ILLINIOS POLLUTION CONTROL BOARD
December 19, 2002

MAC INVESTMENTS d/b/a OLYMPIC OLDSMOBILE,	)	
Petitioner,	)	
v.	)	PCB 01-129 (UST Appeal)
OFFICE OF THE STATE FIRE MARSHAL,	)	
Respondent.	)	

OPINION AND ORDER OF THE BOARD (by M.E. Tristano):

On March 19, 2001, Mac Investments, doing business as Olympic Oldsmobile (petitioner) filed a petition for review with the Board pursuant to Section 57.9(c)(2) of the Environmental Protection Act (Act) (415 ILCS 5/57.9(c)(2)), and Sections 105.500-105.510 of the Board's procedural rules (35 Ill. Adm. Code 105.500-105.510). The petition asks the Board to reverse the Office of the State Fire Marshal's (OSFM) determination that a $15,000 deductible applied to an underground storage tank (UST) at Mac Investment's property located at 3350 N. Cicero Ave., Cook County, Chicago. The Board reverses the OSFM's determination that a $15,000 deductible applied to the UST.

PROCEDURAL HISTORY

On May 22, 2001, the respondent filed an answer to the petition. On July 3, 2001, petitioner filed a supplement to the petition for review. On July 3, 2001, interrogatories were filed by the petitioner. On July 26, 2001, the Board granted respondent's motion to file the record instanter and accepted the OSFM record in this matter.

On July 23, 2002, a hearing in this matter was held in Chicago. Four witnesses testified at the hearing. Petitioner presented testimony from Ms. Margaret Wisniewski, an administrative business manager at Mac Investments. Respondent presented testimony from Mr. Bernard Nessler, a senior environmental inspector with the City of Chicago Department of Environment; Mr. Charles Southern, a storage tank safety specialist with OSFM; and Ms. Deanne Lock, an administrative assistant with OSFM. Based on the legal judgment, experience and observations of the hearing officer, the credibility of the witnesses are not an issue in this matter.

FACTS

This action involves the property commonly known as 3350 N. Cicero Ave., Chicago. The dimensions of the site are 266.4 feet x 125.0 feet. Tr. at 15-16. The site is bound on the east by N. Cicero Ave., on the north by W. Roscoe St., on the south by W. Henderson St., and on the

west by an alley. Tr. at 14-15. The site is not divided by any road, any alley, and is not separated by any public right-of-way. Tr. at 25.

The site is owned by MAC Investments and was acquired in the 1980s. Tr. at 35-36. The site was treated as a single enterprise by MAC Investments. Tr. at 24. Six underground storage tanks were on the site. All six of the UST's found on the site existed on the site before MAC Investments acquired the property. Tr. at 25, 36-37.

On or about April 12, 1999, five tanks were removed from the site. A sixth tank was subsequently removed on or about October 16, 2000. According to Ms. Wisniewski of Mac Investments, the demolition of the building, the cleaning of the site, and the removal of the tanks was all one continuous project. Tr. at 25, 39.

On or about June 13, 2000, MAC Investments submitted to OSFM an "Underground Storage Tank Fund Eligibility and Deductibility Application." This application dealt with the five tanks removed from the site on or about April 12, 1999. These five tanks contained gasoline, waste oil, and heating oil or waste oil. Tr. at 19-20. After reviewing the application, OSFM determined that MAC Investments was eligible to access the Underground Storage Tank Fund and that a $15,000 deductible applied. The deductible determination was made by Deanne Lock, an Administrative Assistant with OSFM. Tr. at 90, 97.

Nine months later on January 19, 2001, MAC Investments submitted a second "Underground Storage Tank Fund Eligibility and Deductibility Application" to OSFM. This application covered a sixth tank found on the site, which contained heating oil. Tr. at 21-23. After reviewing this second application, OSFM determined that MAC Investments was eligible to access the Underground Storage Tank Fun with respect to the sixth tank, but determined that a further/second $15,000 deductible applied. Ms. Lock also made this deductible determination for OSFM. Tr. at 101.

According to Ms. Lock, the second deductible was assessed because the two applications were submitted under separate incident numbers and were, therefore, considered by OSFM to be " … complete and separate incidents." Tr. at 102.

