

ILLINOIS POLLUTION CONTROL BOARD
February 28, 1991

ROCKFORD DROP FORGE)	
COMPANY,)	
)	
Petitioner)	
)	
v.)	PCB 90-46
)	(Underground Storage
ILLINOIS ENVIRONMENTAL)	Tank Reimbursement)
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by M. Nardulli):

This matter comes before the Board on a motion for reconsideration filed January 29, 1991 by petitioner Rockford Drop Forge Company (Rockford). On February 8, 1991, the Illinois Environmental Protection Agency filed its response.

By its motion, Rockford asks that the Board reconsider its decision of December 20, 1990 finding that Rockford's heating oil tank is not an underground storage tank (UST) as defined by the Environmental Protection Act (Act) (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1022.18(e)(1)(a)) and upholding the Agency's decision finding Rockford ineligible to access the UST Fund. Because this is a matter of first impression, the Board will address Rockford's argument's raised in support of reconsideration.

The sole issue presented is whether the Agency correctly determined that Rockford's tank is not a UST for purposes of reimbursement from the UST Fund. Rockford contends that the Board's interpretation of "on the premises where stored" as set forth in the heating oil exemption is erroneous. The Board applied the definition of UST set forth in the Environmental Protection Act (Act) in effect at the time Rockford filed its application for reimbursement.¹ That definition, adopted identical in substance from the federal definition of UST, provides that UST does not include a "tank used for storing heating oil for consumptive use on the premises where stored." (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1022.18(e)(1)(A); 40 CFR 280.12.) Hence, the Board was required to interpret the term "on the premises where stored." The

¹ As noted in the Board's opinion, Public Act 86-1050 changed the definition of UST in the Act to include heating oil tanks greater than 1,100 gallons serving other than residential units.

Board looked to the preamble to the federal regulations and to a prior decision interpreting a proposed RCRA definition of "on-site" (Eureka Co. v. Environmental Protection Agency, PCB 79-117 (September 6, 1979)) for guidance in determining whether the fact that Rockford's tank was located on a separate parcel of property from the forging furnaces (the two parcels are separated by a public street) meant that the tank was not used for storing heating oil "on the premises where stored." The Board concluded that Rockford's heating oil tank was located on the same property where the oil was used even though the property was separated by a public street. Therefore, the Board concluded that Rockford's tank was used for storing heating oil for consumptive use on the premises where stored and, therefore, was not a UST.

Rockford asserts that the Board erred in relying on Eureka because that case interpreted "on-site" rather than "premises". In Eureka, the Board had to interpret "on-site" and looked to the proposed RCRA definition that "two or more pieces of property which are geographically contiguous and are divided by a public or private right-of-way are considered a single site." (PCB 79-117 at 2.) The Board did not find that Eureka was in and of itself dispositive of the issue at hand, but looked to Eureka for guidance given that the facts presented here in terms of the separate parcels of property are analogous to the proposed RCRA definition of "on-site". Moreover, the Board relied primarily upon the federal preamble and the fact that it would be incongruous to treat Rockford differently from a business located on one parcel of property for purposes of the heating oil exemption in reaching its determination that Rockford's tank fell within the heating oil exemption. Reliance upon Eureka for guidance in the instant matter was proper.

Rockford also argues that the Board's decision is incorrect because the Agency and the Board relied upon the definition of UST set forth in the Act rather than the Office of State Fire Marshall (OSFM) definition of UST. The OSFM definition of UST includes heating oil tanks of 1,100 gallons or more whereas, at the relevant time, the Act and Board regulations followed the federal definition of UST. Rockford alleges that the legislature authorized the OSFM to determine and define what is a UST and that the Agency lacks the authority to render an independent definition of UST.

The Board is sympathetic to the confusion incurred by Rockford as a result of the different definitions of UST. The following background discussion of the UST program is given to explain the Board's adherence to its position that the Agency and the Board must apply the definition of UST set forth in the Act and Board regulations. The Act gives authority to both the OSFM and the Agency to implement the UST program. The Board has determined that, while no explicit division of authority is set forth, such a division is implied from the provision that the OSFM "shall not adopt regulations relating to corrective action." (Ill. Rev. Stat.

1989, ch. 127 1/2, par. 153(3)(b)(ii); In the Matter of: UST Update, USEPA Regulations, R88-27 at 3 (April 27, 1989).) Those regulations dealing with corrective action (i.e., confirmation of a suspected release) are implemented by the Agency whereas the OSFM implements those regulations concerning installation of a tank and routine leak detection up to the time a leak is confirmed. (R88-27 at 3.)

