ILLINOIS POLLUTION CONTROL BOARD
December 17, 1992

REICHHOLD CHEMICALS, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 92-98
	)	(Underground Storage Tank
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	Fund Determination)
	)	
Respondent.	)	

JAMES R. MORRIN APPEARED ON BEHALF OF PETITIONER, AND

TODD RETTIG APPEARED ON BEHALF OF RESPONDENT.

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

This matter is before the Board on a petition for review filed by Reichhold Chemicals, Inc. (Reichhold) on June 26, 1992. Reichhold requests that the Board review the Illinois Environmental Protection Agency's (Agency) May 26, 1992 underground storage tank (UST) reimbursement determination. In that letter, the Agency determined that although Reichhold was eligible to access the State Fund (Fund) for five of its USTs, Reichhold was not eligible to access the Fund for 22 of its USTs because it failed to positively identify the contents of those USTs.

On September 23, 1992, hearing was held in this matter in Chicago, Cook County, Illinois. No members of the public were present at hearing. Reichhold filed its post-hearing brief on October 22, 1992. On October 26, 1992, Reichhold filed an errata sheet to its brief and a corrected post-hearing brief. The Agency filed its post-hearing brief on November 12, 1992. On November 23, 1992, Reichhold filed its post-hearing reply brief.

The Board finds that Reichhold met its burden of proof in identifying the contents of the 22 USTs. Accordingly, the Board reverses the Agency's May 26, 1992 eligibility determination regarding the 22 USTs.

PRELIMINARY MATTERS

Reichhold's Motion to Supplement the Record

On August 26, 1992, Reichhold filed a motion for leave to supplement the record in this matter with a "45-Day Report", dated May 22, 1992, that was allegedly in the Agency's possession on or before the Agency's May 26, 1992 determination. Because the Agency did not respond to Reichhold's motion, the Board granted the motion on September 17, 1992.

At the September 23, 1992 hearing in this matter, Reichhold's attorney stated that he wished to withdraw his motion to supplement. (Tr. 5.) In support of his request, Reichhold's attorney stated that the Agency had demonstrated that the Agency received the report subsequent to the Agency's May 26, 1992 final determination. (Tr. 5.)

Because the Board ruled on Reichhold's motion to supplement, Reichhold cannot now withdraw its motion. The Board, however, on its own motion, will reconsider its September 17, 1992 order. Based upon the assertions of Reichhold's attorney at hearing, the Board hereby reverses its September 17, 1992 ruling on Reichhold's motion to supplement the record with Reichhold's "45-Day Report".

Agency's Motion for Leave to File Reply Brief Instanter

On December 2, 1992, the Agency filed a motion for leave to file a reply brief instanter. In support of its motion, the Agency asserts that Reichhold's reply brief contains a number of prejudicial statements that, if left unclarified, unfairly characterize the Agency's statements and positions. More specifically, the Agency argues that Reichhold incorrectly characterizes the testimony of the Agency's witness and misinterprets the Agency's statements concerning the applicable standard of review and burden of proof. Reichhold has not responded to the Agency's motion.

The Board hereby grants the Agency's motion.

BACKGROUND

Reichhold owns property at 3101 South California Avenue in Chicago on which it operated an adhesives manufacturing plant, Swift Adhesives. (Tr. 70; Pet. Ex. 1; Agency Rec. 105.) The site is currently inactive. (Tr. 70.) Swift had three small USTs at the site. (Tr. 70-71.) Swift used one tank (Tank No. 1) and a former tenant of Swift, D&D Cartage, used two other tanks (Tank Nos. 4 and 5). (Tr. 71.)

In mid-1991, Reichhold hired two contractors, Laidlaw Environmental Services (Laidlaw) and CH2M Hill (CH2M), to remove certain USTs at the site. (Tr. 10-11, 72.) At the time that the contractors were retained, Reichhold knew of the presence of five USTs on the site and believed that a sixth UST was possibly present. (Tr. 13-14.) After removing the five USTs (Tank Nos. 1, 2, 4, 5, and 6), the contractors conducted exploratory digging and discovered 23 10,000 gallon USTs (Tank Nos. 3, 7-28). (Tr. 13-16, 72, 106.) The 23 USTs were buried in a group away from the five other USTs. (Tr. 73-74; Pet. Ex. 1.) When the contractors started excavating to locate the USTs, they encountered black soil that emitted very strong vapors of diesel.

