ILLINOIS POLLUTION CONTROL BOARD
February 6, 1992

LAWRENCE CADILLAC,	)	
	)	
Petitioner,	)	PCB 91-133
	)	(Underground Storage Tank Fund
v.	)	Reimbursement Determination)
	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

MR. MICHAEL E. STEIN APPEARED ON BEHALF OF PETITIONER.
MR. TODD RETTIG APPEARED ON BEHALF OF RESPONDENT.

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

This matter is before the Board on a petition for review (Pet.) filed August 2, 1991 by petitioner Lawrence Cadillac (Lawrence) pursuant to Section 22.18b(g) of the Environmental Protection Act (Act) (Ill.Rev.Stat. 1989, ch. 111 1/2, par. 1022.18b(g)) Lawrence challenges the Illinois Environmental Protection Agency's (Agency) determination that Lawrence'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 October 18, 1991 in Chicago, Illinois. No members of the public attended and no witnesses were presented by either side at hearing. Petitioner filed is post-hearing brief (Pet. Br.) on November 25, 1991. The Agency responded with its brief (Ag. Br.) on December 9, 1991. The petitioner filed a reply brief on December 23, 1991.

The only issue in this case is whether Lawrence had actual or constructive knowledge, prior to July 28, 1989, that a release from its USTs had occurred. If Lawrence had such knowledge, a $50,000 deductible applies to its claim. (Ill.Rev.Stat., 1989, ch. 111 1/2, par. 1022.18b(d)(3)(c)(ii)) If Lawrence establishes that it did not have actual or constructive knowledge before July 28, 1989, a $10,000 deductible applies to its claim.

BACKGROUND

This case involves corrective action at property owned by Lawrence located at 9601 Ogden Avenue, LaGrange, Illinois. The USTs, ten in all, had been taken out of service in 1981 by the owner. In 1986 Lawrence purchased the property. The tanks were then removed by Lawrence in September 24, 1987. (R. 8-17)

Though the UST Fund may reimburse owners and operators for the costs of corrective action resulting from a release of petroleum, Lawrence's initial application dated April 26, 1991 stated that "none" of the tanks were presently leaking at the

site. (See answer to question 7C, Pet., Exhibit B)[1] The Agency returned this application and requested clarification. (Pet. Exh. D) Lawrence then refiled its application on May 22, 1991. (R. 6-19) By letter dated June 3, 1991 the Agency returned the application stating, among other things that the answer to question 7C was unacceptable and that the Agency could not determine whether the subject premises was eligible for reimbursement given Lawrence's response to the question. Lawrence then amended its answer to question 7C to state that all tanks were "presently" leaking. When the Agency determined that a $50,000 deductible applied to this claim, Lawrence appealed to the Board.

DISCUSSION

Section 22.18(d)(3)(c)(ii) of the Act states:

> It shall be the burden of the owner or operator to prove to the satisfaction of the Agency that the owner or operator had no actual or constructive knowledge that the release for which a claim is submitted first occurred prior to July 28, 1989.

At dispute for resolution at hearing was the Agency's contention that a $50,000 deductible applied. The Agency's determination letter contends that the contamination exhibited in soil samples taken at the site in 1991 must have occurred prior to July 28, 1989 as the only known source of the contamination, Lawrence's USTs, were removed prior to that date. (R.1, 29)

The petitioner argues that the evidence demonstrates petitioner had no actual or constructive knowledge of a release at the site prior to July 28, 1989. (Pet. Br., p.3) Lawrence claims in its brief that it first became aware of a release on the subject property on May 17, 1991 when a site investigation revealed the contamination to the owner. Lawrence also argues in its brief that it amended its answer to question 7C of the application because of its "belief that the tanks must have been leaking at some point in the past" but that it did not know exactly when. (Pet. Br., p.2,9) Lawrence asserts that under these facts, a $10,000 deductible applies.

