

ILLINOIS POLLUTION CONTROL BOARD  
February 4, 1993

GREENVILLE AIRPORT AUTHORITY, )  
 )  
Petitioner, )  
 )  
v. ) PCB 92-157  
 ) (Underground Storage Tank Fund  
ILLINOIS ENVIRONMENTAL ) Reimbursement Determination)  
PROTECTION AGENCY, )  
 )  
Respondent. )

R. RANDALL NEUMANN, ESQ., APPEARED FOR THE PETITIONER; AND

TODD F. RETTIG, ESQ., ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,  
APPEARED FOR THE RESPONDENT.

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

This matter is before the Board on a petition for review of the Illinois Environmental Agency's (Agency) denial of eligibility for reimbursement from the Underground Storage Tank Fund (Fund) filed by Greenville Airport Authority (Greenville) on October 22, 1992, pursuant to Sections 22.18b(g) and 40 of the Illinois Environmental Protection Act (Act). Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1022.18b(g) and 1040. A release of aviation jet fuel (fuel) occurred at the Greenville Airport in the City of Greenville, Bond County, Illinois on May 30, 1990. The petition seeks review of the Agency's determination that the release is ineligible for reimbursement because it is not associated with an underground storage tank (UST) system. The hearing in this matter was held on December 22, 1992. Greenville filed a post hearing brief on January 8, 1993, and on January 11, 1993, the Agency filed a post hearing brief.

PRELIMINARY ISSUES

Greenville and the Agency make several motions at hearing and in their briefs. One such motion is the motion by Greenville for sanctions against the Agency pursuant to 35 Ill. Adm. Code 101.280. Greenville argues in its brief (G. Brief) that, because the Agency has not yet responded to Greenville's Freedom of Information Act (FOIA) requests, the Agency is "maliciously withholding information" and should be sanctioned. (G. Brief at 2.) Greenville characterizes the Agency's failure to respond as a deliberate failure to comply with discovery requests. (G. Brief at 3.)

0139-0063

In addition, Greenville cites several cases in support of the imposition of sanctions. (G. Brief at 2 and 3.) However, the majority of these cases involve the Illinois Code of Civil Procedure and not the Board's procedural rules. Greenville argues that the Illinois Code of Civil Procedure and the Illinois Supreme Court Rules should be considered by the Board in order to offer guidance pursuant to 35 Ill. Adm. Code 101.100(b).

In response to Greenville's motion, the Agency in its brief (A. Brief) argues that 35 Ill. Adm. Code 101.280 requires a discovery attempt prior to the assessment of sanctions. It is the Agency's position that it did not refuse to comply with the Board's rules or any order of the Board or Hearing Officer. (A. Brief at 12.) The Agency argues that Greenville has not attempted discovery pursuant to the Board's procedural rules. (A. Brief at 12.) As for the FOIA request, the Agency argues that FOIA contains its own provisions for appeal if a requesting entity is not satisfied with the response it receives. (A. Brief at 13, citing Ill. Rev. Stat., 1991, ch. 116, par. 210.)

The sanctions requested by Greenville are denied. 35 Ill. Adm. Code 101.280 provides in part, "if any party or person unreasonably fails to comply with any order entered by the Board or the Hearing officer...the Board will issue sanctions." The Board does not know of any Hearing Officer or Board order with which the Agency has unreasonably failed to comply. The Board also notes that it does not find the Illinois Code of Civil Procedure or the Illinois Supreme Court Rules to be controlling in this matter. The Board's rules state expressly that the parties may argue that the Illinois Code of Civil Procedure and the Illinois Supreme Court Rules should be applied in absence of a specific provision in the Board's procedural rules which governs a particular situation. (35 Ill. Adm. Code 101.100(b).) In the instant case, sanctions and discovery are specifically provided for in the Board's procedural rules. (35 Ill. Adm. Code 101.260 and 101.261 and 101.280.)