(Tr. 27.) Reichhold never installed or used these USTs and was unaware of the 23 USTs prior to their discovery in late 1991, because the piping and fill pipes to the USTs had been removed. (Tr. 17, 71, 72.)

In order to determine the origin and ownership of the 23 USTs, Reichhold obtained a title search and several historical insurance maps known as "Sanborn" maps. (Tr. 41, 74-75; Pet. Exs. 3, 4, 5, 6.) Based on the documents, Reichhold concluded that the USTs had been owned by Roxanna/Shell Oil Company (Shell). (Tr. 75, 103.) Shell operated the USTs as a bulk distribution facility for gasoline, heating oil, and diesel fuel. Roxanna Petroleum owned the site prior to Shell and Thompson-Hayward Chemical owned the property after Shell, from the late 1950s until 1965. (Tr. 97-98, 102.)

Reichhold delayed removal of the USTs to request information concerning the USTs from Shell. (Tr. 75-76.) Shell, however, refused to supply any information to Reichhold. (Tr. 76.)

In late 1991, Reichhold's contractors began to remove the USTs. During the removal process, a strong diesel odor was predominant at the site and groundwater was encountered at approximately two feet below grade. (Tr. 16, 17-18, 26, 27, 83.) During excavation, the owner of K&K Ironworks, an adjacent property, came to the site because he was able to smell a diesel odor. (Tr. 28.)

Each of the 23 USTs was physically inspected as they were removed. (Tr. 20-21, 24, 25-26.) Some of the USTs were filled with a water/product mixture while others had been previously cut into and partly filled with soil and debris that was saturated. (Tr. 16-17, 18-19, 20, 24, 25, 78.) Although most of the USTs smelled of diesel fuel, some USTs smelled of gasoline. (Tr. 16, 26, 30.) When Mr. Randall Price, a project manager for Laidlaw who oversaw the supervision of the removal of the USTs, tested the UST excavation with a PID meter, an instrument that measures for the presence of hydrocarbons (i.e., petroleum products), the test was positive. (Tr. 8, 10-11, 31, 32-33, 73.)

Although soil samples were taken from underneath each of the 23 USTs, no soil samples of the USTs' contents were taken. (Tr. 33-34.) The samples that were obtained from the USTs that were filled with water had a visual sheen on the top although there was no odor associated with the water. (Tr. 19-20, 33.)

On January 14, 1992, Reichhold filed its application for reimbursement with the Agency. (Joint Ex. 1; Agency Rec. pp. 37-76; Petition Attach. 1.) Reichhold sought reimbursement for expenses incurred in association with the removal of 28 leaking USTs on its property. (Joint Ex. 1; Agency Rec. pp. 37-76; Petition Attach. 1.) Mr. Roger Huddleston, a hydrogeologist and

project manager with CH2M assisted Reichhold with its application and with the preparation of a "45-Day Report" required by the Board's UST regulations. (Tr. 36, 37-38, 39, 73, 79, 82, 83; Pet. Ex. 2.) The 45-Day Report contains the analytical results from the soil samples taken beneath each USTs as well as the groundwater remaining after the USTs were removed. (Tr. 47, 91-92.) Those results indicated that the USTs contained some type of hydrocarbon. (Tr. 54.)

In discussions with the Agency, Mr. Huddleston was told that, for reimbursement purposes, the Agency wanted to know the substance last contained in each UST. (Tr. 46-47.) Although Mr. Huddleston could not determine the last substance that each tank had contained, he reviewed certified copies of Sanborn maps for 1919, 1951, 1975, and 1991 as well as certain analytical data that was contained in the 45-Day Report. (Tr. 41-45; Pet. Exs. 2, 3, 4, 5, and 6.)

