

ILLINOIS POLLUTION CONTROL BOARD  
December 18, 2003

MICK'S GARAGE, )  
)  
Petitioner, )  
)  
v. ) PCB 03-126  
) (UST Appeal)  
ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY, )  
)  
Respondent. )

CURTIS W. MARTIN, OF SHAW & MARTIN, P.C., APPEARED ON BEHALF OF PETITIONER; and

JOHN J. KIM, OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by N.J. Melas):

Mick's Garage (Mick's) seeks review of a January 10, 2003 determination by the Environmental Protection Agency (Agency). The Agency approved a site characterization report and corrective action plan and deductible determination, received by the Agency on November 13, 2003, regarding Mick's underground storage tank (UST) site. Mick's appeals on the grounds that the Agency based its deductible determination on a report of a suspected leak in the tank registration, rather than on the log of tank removal, which indicated that no leakage had occurred. For the reasons discussed below, the Board affirms the Agency's January 10, 2003 determination that a \$50,000 deductible applies to the Mick's Garage site.

**PROCEDURAL BACKGROUND**

On May 20, 2003, Mick's timely filed a petition asking the Board to review the Agency's determination. The Board held a hearing in this matter on June 10, 2003. The Agency filed the administrative record on July 14, 2003.<sup>1</sup> Mick's filed a post-hearing brief on August 18, 2003, and the Agency responded on September 16, 2003. The decision deadline is December 31, 2003.

**BACKGROUND**

Mr. Stephen Fincher is the president of Mick's Garage. Pet. Br. at 2. Mick's is a truck maintenance facility, located at 1251 East Chain of Rocks Road, Pontoon Beach, Madison

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<sup>1</sup> Throughout the following opinion, the Board cites to the administrative record as "AR, at \_\_\_"; Mick's post-hearing brief as "Pet. Br. at \_\_\_"; the Agency's brief as "Resp. Br. at \_\_\_"; and exhibits filed by Mick's at hearing as "Pet. Exh. \_\_\_."

County. *Id.* The parties agree that on June 11, 1991, Mick's reported a suspected release from its site, for which the Illinois Emergency Services Disaster Agency issued incident number 911582. Pet. Br. at 1. Mick's applied for reimbursement from the Underground Storage Tank Fund (Fund) for the site and the Agency issued a decision dated February 7, 1992 stating that the \$50,000 deductible applies to the Mick's Garage site. The February 7, 1992 letter also states that the two 500-gallon heating tanks were ineligible for reimbursement because they were not properly registered, but does not indicate how many Underground Storage Tanks (USTs) were reported at the site. AR, at 1. Mick's represented in the 1991 application that it knew of the suspected release in 1980, and that the two diesel fuel USTs at the site were taken out of service in 1980 due to a leak from the line going from the connecting tank to the pump. AR, at 1; Tr. at 23. The application also indicated the contamination had not been addressed. *Id.* The February 7, 1992 letter from the Agency indicated it was the Agency's final appealable decision, and Mick's did not appeal the decision. Resp. at 5.

The Agency subsequently sent two letters regarding the same incident number. The first, sent in March of 1992, restated what was said in the February 7, 1992 letter. AR, at 3. The second, dated March 1993, changed the Agency's February 7, 1992 letter regarding two issues. AR, at 4. The March 1993 letter stated that the two heating tanks were now eligible for reimbursement and that the two diesel fuel tanks were 2,000 gallon, rather than 20,000 gallon, tanks. *Id.*

On April 8, 1999, Mick's removed six tanks from the site. AR, at 22. The Office of the State Fire Marshal (OSFM) logged the removal and the Illinois Environmental Management Agency issued Mick's a new incident number 990820. AR, at 35. The OSFM's log, dated April 22, 2003, indicated that of the six tanks removed, all but the two 2,000 diesel USTs appear to have leaked. *Id.* Mick's contends that upon their removal, Mr. Fincher discovered the diesel fuel delivery system to the two diesel fuel USTs was a suction pump apparatus. Pet. Br. at 3. Mick's contends that because of the nature of the fuel delivery system, a crack that was found in the pump could not have allowed fuel from the tanks to enter the lines causing the fuel to remain in the tanks. *Id.*

On April 26, 2000, Mick's submitted an application for eligibility and deductibility with the OSFM.<sup>2</sup> Pet. Exh. 1. On May 9, 2000, the OSFM issued a decision stating the applicable deductible for the site was \$15,000. The May 9, 2000 decision reflects 15 USTs at the site, lists the occurrence number as 990820, and lists the occurrence notification date as April 4, 1999. Pet. Exh. 1. Four of the 15 USTs were listed as ineligible for reimbursement because they had not been in operation since 1974. The OSFM decision also stated that the application reported no releases for five of the eleven eligible USTs. Pet. Exh. 1.

