

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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AUG 18 2003

MICK'S GARAGE,)
)
Petitioner,)
)
vs.)
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

STATE OF ILLINOIS
Pollution Control Board

PCB No. 03-126
(UST Appeal)

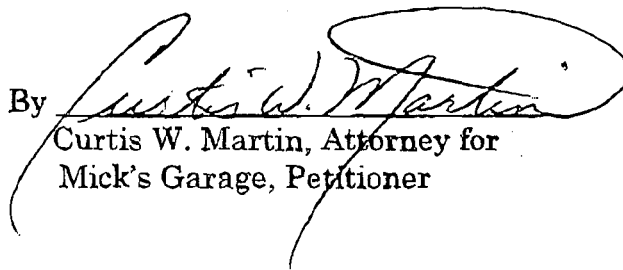
NOTICE

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
State of Illinois Center
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Suite 11-500
Chicago, IL 60601

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Carol Sudman
Hearing Officer
Illinois Pollution Control Board
600 S. Second Street, Suite 402
Springfield, IL 62704

PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board a Brief of Petitioner, a copy of which is herewith served upon you.

By 
Curtis W. Martin, Attorney for
Mick's Garage, Petitioner

Curtis W. Martin
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BRIEF OF PETITIONER

NOW COMES the Petitioner, Mick's Garage, ("Mick's"), by one of its attorneys, Curtis W. Martin of Shaw & Martin, P.C., and for its Brief pursuant to the Hearing Report of the Hearing Officer filed July 28, 2003, states as follows:

This appeal concerns the proper deductible determination applicable to the Mick's facility located at 1251 East Chain of Rocks Road in Pontoon Beach, Illinois. Mick's has been in operation as a truck repair facility and fueling station since 1945. On June 11, 1991, a "suspected" release of contaminants was reported to the Illinois Emergency Services Disaster Agency ("IESDA") and Incident No. 911582 was assigned to the site. The suspected release related to an area of discoloration above gasoline lines near Mick's building. No diesel fuel flowed through these lines.

At various times between 1991 and 1999, Mick's environmental consultants submitted requests for reimbursements resulting in Agency letters dated February 7, 1992, March 9, 1992 and January 10, 2003, the current Agency decision Mick's now appeals. The February 7, 1992 and March 9, 1992 Agency letters both reference two (2) 2000 gallon diesel fuel tanks (as corrected by the Agency's March

24, 1992 letter), and Mick's constructive knowledge that a release occurred from these tanks prior to July 28, 1989.

Stephen Fincher, now Mick's President, has been involved in the family business since 1973 and in the early 1980's became the manager of the operations. In the early 1980's a dispenser connected to the two (2) 2000 gallon diesel fuel tanks located at the rear of Mick's facility was damaged by a tractor trailer. At no time following the tractor trailer incident did Mr. Fincher notice any spill or leak from the fuel dispenser. Following the tractor trailer incident, the pump attached to the two (2) 2000 gallon diesel fuel tanks would not dispense fuel. Mr. Fincher was not aware of how the dispenser operated and made an assumption that the reason it was not operating was because the line to the pump must have leaked. Mr. Fincher held to this assumption for a number of years. Because diesel fuel sales at Mick's had been dwindling, Mick's decided not to repair the pump or to sell diesel fuel at its facility.

Eleven underground storage tanks ("UST's") were removed from Mick's on April 5 through 8, 1999. Because there appeared to be a release from some of the UST's removed, Arthur Jacobs, the representative of the Office of the State Fire Marshall ("OSFM"), requested a second reporting of the initial suspected release of June 11, 1991. On April 5, 1999 the Illinois Emergency Management Agency ("IEMA") assigned a second Incident No. 990820 to Mick's site. Mr. Fincher and Mr. Jacobs were present when the two (2) 2000 gallon diesel fuel tanks were removed. Mr. Fincher observed no spill, leak, or other free product from the two

tanks. In addition, Mr. Jacobs' Log of Underground Storage Tank Removal reflected no release from the two (2) 2000 gallon diesel fuel tanks.

Following the removal of the tanks, Mr. Fincher provided a written explanation to the Agency, and provided testimony during the hearing, that he was not previously aware that the diesel fuel delivery system connected to the two (2) 2000 gallon diesel fuel tanks was a suction pump apparatus. Mr. Fincher later learned that the system was a suction pump system and that a crack in the pump caused a complete malfunction of the system. Because the suction pump system operated by drawing fuel out of the tanks, its complete malfunction would not allow fuel to be removed from the tanks to enter the lines causing the fuel to remain in the tanks.