The 1951 Sanborn map depicts a Shell distribution facility with several USTs in the area of the site where USTs were actually discovered during the remediation. (Tr. 42, 43; Pet. Ex. 3.) The map also states, "10,000 gal. gasol, kerosene and fuel oil tanks undergr." (Tr. 44-45, 82-83; Pet. Ex. 3.) The 1975 and 1991 Sanborn maps show the presence of Illinois Adhesives Products Company and Swift Adhesive Products, respectively, at the site. (Tr. 42, 104; Pet. Exs. 4, 5.) The 1919 Sanborn map shows the property as being unoccupied. (Tr. 42; Pet. Ex. 6.) Neither the 1919, 1975, or the 1991 Sanborn maps show USTs. (Tr. 43; Pet. Exs. 4, 5, 6.) Based on the documents, Mr. Huddleston concluded that the 23 USTs had contained either gasoline, kerosene, diesel or fuel oil and of these, his "best guess" was gasoline or diesel. (Tr. 51.)

Based on Mr. Huddleston's understanding that only the last substance could be listed on the reimbursement application, but after considering that another "eligible" substance could have been the last substance in the USTs, Mr. Huddleston advised Reichhold, when asked by the Agency to identify the last substance in each tank, to place a question mark after the answer to indicate that Reichhold was uncertain as to whether gasoline or diesel was the last tank content. (Tr. 51, 53, 82, 83, 84.) Accordingly, in answer to question 8(j) on the application, Reichhold listed a single substance (i.e., gasoline or diesel) followed by a question mark.[1] (Tr. 51, 53, 83, 84, 130; Joint Ex. 1; Agency Rec. pp. 39-76; Pet. Attach. 1.) Reichhold also answered "unknown" to questions 8(a), (b), and (c) inquiring

[1]When asked to identify the contents of Tank No. 25, Reichhold supplied the answer "gasoline". (Tr. 94, 112.) However, due to typographical error, Reichhold did not place a question mark after the term. (Tr. 94-95.)

about the address of the owner at the time of the UST installation as well as the installation and out-of-service dates for the USTs. (Tr. 87, 88, 95-96, 129-130; Joint Ex. 1; Agency Rec. pp. 39-76; Pet. Attach. 1.)

Mr. Steve Jones, one of the Agency's environmental protection specialists, reviewed Reichhold's reimbursement application. (Tr. 108, 109, 126-127.) Mr. Jones determined that Reichhold's answers of "unknown" to the questions of when the USTs were installed and when they were taken out of service was unacceptable. (Tr. 100-101, 109.) He also construed the question mark in response to the question of tank contents as unsatisfactory. (Tr. 90, 109.)

On March 17, 1992, the Agency sent a letter to Reichhold detailing Mr. Jones's concerns. (Tr. 109, 111-112, 128; Agency Rec pp. 32-33.) It also returned Reichhold's application, and requested additional information on Reichhold's answers to question 8 for 23 of the USTs. (Tr. 85-86, 90, 128; Agency Rec. pp. 32-33.) On April 15, 1992, and in response to the Agency's March 17, 1992 letter, Reichhold submitted a supplemental application containing additional information to the Agency. (Tr. 90-91, 112-113, 122, 128-129; Agency Rec. pp. 34-36; Petition Attach. 3.) Although Reichhold referenced the 1951 Sanborn map in its letter, it did not include the map in its submittal.[2] (Tr. 99, 112-113, 118-119, 122.) After Mr. Jones reviewed Reichhold's April 15, 1992 supplemental application, he determined that it was impossible for Reichhold to know the installation or out-of-service dates of the tanks because Reichhold was not in control of the Shell facility. (Tr. 112.)

On May 22, 1992, Reichhold mailed its "45-Day Report" to the Agency.[3] (Tr. 21, 91; Pet. Ex. 2.) On May 26, 1992, the Agency determined that five of the USTs were eligible to access the Fund for reimbursement and that 22 of the USTs (Tank No. 3, 7-28 with the exception of Tank No. 25) were ineligible because the contents of the 22 USTs had not been "positively identified". (Tr. 110-111, 113, 116; Agency Rec. 115-117; Petition Attach. 4.) Of the 23 USTs, the Agency determined that only Tank No. 25 was eligible to access the Fund. (Tr. 116.) Mr. Jones testified that the sole basis for such approval was the fact a question mark had not been written after "gasoline" on line 8(j). (Tr.

