ILLINOIS POLLUTION CONTROL BOARD
March 14, 1991

A.K.A. LAND, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 90-177
	)	(Underground Storage
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	Tank Fund Reimbursement Determination)
	)	
Respondent.	)	

DAVID L. ANTOGNOLI APPEARED ON BEHALF OF THE PETITIONER, AND

RONALD SCHLLAWITZ APPEARED ON BEHALF OF THE RESPONDENT.

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

This matter comes before the Board on a petition filed by A.K.A. Land, Inc. (AKA) on September 26, 1990. AKA requests review of a determination by the Illinois Environmental Protection Agency (Agency) to impose a $100,000 deductible, rather than a lesser amount, as a condition for reimbursement from the State's Underground Storage Tank Fund (State Fund) following AKA's removal of a number of Underground Storage Tanks (UST's). The provisions related to the State Fund are found in Sections 22.18, 22.18a, 22.18b, and 22.18c of the Environmental Protection Act (Act). (Ill. Rev. Stat. 111 1/2, pars. 1001 et seq.) The deductibility provisions are found in Section 22.18b(d)(3)(A), (B), and (C) of the Act.

Hearing was held on November 15, 1990, and no members of the public were present. At hearing, the Agency presented a statement of the Illinois Petroleum Marketers Association (IPMA), which was not present at hearing. The statement and a response by AKA were filed without objection. The Agency filed its brief on December 14, 1990, and AKA filed its reply brief on December 20, 1990.

On February 7, 1991, the Board entered an Interim Order requesting responses to questions posed in that Order. On February 13, 1991, AKA, the Agency, and the IPMA filed responses. (Because the responses essentially repeat arguments already contained in the record, we will not separately address them in this Opinion.)

SUMMARY

At the outset, we note that the issues raised in this matter not only were intertwined to an unusual degree, but also tended to evolve during the course of the proceeding. We believe that the following brief explanation and identification of the major issues raised, as well as the Board's conclusions, may enhance the reader's understanding when subsequently more fully addressed in this Opinion.

AKA, after finding on its property some abandoned underground gasoline tanks that had leaked, had the tanks and contaminated surrounding soil removed. AKA applied to the Agency for reimbursement from the State Fund. The State Fund was created by statute and provides for corrective action reimbursements, after a varying deductible amount is imposed, to eligible owners and operators of UST's containing petroleum. The Agency found AKA eligible for reimbursement, but imposed the highest deductible ($100,000). AKA appealed the Agency's deductibility determination.

How the State Fund operates, and who is covered, is linked to the UST regulatory program adopted by the USEPA. The USEPA's regulations have vastly expanded the standards applying to UST's. Among them are the requirements for "private" financial assurance. It is the financial assurance provisions that provide for the State Fund as an alternate compliance route, a route that is potentially more accessible and less expensive. Although the monies for the State Fund come from tank registration fees collected by the Office of the State Fire Marshal (OSFM), the Agency determines who gets the reimbursements and what the deductible amount is.

In the State Fund deductibility provisions, whether the phrase "in use" means that the UST's petroleum is actively being utilized, or whether it means that the UST simply contains petroleum, affects whether the full $100,000 deductibility imposed on AKA was correct. Additionally, when applying the phrase "in use" in the "active" sense to other language, particularly to the federally derived definitions of "owner" and "operator", the question was argued as to whether AKA was an owner and if not an owner, then an operator. If neither, then it was argued that AKA was not eligible for any reimbursement at all from the State Fund.

The Board has construed "in use" as meaning that the UST's are utilized in the "active" sense; that AKA is not the "owner" but is an "operator" and is thus eligible for the State Fund; and that the $100,000 deductible does not apply. The Board is remanding this matter to the Agency for it to determine whether the $50,000 or the $10,000 deductible applies, as that issue was not fully aired in this proceeding.

THE STATE FUND

A summary of the pertinent provisions of the State Fund follows.

As a general observation, we recognize the concern of the Agency and the IPMA about the sufficiency of the State Fund if AKA's arguments were to prevail. However, we emphasize that the arguments put forth by the parties and the IPMA have raised issues that, by implication, affect the liability provisions of the Resource Conservation and Recovery Act (RCRA) UST enforcement program as well as the State Fund deductibility provisions in dispute here. The arguments over the meaning of the phrase "in use" in the State Fund deductibility provisions has raised a fundamental problem with the Agency's view as to who is an "owner" and who is an "operator", as defined in the federal RCRA regulations. This Opinion will focus on the intertwining aspects of these issues as they arise.

