

ILLINOIS POLLUTION CONTROL BOARD
December 20, 1990

ROCKFORD DROP FORGE)
COMPANY,)
)
Petitioner)
)
v.) PCB 90-46
) (Underground Storage Tank)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

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

This matter comes before the Board on a petition for review filed on April 3, 1990 by Rockford Drop Forge Company (Rockford) pursuant to Section 22.18b(g) of the Environmental Protection Act (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1022.18b(g) challenging the Illinois Environmental Protection Agency's (Agency) denial of Rockford's application for reimbursement from the Underground Storage Tank Fund for corrective action costs. A hearing was held September 11, 1990 in Rockford, Illinois at which no members of the public attended.

FACTS

Rockford owns two parcels of property located at the intersection of 20th Avenue and 9th Street in Rockford. (Tr. at 29.) Both parcels are located north of 20th Avenue. One parcel, Lot 18 in Block 11, is located on the west side of 9th Street and the other parcel, which is part of Block 8, is located on the east side of 9th Street. The parcels are separated by 9th Street, a public thoroughfare which is owned by the City of Rockford. Lot 18, located west of 9th Street, contained ten underground tanks, installed between 1925 and 1949, ranging in capacity from 20,500 and 22,000 gallons each. The tanks were registered with the Office of the State Fire Marshal on February 4, 1986. (Resp. Ex. 1.) The tanks were used to store fuel oil. Ten to 15 percent of this fuel was used to fuel forklift trucks and other equipment. The remaining 85 to 90 percent of the fuel was used to fuel furnaces located in the forge shop which was, in turn, located on Block 8 on the east side of 9th Street. The fuel oil was pumped through pipes underneath 9th Street to the forge shop. (Resp. Ex. 1; Tr. 30-31, 50-51.)

In October of 1989, Rockford removed five of the tanks (Tr. 39-40) and in November, the remaining five tanks were removed (Tr. 62). On October 3, 1989, Rockford discovered that one of the tanks had leaked. On the same day, Rockford notified the Emergency Services and Disaster Agency (ESDA). (R. 58.) As of August 1, 1990, Rockford had expended approximately \$49,000 on corrective

action. (Tr. 44.)

On January 3, 1990, Rockford filed an application for reimbursement from the Fund for corrective action costs. (R. 56-75.) On January 12, 1990, the Agency notified Rockford that reimbursement was denied because the "definition of underground storage tank does not include tanks used for storing heating oil for consumptive use on the premises where stored. (35 Ill. Adm. Code 731.112 and 40 CFR 280.12.)" (R. 76.) "Since your tank held fuel oil that was consumed for process heating, your tank is exempt from the ... UST regulations according to the definition of UST." (R. 76.) On February 19, 1990, Rockford requested reconsideration of the Agency's decision. (R. 82.) On March 9, 1990, the Agency notified Rockford that the Agency's position had not changed and that reimbursement was denied. (R. 86-88.) On April 5, 1990, Rockford filed a petition for review challenging the Agency's denial of reimbursement.

DISCUSSION

The sole issue is whether Rockford's tank falls within the exclusion to the definition of underground storage tank set forth at 22.28(e)(1)(A) of the Act (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1022.18(e)(1)(A)) and adopted by the Board at 35 Ill. Adm. Code 731.112. If the Board determines that Rockford's tank falls within this exclusion, Rockford is not eligible for reimbursement from the Fund because its tanks are not "underground storage tanks" within the meaning of the Act and regulations.

Section 22.18(e)(1)(A) of the Act provided at the time Rockford filed its application and the Agency rendered its determination as follows:

The terms "petroleum" and "underground storage tank" shall have the meanings ascribed to them in Subtitle I of the Hazardous and Solid Waste Amendments of 1984 (P.L.98-616), as amended, of the Resource Conservation and Recovery Act of 1976 [RCRA] (P.L. 94-580), as amended. (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1022.18(e)(1)(A).)

RCRA defines underground storage tank in the following manner:

Sec. 9001. For purposes of the subtitle -
 (1) The term 'underground storage tank' means any one or combination of tanks (including underground pipes connected thereto) which is used to contain an accumulation of regulated substances, and the volume of which (including the volume of the underground pipes connected thereto)

os 10 per centum or more beneath the surface of the ground. Such term does not include any -

* * *

(B) tank used for storing heating oil for consumptive use on the premises where stored.

Pursuant to Section 9001 of RCRA, the United States Environmental Protection Agency promulgated rules that copy the definition set forth in RCRA (40 CFR 280.12). The Board adopted 35 Ill. Adm. Code 731.112 defining underground storage tanks which is identical in substance to the federal regulation.

