

ILLINOIS POLLUTION CONTROL BOARD  
September 12, 1991

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

ORDER OF THE BOARD (by J. Theodore Meyer):

This matter is before the Board on the Illinois Environmental Protection Agency's (Agency) motion for summary judgment, filed on August 27, 1991. Petitioner Beer Motors, Inc. (Beer) has not responded to the motion.

On December 17, 1990, Beer applied to the Agency for reimbursement from the Underground Storage Tank (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. (Rec. at 32-33.) The Agency stated that the \$50,000 deductible applied pursuant to Section 22.18b(d)(3)(C)(ii) of the Environmental Protection Act (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...

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 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. (Rec. at 24-26.) On June 12, 1991, the Agency reaffirmed its decision that a \$50,000 applies to Beer. (Rec. at 27.) Beer filed this appeal with the Board on July 17, 1991.

In its motion for summary judgment, the Agency contends that there is no genuine issue of material fact in this matter and that the Agency is entitled to judgment as a matter of law. The Agency maintains that a release occurred prior to July 28, 1989, and that

Beer had constructive, if not actual, knowledge of a release before July 28, 1989. In support of these claims, the Agency notes that in May 1989 O'Brien & Associates, Consulting Engineers (O'Brien) performed soil sampling on Beer's property on behalf of a prospective purchaser of the property. On June 9, 1989, O'Brien notified the prospective purchaser's attorney, Leon Teichner, that its tests indicted that the property contained elevated levels of benzene and xylene. (Rec. at 5.) Mr. Teichner forwarded a copy of O'Brien's report to Beer on June 9, 1989. (Rec. at 8.) Beer's tanks were taken out of service on July 8, 1989 (Rec. at 39). On July 14, 1989, O'Brien performed additional testing on the property, at Beer's request. These tests indicated that levels of benzene, toluene, and xylene were below Agency clean-up objectives. (Rec. at 10-11.) The tanks were removed on June 1, 1990. (Rec. at 16-17; 39.) The Agency asserts that these facts, contained in the record of this proceeding, show that a release occurred prior to July 28, 1989, and that Beer had constructive, if not actual, knowledge of that release.

Beer did not file a response to the motion for summary judgment. However, after examining the statute and the record, the Board denies the Agency's motion for summary judgment. 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, the Agency has 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 the contamination is 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. (Rec. at 5, 11, 17, 20, and 24.) Based upon the varying information contained in the record, the Board finds that there is indeed a genuine material issue of fact in this proceeding, as to whether a release occurred prior to July 28, 1989 and to whether Beer had actual or constructive knowledge of a release.

The Board notes that the Agency asserts that the June 9, 1989 letter from O'Brien to Mr. Teichner states that the contamination is the result of a release or spill from the UST system. The Agency contends:

According to the letter from O'Brien to the attorney for the purchasers of the Property [sic] dated June 9, 1990[sic] the native soils are relatively impermeable clays therefore, contamination at this depth must be the result of a release from the ...UST system or very serious spillage from the UST system.<sup>1</sup>

(Agency motion at 7.)

However, the letter actually states:

With the available information, it is not possible to accurately determine the source of the contamination. 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.

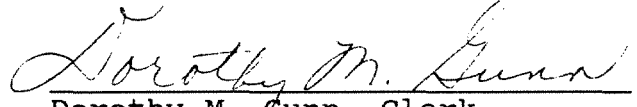
(Rec. at 5.)

The Board believes that it is improper to characterize a letter which actually states that leakage from the tanks is a "less likely" source of contamination as saying that the source of contamination "must be" leakage from the UST system.

The Agency's motion for summary judgment is denied. This matter will proceed to hearing.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 12<sup>th</sup> day of September, 1991, by a vote of 7-0.

  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board

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<sup>1</sup> The Board notes that the Agency cites a June 9, 1990 date for this letter. The Board believes that the Agency is referring to the June 9, 1989 letter from O'Brien to Mr. Teichner.