The State Fund provides that eligible owners or operators of UST's may receive reimbursement for the costs of corrective action taken when there has been a release of petroleum; however, the State Fund also provides for a deductible of $10,000, $15,000, $50,000 or $100,000. The amount depends on such factors as the timing of the removal, when the leak first occurred, when the tanks were registered, etc.

The State Fund implements a provision of the RCRA. RCRA requires that UST owners/operators have "private" financial assurance to cover a release, and details what must be covered in the financial assurance. RCRA also permits the establishment of an "equivalent" State Fund. (40 CFR 280.101 (1990)). The Board has incorporated the State Fund into its RCRA "identical in substance" regulations. (See R89-19, April 26, 1990; 35 Ill. Adm. Code 731.200, adopted at 15 Ill. Reg. 9454, June 15, 1990).

It is important to note that the State Fund defines "owner", "operator", and "underground storage tank" by directly referencing these definitions in RCRA's Hazardous and Solid Waste Amendments of 1984 (HSWA). The Board has adopted these definitions as part of its adoption of other HSWA provisions as identical in substance. (See R88-27, April 27, 1989). The definitions are found at 35 Ill. Adm. Code 731.112.

One requirement for eligibility to the State Fund is a showing that the tanks be registered and fees paid into the State Fund. This activity is under the jurisdiction of the OSFM, pursuant to Section 4 of "An Act to regulate the storage, transportation, sale and use of gasoline, violatile oils and other regulated substances". (Gasoline Act) (Ill. Rev. Stat. 1989, ch. 127 1/2, par. 156). RCRA corrective action, on the other hand, is under the jurisdiction of the Agency. Thus, it is the Agency that oversees the State Fund's expenditures. The

Agency determines eligibility and the applicable deductible and processes claims. In this case, the Agency determined that AKA was eligible for reimbursement from the State Fund, and that its deductible was $100,000. (See Section 22.18b and c of the Act generally).

If the Agency refuses to reimburse, in whole or in part, then the affected owner/operator may petition the Board pursuant to the permit appeal provisions of Section 40 of the Act. (See Section 22.18b(g) of the Act). AKA's appeal is based on a dispute over the Agency's decision to impose the $100,000 deductible.

THE DEDUCTIBILITY PROVISIONS

The base deductible amount in the Act is $10,000, except that the deductible increases to $15,000, $50,000 or $100,000 under certain circumstances. The $15,000 deductible is not at issue here. When one is determining which deductible applies to AKA, the point at which the following events occurred in relation to the State Fund's "break point" date of July 28, 1989 are highly relevant: a) when the tanks were registered with the OSFM, b) when the tanks were "in use", and c) when the release first occurred.

It is undisputed that AKA purchased the property containing the UST's prior to July 28, 1989. It is also agreed by the parties that AKA's tanks were registered after that date, on August 15, 1990, and that the release occurred before July 28, 1989 (an event that becomes important if the $100,000 deductible does not apply). (R. 4, 56; Agency Record, p. 20). What is in dispute is whether the tanks were "in use" prior to July 28, 1989, which in turn depends on what "in use" means. As quoted later in this Opinion, the phrase "in use" is used in both the deductibility provisions of the Act and in the RCRA regulations defining "owner", but is not expressly defined in either place. Generally, the Agency and the IPMA argue that "in use" means "containing", even residual amounts, of petroleum. AKA, on the other hand, argues that "in use" should be construed in the active sense of the tanks being used for some purpose.

The Agency's and the IPMA's interpretation supports the imposition of the $100,000 deductible, and AKA's interpretation supports a lesser deductible (either $10,000 or $50,000). We note that the IPMA, in its statement filed at hearing, asserts that applying the minimum $10,000 deductible would inadvertently, by expanding the scope of the program, deplete the State Fund; however, the IPMA does not discuss the $50,000 deductible (Ex. A of Agency Brief, December 14, 1990).

The Agency based its $100,000 determination on Section 22.18b(d)(3)(B)(i) of the Act, which states in pertinent part:

> If prior to July 28, 1989, the owner or operator had registered none of the underground storage tanks in use on that date...the deductible amount...shall be $100,000 rather than $10,000....(Emphasis added).

AKA contends that the $100,000 deductible would not apply because the tanks were not "in use" prior to July 28, 1989. If such is the case then the $50,000/$10,000 deductibility provisions of Section 22.18b(d)(3)(B)(ii) of the Act come into play. That Section states 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 the operator had actual or constructive knowledge that such a release had occurred prior to July 28, the deductible amount...shall be $50,000 rather than $10,000, unless [the $100,000 deductible] applies, in which case the deductible amount shall be $100,000. If...the owner or operator had no actual or constructive knowledge that such a release had occurred prior to July 28, 1989, the deductible amount shall be [$10,000]. It shall be the burden of the owner or operator to prove to the satisfication 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.