[2]Mr. Jones did not request any verification regarding the map even though he was seeking documentation, such as historical or inventory records, that would indicate what was held in the USTs. (Tr. 113, 114, 118-119, 122, 131.)

[3]As previously stated, the Agency received the 45-Day Report after issuing its May 26, 1992 final determination. (Tr. 5, 48, 50, 114.)

116.)

APPLICABLE REGULATIONS

Section 22.18b(a)(5) of the Illinois Environmental Protection Act (Act) allows owners or operators whose USTs contain certain, specific substances to access the Fund. Section 22b(a)(5) specifically provides, in part, as follows:

> a. an owner or operator is eligible to receive money from the Underground Storage Tank fund for costs of corrective action or indemnification only if all the following requirements are satisfied:
>
> * * * *
>
> (5) The released petroleum is within one or more of the following categories:
>
> (A) Fuel, as that term is defined in Section 1.19 of the Motor fuel Tax Law.
>
> (B) Aviation fuels, heating oil, or kerosene.
>
> (C) Used oil. For purposes of this Section, "used oil" means any oil that has been refined from crude oil used in a motor vehicle, as that term is defined in Section 1.3 of the Motor Fuel Tax Law, and that, as a result of that use, is contaminated by physical or chemical impurities.

The definition of fuel in the Motor Fuel Tax Law, Ill.Rev.Stat. 1991, ch. 120, par. 417.19, is as follows:

> [f]uel means all liquids defined as "Motor Fuel" in Section 1.1 of this Act and aviation fuels and kerosene, but excluding liquified petroleum gasses.

Section 1.1 of the Motor Fuel Tax Act, Ill.Rev.Stat. 1991, ch. 120, par. 417.1, defines motor fuel as follows:

> all volatile and inflammable liquids produced blended or compounded for the purpose of, or which are suitable or practicable for, operating motor vehicles....

DISCUSSION

The issue in this case revolves around two differing interpretations of Section 22.18b(a)(5) of the Act. The Agency argues that Section 22.18b(a)(5) requires an applicant to identify the last contents of a UST with certainty. Reichhold,

on the other hand, argues that Section 22.18b(a)(5) contains no such requirement. The Board must determine what level of proof is required to establish eligibility to access the Fund.

The Agency's May 26, 1992 letter states that Reichhold failed to "positively identify" the contents of the tanks for which Fund eligibility was denied. (Agency Rec. 115-117; Petition Attach. 4.) Section 22.18b(a) of the Act sets forth five elements necessary for Fund eligibility, and subsection (a)(5) limits eligibility to USTs containing certain substances, among them gasoline, diesel fuel, heating oil, and kerosene. The Act does not expressly require "positive identification" of those substances. The statute does not even contain or define the term "positive identification". Moreover, no court has set the standard of proof for Fund reimbursement at certainty. Rather, Section 22.18b(g) of the Act applies the same standard of proof that is used in permit reviews pursuant to Section 40 of the Act. The Board has held the Section 40 standard of proof to be preponderance of the evidence. IBP v. IEPA (April 23, 1992), PCB 88-98 at 3, 133 PCB 111, 113; Citizens Utility Board v. IEPA (March 9, 1989), PCB 85-140 at 3, 97 PCB 89, 91. (See also In the Matter of: Procedural Rules Revision, 35 Ill. Adm. Code 101, 102, 106, and 107 (September 22, 1988), R88-5 at 21,22, 92 PCB 575, 595, 596.)