GOVERNING STATUTE

The provisions of the Act governing the Leaking Underground Storage Tank Program are set out in Title XVI of the Act. Section 57.9(b) in Title XVI sets forth the statutory provisions governing deductible determinations and provides, in pertinent part, as follows:

> (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:
>
> * * *

(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 confirmed release on or after July 28, 1989.

A deductible shall apply annually for each site at which costs were incurred under a claim submitted pursuant to this Title, except that if corrective action in response to an occurrence takes place over a period of more than one year, in subsequent years, no deductible shall apply for costs incurred in response to such occurrence. 415 ILCS 5/57.9(b)

A number of definitions are critical in an examination of OSFM's actions. They are site, occurrence, and corrective action.

"Site" means 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

"Occurrence" means an accident, including continuous or repeated exposure to conditions, that results in a sudden or nonsudden release from an underground storage tank. 415 ILCS 5/57.2

"Corrective action" means activities associated with compliance with the provisions of Sections 57.6 and 57.7 of this Title.

OSFM's ARGUMENT

The respondent argues that while the site where the underground storage tanks were located is a single tract of land which is not separated by a right of way or street or alley, this is not the only factor considered in a deductible determination. Numerous other factors, including but not limited to the locations of the USTs on the site, the timing of reported releases, as well as public policy contribute to the determination of a deductible for a site and an occurrence at the site. Resp. brief at 2.

The respondent argues that the determination of the applicable deductibles for the first removal of five USTs and the second removal of the sixth UST was not based on there being a single/multiple sites, the distance between the USTs, or the lapse in time between the removals. Respondent contends that its determination was made solely on factors set out in the Act. The factors which the respondent took into consideration were as follows: (1) The dates the USTs were registered; and (2) dates of reported releases from the UST. Further, "a deductible shall apply annually for each site … except that if corrective action in response to an occurrence takes place over a period of more than one year, in subsequent years, no deductible shall apply … " 415 ILCS 5/57.9(b). The respondent argues that in addition to the dates of registration and reported release, a deductible is only applicable for one year and for one occurrence. Resp. brief at 2-3. The respondent argues that a proper determination of deductible was made based on these factors:

Dates of Registration

The dates of registration of the USTs are as follows:

UST #1	12/10/85
UST #2	12/10/85
UST #3	12/10/85
UST #4	exempt 6/13/2000
UST #5	exempt 6/13/2000
UST #6	exempt 6/13/2000
UST #7	exempt 6/13/2000
UST #8	6/13/2000
UST #9	10/17/00

The dates the State received notification of the releases from the USTs, are as follows:

UST #1	4/12/99
UST #2	4/12/99
UST #3	4/12/99
UST #4	n/a
UST #5	n/a
UST #9	10/17/00

Based on the dates of registration and reported releases for the first five USTs, the respondent argues, a $15,000 deductible shall apply when one or more but not all of the USTs were registered prior to July 28, 1989, and the State received notice of the confirmed releases on or about July 28, 1989. USTs #1, #2, and #3 were registered in 1985, prior to the statutory date, #4, #5, #6, and #7 are exempt from registration, #8 was registered 6/13/2000, and #9 was registered 10/17/2000. Based on these dates, some but not all of the USTs were registered prior to the July 28, 1989 date contends the respondent. The releases were all reported after July 28, 1989; and therefore the $15,000 deductible applies. Resp. brief at 4.

The sixth UST was registered after 1989 and the release was reported after 1989. Because there are other USTs on the site registered prior to July 28, 1989, they act as the “some” tanks registered before 1989. The respondent argues that because the registration dates and the

release dates match the language of the Act for a $15,000 deductible, a $15,000 deductible was properly applied to this application for reimbursement relating to the sixth UST. Resp. brief at 4-5.

The first five USTs were removed on April 12, 1999. The last UST was removed on October 16, 2000. The respondent argues that the time in between these two removals is over 18 months which is beyond the year allowed for in the Act and because the deductibles shall apply annually per the Act, the sixth USTs removal would fall outside of the year. Resp. brief at 5.