As noted earlier, it was agreed that the release occurred before July 28, 1989. Thus, AKA's deductible would be $50,000 rather than $10,000, unless it can prove that it had no actual or constructive knowledge of the release before July 28, 1989.

We will now summarize the testimony at hearing, as it will help place into perspective the issues as identified by the parties as well as the underlying issues affecting the outcome of this matter.

HEARING TESTIMONY

At hearing, the president of AKA, Mr. Thomas C. Armstrong, testified that the company had been in the business of buying, selling, and developing real estate for approximately two years (R. 9). In November of 1988, AKA acquired what was then vacant property located at 755 South Belt West in Belleville, Illinois (R. 16). The purpose of the purchase was to develop the property

for use as a Super K convenience store with gasoline pumps. (R. 10).

At that time there was evidence of a former Texaco station on the property which, according to available records, closed in about 1975 and, in any event, was no longer operating in 1976. (R. 18). Remaining on the lot at the time of AKA's purchase were a building, partial paving, and an abandoned gasoline pump island with two service bays. (R. 10, 17). The gas pumps had been removed (R. 11, 17). The only later use of the facility was as a muffler shop. (R. 18).

Mr. Armstrong testified that he was not aware of the presence of any USTs at the time of acquisition. However, when AKA entered into a long-term lease agreement with Quick Trip Corporation (Quick Trip) for AKA to construct a facility for it, Quick Trip, as was its policy, had the property tested for the presence of hydrocarbons in November of 1989. (R. 12, 13, 23). The tests, conducted by Geo-Technology Environmental Inc. (Geo-Technology), showed that a release of petroleum had occurred, and that there were an undetermined number of tanks on the property. The Agency was notified at this time. (R. 13, 25).

Mr. Armstrong, after determining what the alternatives were, including an additional-testing option, decided to proceed with the clean-up. Although no dollar amounts were given, Mr. Armstrong testified that the clean-up cost considerably more than the estimates. (R. 26). AKA found six underground storage tanks when it had the tanks and the contaminated soil surrounding the removed in March/ April of 1990. The tanks contained residual petroleum sludge and dirt that could be contained in two or three 55 gallon drums. (R. 13, 14, 28).

Mr. Armstrong testified that he had made no inquiries of either the muffler shop or adjoining land owners to determine if tanks were on the property and had been removed, and that he assumed that Texaco, as a reputable company, would properly abandon any tanks. (R. 20). He stated that, in his prior experience as a real estate developer for 7-Eleven stores, construction was overseen by a construction manager and that he had not personally experienced a situation where tanks weren't properly abandoned, although he had knowledge of others being involved in such situations. (R. 21, 22, 26). He stated that AKA had never been a member of IPMA or received materials from them, and was not even aware of the existence of the State Fund until told of it by Geo-Technology. (R. 34).

The other person who testified at hearing was Mr. Bur Filson, Agency project manager of the UST program, whose duties in part were to review applications for reimbursements. (R. 40). He reviewed AKA's supplemental application and determined that AKA could access the fund and that the deductible was

$100,000, which amount would have to be paid before AKA could receive monies from the State Fund. (R. 54, 56).

Regarding his understanding of "in use", Mr. Filson testified that he had consulted with the then-head attorney in the Division of Land Pollution Control, Mr. Gary King. (R. 60). Mr. Filson noted that the phrase "in use" appears in two subsections of the deductiblity provisions, those being the $15,000 and $100,000. He also testified that the July 28, 1989 "start" date was the same date the State Fund was amended in the legislature and applied to everyone, and that, if the phrase "in use" were not present in the deductibility provisions, "it would be cost prohibitive for someone to open up a service station today". (R. 61).

As the Board understands Mr. Filson's testimony, the reason he believed "in use" meant "in the ground" prior to July 28, 1989 was because there was nothing in the OSFM's tank registration language that otherwise fit the scenario; there was a definition for "existing tanks", which Mr. Filson testified was "in the ground or substantial construction had been begun on December of 1988. So as a result of that, and the lag time from December of 1988 to July of 1989, the "in use" was inserted to, I guess, in effect redefine what existing tank was for the purposes of the funds." (R. 61, 62).