Both parties cite to the preamble to 40 CFR 280 in support of their interpretations of the statutory and regulatory language. The terms that require interpretation are "consumptive use" and "on the premises where stored". Rockford points to the fact that the tanks were located on a separate parcel of property from where the heating oil was used and to the fact that 10% - 15% of the oil was used to fuel industrial equipment in support of its contention that its tanks do not fall within the exclusion. The Agency argues that Rockford owned both parcels of property and that the exclusion places no restrictions on the use of the heating oil in support of its position that Rockford's tanks fall within the exclusion.

Rockford cites the following portion of the preamble:

Throughout the development of the UST regulations, where there has been ambiguity in the terms defining the jurisdiction of the Subtitle I program, it has been the Agency's policy to define the scope of the UST regulations broadly and interpret the exclusions relatively narrowly. By taking this approach, the Agency hoped to avoid prematurely eliminating from its jurisdiction tanks that may pose an environmental threat. (40 CFR 280; 53 Fed. Reg. 37,114a(1)(a).)

The Agency relies on the following portions of the preamble which explain the meaning of the terms "consumptive use" and "on the premises where stored":

- (b) Consumptive use means used on the premises. Accordingly, this exclusion applies to tanks at residential, commercial and industrial facilities storing heating oil that is used at the same site. The heating oil exclusion

does not apply to the storage of heating oil for resale, marketing or distribution.

In the preamble to the proposed rule, EPA stated that 'consumptive use' was not intended to be limited to only space heating purposes, and described other uses of heating oil that would qualify for this exclusion. This definition has been modified since the proposed rule to clarify that tanks holding heating oil for any on-site use, such as heating or to power a generator, are exempt from regulation.

Several commenters supported this interpretation of consumptive use. Heating oil used to process steam, process heat, electricity and emergency power were among the consumptive uses that the commenters thought should be included in the heating oil exclusion.

Several commenters argued that tanks storing diesel fuel for use in emergency generators should be exempt as tanks storing heating oil. As explained above, no restrictions are being placed on the use of the heating oil under this exclusion, except that it be used consumptively on site. (40 CFR 280; 53 Fed. Reg. 37,118-119.)

- (c) On the premises where stored means tanks located on the same property where the stored heating oil is used. Tanks are excluded as long as the oil is stored anywhere on the same property. 'On the premises' is not limited to the building where the heating oil is stored. Thus, centralized heating units using heating oil that serve more than one building on the same property would be excluded.

In addition, several commentators provided suggestions that would result in narrower interpretations of this exclusion by regulating one of the following segments: All

residential and commercial tanks; all tanks at commercial and government buildings; all residential buildings of six or more units; or all tanks above a certain size. The Agency recognizes the concerns expressed by these comments but believes that the statutory language prevents adoption of such suggestions. Under the statute, the exclusion of heating oil tanks is not limited to certain categories of heating oil tanks (e.g., only residential or only tanks less than 1,100 gallons). Congress did recognize, however, that heating oil tanks may require some regulation and required that EPA study this universe of exempt tanks and make recommendations concerning regulation (section 9009). (40 CFR 280, 53 Fed. Reg. 37,118.)

Rockford's tanks fall within the explanation of "consumptive use" given above. There is no dispute that Rockford's heating oil was consumed on site and was not sold. The evidence also establishes that the heating oil was used to process heat and, therefore, falls within the exclusion. Ronald Ward, plant engineer and maintenance superintendent for Rockford, testified that Rockford is in the steel forging business. (Tr. 24.) Forging consists of heating steel to 240 degrees. (Tr. 25.) The metal parts are heated in "direct contacts slot forge furnace[s]." (Tr. 25.) "Direct contacts slot forge ... means that [the metal parts] are actually inserted into the furnace ... and have direct flame contact bringing them up to forging temperature." (Tr. 25.) The furnaces used in the forging process are heated with fuel oil from the tanks. (Tr. 25.)

Given that the oil from Rockford's tanks was used on site for process heat and was not stored for resale or distribution, the only remaining question is whether the use of 10% - 15% of the oil to fuel forklifts exempts Rockford from the exclusion. The Board is unpersuaded that the use of a portion of the oil for on-site use of industrial equipment removes Rockford from the purview of the exemption. First, the explanation to the federal regulation discussed above states that "no restrictions are being placed on the use of the heating oil under this exclusion, except that it be used consumptively on site." Based upon this statement, it makes no difference that a portion of the oil was used to fuel industrial equipment. Secondly, the use of the oil to fuel industrial equipment was minimal compared to the use of the fuel for process heat. Therefore, the Board concludes that the heating

oil in Rockford's tanks was stored for consumptive use within the meaning of the exclusion.

