ILLINOIS POLLUTION CONTROL BOARD
May 9, 1991

SPARKLING SPRING MINERAL WATER CO.,	)	
Petitioner,	)	
v.	)	PCB 91-9
	)	(Underground Storage Tank
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	Reimbursement)
Respondent.	)	

MR. GLENN M. WAGNER, PRO SE, APPEARED ON BEHALF OF PETITIONER.

MR. RONALD L. SHALLAWITZ APPEARED ON BEHALF OF RESPONDENT.

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

This matter comes before the Board on a petition for review filed January 17, 1991, by petitioner Sparkling Spring Mineral Water Company (Sparkling Spring) pursuant to Section 22.18b(g) of the Environmental Protection Act (Act). (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1022.18b(g).) Sparkling Spring challenges the Illinois Environmental Protection Agency's (Agency) determination that Sparkling Springs' application for reimbursement for corrective action costs from the Underground Storage Tank Fund (UST Fund) is subject to a $50,000 deductible. A hearing was held on April 2, 1991 in Waukegan, Illinois at which no members of the public attended.

FACTS

Sparkling Spring bottles and distributes water taken from a well on its property at 1629 Park Avenue West, Highland Park, Illinois. On December 3, 1990, the Agency received Sparkling Springs' application for reimbursement for corrective action costs incurred in the removal of two underground storage tanks (UST). (R. 3-9)[1] The application provides that on July 8, 1990, Sparkling Spring removed a 1,000 gallon tank which had contained gasoline, that the release was a "tank system leak", that the tank had been taken out of service prior to 1972 because a larger tank was installed adjacent to the 1,000 gallon tank and that the reasons the tank was removed was age of the tank and lack of liability insurance. (R. 7) The application also provides that a 2,000 gallon diesel oil tank was removed July 12, 1990 because the tank

[1] R. ___ denotes citation to the Agency Record and TR. __ denotes citation to the hearing transcripts.

was leaking due to a "tank system leak" and that this tank was taken out of service on February 1, 1988 because of its age and lack of insurance. (R. 6)

On December 14, 1990, the Agency issued a letter stating that the 1,000 gallon tank had not been registered and, therefore, corrective action costs associated with this tank could not be reimbursed (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1022.18b(a)(4)). (R. 22-23) Regarding the 2,000 gallon tank, the Agency applied Section 22.18b(d)(3)(C)(ii) of the Act and determined that Sparkling Spring had actual or constructive knowledge of the release prior to July 28, 1989 because Sparkling Spring stated in its application that the tank was taken out of service in February of 1988 and was leaking when removed. Therefore, the Agency applied a $50,000 deductible to the corrective action costs associated with the 2,000 gallon tank.

On January 17, 1991, Sparkling Spring filed its petition for review challenging the Agency's decision. Sparkling Spring included with its petition a "corrected application" for reimbursement. This corrected application provided, inter alia, that the release from the 2,000 gallon tank was a "product of overfill" and deleted the statement that the tank was leaking when pulled. On February 1, 1991, the Agency filed a motion for summary judgment asserting that there were no genuine issues of material fact and that, as a matter of law, the Agency's decision should be affirmed. On March 14, 1991, the Board granted the Agency's motion as to the 1,000 gallon tank, but denied the motion as to the 2,000 gallon tank; therefore, the instant matter concerns only the larger tank.

At hearing, Sue Dwyer of the Office of the State Fire Marshal's Division of Petroleum and Chemical Safety testified that she did not observe any "visible corrosion holes that would cause leakage" in the 2,000 gallon UST. (Tr. 6, 12) She also testified that the tanks were removed in two separate excavations approximately ten feet apart, that the 1,000 gallon tank was "riddled with holes" and that there was visible contamination in the excavation but that she could not remember which excavation site was contaminated. (Tr. 12-13)

Ray Branaman, Division Manager for Sparkling Spring, testified that he was involved with the removal of the USTs. (TR. 19) Branaman testified that he first became aware of a release from the 2,000 gallon UST when the tank was pulled and contamination was visible on the "walls of the hole". (Tr. 22) According to Branaman, "[t]here was (sic) no holes in the tank because we had the on site (sic) tank that had to pump the water out of the tank and there was I'm going to say 800 gallons or 700 gallons of used left-in fuel that we didn't take out of there." (Tr. 23) Branaman testified that Sparkling Spring did not receive any complaints from neighbors which would indicate the possibility of a leak. (Tr. 23)

