ILLINOIS POLLUTION CONTROL BOARD January 21, 1993

PHILLIPS 66 COMPANY,

a DIVISION OF PHILLIPS

PETROLEUM COMPANY,

v.

PCB 92-171

(Underground Storage
ILLINOIS ENVIRONMENTAL

PROTECTION AGENCY,

Respondent.

DISSENTING OPINION (by J. Anderson):

I dissent here for the reasons expressed in my dissent of June 23, 1992, in <u>City of Lake Forest v. Illinois Environmental Protection Agency</u>, PCB 92-36. (See also dissents of July 30, 1992 on motion for reconsideration in <u>Lake Forest</u> and motion for reconsideration in <u>Village of Lincolnwood v. Illinois Environmental Protection Agency</u>, PCB 91-83.)

Let me further elaborate. All of these cases share one common reason why the Illinois Environmental Protection Agency (Agency) denied access to the Underground Storage Tank (UST) Fund monies. The reason is: by action of the Office of the State Fire Marshal (OSFM) pursuant to the Gasoline Storage Act, the tanks were exempted from registration and the payment of fees. In that the OSFM also appears not to accept voluntary registration and fee payments, the result is that no applicant for UST Fund monies so situated is able to make a showing to the Illinois Environmental Protection Agency (Agency), which administers the UST Fund, of registration and payment of fees to the OSFM.

My dissent rests on my belief that the majority was in error when it held that failure to make such a showing to the Agency prevented access to the UST Fund as a matter of law.

We all agree that any review of an OSFM decision regarding registration and payment of fees, made pursuant to the Gasoline Storage Act, is within the purview of the OSFM, not the Board. However, the registration and payment of fees language conditioning access to the <u>UST Fund</u> is found in the <u>Environmental Protection Act</u> (Act), in Section 22.18b(a)(4), and thus the meaning of Section's language <u>is</u> within the purview of the Board, not the OSFM.

I argue that a showing to the Agency of a declaration by the OSFM of an exemption from the registration and fee requirements

satisfies the requirements of Section 22.18b(a) (4) of the Act. That Section requires that the person seeking access to the UST Fund is to satisfy the requirement to register "in accordance with" Section 4 of the Gasoline Storage Act and to pay all fees required "in accordance with" Sections 4 and 5 of that Act (and OSFM regulations). If such persons have been duly deemed exempt by the OSFM "in accordance with" the registration and fee requirements of Sections 4 and 5, then should not the Board hold that Section 22.18b(a) (4) is satisfied? I suggest that the majority's contrary holding is arguably "second guessing" a decision of the Fire Marshal made "in accordance with" Sections 4 and 5 of the Gasoline Storage Act.

I believe that Section 22.18b and other provisions in the Act buttress the above interpretation!

First, there is no affirmative declaration anywhere in Section 22.18b of legislative intent to totally prevent access to the UST Fund of all exempt tanks as a class. Indeed, exempt tanks are not mentioned at all. I would argue that totally eliminating a class of tanks in the absence of an affirmative declaration is inconsistent with the elaborately detailed language of Section 22.18b. That language reflects a legislative intent throughout (albeit often difficult to construe) to affirmatively detail its Fund-related classifications.

Next, allowing the exempt tank class access to the UST Fund is consistent with the environmental perspective embodied in the Environmental Protection Act as a whole, including its purpose as expressed in Section 2. I believe that the above construction is consistent - as the majority's is not - with the environmental goal in the overall UST removal program, that goal being to clean up the pollution caused by these leaking underground storage tanks. The UST Fund exists to make it easier, and in many cases to make it even possible, to finance these corrective actions.

Finally, a most important point. The UST Fund exists to enhance compliance with the federal Resource Conservation and Recovery Act (RCRA) requirements for corrective action related to leaking USTs, or LUSTs. The RCRA/UST regulations encompass the class of tanks at issue here. The State Fund is a federally allowed alternative to the RCRA/UST requirements for financial assurance, the latter being generally viewed as unavailable or financially unduly burdensome. In essa ce, then, the purpose of the Agency-administered UST Fund is to enhance compliance with the environmentally-related mandates flowing from the RCRA/UST That is why its corrective action provisions are in the program. Environmental Protection Act in the first place. It seems, therefore, most appropriate for the Board to have this environmental perspective also in mind when reviewing questions of access to the Fund.

It is for these reasons that I respectfully dissent.

Foan G. Anderson Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above dissenting opinion was submitted on the _________, day of ________________, 1993.

Dorothy M. Gynn, Clerk

Illinois Pollution Control Board