Additionally, the Board points out that FOIA contains its own provision for review and that it does not provide for an appeal to the Board. Therefore, the Board finds that FOIA request is improperly before it and that the Board lacks jurisdiction to review the request.

The Agency in its brief (A. Brief) moves the Board to strike petitioner's exhibits #1, #2, #4, and #5. (A. Brief at 7.) The Agency argues that exhibits #1 and #2 are FOIA requests which are incorrectly characterized as discovery documents. (A. Brief at 8.) In addition, the Agency argues that exhibits #4 and #5 were not part of the Agency's Record or in the Agency's possession prior to its final determination. (A. Brief at 9.) Greenville did not directly respond either at hearing or in its post hearing brief to the Agency's motions to strike.

The Board finds that petitioner's exhibits #1, #2, #4, and #5 are not relevant to this proceeding. The exhibits were not part of the Agency record or in the Agency's possession prior to its final eligibility determination. The scope of the Board's review is limited to the material relied upon by the Agency in making its decision. (See, Alton Packaging Corp. v. PCB, 162 Ill. App. 3d 731, 516 N.E. 2d 275, 280 (5th Dist. 1987); and CWM Chemical Services, Inc. v. IEPA, (July 11, 1991), PCB 89-177.) Therefore, the Board grants the Agency's motion and strikes petitioner's exhibits #1, #2, #4, and #5.

### BACKGROUND

The Agency record (R.) establishes that a release of fuel occurred at the Greenville Airport early in the morning on May 30, 1991. (R. at 000002 and 000051.) The Record and the testimony at hearing establish that the release occurred after a plane was refueled. (R. at 000051 and Tr. at 42 and 48.) The fuel pump was not turned off after the refueling and when the fuel hose ruptured the pump turned on and released 1,500 gallons of fuel onto the asphalt apron at the airport. (R. at 000051 and Tr. at 42 and 48.) The asphalt apron is described in the testimony of Thomas Meyer, Chairman of the Greenville Airport Authority, as the area where the planes are parked. (Tr. at 42.)

On July 15, 1992 Greenville submitted its application for reimbursement of corrective action costs. (R. at 48) On August 14, 1992, the Agency returned Greenville's application because it was incomplete. (R. 48.) On August 27, 1992, Greenville resubmitted its application. (R. 49.) On September 11, 1992 the Agency denied the application, stating the release was not eligible for reimbursement under the UST Fund. (R. at 66 and 67.) The Agency's letter explained that reimbursement was denied because the release was from a broken fill hose and not from an underground storage tank. (R. at 67.) Greenville filed a petition for review with the Board on October 2, 1992.

### ISSUES

The facts in this case are not disputed. The question before the Board is whether a release of fuel from a ruptured pump hose and nozzle is covered by the Fund.

Greenville in its post hearing brief argues that the Agency's interpretation that a release from a broken hose does not constitute a release from an underground storage tank is narrow and that it conflicts with Section 2(b) and (c) of the Act which require that the Act be liberally construed. (G. Brief at 6 and 10.) Additionally, Greenville argues that it does not make sense to arbitrarily distinguish between a release from a UST and

a release from a UST via a broken pressurized fuel delivery pipe. (G. Brief at 12.)

In contrast to Greenville's arguments, the Agency in its post hearing brief asserts that a release of fuel from a ruptured above-ground hose is not a release as defined in Section 22.18b(a)(3) of the Act. (A. Brief at 3.) The Agency contends that the ruptured filler hose is, in fact, ancillary equipment which is separate and distinct from the UST to which it is attached. (A. Brief at 4 and 5.)

Greenville also argues that the Agency's interpretation of the statute would remove contamination from spills through the nozzle from the corrective action requirements and various regulations in the UST statutes. (G. Brief at 13 and 15.) Greenville further argues that the Agency's interpretation of what constitutes a release from an UST is contrary to United States Environmental Protection Agency's interpretation of the federal UST regulations. (G. Brief at 14 and 15.)