Moreover, the Agency itself has not promulgated regulations that require content identification or define the term "positive identification" even though it is authorized to so in the Act. Section 22.18b(f) of the Act explicitly authorizes the Agency to "adopt reasonable and necessary rules for the administration of [the Fund]." Section 3.09 of the Administrative Procedure Act, Ill. Rev. Stat. 1989, ch. 127, par. 1003.09, defines a "rule" as follows:

> "Rule" means each agency statement of general applicability that implements, applies, interprets, or prescribes law or policy, but does not include (a) statements concerning only the internal management of an agency and not affecting private rights or procedures available to persons or entities outside the agency, (b) informal advisory rulings... (c) intra-agency memoranda or (d) the prescription of standardized forms.

(See Platolene 500, Inc. v. IEPA (May 7, 1992), PCB 92-9 at 4-5, 133 PCB 234, 237-238; See also Warren's Service v. IEPA (June 4, 1992), PCB 92-22 at 3, 134 PCB 41, 43; Strube v. IEPA (May 21, 1992), PCB 91-205 at 3, 133 PCB 477, 479).

The Agency does not even require content identification with absolute certainty or define or use the term "positive

identification" in its own UST guidance manual entitled "Leaking Underground Storage Tank Manual" (Fall, 1991) or in its UST reimbursement application form. In fact, the Agency, in its reimbursement application, does not ask the applicant to justify its identification of a UST's contents.[4]

Based on the above, the Board cannot conclude that the intent of the law and regulations is to determine which of two eligible substances are last in USTs. The matter would be different if the debate were between an eligible substance and a non-eligible substance. Then, arguably, the State's interest in protecting the Fund from invasion by parties not intended by the General Assembly to be eligible for the Fund would come into question. If, however, it can be proved by a preponderance of the evidence that an eligible substance was the last substance contained in the USTs, Fund eligibility should be accorded.

In the instant case, Reichhold met its burden of proving that its USTs last contained an eligible substance. First, testimony elicited on behalf of Reichhold indicates that positive identification of the tanks last contents with absolute certainty is technologically infeasible. Specifically, Dr. Patricia Cline, an environmental chemist and project manager for CH2M, testified that she reviewed the analytical data from the soil samples taken from under each UST. (Tr. 55, 59-60, 63.) Dr. Cline testified that in order to "fingerprint" petroleum samples, a reference sample is necessary but that no such samples are available for specific products. (Tr. 57-59.) She concluded that, considering the age and the poor condition of the USTs at issue, there is no test that would have enabled Reichhold to positively identify the last contents of the USTs. (Tr. 62.)

It is important to note that despite the technological infeasability of identification, Dr. Cline could find no inconsistencies in the data with the conclusion that the USTs contained either gasoline, diesel fuel, heating oil, or kerosene. (Tr. 63.) Dr. Cline also did not see anything in the data that indicated that a substance other than gasoline, diesel fuel, heating oil, or kerosene was contained in the USTs. (Tr. 63.) The Agency did not cross-examine Dr. Cline. (Tr. 64.)

Even though Dr. Cline testified that positive identification of the USTs' last contents with absolute certainty is technologically infeasible, testimony elicited at hearing indicated that the USTs last contained an eligible substance.

[4]The Board's regulations do not require applicants to obtain samples of the UST contents. (Tr. 34, 50.) Nor has the Agency promulgated regulations that require applicants to obtain such samples.

Mr. Price testified that the black soil that was encountered during the excavation is indicative of diesel and fuel oil contamination (Tr. 28.) Mr. Price also provided extensive testimony on the odors that were prevalent at the site. Specifically, Mr. Price testified as follows:

> A. On the tanks that were filled with water, I could not make a determination as to what the tanks contained, whether it be gasoline or diesel.
>
> The tanks that had been filled with sand or backfill, when we were actually cleaning the tanks out, occasionally during that cleaning process or during the certification process I would smell like a gasoline odor.
>
> The predominant odor of this entire site was a very strong diesel smell. So when we did smell gasoline from the tank it was noticeable.
>
> (Tr. 26.)
>
> A. ...Occasionally when I would be cleaning out a tank, I would smell like gasoline immediately. And I would say, well, that tank was gasoline, maybe contained gasoline.
>
> But the overriding odor was diesel. And so it seemed like most of the tanks were either gasoline or diesel.
>
> (Tr. 30.)