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<sup>2</sup> As discussed below, under the original section of the Environmental Protection Act (Act) regarding UST Fund reimbursement the Agency was responsible for making eligibility and deductibility determinations. 415 ILCS 5/22.18b(d)(3) (1992). This section was repealed and a new Title XVI enacted, effective September 13, 1993, changing the agency responsible for making eligibility and deductibility determinations to the OSFM. 415 ILCS 5/57.9(c) (2002).

On May 17, 2000, a consultant for Mick's, United Science Industries, Inc. (USI), submitted another application for eligibility and deductibility to the OSFM. AR, at 5. The application listed the incident number as 911582 and the occurrence notification date as June 11, 1991. AR, at 7. The application also listed incident number 990820, but listed it as a second reporting of the same occurrence. AR, at 7. The application listed 11 USTs, all of which had releases that were reported on June 11, 1991, and all of which were registered on May 5, 1986. AR, at 9.

On September 11, 2000, the OSFM received a third reimbursement eligibility and deductible application from Mick's for incident number 911582. This application also listed the occurrence notification date as June 11, 1991. On September 22, 2000, the OSFM issued a decision in response to the September 11, 2000 application stating that 11 USTs at the site are eligible for reimbursement, and that \$10,000 is the appropriate deductible. Pet. Exh. 1 at 9.

The consultant for Mick's sent a letter dated August 8, 2002 asking the Agency to change its decision regarding the deductible applicable to incident numbers 911582 and 990820 concerning the removal of USTs at the Mick's Garage site on April 5, 7, and 8, 1999. AR, at 14-15.

In response to the August 8, 2002 letter, the Agency stated that the information that USI provided did not change the Agency's decision that a \$50,000 deductible applies to incident numbers 911582 and 990820 at the Mick's Garage site.

The Agency received a site characterization report and corrective action plan (corrective action plan) from Mick's on November 13, 2002. AR, at 36. The Agency approved the plan in a letter dated January 10, 2003. The Agency indicated in the letter that it reviewed additional information that Mick's submitted with the plan, yet "continues to believe that the \$50,000 deductible originally assessed applies to this site." AR, at 37. The Agency reaffirmed its previous determination that a \$50,000 deductible applied to the site. The Agency also stated in the letter that it based its original determination on information provided in the corrective action plan, received by the Agency on August 8, 1991, and Mick's application for reimbursement from the UST Fund, dated September 17, 1991. The Agency noted that the information provided at the time indicated the release reported on June 11, 1991 was for a gasoline UST. AR, at 36.

### **APPLICABLE LAW AND STANDARD OF REVIEW**

The original section of the Environmental Protection Act (Act) governing UST Fund reimbursement applications and determinations was found at Section 22.18b of the Act (Title V). This section set forth the appropriate deductibles to be imposed on reimbursement applications for USTs eligible to access the UST Fund. In 1993, this section of the Act was repealed and a new Title XVI was enacted, effective September 13, 1993. 415 ILCS 5/57 (2002). The law to be applied is the law in effect upon the date the application is filed. Kean Oil Co. v. IEPA, PCB 92-60, slip op. at 11 (Sept. 5, 1996). Owners or operators who reported releases after the effective date of the amendments would proceed under the new law. Owners or operators who reported releases prior

to the effective date proceeded under the old law unless expressly electing to proceed under the new Title XVI. 415 ILCS 5/57.13(b) (2002).

Regarding applicable deductibles, Section 57.9(b) of the new Title XVI provides:

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 . . . 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 the confirmed release on or after July 28, 1989. 415 ILCS 5/57.9(b) (2002).

