ILLINOIS POLLUTION CONTROL BOARD
January 23, 1992

BEER MOTORS, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 91-120
	)	(Underground Storage Tank
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	Fund Reimbursement)
	)	
Respondent.	)	

THOMAS T. SCHLAKE, OF THOMAS T. SCHLAKE & ASSOCIATES, APPEARED ON BEHALF OF THE PETITIONER;

TODD F. RETTIG APPEARED ON BEHALF OF THE RESPONDENT.

OPINION AND ORDER OF THE BOARD (by M. Nardulli):

This matter is before the Board on a petition for review filed July 17, 1991, by petitioner Beer Motors, Inc. (Beer) pursuant to Section 22.18b(g) of the Environmental Protection Act (Act). (Ill.Rev.Stat. 1989, ch. 111 1/2, par. 1022.18b(g).) Beer challenges the Illinois Environmental Protection Agency's (Agency) determination that Beer's application for reimbursement for corrective action costs from the Underground Storage Tank (UST) Fund is subject to a $50,000 deductible. A hearing was held on September 26, 1991, in Skokie, Illinois. No members of the public attended.

The only issue in this case is whether Beer had constructive knowledge, prior to July 28, 1989, that a release had occurred. If Beer had constructive knowledge prior to that date, a $50,000 deductible applies to its claim, pursuant to Section 22.18b(d)(3)(C)(ii) of the Act. If Beer did not have constructive knowledge before July 28, 1989, a $10,000 deductible applies to its claim. Both Beer and the Agency agree that Beer did not have actual knowledge of the release before July 28, 1989.

Background

This case involves corrective action at a piece of property, owned by Beer, located at 1603 Algonquin Road, Mt. Prospect, Illinois. (R. at 37.)[1] Beer Motors apparently was in the business of renting heavy equipment. The property is located on the northern boundary of a Shell Oil complex. (R. at 18.) In April

[1] "R." denotes citation to the Agency record and "Tr." denotes citation to the hearing transcripts.

1989 Beer entered into a contract with Amerivest Property Services, Inc. (Amerivest) for the sale of the property. The contract provided that an environmental assessment would be made at Beer's expense. If the assessment was not satisfactory, Amerivest could vitiate the contract. (Tr. at 14-15; pet. br. at 2.) In May 1989 Amerivest retained the firm of O'Brien and Associates, Consulting Engineers (O'Brien), to conduct the soil sampling. O'Brien took seven soil probes on the Beer property. Mr. Dixon O'Brien testified at hearing that several of those probes showed contamination, but that Mr. Leon Teichner, Amerivest's attorney, requested that Mr. O'Brien prepare a letter describing only the results of probe B-6. Mr. O'Brien was not to refer to any of the other information gathered by O'Brien's inspection. (Tr. at 42-45; R. at 24.) On June 9, 1989, Mr. O'Brien wrote the requested letter, stating that its tests indicated that the property contained elevated levels of benzene and xylene. (R. at 5.) Mr. Teichner forwarded a copy of O'Brien's report to Beer on June 9, 1989. (R. at 8.) Beer received that letter on or about June 20, 1989, because the letter was sent to the wrong address. (Tr. at 11.) The sale did not proceed as planned, although the property eventually was sold. (R. at 38.)

Beer's tanks were taken out of service (but not removed) on July 8, 1989. (R. at 39.) On July 14, 1989, at Beer's request, O'Brien performed additional testing on the property. The tests indicated that levels of benzene, toluene, and xylene were less than Agency clean-up objectives. Beer was informed of the results of these tests in a letter dated July 31, 1989. (R. at 10-11.)[2] The tanks were removed on June 1, 1990. (R. at 16-17; 39.)

On December 17, 1990, Beer applied to the Agency for reimbursement from the UST fund for corrective action costs. On January 24, 1991, the Agency determined that Beer is eligible for reimbursement, subject to a $50,000 deductible. (R. at 32-33.) The Agency stated that the $50,000 deductible applied pursuant to Section 22.18b(d)(3)(C)(ii) of the Act, which provides:

> If the costs incurred were in response to a release of petroleum which first occurred prior to July 28, 1989 and the owner or operator had actual or constructive knowledge that such a release had occurred prior to July 28, 1989, the deductible amount ... shall be $50,000 rather than $10,000...
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> Ill.Rev.Stat.1989, ch. 111 1/2, par.1022.18b(d)(3)(C)(ii).

On February 8 and May 20, 1991, Beer requested a review of the

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[2] Mr. Beer testified at hearing that he picked up that July 31, 1989 letter at O'Brien's offices on August 2 or 3, 1989. (Tr. at 16-17, 28.)

Agency's determination, contending that it had no knowledge of a release until June 1, 1990, and that thus a $10,000 deductible should apply. (R. at 24-26.) On June 12, 1991, the Agency reaffirmed its decision that a $50,000 deductible applies to Beer. (R. at 27.) Beer filed this appeal with the Board on July 17, 1991. On August 27, 1991, the Agency filed a motion for summary judgment, contending that it was entitled to judgment as a matter of law. The Board denied that motion on September 12, 1991.