In its brief, the Agency also contends that a plain reading of the UST regulations set out at 35 Ill. Adm. Code 731.112 leads to the conclusion that a filler hose is not in fact an UST or an underground pipe. (A. Brief at 6.) The Agency asserts that references to the associated piping and ancillary equipment in the definition of the underground storage tank include the term "underground". Thus, the Agency argues, a release from a filler hose which is attached to a pipe sticking two feet out of the ground does not qualify for reimbursement because it is not a release from an UST. (A. Brief at 4-6.)

In addition, Greenville in its brief argues that the recent Board decisions in Harlem Township v. IEPA (October 16, 1992), PCB 92-83, motion for reconsideration denied January 7, 1993, and Ramada Hotel, O'Hare v. IEPA, (October 29, 1992), PCB 92-87, motion for reconsideration denied January 7, 1993, should not apply to this case. (G. Brief at 6.) Greenville argues that the previous decisions are distinguishable because the cases involved releases from an above-ground dispensing hose and above-ground fuel pump. (G. Brief at 6.) Greenville maintains that in the instant case, the release was from a flexible hose attached to the fuel nozzle which is an integral part of a pressurized underground storage tank system. (G. Brief at 5 and 6.) In its brief, the Agency argues that the Board's decisions in Harlem and Ramada, taken together with relevant portions of the Act, indicate that a release, such as the one in this case, was not intended to be covered by the Fund. (A. Brief at 4.)

Greenville also contends that the Agency has changed its position on releases in that the Agency previously maintained that spillage during vehicle filling was a release from an UST in Sparkling Springs Mineral Water Co. v. IEPA, (May 9, 1991), PCB

91-9, and now maintains that an accidental release of the type the petitioner suffered is not reimbursable from the Fund. (G. Brief at 7 and 8.) However, the Agency notes in its brief that the issue in Sparkling Springs was the application of the deductible and that Greenville's reliance on the case is misplaced. (A. Brief at 7.) The Agency also argues that it may not reimburse an owner or operator for corrective action costs unless the release of fuel is from an underground storage tank. (A. Brief at 15.)

Finally, Greenville contends that the Agency should have turned over to the Attorney General's (AG) office Greenville's notification that it paid \$47,026.71 as a result of litigation regarding the fuel spill. (G. Brief at 17.) Greenville argues that under Section 22.18(b)(e)(1), the Agency is required to forward a copy of an indemnification request to the AG's Office if the petitioner has fully complied with the requirements in Section 22.18b(d)(4). (G. Brief at 17.) Greenville states in its brief that it has fully complied with Section 22.18b(d)(4). (G. Brief at 18.)

On the other hand, the Agency argues that Greenville is barred from raising the issue of indemnification now because it failed to raise the issue prior to the Agency's final eligibility determination. (A. brief at 9.) Additionally, the Agency points to previous decisions by the Board which state that it is the Agency denial letter which frames the issues on appeal. (A. Brief at 9.) In its brief, the Agency argues that the Agency record does not show any requests by Greenville for indemnification as required by Section 22.18b(e)(1) of the Act. (A. Brief at 10.) Finally, the Agency argues that it did not construe Greenville's notification of the litigation as a request for indemnification. (A. Brief at 10.)

#### DISCUSSION

Reimbursement from the UST Fund is allowed for corrective action resulting from a release of petroleum from an underground storage tank. (Section 22.18b(a)(3) of the Act.) It is undisputed that there was a release of petroleum; however, the question remains whether Greenville is entitled to Fund reimbursement for corrective action in response to an above ground release as occurred here. In addition, the question of whether or not Greenville is entitled to indemnification also remains. The Board will first address the question of indemnification.

In prior decisions, the Board has held that it is the Agency's denial letter which frames the issues on appeal. (See, Centralia v. IEPA, (May 10, 1990), PCB 89-170; City of Metropolis v. IEPA, (February 22, 1990), PCB 90-8; and Paul

Rosman v. IEPA, (December 19, 1991) PCB 91-80.) In the instant case there is no evidence in the record that Greenville requested indemnification prior to the Agency's final eligibility determination. The Board finds that here, where the issue was not raised below and is not in the Agency letter, Greenville may not raise indemnification for the first time on review.