Here, the tanks were removed on April 8, 1999, and Mick's reported a release to the Agency in 1991, prior to the adoption of the new law. Two incident numbers apply to the Mick's Garage site. The first was issued in 1991, and the second was issued in 1999 when the tanks were removed. The OSFM noted when it issued the more recent incident number that it was a second report of the suspected release reported in 1991.

The parties disagree on the applicable statute. Mick's states that the new Title XVI applies while the Agency argues the old law applies. The Board is persuaded by the Agency's arguments. The Board finds that because the OSFM issued a second incident number as a re-reporting of the first incident, for which the application was submitted on November 15, 1991, Section 22.18b of the Act applies. At that time, Section 22.18b(d)(3)(A) provided in part:

If an owner or operator submits a claim or claims to the Agency for approval under this Section 22.18b, the Agency shall deduct from the amount approved a total of \$10,000 for each site for which a claim is submitted. 415 ILCS 5/22.18b(d)(3)(A) (1992).

Section 22.18b(d)(3)(C)(ii) of the Act provides in pertinent part:

If the costs incurred were in response to a release of petroleum which first occurred prior to July 28, 1989, and the owner or operator had actual or constructive knowledge that such a release occurred prior to July 28, 1989, the deductible amount . . . shall be \$50,000 rather than \$10,000 . . . . It shall be the burden of the owner or operator to prove to the satisfaction of the Agency that the owner or operator had no actual or constructive knowledge that the release of petroleum for which a claim is submitted first occurred prior to July 28, 1989. 415 ILCS 5/22.18b(d)(3)(C)(ii) (1992).

Section 22.18b(g) of the Act provides that an applicant may appeal an Agency decision denying total or partial reimbursement to the Board under the provisions of Section 40 of the Act (415 ILCS 5/40 (2002)).

The standard of review under Section 40 of the Act is whether the application, as submitted to the Agency, would not violate the Act and Board regulations. Ted Harrison Oil Co. v. IEPA, PCB 99-127, slip op. at 5 (July 24, 2003); *citing* Browning Ferris Industries of Illinois v. PCB, 179 Ill. App. 3d 598, 534 N.E.2d 616 (2nd Dist. 1989). The Board will not consider new information not before the Agency prior to its final determination regarding the issues on appeal. Kathe's Auto Service Center v. IEPA, PCB 95-43, slip op. at 14 (May 18, 1995).

## **DISCUSSION**

Mick's seeks review of the Agency's decision that a \$50,000 deductible applies to the reimbursement for the UST removal at the Mick's Garage site in 1999. Mick's argues that either the \$10,000 or \$15,000 deductible, as determined by the OSFM, applies. Pet. Br. at 4. The Agency maintains that a \$50,000 deductible, as determined by the Agency in 1992 and again in 2002, applies.

### **Mick's Arguments**

Mick's asserts the applicable deductible is either \$10,000 or \$15,000 pursuant to both Section 57.9(b) of the Act and the OSFM's findings. Pet. Br. at 4. Mick's asserts that Section 57.9(b) of the Act directs that the deductible will be \$10,000, except under Section 57.9(b)(3) where the deductible will be \$15,000 if 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. According to Mick's, the proper deductible is \$10,000 because all of the USTs at issue were registered prior to July 28, 1989. Pet. Br. at 4.

Alternatively, Mick's argues that the \$15,000 deductible applies because while the USTs were registered prior to July 28, 1989, the State was notified of the release after July 28, 1989. Pet. Br. at 4-5. Mick's argues that either way, the Agency erred in determining that a \$50,000 deductible applies to the site. Pet. Br. at 5.

Mick's argues that not until the USTs were removed in April of 1999, did it discover that the two 2,000 gallon diesel fuel USTs had not leaked. Pet. Br. at 2-3. Mick's further contends that because of additional information Mr. Fincher learned once the USTs were removed, particularly that the nature of the fuel delivery system could not have allowed the lines of the diesel tanks to leak, neither of the two diesel fuel tanks had a release or contributed to the contamination found at the Mick's Garage site. Mick's further argues the OSFM's removal log confirms that no release was found from the two diesel USTs. Essentially, Mick's argues that information discovered subsequent to removal of the USTs in 1999 disproves the release of diesel fuel that Mick's reported in 1991, and a \$10,000 or \$15,000 deductible applies rather than a \$50,000 deductible.