Arguments of the Parties

Beer argues that it did not have constructive knowledge of a release from the USTs prior to July 28, 1989. Beer notes that on or about June 20, 1989, it received the letter from Mr. Teichner indicating that there was contaminated soil on the property, but points out that the June 9, 1989 O'Brien report concludes that the most likely cause of the contamination was a spill at the surface. The June O'Brien report concluded:

> Because the lot has a gravel surface and the majority of the native soils are relatively impermeable clays, contamination from surface spillage is a likely cause. Less likely causes include leakage from the tanks and off-site contamination.
>
> (R. at 5.)

Beer contends that the Agency's position, that the June 9, 1989 letter gave Beer constructive knowledge of a release, ignores the conclusions as to the cause of the contamination. Beer also points out that further information from the May O'Brien assessment was withheld from Beer at the direction of the prospective purchaser's attorney, Mr. Teichner.

Beer also challenges the Agency's position that the additional analysis, which it asked O'Brien to undertake in July 1989, is further evidence of Beer's constructive knowledge of the release. Beer contends that this position ignores the fact that the July 1989 O'Brien analysis, performed on July 14 and reported in a July 31, 1989 letter, concluded that:

> "...it appears that the contaminated soil encountered in the soil boring performed for the previous environmental assessment probably represents an isolated condition. It is possible this situation is the result of surficial infiltration of diesel fuel from a leaking tank on a piece of construction equipment parked in this area."
>
> (R. at 10-11.)

Beer also points out that Mr. Bur Filson, an Agency employee who prepared the January 24, 1991 Agency letter imposing a $50,000

deductible, testified at hearing that he was not aware that Amerivest, not Beer, had ordered the May 1989 site assessment. (Tr. at 76.) Therefore, Beer maintains that Mr. Filson's conclusions were based on a mistaken idea that Beer had been the initial employer of O'Brien, and that it was simply not credible that O'Brien would have withheld information from the May assessment.

The Agency argues that the facts in this case gave Beer constructive knowledge, prior to July 28, 1989, that a release had occurred. The Agency points out that the real estate sale contract did not proceed as planned after the results of the May assessment. The Agency contends that this fact placed a duty on Beer to diligently investigate the possibility that a release had occurred. Furthermore, the Agency maintains that because Beer was provided with some of the results of the May assessment, a reasonable person would suspect a release and therefore have a duty to investigate any potential release more fully. The Agency asserts that instead of complying with this duty to investigate, Beer chose to rely on a mistaken assumption about the cause of the contamination.

Board Conclusions

After examining the arguments and the record, the Board finds that Beer did not have constructive knowledge of a release prior to July 28, 1989. O'Brien's May 1989 testing does indicate that there may have been contamination on the property prior to July 28, 1989, although the results of the July 14, 1989 testing show that levels of benzene, toluene, and xylene were below clean-up objectives. However, as the Board indicated in its September 12, 1991 order denying summary judgment, both parties have focused simply on the issue of contamination on the property, without focusing on the fact that contamination does not necessarily equate with a release. 35 Ill.Adm.Code 731.112 defines "release" as:

> any spilling, leaking, emitting, discharging, escaping, leaching or disposing from a UST into groundwater, surface water or subsurface soils. (emphasis added.)

Therefore, the relevant issue is whether Beer had constructive knowledge that the contamination was the result of spilling, leaking, or discharging from the tanks. The record contains a number of suggestions as to the source of the contamination discovered in May 1989. Various suggestions include surface spills, leakage from USTs, leakage of diesel fuel from a piece of construction equipment, and off-site contamination from the Shell Oil tank farm adjacent to the Beer property. (R. at 5, 11, 17, 20, and 24.) Based upon the varying information contained in the record as to the source of the contamination, the Board finds that Beer did not have constructive knowledge of a release before July 28, 1989.

The Board is not persuaded by the Agency's argument that the facts imposed a duty upon Beer to investigate. The statute states only that constructive or actual knowledge of a release before July 28, 1989 will trigger a $50,000 deductible. There is no provision or mention of investigation as a relevant factor. In other words, whether or not Beer investigated the source of the contamination is not at issue here. If the facts were such that Beer had constructive knowledge, that is sufficient to mandate imposition of a $50,000 deductible. The Board finds that the facts here did not give Beer constructive knowledge of a release.[3]

Finally, the Board notes that today it remanded a UST fund appeal to the Agency, prior to a Board decision on a challenge to the amount of the deductible. That remand is based upon the Board's finding that an Agency decision in a UST reimbursement case is not appealable to the Board until all Agency decisions (including reimbursability of costs) have been made. (Ideal Heating Company v. Illinois Environmental Protection Agency, PCB 91-253 (January 23, 1992).) However, the Board has decided to apply that holding only to cases where no hearing has been held. Therefore, the Board has decided this case, which was fully briefed, on the merits of the arguments.

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

ORDER

The Agency's June 12, 1991 decision imposing a $50,000 deductible in this matter is hereby reversed. This matter is remanded to the Agency, and this docket is closed.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (Ill.Rev.Stat. 1989, ch. 111 1/2, par. 1041) provides of appeal of final orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

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[3] The Board points out that Beer did indeed investigate the source of the contamination, when he asked O'Brien to make a further assessment of the property. Even if this factor were relevant, it would work against the imposition of a $50,000 deductible, since it is uncontroverted that Beer did not receive the results of the July 14, 1989 tests until at least July 31, 1989--three days after the July 28, 1989 date.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 23rd day of January, 1992, by a vote of 5-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board