Regarding the corrected application, Branaman testified that he assumed that the tank was leaking because of the soil contamination, but that after speaking with Sue Dwyer, Sparkling Spring concluded that it had incorrectly stated in its application that the tank was leaking when removed. (Tr. 32) When asked to explain the source of the contamination, Branaman explained that "when the [delivery] tanker comes to fill the tanks there could have been an overfill on a tank which would produce a flow of fuel out of the spout that goes into the tank which depending on the amount of spill ... if it absorbed right in the ground I would not see that." (Tr. 34) Branaman testified that Sparkling Spring was required to place diesel orders of 2,000 gallons and that the tank was not always empty when the new delivery arrived. (Tr. 40) Branaman also testified that over fills of two to three gallons could occur when filling Sparkling Springs' trucks. (Tr. 41) The tank pump did not have an automatic shut-off nozzle. (Tr. 42) Branaman stated that no deliveries of diesel fuel were accepted into the tank after February 1, 1988 and that the contamination must have occurred prior to that date. (Tr. 37, 38)

Ronald Schallawitz testified on behalf of the Agency.[2] Schallawitz explained the Agency's determination to apply a $50,000 deductible to Sparkling Spring's claim. (Tr. 51-56) When asked whether the Agency's determination would be the same in light of the corrected application and testimony presented at hearing regarding contamination from overfill, Schallawitz opined that the Agency's determination would be the same. (Tr. 56-58, 60-64)

DISCUSSION

Before addressing the merits, the Board must address the Agency's continuing objection to the hearing officer's ruling admitting two exhibits into evidence. Exhibit 1 is a soil excavation project report prepared by Air Quality Testing, Inc. (Pet. Ex. 1) Exhibit 2 is a letter from the Highland Park Fire Department dated April 2, 1991 stating that from 1987 to the date of the letter the fire department had not responded to any UST related occurrences at the site. (Pet. Ex. 2) The Agency objected to the introduction of this evidence because it was not included with the application for reimbursement. (Tr. 16-18) The Agency relies upon the general rule in permit appeals that the application package must demonstrate compliance with the Act and, therefore, the Board reviews the denial of a permit or imposition of permit

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[2] Glenn Wagner appeared pro se on behalf of Sparkling Spring and called Ronald Schallawitz, the Agency attorney, as a witness. Schallawitz testified while recognizing that such a procedure was rather unusual given the difficulty of cross-examining one's self. (Tr. 48)

conditions based on the application as submitted to the Agency. (Joliet Sand & Gravel v. PCB, 163 Ill. App. 3d 830, 516 N.E.2d 955, 958 (3d Dist. 1987).) However, the Board is hesitant to strictly apply this rule in UST matters where no regulations exist identifying the type of information necessary to complete an application for reimbursement as exist for permit applicants. Moreover, it appears that Sparkling Spring introduced this evidence in response to the Agency's statement in its motion for summary judgment that Sparkling Spring gave no evidence such as "evidence that no release was reported to the local fire department" or that "the excavation for the 2,000 gallon tank adjacent to the 1,000 gallon tank was not done in contaminated soil" to show that it did not have knowledge of the release. (Agency Mot. Sum. Judg. at 8.) Therefore, the Board affirms the hearing officer's ruling admitting Sparkling Spring's exhibits.

The primary issue is whether the Agency correctly determined that Sparkling Spring's application for reimbursement for corrective action costs is subject to a $50,000 deductible pursuant to Section 22.18b(d)(3)(C)(ii) of the Act because Sparkling Spring had actual or constructive knowledge of the release from the 2,000 gallon UST prior to July 28, 1989. (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1022.18b(d)(3)(ii).) Section 22.18b(d)(3)(C)(ii) provides that:

> 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 under subparagraph (A) of paragraph (3) shall be $50,000 rather than $10,000, unless subparagraph (B)(i) applies, in which case the deductible amount shall be $100,000. If the costs incurred were in response to a release of petroleum which first occurred prior to July 28, 1989, but the owner or operator had no actual or constructive knowledge that such a release had occurred prior to July 28, 1989, the deductible amount shall be as provided under subparagraph (A) or (B) of paragraph (3) of this subsection (d), whichever is applicable. 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 of petroleum for which a claim is submitted first occurred prior to July 28, 1989.

The Board notes that the circumstances presented here are unusual in that Sparkling Spring's factual basis for claiming reimbursement changed from the filing of the initial application to the filing of the corrected application with its petition for review and hearing. In its initial application, Sparkling Spring stated that the tank was removed because it was leaking and checked

the line on the form identifying the release as a "tank system leak." (R. 6) In its corrected application, Sparkling Spring deleted the statement that the tank was removed because it was leaking and identified the release as "a product of overfill." (Resp. Ex. 7) Other than objecting to the two exhibits discussed above, the Agency does not object to the filing of the corrected application merely argues that, regardless of which version of events is applied, its deductible determination remains the same. Hence, the Board will review the Agency's determination in light of that evidence relied upon by Sparkling Spring in its corrected application and at hearing.