Deductible Good for Each Occurrence

The respondent argues that because the two removals and releases were greater than a year apart, they are not the same occurrence according to the Act. Because the second removal is not a corrective action of the first removal, it is a separate occurrence from the first occurrence and was properly assessed a separate deductible. The respondent argues that the removal of the first five USTs and the later removal of the sixth tank were two separate occurrences and this is why they were assigned two different Illinois Emergency Management Agency numbers and two separate deductibles. Resp. brief at 5.

Public Policy

The respondent argues that there are three compelling public policy arguments for the proper assignment of the second deductible for the sixth UST: (1) in order to avoid applicants from grouping unrelated occurrences which would enable them to have a single deductible and in turn deplete the fund; (2) in order to allow those with larger remediations to be able to access funds up to $1,000,000.00 where needed for each occurrence, instead of for each site; and (3) assessing a deductible to an applicant on a per occurrence basis encourages the applicant to avoid occurrences thereby protecting the environment and the access to the fun itself encourages reporting of occurrences when they do happen and thereby invokes the state oversight to insure proper corrective action is taken. Resp. brief at 9-10.

Petitioner's Argument

The Statute Provides that Deductibles Are to Be Determined for a "Site"

The petitioner argues that the statute provides that deductibles are to be determined for a site and that all the tanks in question were located within a single site. The petitioner states that the property at issue is not separated by any public right-of-way or divided by any road or alley. Tr. at 24-25. Petitioner states that even OSFM's own witness, Deanne Lock, admitted that the property at issue constitutes a single "site" for purposes of deductible determinations. Tr. at 104-105.

Response to OSFM's Two Arguments

The petitioner believes that OSFM's separate "tank field" argument is flawed for five reasons which are (1) there is no regulation which makes the defined term "tank field" applicable

to deductible determinations; (2) there is no written regulatory direction on how the term "tank field" is to be applied; (3) OSFM could not change the statutory provision that deductibles are to be determined by "site" by adopting a regulation; (4) there was no fairness or opportunity to measure; (5) and the wrong measurement was used.

First, petitioner argues that the definition of "tank field", which is contained within Part 732, does not make the term applicable to deductible determinations. The term "tank field" is used only in 732.307(c), dealing with soil boring requirements for purpose of site evaluation. Subpart F of Part 732 deals with applications for payment or reimbursement. But petitioner argues that nothing in Subpart F provides that deductible determinations shall be based on "tank fields" or distances between "tank fields." The term "tank field" does not appear anywhere in Subpart F. The petitioner argues that OSFM's position comes down to the argument that because the term "tank field" is a defined term in regulations dealing with the Underground Storage Tank Program, it should apply to deductible determinations. Petitioner argues that OSFM does not have any specific provision which expressly says that separate deductibles are charged for each "tank field." Pet. brief at 13-14.

Second, petitioner argues that assuming that the concept of "tank fields" somehow applies to deductible determinations, there is nothing that specifies how it should be applied. Namely should a separate deductible be charged for any tank which is outside of a tank field? And should a separate deductible be charged for any tank that is more than 100 feet away from the next closest tank field? And should a separate deductible be charged when two tank fields are separated by more than 100feet Pet. brief at 14-15.

Third, the petitioner argues that even if there were some specific regulation which provided that separate deductibles are to be charged on the basis of tank fields, that regulation would be invalid under long-standing principles of statutory construction. Pet. brief at 15.

Fourth, the petitioner argues that if distances between tanks or tank fields is to be the basis on which deductibles are to be charged, there should be some notice to applicants and some opportunity for applicants to measure or verify such distances. There is nothing in the application form which calls for any such information or puts the applicant on notice that this is a factor. Petitioner argues the issue is left to the inspector raising the subject which is fundamentally unfair and violates equal protection. Pet. brief at 17.

And fifth, petitioner argues that if the definition of tank field is to be the basis for determining deductibles, OSFM did not apply it correctly. The regulation says that "tank field means all underground storage tanks at a site that reside within a circle with a 100 foot radius." OSFM's witnesses, Mr. Nessler and Mr. Southern, did not draw geometric circles, but measured from what they estimated to be the edge of the nearest of the tanks. Petitioner argues that all six tanks lie within a single tank field in that they all fall within a circle having a 100 foot radius. Pet. brief at 18.

OSFM's More Than One Year Argument

At the hearing, OSFM took the position that because there are two separate occurrences, more than a year apart, each occurrence has a separate $15,000 deductible. Petitioner argues that this argument fails for four reasons. Pet. brief at 22.