The Agency argues that petitioner did not carry his burden of proof by simply applying for reimbursement. (Ag. Br., p.2) Lawrence, the Agency argues, submitted no evidence at hearing or otherwise to show that the petitioner had no actual or constructive knowledge that a release occurred prior to July 28, 1989. The Agency asserts that the petitioner cannot rely on the absence of facts in the record to meet its burden nor can it rely on its arguments at hearing or in briefs to supply the requisite

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[1] This information is included for purposes of background. The application and letter were not made part of the Record. See also fn 2.

showing. (Ag. Br. p. 3)

Given the structure of the statute, in a situation where an application for determination of eligibility for corrective action costs shows the removal of tanks at a site in 1987 and the subsequent discovery of contamination at that site in 1991 the Agency may validly infer that the contamination came from the USTs. We believe, that in the absence of evidence to the contrary, the Agency could also validly infer that any release occurred prior to July 28, 1989. The applicant's burden is to establish that it did not have actual or constructive knowledge of a release prior to July 28, 1989. Ill.Rev.Stat. 1989, ch. 111 1/2, par. 1022.18(d)(3)(c)(ii)

The Board agrees with the Agency that the record is devoid of any facts which indicate that the petitioner met its statutory burden of proof. No witnesses were provided at hearing by petitioner relating to the issue. The petitioner did not attempt to introduce the May 1991 site audit or any evidence regarding the tank removal in 1987. The sole evidence, in this case, consists of the Agency Record, introduced as Joint Exhibit #1 at hearing. (TR. 18)[2] The Board has not considered in its deliberations of this case factual allegations introduced outside the record such as in briefs or reply briefs. Among these are alleged facts concerning the circumstances surrounding the UST removal and petitioner's state of mind in answering certain questions in the reimbursement application. Under these circumstances we cannot say that Lawrence met its burden of proof. The language of the statute is clear that it is the applicant, not the Agency, which must go forward with evidence regarding absence of actual or constructive knowledge. To rely upon the absence of facts in the record to make petitioners case would, as the Agency argues, impermissably shift the burden of proof. We must conclude that where the petitioner fails to go forward with its burden, its case fails.

The case at hand is distinguishable from that in Beer Motors, Inc. v. IEPA, PCB 91-120, _____ PCB ____ (January 23, 1992) where the issue of actual or constructive knowledge was involved. There the petitioner introduced evidence at hearing which showed various possible causes for the soil contamination, not all of them related to a release from a UST. In that case the Board decided that petitioner had rebutted the inference of constructive or actual knowledge. In the case at bar the

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[2] In cases which turn upon the applicant's burden of proof, we believe the better practice is to include all correspondence between the applicant and the Agency, including the rejected applications, in the Agency Record. We note, however, that the applicant chose not to move to supplement the record either before or at hearing. The applications do not include any evidence concerning the May 1991 site investigation or the 1987 tank removal. We also note that the Agency questionnaire does not readily lend itself to this fact situation.

petitioner introduced no evidence at all on the issue.

Finally, Lawrence argues that it was denied due process by its inability to present evidence at hearing. The hearing was properly noticed and, at hearing, Lawrence gave no reason for being unprepared to present witnesses or evidence. Additionally, we do not see where the petitioner either appealed the hearing officer's apparent decision to deny petitioner's request for a continuation of the hearing date nor do we see that petitioner properly preserved any objection on this point at hearing. We believe, therefore, that petitioner's objection has been waived.

The Board also notes that it has decided to remand to the Agency those Agency determinations of eligibility which did not reach the issue of reimbursability of costs and deductibility. In Ideal Heating v. IEPA, PCB 91-253, ____ PCB ____ (January 23, 1992) the Board held that such incomplete determinations are not appealable. The Board applies this principle only in cases where no hearing has been held. Because a hearing was held in this case, the Board, therefore, has decided this case on the merits.

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

ORDER

The Agency determination that a deductible of $50,000 applies is affirmed.

IT IS SO ORDERED.

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

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 6th day of February, 1992, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board