Mr. Filson decided on the $100,000 deductible on the basis that the tanks were not registered on July 28, 1989, but were in the ground on that date. (R. 69). He did not consider the possibility of any other deductible applying, nor did he specifically consider whether Mr. Armstrong had any knowledge of the release before July 28, 1989 (which, as earlier noted, is a consideration articulated in the $50,000 deductible provisions). (R. 67).

Mr. Filson agreed that indications were that the tanks were not dispensing fuel, but asserted that AKA was storing a regulated substance on July 28, 1989, and that "use" could mean employing something for a purpose, although he had no idea what purpose AKA's tanks were being employed for before July 28, 1989. (R. 69). Regarding "storing", Mr Filson felt that it did not require that there be a purpose; he felt, for example, that when a milk carton is used for storing and dispensing milk, the presence of remaining residue still constitutes storage even after the carton is thrown in the garbage. (R. 72).

ARGUMENTS AND BOARD DISCUSSION

In a lengthy brief, the Agency uses four arguments to support its interpretation of "in use". The parties' and the IPMA's arguments and responses are summarized, and the Board discussion of them follows.

RCRA/Board Definitions

The Agency references, and partially quotes, definitions for "existing tank system", "tank", "underground storage tank or UST", and "regulated substance" that are found in the Board's identical in substance RCRA regulations at 35 Ill. Adm. Code 731.112. The Agency points out, with the Agency's emphasis repeated here, that in the definition of: "Existing tank system", the phrase used to contain is used; "Tank", the phrase designed to contain is used; and that "underground storage tank or UST" means one or more tanks used to contain an accumulation of regulated substances (we note for later discussion purposes, that the UST definition also specifies that 10% of the volume, including underground pipes connected thereto, is to be beneath the ground). The Agency also notes that "Regulated substance" means petroleum.

The Agency then asserts that a UST is a tank designed to contain petroleum, that the amount of petroleum is not specified, and that the federal view is that the purpose of a UST is that it is designed to contain a regulated substance, in this instance petroleum.

We believe that the Agency's arguments beg the question as to what the phrase "in use" means as it is used in the State Fund deductibility provisions in the State statute. It is because the "contained" language is already used in these definitions that the addition of "in use" becomes a useless redundancy if it means the same thing. People v. Wick, 107 Ill.2d 62, 481 N.E.2d 676, 679 (1985). More specifically, if used to contain is already used in the definition of "underground storage tank", then why would it be repeated directly after the words "underground storage tank" in the $100,000 deductibility provisions (i.e. "..underground storage tanks in use on that date at the site...(Section 22.18b(d)(3)(B)(i))? As for the Agency's assertion that "regulated substance" means "petroleum, we are uncertain as to its relevancy, because no one is arguing that point. We must conclude that, because the State Fund specifically relies on the federal definitions for "petroleum" and "underground storage tank", and because "contain" language is already used, but the term "in use" is not used in those definitions, then "in use" is put in the deductibility provisions for a purpose and must mean something different.

The Gasoline Act

The Agency also quotes from the IPMA statement, which itself takes exerpts from the Gasoline Act. (Agency Brief pp. 17-18). The IPMA notes that the Gasoline Act requires UST's which contained petroleum to register the tank with the OSFM and notify the OSFM of their removal.

Ironically, we find this to be additional persuasive evidence that "in use" does not mean "contained". First, we see nothing inconsistent with using "contained" as a determinant for registration (and fee collection) purposes in the Gasoline Act, and using "in use" as a different determinant for deductibility purposes in the Act. It is obvious from this record that the OSFM's registration (and fee) activities and the persons they affect operate independently from the Agency's duty to oversee who gets paid, and how much, from the State Fund. A State Fund applicant must simply show to the Agency that OSFM accepted the registration and that the fees were paid; OSFM's statutory or regulatory language that served as a basis for OSFM's determination is not for the Agency to review. The language of the Act, not the OSFM Act, is before the Board for interpretation.*

Next, of particular note regarding the question of legislative intent as to whether the "contained" language in the Gasoline Act and the "in use" language in the Act mean something different, the "contained" provisions in the Gasoline Act were enacted at the same time in the same legislation as the "in use" provisions of Section 22.18b of the Environmental Protection Act. (see P. A. 86-25).

Deductibility for New Tanks Affected

The Agency next argues that "in use" must be used in the two subsections of Section 22.18b(d)(3) of the Act that describe the $100,000 and $15,000 deductibles, to cover the situation where the release was from a new tank, one that was installed after July 28, 1989. Without "in use", the maximum $100,000 deductible would be assigned to these new tanks. The Agency cites the definition of "new tank system" in 35 Ill. Adm. Code 731.112, which refers to a "tank system that will be used to contain an accumulation of regulated substances and for which installation has commenced after December 22, 1988." (Agency emphasis). The Agency argues that, because the deductible sections focus on the date of July 28, 1989, which is after the December 22, 1988 effective date of the federal rules, the term "new tank system" could not be used to clarify which deductible applies to a UST installed after July 28, 1989. (Agency Br. pp. 14, 15).