The record establishes that there were no observable holes in the 2,000 gallon UST upon removal on July 12, 1990. However, the record also establishes visible soil contamination on the sides of the excavation hole where the UST was located. Mr. Branaman testified that there was spillage and overflow from both filling the UST and from filling Sparkling Spring's delivery trucks. Branaman also testified that there was no automatic shut-off nozzle to prevent overflow. Lastly, Sparkling Spring established that the UST was installed in 1971 (R. 6; Resp. Ex. 7) and that it stopped using the UST on February 1, 1988.

Here, the record establishes that the spills and overflows from the UST occurred on or before February 1, 1988. Sparkling may not have understood that the piping was part of the UST or that the overflow and spilling constituted a release as defined by the Act. However, USTs are defined to include all piping connected to the tank and release includes any spilling, leaking, emitting, discharging, escaping, leaching or disposing from an UST into groundwater, surface water or subsurface soils. (35 Ill. Adm. Code 731.112.) Sparkling Spring's misunderstanding as to the UST provisions does not relieve it from the $50,000 deductible. The Board finds that Sparkling Spring had constructive, if not actual, knowledge that the release occurred prior to the deductible cut-off date of July 28, 1989. (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1022.18b(d)(3)(C)(ii).) Therefore, the Board concludes that the Agency correctly determined that Sparkling Spring's claim for reimbursement from the UST Fund is subject to a $50,000 deductible.

The Board finds that the Agency's ultimate determination should be upheld, although for different reasons than those stated by the Agency in its December 14, 1990 final determination letter. Consequently, it would be a waste of both administrative resources and Sparkling Spring's resources to remand this matter in light of evidence not presented to the Agency with the application for reimbursement. Remand would, however, be the normal procedure followed by the Board because Section 22.18b(d)(3)(C)(ii) provides that the burden is on the owner or operator to prove to the Agency that it did not have knowledge of the release. (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1022.18b(d)(3)(C)(ii).) In light of Wells Manufacturing Co. v. IEPA, 195 Ill. App. 3d 593, 552 N.E.2d 1074

(1st Dist. 1990), the Board is concerned with the use of a form for applicants seeking reimbursement where the deductible provision based on actual or constructive knowledge of the release is involved. (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1022.18b(d)(3)(C)(ii).) When an applicant seeking reimbursement receives an "Application for Reimbursement" form from the Agency and completes the form and answers form question 8(c) "Date UST taken out of service" with a date prior to July 28, 1989, the Agency imposes the "knowledge of the release deductible" provision of Section 22.28b(d)(3)(C)(ii) of the Act, which is higher than the general deductible amount, simply because the date taken out of service is prior to July 28, 1990.[3]

The problem with this procedure is that the applicant submitting the Agency's form must anticipate that the "knowledge of the release" deductible will be applied and that its only chance to submit documentation to rebut this finding and prove to the Agency that it did not have knowledge of the release is with the filing of the application for reimbursement form. The form provided by the Agency coupled with the failure to provide the applicant the opportunity to protect its interest at the Agency level appears to be inconsistent with Wells. Additionally, the failure to provide the opportunity to submit information showing lack of knowledge in response to the Agency's determination that the "knowledge of the release" deductible applies, such that the applicant must present this evidence for the first time at the Board level, is inconsistent with the provision in the Act requiring that the applicant prove to the Agency that it did not have knowledge of the release prior to July 28, 1989. While recognizing that both the Agency and the Board interpret the permit provision time-deadlines to apply to UST matters, the Agency may wish to utilize a procedure akin to the discretionary request for more information used in permit matters when applying the "knowledge of the release" deductible provision. Such a procedure would give the applicant the opportunity to submit information of knowledge of the release to the Agency, thereby allowing the Agency to review this information prior to rendering a final deductible determination.

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

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[3] While the Board need not rule upon the propriety of this presumption in reaching its determination, it questions the merit of this presumption particularly where, as in the instant case, there is no reason to presume that the tank leaked prior to July 28, 1989 as opposed to between July 28, 1989 and July 12, 1990 when the tank was removed, particulary where the record establishes that the tank contained 700-800 gallons of fuel and water when removed. (TR. 23)

ORDER

For the foregoing reasons, the Agency's determination that Sparkling Spring's claim for reimbursement for corrective action costs associated with its 2,000 gallon diesel UST is subject to a $50,000 deductible is affirmed.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (Ill. Rev. Stat. 1989, ch. 111 1/2, apr. 1041) provides for the appeal of Final Board Orders 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 9th day of May ,1991, by a vote of 7-0 .

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board