The Board now moves to the issue of whether Greenville is entitled to reimbursement from the Fund for the corrective action it took in response to an above-ground fuel release. The Board does not find Sparkling Spring to be controlling on determining the eligibility of a release of petroleum from a pump nozzle. The issue before the Board in Sparkling Spring was the amount of the deductible. The source of contamination was not at issue.

The Board does find Harlem Township v. IEPA and Ramada Hotel, O'Hare v. IEPA cases, with similar fact patterns to the instant case, to be controlling. The Board held in both cases that a release from an above-ground pump nozzle was not eligible for reimbursement from the UST Fund.

The reason for the nozzle release in Harlem was unknown, but was most likely a result of vandalism. (Id., at 1-2.) In Harlem, an employee of Harlem Township arrived at work to find the gate open and the shop door unlocked. The employee also found a puddle of fuel near the pumps. In addition, the employee noticed a nozzle from the fuel pump laying on the ground in an unlocked position on the ground. The pump motor was burned out and fuel was no longer discharging from the nozzle. (Id.)

In Ramada, it was believed that the release of diesel fuel occurred as a result of overfilling of Ramada's buses. (Ramada at 1.) Neither Ramada nor the Agency were completely sure of what caused the release. However, to the best of anyone's knowledge, the release was caused by an overflow release mechanism which malfunctioned when an employee was filling a vehicle. (Id.)

The Board in Harlem determined that the pump and the pump nozzle are not part of an underground storage tank as it is defined by the Act. (Id., at 4.) Additionally, the Board explained that a pump system is not a tank or part of the underground pipes connecting the tank. (Id.) The Board went on to state:

...if the statute is read as limiting reimbursement to leaks from underground tanks and underground interconnecting piping only, the release from the pump nozzle would not be eligible for reimbursement from the fund because the pump is not part of the underground storage tank or underground piping. (Id.)

The Board did not find in Harlem, nor did it find in Ramada, any authority to suggest that the Board's interpretation was contrary to the federal interpretation of the UST regulations. (Harlem, at 6, and Ramada at 4.) Additionally, the Board did not believe that it was contrary to the intent of the statute or the intent of the UST Fund to hold that corrective action in response to a release from an above ground nozzle is not reimbursable from the UST Fund. (Harlem at 6, and Ramada at 4.)

The Board is not persuaded by Greenville's argument that the above-ground filler hose is part of the underground storage tank. Despite the fact that Greenville argues that the release in this case is different from that in Harlem or Ramada because Greenville's UST system is an integrated pressurized system, the release still came from an above ground source. To be eligible to access money from the Fund, the release must be from an underground storage tank. Thus, the Board finds that a release of fuel from a ruptured filler hose is not eligible for reimbursement. Accordingly, the Board affirms the Agency's September 11, 1992, determination that a release of fuel from the filler hose is ineligible for reimbursement from the underground storage tank fund.

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

#### ORDER

For the reasons stated in the above opinion and order, the Board affirms the Agency's, September 11, 1992, denial of reimbursement to the Greenville Airport Authority from the Underground Storage Tank Fund.

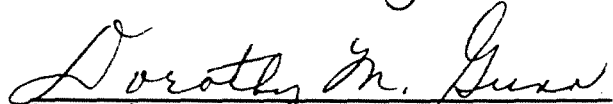
IT IS SO ORDERED.

J. Theodore Meyer dissented.

Section 41 of the Environmental Protection Act (Ill.Rev.Stat. 1991, Ch 111 1/2, 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 35 Ill. Adm. Code 101.246, Motions for Reconsideration, and Castenada v. Illinois Human Rights Commission (1989), 132 Ill. 2d 304, 547 N.E.2d 437.)

0139-0069

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 44 day of February, 1993, by a vote of 5-1.

  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board

0139-0070