We do not accept the Agency's reasoning. The State Fund's deductible definitions are State selected definitions implementing the State Fund program. The State Fund definitions

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* We also note that the Agency has argued in another UST case that it is bound, not by the OSFM regulations, but by the definitions in the Act and Board regulations. Rockford Drop Forge Company v. Illinois Environmental Protection Agency, PCB 90-46, Opinion and Order of the Board p. 7 (December 20, 1990)

reference the federal definitions of "petroleum" and "UST's", but make no use of the term "new tank system" by reference or otherwise. Moreover, the only "triggering date" in the State Fund for determining deductibility is July 28, 1989. Most important, until the tank is installed below the surface (i.e. to comport with the 10% or more petroleum by volume "beneath the surface of the ground" language in the UST definition) it is not yet an underground storage tank. (35 Ill. Adm. Code 731.112). Until a tank is an underground storage tank, the deductibility distinctions, including the registration requirements, do not apply, no matter which interpretation, AKA's or the Agency's, is given to the phrase "in use". Except for the $10,000 deductible, all of the deductibility provisions refer to UST related events occurring prior to July 28, 1989. Put another way, how can a "new" storage tank be "in use" prior to July 28, 1989, if it was not yet a UST?

We agree with AKA that the statutory phrase "in use" must mean something else. AKA argues that the only plausible explanation is that the phrase was intended to mitigate the consequences of failure to register tanks not being used for storage or dispensing fuel. (AKA Reply Br. p. 3). The Board finds that the term "in use" means "use for a purpose" as interpreted by AKA. The deductibility provisions can be read rationally with this interpretation, the words "in use" are not a meaningless redundancy, or surplusage as AKA calls it, and the Board's interpretation is consistent with how "in use" is used in the RCRA definition of "owner". The discussion below addresses this latter issue.

"Owner" as defined

The Agency next claims that AKA would not be an "owner" if AKA's construction of "in use" prevails. The Agency then asserts that AKA is not an "operator", so then AKA would be precluded from access to the State Fund. We do agree that AKA would not be an owner of the tanks under the RCRA definition of "owner", but do not agree that AKA is not an operator under the RCRA definition of "operator".

We note again that, if the Agency's arguments are implying that AKA could be neither the owner nor operator, such arguments 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.

The Agency clearly granted AKA access to the Fund and thus, that determination was not raised as an issue here per se. However, the Agency argues that it based its determination on its conclusion that AKA, as the current owner, was an "owner" as defined in the RCRA regulations, which definition is relied on by

reference in the State Fund. In fact, the Agency prepared its forms on the assumption that the current owner of the tanks was the owner under the RCRA definition, and essentially ignored the "in use" language. In its forms required to be filled out for access to the Fund, the Agency asked for the name of the current owner/operator (Agency Record p. 18)

The Board will first address the owner issue. In Section 22.18(e)(1)(B) of the Act, "owner" is defined as follows:

> For purposes of this Act:
>
> When used in connection with, or when otherwise relating to, underground storage tank, the terms "owner", "operator",...shall have the meanings ascribed to them in Subtitle I of the Hazardous and Solid Waste Amendments of 1984 (P.L. 98-616), as amended, of the Resource Conservation and Recovery Act of 1976 (P.L. 94-580), as amended. (Also see 35 Ill. Adm Code 731.112).

Owner is defined in the federal regulations (also see 35 Ill. Adm. Code 731.112) as follows:

> "Owner" means (A) in the case of an underground storage tank in use on November 8, 1984, or brought into use after that date, any person who owns an underground storage tank used for the storage, use, or despensing of regulated substances, and (B) in the case of any underground storage tank in use before November 8, 1984, but no longer in use on November 8, 1984, any person who owns such tank immediately before discontinuation of its use. 42 U.S.C. §6991(3). (Emphasis added).*

Given the facts of this case, since the Board intreprets "in use" in the active sense that AKA would have those words interpreted, it is clear that AKA is not an owner under the Act, RCRA, or for purposes of access to the State Fund. If the tanks were not, as AKA asserts, in use on November 8, 1984 or thereafter, AKA would not be an owner under subsection (A). If the tanks were in use prior to November 8, 1984, then, under subsection (B), the owner would not be AKA, but Texaco because it was Texaco that under subsection (B) had the UST's in use before November 8, 1984 and then discontinued their use before that date.