First, petitioner states that the statutory language speaks to duration of the corrective action, and not the time between occurrences. It is the corrective action which is the focus and not the occurrence. If the corrective action takes place over more than one year, no separate deductible is assessed in the second or subsequent years. Petitioner states that this is true for the first five tanks found on the site but questions why should these five tanks be treated one way and the sixth tank found on the site be treated differently. Pet. brief at 22-23.

Second, petitioner argues that the provision of the Act dealing with eligibility and deductibles does not say that deductibles are to be assessed based on the number of occurrences. Rather, the deductibles are assessed per site. Petitioner argues that definition of occurrence looks to the circumstances which lead to a release. It does not look to either the lapse of time between releases or distances between tanks as the respondents argue. OSFM says that occurrence is related directly to the work involving the USTs and the clean up of any releases. The petitioner argues that this is a misreading of the clear and unambiguous statutory language. The term occurrence does not mean clean up work or remediation, as OSFM concludes. It is the event which resulted in the release.

Third, the petitioner argues that the undisputed testimony was that the demolition of the building, the cleaning of the site, and the removal of the tanks was all one continuous project. This would satisfy the continuous corrective action exception. Pet. brief at 23.

Fourth, the petitioner argues that the second deductible determination cannot be sustained on any basis other than that made at the time of the original action. Petitioner states that the "agency action may only be sustained on the rationale offered by the agency at the time the action is taken." Grand Boulevard Improvement Association v. City of Chicago, 553 F.Supp. 1154, 1166 (N.D.Ill. 1982). Pet. brief at 23-24.

DISCUSSION

Whether to reverse OSFM's determination that a $15,000 deductible applied to the sixth tank centers around three issues: (1) Does the property constitute one site; (2) Was there one or two occurrences; and (3) was there corrective action.

As to the first issue, the property does constitute one site. The property is not separated by any public right-of way or divided by any road or alley. OSFM's witness, Deanne Lock, who makes deductible determinations under the LUST program for OSFM, admitted that the property constitutes a single site.

As to the second issue the Board finds that there was only one occurrence. OSFM argues that the second deductible was assessed because the removal of the first five tanks and the later sixth tank were separate occurrences. The Board finds, however, that Section 57.9 of the Act dealing with eligibility and deductibles does not say that deductibles are to be assessed based on

the number of occurrences. To the contrary, it says that deductibles are assessed per site. Under Section 57.2 of the Act, occurrence looks to the circumstances which lead to the release. It does not look to either lapse of time between releases or distances between tanks. The term occurrence does not mean clean-up work or remediation. It means the event which resulted in the release. The undisputed testimony of Ms. Wisniewski for the petititioner showed that the demolition of the building, the cleaning of the site, and the removal of the tanks was all one continuous project.

The Board does not accept OSFM's position that the sixth tank was in a separate tank field from the first five tanks and should have a separate deductible. The Act provides that deductibles apply to a site. There is nothing in Title XVI of the Act which provides for the assessment of more than one deductible based on any 100-foot rule or on the fact that tanks are situated more than 100' apart. The definition of tank field is contained within Part 732, Title 35 of the Illinois Administrative Code. There is nothing in Part 732 which purports to make the term "tank field" applicable to deductible determinations.

Finally, the Board finds there was a continuous corrective action. Under the Act, if the corrective action takes place over more than one year, no separate deductible is assessed in the second or subsequent years. There is no dispute that the demolition of the building, the cleaning of the site, and the removal of the tanks was all one continuous project. This satisfies the continuous corrective action exception. In this case, a single building which covered most of the site was being demolished and the site remediated. During the course of the demolition, an additional tank was discovered. In terms of the corrective action, the Board does not see how the sixth tank is any different than the first five tanks.

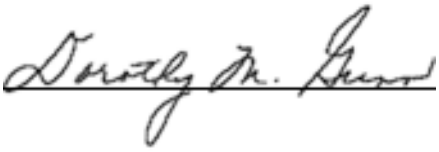
CONCLUSION

The Board reverses the OSFM's determination and assessment of a second $15,000 deductible for the site and there should be no second deductible charged for or in connection with the sixth tank located on the site.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2000); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on December 19, 2002, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board