agency.

Shell Oil transferred ownership of the tanks to James Benak on January 9, 1989. Mr. Benak has performed no corrective action and spent no money on corrective action, while Shell Oil has performed all the corrective action and has spent all the money that has been spent on such corrective action. (Pet. Br. at 11.) Furthermore, according to Petitioner's Brief, Shell Oil "is obligated to continue, has continued, and is continuing to perform corrective action even though the tanks are now owned by Mr. Benak". (Pet. Br. at 4.) The Agency has not disputed Shell Oil's claims that Mr. Benak has not paid for any of the corrective action costs.

The Agency's denial was based solely on the fact that Shell Oil was not the owner of the tanks when the application for UST Fund reimbursement was filed with the Agency on July 24, 1992. The Agency argues that "to be eligible for reimbursement from the

fund, Shell must justify expansion of the traditional owner and operator classes to include former owners". (Res. Br. at 1.) The Agency submits that the federal language in Section 6991 (3) and (4) used the present tense to focus on the current or present owner or operator of an underground storage tank. The Agency opines that the wording of these sections limits the definition of an owner or operator by their relationship to a UST at a given point in time. (Res. Br. at 2.) To avoid the eligibility problems of the instant case, the Agency suggests that Shell Oil could have chosen:

to delay the transfer of ownership of this site and these UST's or to make legal arrangements with the current owner whereby eligibility under the current owner and operator definitions could have been obtained. Instead, Shell asks that the eligibility schemes be changed to accommodate one site. (Res. Br. at 3.)

Shell Oil argues that the Agency's restriction of eligibility for reimbursement from the UST Fund to persons who are owners or operators at the time the application for reimbursement is filed is contrary to the language of the statute and the intent of the legislature. (Pet. Br. at 6.) Shell Oil notes that nowhere in Section 22.18b of the Act is there an explicit provision that only the current owner or operator is eligible to receive money from the UST Fund. The only statutory provision which ties the date of the Agency's receipt of an application to an Agency determination is Section 22.18b(d)(3)(G). This requires the Agency to determine the applicable deductible under Section 22.18b(d)(3) "based on the date that a complete application for eligibility determination . . . is received by the Agency". Furthermore, Section 22.18b gives a very specific and detailed list of requirements for reimbursement from the UST Fund; however, there is no specific "owner at the time of Agency receipt of application" requirement. (Pet. Br. at 9.)

Shell Oil further argues that the probable key to the Agency's position in this case is what could be termed "policy" considerations against finding Shell eligible for reimbursement. (Pet. Rep. Br. at 1.) Shell Oil states:

The first (and only) full paragraph on the third page of Respondent's Brief seems to supply the key to the Agency's position, and this is what it comes to: "That is how the Agency has always done it and to change it now will be too much trouble." Specifically, the Agency says that:

1. It perceives Shell as asking for the Agency's "eligibility scheme" to be "changed to

- accommodate one site".
2. Numerous sites have received no reimbursement or just partial reimbursement "because the requirements of the [Agency's] system could not be met".
  3. There will be "problems" if the Agency is required to expand its definition of "owner and operator".
  4. The Agency will encounter "difficulty in re-crafting the definitions".
  5. These points all "greatly outweigh the benefits of finding Shell eligible for reimbursement at this one site".

The Agency overlooks that Shell is not asking the Board to create new policy; Shell just asks that the Agency be made to comply with the Act. The Agency has not challenged Shell's statutory construction and legislative history arguments, all demonstrating that a former owner in Shell's position is eligible for reimbursement from the UST Fund. What the Agency in effect now says is that the Board should simply ignore all that and base its decision on "policy" considerations which amount to:

- (i) The possibility of inconvenience to the Agency.
- (ii) The Agency's apparent belief that it was unwise of the legislature to make a slightly wider group of persons eligible for reimbursement from the UST Fund than the Agency's current definitions provide for.

The obvious answer to this is that the legislature has spoken and hence these considerations have no place here. The Agency must follow the Act; Shell respectfully submits that the Board should insist that the Agency do so despite the Agency's evident reluctance....

A further comment should be made on the Agency's "legislative wisdom" argument of unspecified "problems caused by expanding the [Agency's] definition of owner and operator". The "expansion" which a correct reading of the Act requires is really very limited -- eligibility of former owners for corrective action for releases which occurred during their ownership and for which they are responsible. (In the present case, there is the further factor that the corrective action actually began while Shell was still the owner.)

(Pet. Rep. Br. at 2,3.)

The Board notes that this is not the first time it has been asked to interpret the definition of "owner" adopted in Section 22.18(e)(1)(B). As stated in A.K.A. Land, Inc. v. IEPA (120 PCB 35, PCB 90-177, March 14, 1991) (A.K.A.), the issue of whether the petitioner is an owner "suggest consequences that go well beyond the issue of who has access to the State Fund; only owners or operators fall within the jurisdictional purview of the whole federal RCRA and State UST regulatory program". (A.K.A., at 10.) The Board is certain that if the Agency were seeking to enforce provisions of the UST corrective action requirements, the Agency would not argue that Shell Oil does not have to comply because it is not an "owner".

The Board is persuaded that the legislature did not intend to limit access to the fund to the extent that the Agency is arguing in this case. To prohibit an entity from reimbursement that clearly would be eligible for reimbursement but for the name on the current OSFM registration would be an absurd result in the instant case. The Agency suggests that it would have no objection to allowing Mr. Benak access to the fund. (Ag. Br. at 4.) However, Mr. Benak was not the owner when the leak occurred, Shell Oil was. To adopt the interpretation of the statute sought by the Agency could result in indefinite delays of property transfers, even when the party responsible for the contamination is willing to accept the responsibility and clean-up the site. This is clearly against the best interest of Illinois citizens and the environment, and not what the legislature intended when crafting the UST statutes. Therefore, the Board finds that in the circumstance of the instant case, Shell Oil meets the definition of "owner" under Section 22.18b of the Act.

#### CONCLUSION

Clearly, Shell Oil was the owner of the tanks when the leak was reported to OSFM on October 27, 1987. Shell Oil commenced corrective action in November 1987. Although ownership of the tanks was transferred to James Benak on January 9, 1989, Shell Oil is still obligated to complete the corrective actions. Shell Oil has established that it was the owner of the tanks when the leak was reported, and has paid for all of the corrective action costs. Therefore, the Board reverses the Agency's denial of eligibility and finds that Shell Oil is eligible for reimbursement from the UST Fund.

Since the Agency did not rule on the applicable deductible and the reasonableness of corrective action costs incurred by Shell Oil pursuant to Section 22.18b the Board hereby remands this case to the Agency for its determination. This docket is closed. Petitioner is free to seek Board review of the Agency's final determination of the appropriate deductible and the reasonableness of costs under a separate docket.

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

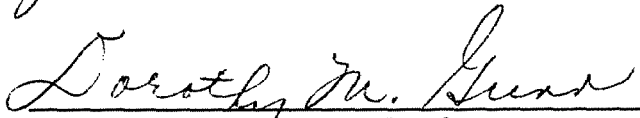
ORDER

The Board reverses the Agency decision of September 11, 1992, denying reimbursement for corrective action costs for three UST's at 701 Burlington, Western Springs, Cook County, Illinois. The case is remanded to the Agency to determine the applicable deductible and the reasonableness of costs. This docket is closed.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1992)) provides for the appeal of final orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill. Adm. Code 101.246, Motion for Reconsideration.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 3rd day of June, 1993, by a vote of 6-0.

  
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Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board