Additionally, both the OSFM and the Board are directed to adopt regulations which are "identical in substance" to the USEPA rules. (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1022.4(d); Ill. Rev. Stat. 1989, ch. 127 1/2, par. 154(b)(i).) The Act directs the Board to adopt regulations to implement the legislative intent that the State Fund satisfy the federal financial assurance requirements. (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1022.13(d).) In numerous identical in substance rulemakings, the Board has adopted the USEPA UST regulations. (See, In the Matter of: UST State Fund, R89-19 at 2 (April 26, 1990) (setting forth a history of UST rulemakings).) In In the Matter of; UST State Fund, the Board addressed the Agency's and the OSFM's contention that the Board did not have authority to adopt a regulation governing the administration of financial assurance. (R89-19 at 4.) In support of its contention, the Agency and the OSFM relied upon a memorandum of understanding between the two which stated that the OSFM "has sole responsibility for the administration of the program for financial responsibility and that "it is the [OSFM] who has the authority to issue regulations pertaining to the administration of the financial responsibility portion of the [UST]program." (Id.) The Board rejected this contention citing Section 22.13(d) of the Act which specifically empowers the Board to adopt such regulations and the general directive to the Board to adopt USEPA UST rules identical in substance. (Id.) Moreover, the Board stated that the Agency and OSFM incorrectly assumed that rulemaking power is inherently linked to implementing authority and that "the Board is given express rulemaking authority over programs which are almost always implemented by other agencies." (Id. at 5.)

The foregoing establishes that simply because an agency, such as OSFM, has implementing authority does not mean that agency alone has rulemaking authority. Consequently, the Board rejects Rockford's assertion that the Board "lacks the authority to render an independent definition of [UST]."² The foregoing also establishes that the division of implementing authority in terms of corrective action is important in seeking reimbursement from the UST Fund. Owners of USTs must register their tanks with the OSFM

² While Rockford speaks in terms of the Agency rendering a definition of UST different from the OSFM definition, it is clear that the Agency was applying the definition set forth in the Act and adopted identical in substance by the Board. (35 Ill. Adm. Code 731.112.)

and, pursuant to its statutory authority, the OSFM establishes procedures for collecting registration fees. (Ill. Rev. Stat. 1989, ch. 127 1/2, par. 156(b)(1),(3) and (4).) Such fees are deposited in the UST Fund. (Ill. Rev. Stat. 1989, ch. 127 1/2, par. 156(b)(3).) The OSFM may withdraw expenses from the Fund (Ill. Rev. Stat. 1989, ch. 127 1/2, par. 157) and may use monies in the Fund to take emergency action necessary to protect the public health. (Ill. Rev. Stat. 1989, ch. 127 1/2, par. 1022.13(b).) Pursuant to the Act, the Agency has the authority to use the Fund to pay costs of corrective action incurred by, and indemnification to, operators of USTs where certain criteria are satisfied. (Ill. Rev. Stat. 1989, ch. 111 1/2, pars. 1022.13(a) and 1022.18b.) Requests for reimbursement are sent to the Agency and owners or operators may seek Board review of the Agency's reimbursement decision. (Ill. Rev. Stat. 1989, ch 111 1/2, pars. 1022.18b(d)(D)(4) and 1022.18b(g).) This division of authority over the Fund is consistent with the division that the OSFM implements those aspects of the program prior to the confirmation of a leak and the Agency implements those regulations dealing with corrective action. The OSFM 's administration of the Fund concerns those aspects, such as registration fees, which are "pre-corrective action" whereas the Agency oversees those aspects of the Fund, such as eligibility and reasonableness of costs of corrective action, which come into play upon confirmation of a suspected release.

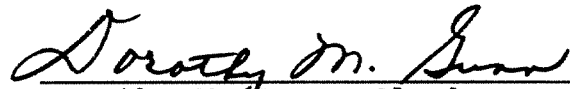
The Board has previously noted that the "complexity of the UST regulatory and program implementation provisions ... can create problems of compatibility." (In the Matter of: UST State Fund, R89-19 at 7 (April 26, 1990).) As the Agency states in its response, the OSFM has the responsibility for registering tanks and may adopt regulations defining USTs for purposes of registration. However, the Agency is not bound by the OSFM's definition of UST and must adhere to the Act and Board regulations adopted thereunder in carrying out its responsibilities of determining eligibility to access the Fund. Unfortunately, at the time pertinent to this review, what was defined as a UST for registration purposes was not compatible with the definition of UST set forth in RCRA, and adopted by the Board identical in substance, for claims of reimbursement from the Fund. The Board rejects Rockford's assertion that the Board applied the wrong definition of UST in reviewing the Agency's decision that Rockford is ineligible to access the Fund. The Board correctly applied the definition of UST as set forth in RCRA and adopted identical in substance by the Board.

The Board has reconsidered its determination that Rockford's tank falls within the purview of the heating oil exemption and has determined that its decision of December 20, 1990 is proper. Therefore, the relief requested by Rockford is denied.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (Ill. Rev. Stat. 1989, ch 111 1/2, par. 1041) provides for appeal of final Board Orders within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 28th day of February, 1991 by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board