### **The Agency's Arguments**

First, the Agency argues the facts clearly support the Agency's February 7, 1992 decision that the \$50,000 deductible applies. Resp. Br. at 4. The Agency argues it issued a final decision on February 7, 1992, setting the deductible for the site at \$50,000 based on the information

Mick's presented in its application for reimbursement eligibility and deductibility. The Agency states that Mick's had an opportunity to appeal that decision at the time, but did not. The Agency contends that ten years later, and after a second incident number was assigned to the same site documenting a re-reporting of the same release, the Agency issued a second final decision stating the applicable deductible is still \$50,000, based on the Agency's original decision. Resp. Br. at 6.

Second, the Agency contends it is not authorized to change its final decision. Resp. Br. at 7. The Agency argues this principle is well-established. See Reichhold Chemicals, Inc. v. PCB, 204 Ill. App. 3d 674, 561 N.E.2d 1343 (3d Dist. 1990). The Agency contends that it is, therefore, bound to its deductible decision of February 7, 1992. Resp. Br. at 7.

Finally, the Agency argues that the OSFM's decisions should not determine the applicable deductible. Resp. Br. at 8. The Agency contends that the old law applies and Mick's did not elect to proceed under Section 57 of the Act. Therefore, Section 22.18b of the Act is the applicable law, and pursuant to that section, it was not within the OSFM's authority to issue reimbursement eligibility and deductible decisions. For all of these reasons, the Agency asserts that \$50,000 is the proper deductible.

### **Board Analysis**

At issue in this appeal is the proper deductible to apply to reimbursement for corrective action by Mick's at its facility in response to a reported release from USTs. Both parties concede, and the record shows, that the second incident number, 990820, was a second reporting of the initial reported release of June 11, 1991, incident number 911582. See Pet. Br. at 2; Resp. Br. at 5; AR, at 7. Because Mick's reported the release in 1991 and did not elect to proceed under the new law, the applicable law is Section 22.18b of the Act. As a result, Mick's arguments under Section 57.9 of the Act are misplaced. Nonetheless, the Board will discuss Mick's arguments concerning the appropriate deductible as they relate to Section 22.18b of the Act.

Section 22.18b(d)(3)(G) of the Act provides that the deductible application must be submitted to the Agency and that the Agency makes the deductible determination:

The Agency shall determine the applicable deductible under this paragraph based on the date that a complete application for eligibility determination in accordance with subsection (a) of this Section is received by the Agency. 415 ILCS 5/22.18b(d)(3)(G) (1992).

Therefore, the Board finds that the Agency's determination based on the application it received from Mick's in 1991 remains the applicable deductible for the Mick's Garage site. Under Section 22.18b, the OSFM does not have authority to determine the applicable deductible at the Mick's Garage site.

The Board further finds that it lacks jurisdiction to review the Agency's February 7, 1992 deductibility determination. The Board has held that a condition imposed in a permit, not

appealed to the Board under Section 40(a)(1), may not be appealed in a subsequent permit. Panhandle Eastern Pipe Line Co. v. IEPA, PCB 98-102, slip op. at 30 (Jan 21, 1999). Similarly, Mick's cannot now appeal the Agency's deductible determination made in 1992 regarding the same site and same USTs. The Agency lacks authority to change or reconsider its final determinations. Reichhold Chemicals, Inc. v. PCB, 204 Ill. App. 3d 674, 677-678, 561 N.E.2d 1343, 1345-1346 (3d Dist. 1990). While the Board does have jurisdiction to review the Agency's January 10, 2003 final decision approving Mick's corrective action plan, Mick's is actually requesting review of the Agency's deductible determination made final on February 7, 1992. The Board finds it lacks authority to review Mick's appeal regarding the Agency's 1992 determination that a \$50,000 deductible applies to the Mick's Garage site.

This opinion constitutes the Board's findings of fact and conclusions of law.

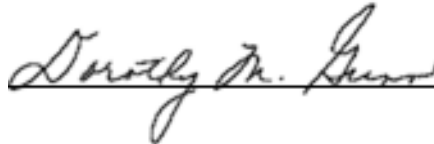
### **ORDER**

The Board affirms the Agency's determination that a \$50,000 deductible continues to apply at the Mick's Garage 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) (2002); *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 18, 2003, by a vote of 5-0.



Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board