

ILLINOIS POLLUTION CONTROL BOARD
October 29, 1992

RAMADA HOTEL, O'HARE,)	
)	
Petitioner,)	
)	
v.)	PCB 92-87
)	(Underground Storage Tank Fund
ILLINOIS ENVIRONMENTAL)	Reimbursement Determination)
PROTECTION AGENCY,)	
)	
Respondent.)	

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

This matter is before the Board on a September 11, 1992 motion for summary judgment filed by Ramada Hotel O'Hare (Ramada) and a cross-motion for summary judgment filed by the Illinois Environmental Protection Agency (Agency) on October 7, 1992. Both motions for summary judgment were filed pursuant to 35 Ill. Adm. Code 101.244. The Agency filed a response to Ramada's motion for summary judgment on October 7, 1992 and Ramada filed a response to the Agency's motion on October 9, 1992. This case involves a petition for review of the Agency's denial of eligibility for reimbursement from the Underground Storage Tank Fund (UST Fund) filed by Ramada on June 4, 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 petroleum occurred at a garage facility operated by Ramada in the city of Rosemont, Cook County, Illinois on June 20, 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.

BACKGROUND

On June 20, 1990 a release of diesel fuel occurred as a result of overfilling of Ramada's buses. (Pet. at 1.) Neither the petitioner nor the Agency are completely sure of what caused the release. Robert A. Patrick, Ramada's Vice President of Technical Services, North American\Caribbean Division, stated in a letter to the Agency, that he did not know exactly what had caused the release. Patrick went on to write that, to the best of his knowledge, the release was caused by an overflow release mechanism which malfunctioned when an employee was filling a vehicle. (Agency Rec. at 29.) A passerby smelled the fuel and reported it to the police who then found a release at the Ramada property. (Agency Rec. at 29.)

On January 27, 1992 Ramada submitted its application for

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reimbursement of corrective action costs. (Pet. at 2.) On May 4, 1992 the Agency denied the application, stating the release was not eligible for reimbursement under the UST Fund. (Agency Rec. at 30.) The Agency's letter explained reimbursement was denied because above ground pumps are not included in the definition of underground storage tanks. (Agency Rec. at 30.) Thus, the Agency reasoned releases from nozzles are not reimbursable under the act. (Agency Rec. at 30.) Ramada filed a petition for review with the Board on June 4, 1992.

ISSUE

Summary judgment will be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. (ESG Watts, Inc. v. IEPA (August 13, 1992), PCB 92-54; Sherex Chemical v. IEPA (July 30, 1992), PCB 91-202; Williams Adhesives, Inc. v. IEPA (August 22, 1991), PCB 91-202.) The facts are not disputed in this matter. Thus, the sole issue of law before the Board is whether corrective action taken in response to a nozzle related release of petroleum is eligible for reimbursement from the UST Fund.

Ramada, in its memorandum in support of its motion for summary judgment (Memo), argues that, "the Act does not artificially distinguish between nozzle-related releases and other releases from an UST." (Memo at 5.) In addition, Ramada argues that there is nothing in the act which specifically excludes spills or overflows from pumps or nozzles. (Motion at 5.)

In its memorandum, Ramada contends that the Agency has changed its position 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. (Memo at 5.) Ramada further argues that the danger to human health and the threat to the environment are the same irrespective of whether the petroleum is released from the nozzle or leaks from the underground tank. (Memo at 4.) Ramada argues that the Act is to be liberally construed and that interpretation of the statute to include releases from the pump nozzle is consistent with the express purpose of the Act. (Memo at 12-13.) Ramada's memorandum 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. (Memo at 9.) Ramada further argues that the Agency's interpretation of what constitutes a release from an UST is contrary to USEPA's interpretation of the federal UST regulations. (Memo at 9.)

In its cross-motion for summary judgment and response to Ramada's motion for summary judgment (Resp.), the Agency notes that the issue in Sparkling Springs was the application of the deductible and that Ramada's reliance on the case is misplaced.

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(Resp. at 15.) The Agency also argues that it may not reimburse an owner or operator for corrective action costs unless the release of petroleum is from an underground storage tank. (Resp. at 9.) In its response, the Agency contends that a plain reading of the UST regulations set out at 35 Ill. Adm. Code 731.112 leads to the conclusion that a nozzle is not in fact an UST or an underground pipe. (Resp. at 12.) 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 nozzle does not qualify for reimbursement because it is not a release from an UST. (Resp. at 12-13.) The Agency also argues that there is no lack of authority to clean-up spills based on its interpretation of what releases are eligible for reimbursement costs for corrective action. (Resp. at 19.) Finally, the Agency points out that there is no federal equivalent to the Illinois UST Fund. (Resp. at 20.) Therefore, the Agency argues, Ramada's concern about how the definition of a release and UST will affect other UST regulations are unfounded. (Resp. 20.) The Agency explains, the present issue centers on eligibility for reimbursement from the Illinois UST Fund. (Resp. 20.)

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 Ramada is entitled to relief as a matter of law.

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, a case with a similar fact pattern to the instant case, to be controlling. (Harlem Township v. IEPA (October 16, 1992), PCB 92-83.) The Board in Harlem held that a release from an aboveground 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.)

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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 release at issue in the instant case and in Harlem was from the nozzle of a fuel pump located above ground level.

The Board does not find in this case, nor did it find in Harlem, any authority to suggest that the Board's interpretation is contrary to the federal interpretation of the UST regulations. (Id., at 6.) Nor does the Board believe that it is 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.

To be eligible to access funds from the underground storage tank fund the release must be from an underground storage tank. The above ground dispensing pump and pump nozzle are not part of the underground storage tank. Therefore, a release of petroleum from the pump or the pump nozzle are not eligible for reimbursement. The Board affirms the Agency's May 4, 1992, determination that a release of petroleum from the pump nozzle is ineligible for reimbursement from the underground storage tank fund.

Ramada's motion for summary judgment is denied. The Agency's cross-motion for summary judgement is hereby granted. The result of this ruling is that this docket is closed.

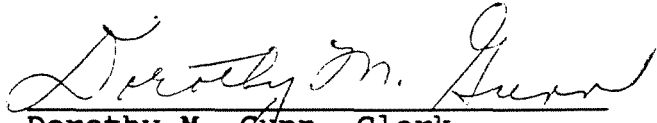
IT IS SO ORDERED.

Board Members J. Theodore Meyer and Michael Nardulli 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.)

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I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 29th day of October, 1992, by a vote of 5-2.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

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