In addition to the above, when Mr. Price tested the UST excavation with the PID meter for the presence of hydrocarbons, the test was positive. (Tr. 31, 32-33.) Moreover, the samples that were obtained from the USTs that were filled with water had a visual sheen on the top. (Tr. 19, 33.)

Reichhold also presented evidence at the hearing that indicated that the USTs, in fact, were used by Shell to store either gasoline or diesel fuel. The 1951 Sanborn map depicts a Shell distribution facility and a number of USTs in the area of the site where USTs were discovered during the remediation. (Tr. 42, 43; Pet. Ex. 3.) The map also states, "10,000 gal. gasol, kerosene and fuel oil tanks undergr." (Tr. 44-45, 82-83; Pet. Ex. 3.) There are also no USTs indicated on the 1919, 1975, or 1991 Sanborn maps.[5] (Tr. 43; Pet. Exs. 4, 5, 6.)

[5]The Sanborn maps and the 45-Day Report were not in the Agency's possession prior to its reimbursement determination. (Tr. 5, 48, 50, 113, 114, 118-119, 122.) The Agency, however, did not

Mr. Bruce Kanzler, Reichhold's senior environmental engineer, testified that he concluded that Shell owned the USTs at issue after examining the 1951 Sanborn map. (Tr. 68, 75.) Mr. Huddleston testified that he concluded that the 23 USTs had contained gasoline, kerosene, diesel, or fuel oil, and that his "best guess" was either diesel or fuel oil after examining the 1919, 1951, 1975, and 1991 Sanborn maps, as well as the analytical data contained in the 45-Day Report. (Tr. 45, 51-52; Pet. Exs. 2, 3, 4, 5, 6.)

In addition to the above, Mr. Huddleston testified that, although a prior adhesive operation had been located on the site, the large petroleum-based USTs were inconsistent with such a use. (R. 102.) Mr. Huddleston also testified that, although it was possible that an owner subsequent to Shell could have used the USTs, it would be commercially unfeasible for subsequent users to have changed the tank usage to other products due to contamination. (Tr. 102-103.)

Mr. Kanzler also testified that it would not make sense for the adhesive manufacturing operations at the site to use such large capacity USTs because the businesses were small quantity concerns, and because any adhesive chemicals stored in USTs that had previously contained hydrocarbons such as gasoline, kerosene, and diesel would not mix with the hydrocarbons. (Tr. 102-103, 104, 106, 107.)

As can be seen from the above, there is ample evidence in the record that indicates that the USTs at issue contained an eligible substance. The Agency, in its post-hearing briefs, points to almost no substantive evidence in its effort to rebut Reichhold's case in chief. In fact, testimony from the Agency's

object to the introduction of the documents as exhibits. (Tr. 41, 140-141.)

In permit appeals, the permit application package must demonstrate compliance with the Act. As a result, the Board reviews the denial of a permit or imposition of permit conditions based on the application as submitted to the Agency. Joliet Sand & Gravel v. PCB (3rd Dist. 1987), 163 Ill.App.3d 930, 516 N.E.2d 955, 958. The Board, however, is hesitant to strictly apply this rule in UST cases because no regulations exist identifying the type of information necessary to complete a reimbursement application as exists for permit applicants. (See Sparkling Spring Mineral Water Co. v. IEPA (May 9, 1991), PCB 91-9 at 3-4, 122 PCB 115, 117-118.) Moreover, Reichhold introduced this evidence in response to the Agency's charge that Reichhold did not prove that the USTs contained gasoline or diesel fuel. (see Sparkling Spring at 3-4, 122 PCB at 117-118.) Accordingly, the Board will refer to the documents in its review.

own reviewer indicates that his decision was based solely on the presence of the question marks on Reichhold's application rather than on the issue of whether the USTs last contained an eligible substance. (Tr. 116, 123.) Specifically, Mr. Jones acknowledged that Reichhold's April 15, 1992 letter to the Agency narrowed the issue of the USTs' contents to either gasoline or diesel and that both were eligible substances. (Tr. 124-125, 138.) Mr. Jones also acknowledged that he would have approved Reichhold's entire application if Reichhold had not placed the question marks on its application. (Tr. 138.) Mr. Jones, in fact, admitted that he approved reimbursement for Tank No. 25 because there was no question mark. (Tr. 116, 138.) The Board, however, wishes to specifically address certain assertions and comments that were made by the Agency in its post-hearing briefs regarding the above evidence.