The Board must now determine whether the fact that the tanks were located on a separate parcel of property from the forging furnaces means that they were not used for storing heating oil for use "on the premises where stored". In Eureka Co. v. Environmental Protection Agency, PCB 98-117 at 2 (September 6, 1979), the Board was called upon to interpret the term "on-site" and relied upon the following RCRA definition of that: "Two or more pieces of property which are geographically contiguous and are divided by a public or private right(s)-of-way are considered a single site." It is clear that if Rockford's business was operated on a single parcel of property, the Board would not be confronted with the instant argument. It would be incongruous for one facility or business located on a single parcel of property to be covered by the exemption and another facility such as Rockford, that happens to be located on two parcels of property separated by a public street, to not come within the purview of the exemption merely on this distinction alone. We also disagree with Rockford's contention that it "could have qualified ... simply by placing the ownership of the two parcels in different subsidiary names." (Pet. Brief at 5.) No determination has been made by the Agency or review by the Board which would indicate that such a maneuver would be a valid basis for avoiding the "heating oil exclusion." The Board concludes that heating oil in Rockford's tanks was for use "on the premises where stored" within the meaning of the exemption.

Rockford asks that the Board review this matter "from the standpoint of statutory interpretation as well as fundamental fairness." (Pet. Brief at 4.) Rockford argues that denying access to the Fund when an applicant has paid the requisite registration fees is fundamentally unfair. Rockford also alleges that such a result is particularly unfair in light of the recent statutory amendment, which would cover Rockford's tanks, defining underground storage tanks as including "heating oil tanks greater than 1,100 gallons in capacity serving other than residential units." (P.A. 86-1050, eff. July 11, 1990.)

The record establishes that Rockford registered its tanks after consultation with the Office of the State Fire Marshall (OSFM) and local fire officials responsible for enforcing the OSFM rules. (Tr. 13-22.) The Agency points out that the OSFM rule defining underground storage tanks differs from the federal and Board regulations and that this difference may result in tanks being registered as USTs and registration fees paid that may not

be USTs for purposes of reimbursement.¹ The Agency also notes that it enforces federal and Board regulations, but not OSFM rules.

Although the parties agree that the recent statutory amendment to the Act (P.A. 86-1050, eff. July 11, 1990) would include Rockford's tank within the definition of "underground storage tank," the statute and regulations in effect at the time pertinent to this matter, which the Board is bound to apply, exempt Rockford's tank from the definition of "underground storage tank." The Board is sympathetic to the confusion encountered by Rockford as a result of the dual-implemented UST system as statutorily created; however, the Board cannot, on this basis, alter its interpretation of the "heating oil exclusion" as it existed at the time Rockford applied for reimbursement and the Agency rendered its determination. While of no consolation to Rockford, the confusion has been lessened by the recent statutory amendment (P.A. 86-1050) which now defines underground storage tanks more consistently with the OSFM rules.² The Board also notes that the recent statutory amendment provides further support to its determination that the statute as it existed at the time pertinent to this review excluded Rockford's tanks from the definition of underground storage tank. (Hession v. Illinois Department of Public Aid, 544 N.E.2d 751, 755 (1989.)

In summary, the Board concludes that Rockford's tank falls within the exclusion of Section 22.18(e)(1)(A) of the Act. Consequently, the tank is not an "underground storage tank" within the definition set forth in that section so that Rockford cannot seek reimbursement from the Fund for its corrective action costs.

¹ The Agency attached copies of the legislative debates surrounding the adoption of Public Act 86-1050. (App. A and B.) These documents were not admitted into evidence by the hearing officer because the Agency's copies were not certified. (Tr. 161-65.) The instant copies are certified, Rockford has not challenged the Agency's use of the documents in its reply brief and, therefore, the Board has considered the debates in its review of this matter.

² Public Act 86-1050 provides added the following language to Section 22.18(e)(1)(A) of the Act: "except that 'underground storage tank' shall include heating oil tanks greater than 1,100 gallons in capacity serving other than residential units." The OSFM rule provides that underground storage tank does not include any "[t]ank of 1,100 gallons or less capacity used exclusively for storing heating oil for consumptive use on the premises where stored" 41 Ill. Adm. Code 170.400(jj).)

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


ORDER

For the reason given above, the Agency's decision denying Rockford's application for reimbursement from the Fund is affirmed.

IT IS SO ORDERED.

J. Anderson and J. D. Dumelle dissent.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 2^{0th} day of December, 1990 by a vote of 5-2.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board