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* For clarity, the Board removed the (A) and (B) from the definition. See 35 Ill. Adm. Code 731.112.

As noted, the Agency (and the IPMA) read "owner" to mean that if a storage tank in a UST system contains even a residual amount of petroleum, then a $100,000 deductible would be appropriate for AKA, because those tanks were not registered until after July 28, 1989. Basically, the Agency and the IPMA contend that it is their "containing petroleum" interpretation that makes AKA eligible for the State Fund, and that their interpretation is assertedly correct on this basis alone.

As earlier noted, we disagree with the Agency's interpretation of "in use". However, the Agency is correct insofar as, if the proper interpretation is applied, then the definition of "owner" would be construed to mean that Texaco, not AKA, is the owner. We note that AKA appears to concede the point on the "owner" issue, while asserting that it is an "operator". (see Reply Brief p. 3).

In any event, the definition of "owner" supports AKA's interpretation of "in use" in the active sense as meaning for a purpose. If used in the passive sense as meaning "contained", the words used in the definition of "owner" would not make sense, and, the very least, one would have to ignore the phrase "storage, use or dispensing of" regulated substances. This language distinguishes between UST's being used for storage, use or dispensing of regulated substances and those which are not, and would be unnecessary surplusage under the Agency's interpretation. The Agency claims "in use" means "containing", and that "used for", "storage" and "use" (but not "dispensing") also means "containing", (although the Agency agreed at hearing that "use" could mean employed for a purpose). (R. 70). In any event, if all this means "containing", the words "storage" and "use" are useless, and the phrase "dispensing of" is rendered meaningless. Also, it is particularly noteworthy that the definition of UST itself already includes the phrase "used to contain regulated substances". In the definition of "owner", the "used for storage, use or dispensing of regulated substances" would have to be ignored to have the Agency's argument make sense. Finally, we note that substituting "containment" for "use" in the last word of the definition makes for awkward interpretation indeed.

Operator as defined

With regard to the issue of whether AKA is an "operator", 35 Ill. Adm. Code 731.112, defines the term as follows:

> "Operator" means any person in control of, or having responsibility for, the daily operation of the UST system."

Somewhat ironically, the Agency construes "operator", unlike its construction of "owner", as limited to those persons who are actively using the tanks.

The Agency first contends that AKA has already admitted that it is not an "operator". The Agency correctly notes that AKA stated both in its supplemental application for reimbursement (Agency Record p. 18) that it never operated the UST's, and also, at hearing, that it never "operated, used or stored fuel in the USTs (see R. 10-11, 26-27)." (Agency Br. p. 16.) We note that, in filling out the forms, AKA's answers were consistent with the questions asked both on the Agency's forms and at hearing, and with its understanding that the reference was to the current operator of a filling station. We also note that the Agency's forms never inquired whether or when the tanks were "in use"; the closest it comes is a question as to when the tanks were "taken out of service". (Agency Record p. 21).

The Agency, on the Application form asked for "current owner operator of tanks". (emphasis added). AKA listed its name and then added in a footnote, "AKA owns the site where the tanks are located. It has never "operated" the tanks. They were previously abandoned and discovered after AKA Land, Inc. purchased the site." (Agency Record p. 18). On the next page, the Agency asked for the "current owner of the site property", to which AKA listed its name. (Agency Record pp. 5, 19).

The context of these answers is also made clear in the hearing transcripts referenced by the Agency above:

> Q [Agency] After that date [1975] has the property ever been operated as a filling station?
>
> A [AKA] Not to my knowledge or information we could get. ....
>
> Q Now, what use is (sic) AKA Land, Inc. made of this property since it was acquired in November of 1988?
>
> A The property has remained vacant. The only activity that we have conducted there is to demolish the structure which existed at the time we acquired it, and to remove the gasoline tanks that were found to be there, and the contaminated soil around them and to refill the excavated space.
>
> (R. 10-12)

In like manner, AKA verified that it had answered "no" when the Agency asked whether AKA had ever used the tanks. (R. 26, 27).

It is clear that AKA was not the current operator of a filling station, and had never used the tanks for that purpose. However, the Board finds that AKA became an operator of the UST system when it became subject to the UST closure regulations. We

do not construe the definition of "operator" as applying only to those persons in daily operational control only of tanks in active service. We construe "daily operation" as meaning "on an ongoing basis", not only when tanks are in active use, but throughout their life.