Once this explanation was provided to the Agency, however, it swiftly shifted its focus to a prior reported leak from the gasoline UST's in 1991. The Agency further seems to take the position that Mick's prior submittal to the Agency of the Underground Storage Tank Fund Eligibility and Deductibility Applications preclude Mick's from reaping the benefit of the proper lesser deductible. Granted, the various applications for deductible determination caused initial confusion, but the true facts were properly and timely presented to the Agency. The true facts of the case are, based upon the Removal Log of the OSFM, that neither of the two (2) diesel fuel tanks had a release or contributed in any other way to the contamination at the Mick's site.

Illustrative of the Agency's failure to consider the true facts in this case is the testimony of John Barrett, the Agency's Project Manager for the Mick's project. He

testified that once he discovered a \$50,000.00 deductible determination in the Agency's file, he decided not to waiver from that decision as it was the first Agency decision and in his view nothing had been submitted by Mick's to change that decision. Yet, despite the additional information provided by Petitioner, Mr. Barrett stated this would not have caused him to change the deductible determination from \$50,000.00 to \$10,000.00 or \$15,000.00, even when the information caused the deductible determination to be "less confusing".

Mr. Barrett settled upon the 1991 report of a release from gasoline UST's registered in 1986 as a basis for the \$50,000.00 deductible determination. Taking Mr. Barrett's, and ultimately the Agency's, position renders the following undisputed facts: (1) the two (2) 2000 gallon diesel fuel UST's had not leaked; (2) if any leak occurred it was reported to the State in 1991 for gasoline UST's registered in 1986; (3) Mick's could not have constructive knowledge prior to 1989 of a diesel fuel leak that never occurred; and (4) there is no evidence in the record of this case to suggest that Mick's had or could have had knowledge of a leak from gasoline UST's prior to 1989.

Given these undisputed facts, Section 57.9(b) of the Environmental Protection Act, 415 ILCS 5/57.9(b), directs that the deductible will be \$10,000.00, except under Section 57.9(b)(3), where one or more but not all UST's were registered prior to July 28, 1989 and the State received notice of the confirmed release on or after July 28, 1989. In the present case, all the UST's were registered prior to July 28, 1989. Therefore, the \$10,000.00 deductible applies. At the very least, the \$15,000.00 deductible applies because the UST's were registered prior to July 28,

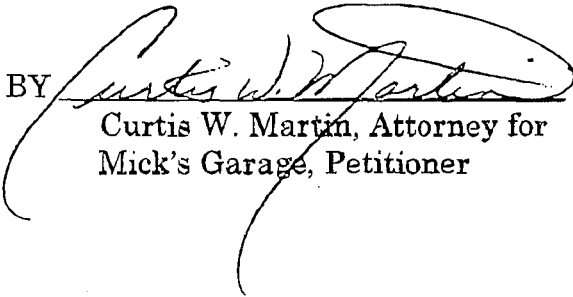
1989 and the State was notified of the confirmed release, be it gasoline or diesel fuel, after July 28, 1989. Accordingly, Mick's has met its burden of proof that the Agency's determination of a \$50,000.00 deductible is applicable in this case was error.

Petitioner, Mick's Garage, for the reasons stated above, requests that the Board reverse the deductible decision of the Agency and rule in favor of Petitioner's request for the application of a \$10,000.00 deductible, or in the alternative a \$15,000.00 deductible, and grant Petitioner such other and further relief as the Board deems just and equitable in the circumstances.

Respectfully submitted,

SHAW & MARTIN, P.C.

BY


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Curtis W. Martin

August 18, 2003

VIA FAX 312-814-3669

Ms. Dorothy Gunn
Clerk of Illinois Pollution Control Board
State of Illinois Center
100 W. Randolph, Suite 11-500
Chicago, IL 60601RE: *Mick's Garage vs. Illinois Environmental
Protection Agency; PCB No. 03-126*

Dear Ms. Gunn:

Pursuant to the hearing officer's Hearing Report, enclosed is a faxed copy of Petitioner's Brief in the above cause. The original of the Brief will follow by mail. Upon receipt of the original and copy of the Brief, please return a file-marked copy to me in the enclosed self-addressed, stamped envelope. Thank you for your assistance in this matter.

Very truly yours,


Curtis W. Martin

CWM/cm

Enclosures

cc: Duane Doty
Carol Sudman
John Kim
John McCracken