After reviewing the record in this case, the Agency, in its post-hearing briefs, argues that Reichhold is using a "best guess" standard even though it is not the level of specificity the legislature intended. (Agency Resp. Br. pp. 2-4.) The Agency sarcastically refers to the "first element in [Reichhold's] "best guess" standard, Randy Price's nose." (Agency Resp. Br. p. 5.) The Agency also questions whether the saturation affected the contents of the USTs and Mr. Price's olfactory observation, and whether contamination from other areas reached the UST excavation. (Agency resp. Br. pp. 5-6.) The Agency also notes that Mr. Price admitted on cross-examination that the PID meter can indicate the presence of any petroleum product, not just gasoline or diesel, and that Mr. Jones testified that petroleum bulk facilities can also handle non-eligible substances such as virgin motor oil and lubricating greases and oils. (Agency Resp. Br. pp. 5, 7 - citing to Tr. 33, 119.).

The Board first wishes to note that the Agency provides no basis for its assertion regarding the level of specificity needed to determine eligibility. As for the Agency's characterization of Mr. Price's testimony, the Board emphasizes that the Agency did not even attempt to rebut Mr. Price's testimony regarding odor even though it places so little weight on an expert's reliance on his olfactory senses. Mr. Price specifically testified that he is able to distinguish among a variety of substances (i.e., diesel, gasoline, acetone, toluene, xylene) based on their odor. (Tr. 10, 34-35.) He also testified that he never smelled any odors that were inconsistent with a gasoline or diesel smell and, specifically, did not smell any toluene or xylene. (Tr. 27, 34-35.) The Board can think of many professions where the use of one's olfactory senses are essential to job performance.

The Board is also at a loss to understand why the Agency failed to question <u>any</u> witness regarding the issues of saturation

and possible contamination from other areas but waited until the submission of its post-hearing brief to raise these questions in an effort to challenge Mr. Price's testimony.

Finally, the Board agrees with the Agency's arguments that a positive reading on a PID meter and the presence of a petroleum bulk distribution facility are not dispositive of the presence of an eligible substance such as diesel fuel or gasoline. The same can be said of any factor (i.e., odor, soil coloration, tank size, analytical data indicating the presence of hydrocarbons, etc.), if it is examined in isolation. The Board, however, believes that several factors, when examined together, can create a rebuttable presumption.

CONCLUSION

The Board cannot conclude that the intent of the Act and regulations is to determine which of two eligible substances is last contained in USTs. The Act does not expressly require nor does it refer to "positive identification" of UST contents. Moreover, no court has set the standard of proof for Fund reimbursement at certainty. Rather, Section 22.18b(g) of the Act applies the same standard of proof that is used in permit reviews pursuant to Section 40 of the Act. The Board has held the Section 40 standard of proof to be preponderance of the evidence. Accordingly, Fund eligibility should be accorded if it can be proven, by a preponderance of the evidence, that an eligible substance was the substance last contained in the USTs.

The Board finds that Reichhold's evidence as well as the admissions of Mr. Jones created a presumption that the USTs in question last contained an eligible substance (i.e., either diesel fuel or gasoline). The Agency failed to rebut the presumption. Accordingly, the Board hereby reverses the Agency's May 26, 1992 denial of reimbursement for Reichhold's 22 USTs.

ORDER

The Board hereby reverses the Agency's May 26, 1992 determination regarding the non-reimbursability of remediation costs incurred by Reichhold for its 22 underground storage tanks.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1991, 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. (But see also Castenada v. Illinois Human Rights Commission (1989), 132 Ill.2d 304, 547 N.E.2d 437).

IT IS SO ORDERED.

Board Members R. Flemal and B. Forcade concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that on the 17th day of December, 1992, the above opinion and order was adopted by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board