We first point out that "operational life" in 35 Ill. Adm. Code 731.112 is defined as follows:

> "Operational life" refers to the period beginning when the installation of the tank system has commenced until the time the tank system is properly closed under Subpart G.

The breadth of the beginning-to-end compliance responsibilities are included in the UST rules at 35 Ill. Adm. Code 731. These regulations address the proper design and operation of the tanks, installation and operation of release detection, confirmation of suspected releases, and corrective action and removal of the tanks.

The UST regulations place continuing and enforceable responsibilities for the proper operation of an UST system specificially and exclusively on an owner/operator, whomever those owner/operator persons may be at a particular point in time during the operational life of the tank. As will be discussed below, the USEPA specially addressed the effect of its regulations on owners and operators of closed or abandoned tanks.

The USEPA, after reconsidering how the closure aspects of its regulations should be implemented with regard to tanks already closed or abandoned, determined that the owner/operator closure responsibilities may be applied selectively. By the language of that determination, it is clear that a person may be an operator, as opposed to an owner, of a closed or abandoned tank. Such language is found in the USEPA preamble at 53 Fed. Reg. 37185, September 23, 1988, and is quoted below:

> EPA now believes that for tanks closed or abandoned before the effective date of today's regulations, the closure provisions should only be applied selectively under the discretionary authority of the implementing agency. These agencies are in the best position to identify abandoned tanks that may have been improperly closed, and to gauge the nature and extent of the threat posed by those tanks. They are also better able to identify the responsible owners and define the appropriate site assessment techniques. This approach is intended to enable the implementing agencies to effectively allocate their resources and only focus upon abandoned

> tanks that are suspected of posing potentially significant problems. This revised approach also reduces the unnecessary burden upon owners and operators of the discovered abandoned tanks by eliminating the requirement for them to revisit and conduct a site assessment at all tanks that have been previously closed and removes the uncertainty associated with the "improper closure" standard.
>
> Therefore, the final rule deletes the proposed requirements to conduct site assessments at all tanks improperly closed before the effective date of the final regulations. The final rule, however, requires owners and operators of abandoned tanks to comply with the closure provisions if so directed by the implementing agency when it determines there is a resonable probability that the tank poses a potential threat to human health and the environmental either now or in the future.
>
> (Emphasis added)

It is clear from the above language that anyone who removes a closed or abandoned tank must be either an owner or an operator who must comply with the closure provisions if so directed by the Agency.

One could argue, though, that AKA was not first notified by the Agency. However, it would be a strained interpretation indeed to say that AKA was not an operator because it initiated the contact with the Agency before the Agency contacted AKA. The intent was to not require a revisiting and site assessment of all such tanks; it is not the federal intent to have the Agency lose jurisdiction and the closure regulations not apply.

Compliance with the corrective action requirements involves repeated notifications to the Agency, and the filing and approval of a series of plans and studies. (35 Ill. Adm. Code 731.161, 731.162(b) and Section 22.18b(d)(4) of the Act). The statute anticipates that corrective action can take place over a year. (see Section 22.18b(d)(3)(A)). There is no indication that the Agency ever objected on the basis that AKA was not, strictly speaking, an "operator".

Had AKA initiated corrective action and removal without notifying the Agency, filing the plans, or obtaining the necessary approvals, it would have been in violation of the UST rules; however, unless it became an "operator", how would AKA be subject to enforcement? In this case, though, AKA complied with the rules, and is hence entitled to compensation.

We also emphasize that, in contrast to the federal definition of "owner", there is no language in the definition of "operator" that reaches back to a prior operator before the tanks were closed or abandoned. That the USEPA intended this difference is buttressed by the reference only to past "owners", not "operators", in the above quoted USEPA preamble, where it states: "They [state agencies] are also better able to identify the responsible owners...." Thus, if one construes "daily operation" to be only the active use period in the operating life of a tank, there can be no operator, past or present, for closed or abandoned tanks; it would be a contradiction. This interpretation directly conflicts with the USEPA preamble quoted above, and cannot stand. We cannot ignore the USEPA's statement, nor can we interpret the meaning of language in an "identical in substance" program that is contrary to the USEPA's intent.*

We note that this is not the first time that the issue of whether a person, other than the owner, is entitled to compensation when initiating a cleanup. In Union Petroleum Corp. v. United States, 651 F.2d 734, 743 (Ct. Cl. 1981), Union sought reimbursement, under the Federal Water Pollution Control Act, for costs incurred for cleaning up an oil spill at its terminal from tanks it did not own. The Court stated in footnote 23:

> That Union was not the "owner" of the tank cars or the oil is not a reason for denying it access to the fund .....
>
> That Union was not the "owner" of the tank cars or the oil is not a reason for denying it the benefit of the reimbursement provision. To take an analogy from the law of sales, under the Uniform Commercial Code ownership or "title" of goods does not determine who must bear the risk of loss. UCC § 2-509 attempts to "place the loss upon the one most likely * * * to take precautions to protect against loss," and that means in most cases the one who has possession and control of the goods. White & Summers, Handbook Of The Uniform Commercial Code (1972) at 138. Likewise in this case it is clearly Union which was responsible in the sense of having possession and control of the tank cars, despite Hartwell's ownership of the oil and lease of

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* The Board notes that it has experienced in an "identical in substance" setting, in this and other media, federal language that gives one pause -- requires interpretation to give a program a coherent whole. For example, the USEPA's use of "owners and operators" (e.g. see the preamble) clearly means "owners or operators" (i.e. a person regulated is one or the other, or both).

> the cars. Just as possession and control would determine the responsibility for loss of the oil, so should it determine responsibility for operation of the "facility" involved in the spill. Union did not act as a mere volunteer in promptly initiating cleanup operations. It proceeded as the Act envisioned.

We again emphasize that what is being regulated is tanks, not filling station operations. For example, if a person were an operator of a filling station and, like AKA, had found "problem" tanks on the property that were closed or abandoned, that person also would become an operator under the regulations addressing closed or abandoned tanks, and would have access to the Fund, if that person properly registered and removed those tanks. Put another way, the State Fund is set up for corrective action; the only "daily operations" left in the operating life of closed or abandoned tanks are the corrective action measures and reports under 35 Ill. Adm. Code 731.Subpart F operations, not gas dispensing operations. When AKA took control of, and became responsible for, on a daily basis, from start to finish, the removal of the tanks and the contaminated soil it became the non-owner person in daily responsible charge of the proper closure requirements.

We believe that identifying the person responsible for the "daily operation" language in particular serves to more clearly identify who actually is an operator, as distinguished, say, from a contractor or employee. This distinction is important from both a compliance and an enforcement perspective. The definitions of "operator", where they exist at all, vary in the language used. However, while the language may vary, there is a consistent attempt to identify and regulate the person in control of or in responsible charge of all aspects of an activity on a continuous, ongoing basis. (See e.g. 35 Ill. Adm. Code 807.104 and 810.103). Even where a definition of "operator" did not exist, the Board has articulated this reasoning in determining who was the operator. (See Richard W. Termat v. Milton Anderson, City of Belvidere, County of Boone, and the Belvidere Municipal Landfill No. 2, PCB 85-129, October 23, 1986, an enforcement case, that revolved around the closure, post-closure care, and financial assurance requirements for waste disposal in Section 21.1(a) of the Act and that identified whether the "operator" was the City or a contract employee.

We also note that the Agency seems to give special weight to the use of the term "system", which is found in both the definition of "owner" and "operator". We find nothing significant in the use of that word for purposes of construing the State Fund deductibility provisions.

We have a final observation regarding the owner/operator issue. As noted earlier, if AKA were neither the owner nor

operator as defined, one could raise a question as to whether AKA could be held liable for the costs of corrective action or other liabilities articulated in Section 22.18 and the following sections of the Act relating to UST's, where the same definitions of owner/operator as in the State Fund portions apply. From an environmental perspective, which is what the Act is all about, it seems prudent not to construe the Act's language in a manner that has a chilling effect on achieving prompt cleanup of a leaking UST.

CONCLUSIONS

The Board finds that the Agency incorrectly applied the $100,000 deductible to AKA. As requested by the Agency in its Brief, we will remand this matter to the Agency for its determination as to whether the $50,000 or $10,000 deductible applies. We note that, at hearing, AKA presented testimony and the Agency asked questions relating to the constructive knowledge issue; however, neither AKA nor the Agency addressed this issue directly on point.

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

ORDER

The Agency's determination that the $100,000 deductible in the UST State Fund applied to A.K.A. Land, Inc. is hereby reversed. This matter is remanded to the Agency for its determination as to whether the $50,000 or $10,000 deductible applies pursuant to Section 22.18b(d)(3)(C)(ii) of the Act.

Section 41 of the Illinois Environmental Protection Act, Ill. Rev. Stat. 1989, ch. 111½, par. 1041, provides for appeal of final orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

IT IS SO ORDERED.

J. Dumelle, B. Forcade and M. Nardulli dissented.

R. Flemal issued a supplemental statement.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 14th day of March, 1991, by a vote of 4-3.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board