ILLINOIS POLLUTION CONTROL BOARD
October 16, 1992

HARLEM TOWNSHIP, Petitioner, v. ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	PCB 92-83 (Underground Storage Tank Fund Reimbursement Determination)

NANCY MINDRUP APPEARED ON BEHALF OF THE PETITIONER, HARLEM TOWNSHIP;

DANIEL MERRIMAN APPEARED ON BEHALF OF THE RESPONDENT, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY.

OPINION AND ORDER OF THE BOARD (by B. Forcade):

This matter is before the Board on a "Petition for Review of Agency Decision" filed by Harlem Township on June 2, 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 1022.40.) A release of petroleum occurred at a garage facility operated by Harlem Township, located in Winnebago County, Illinois. The petition seeks review of the Environmental Protection Agency's (Agency) determination that the release is ineligible for reimbursement because it is not associated with an UST (underground storage tank) system.

A hearing was held on August 18, 1992 in Machesney Park, Illinois. The parties did not file final briefs but relied on closing arguments at hearing.

On September 10, 1992, Ramada Hotel, O'Hare (Ramada) filed a "Motion for Leave to Submit an Amicus Curiae Brief". On September 28, 1992, Harlem Township filed a response in support of the amicus brief. Harlem Township in its response requests the Board to deem the amicus curiae brief submitted by Ramada to have been adopted by Harlem Township. The Agency filed its response on September 29, 1992, along with a motion to file the response instanter. The Board grants the above motions and accepts the above filings.

BACKGROUND

On April 22, 1991, Charles Brockman, an employee of the Harlem Township road commission, noticed signs that a release of petroleum from the fuel pump had occurred over the weekend. Upon arriving at work that morning he noticed that the gate was open, the shop door was unlocked and there was a puddle by the fuel

pumps. (Tr. at 7-9.) He also noticed one of the nozzles from the fuel pump in an unlocked position laying on the ground. (Tr. at 9.) No gasoline was being discharged from the nozzle at the time because the pump had burned out. (Tr. at 10-11.)

The area where the pump is located is gravel and grass with blacktop around it. (Tr. at 15.) A switch to activate the pump is located in the shop. (Tr. at 16.) A police report was filed on the incident. (Tr. at 20, R. at 49.) Vandalism is suspected but no arrest has been made. (Tr. at 21.) Harlem Township estimates that approximately 450 gallons of gasoline were released from the pump. (Tr. at 12.)

The pumps and tanks were subsequently pulled and the site remediated. (Tr. at 21.) Harlem Township filed an application with the Agency for reimbursement from the underground storage tank fund on February 28, 1992. (R. at 9.) The Agency denied reimbursement because the release is not a release from an underground storage tank system. (R. at 56, Tr. at 34.)

ISSUE

The facts are not disputed in this matter. The question before the Board is whether a release of gasoline from a pump nozzle is covered by the UST reimbursement fund.

Harlem Township argues that pumps or pump nozzles are not specifically excluded from the definition of underground storage tank. Harlem Township further argues that if the intent had been to exclude them they would have been listed as a specific exclusion. Additionally, Harlem Township argues that the definition of underground storage tank system at 35 Ill. Adm. Code 731.112 includes containment system and the pump and pump nozzle are part of the containment system. Harlem Township also references language from the Agency's guidance manual in support of its argument.[1]

The Agency asserts that references to the associated piping and ancillary equipment in the definition of underground storage tank includes the term 'underground'. The Agency argues that the customary and ordinary meaning should be applied to underground and therefore the pump and pump nozzle would not be part of the underground storage tank.

---

[1] In Platolene 500 v. IEPA (May 7, 1992), PCB 92-9, the Board held that the guidance manual has no legal or regulatory effect in proceedings before the Board and that the Board is not bound by the guidance manual. Therefore, the Board will not consider the arguments that rely upon the guidance manual.

Harlem Township, in response to the Agency's argument, contends that underground is not used to describe containment system. It further argues that some of the listed exclusions of underground storage tank include equipment that is located above ground (surface impoundment, pit, pond or lagoon).

The amicus curiae brief 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. (Am. Br. at 3.) The brief further points out 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. (Am. Br. at 4.) The Amicus states that the Act is to be liberally construed and interpreting the statute to include releases from the pump nozzle is consistent with the express purpose of the Act. (Am. Br. at 5.) The brief further argues that the Agency's interpretation of the statute would remove contamination from spills though the nozzle from the corrective action requirements and various regulations in the UST statutes. (Am. Br. at 7.) The amicus further argues that the Agency's interpretation is contrary to USEPA's interpretation of the Federal UST Regulations and could jeopardize federal dollars. (Am. Br. at 8.)

The Agency in its response interprets the language in the statute and regulations defining UST and UST system to not include the pump nozzle and therefore concludes that a release of petroleum from the nozzle is not eligible for reimbursement from the fund. (Resp. at 10-11.) The Agency references the regulations of the Office of the State Fire Marshal (OSFM) regulating gasoline storage tanks. (Resp. at 11.) The Agency states that the OSFM regulations draw a clear distinction between USTs or UST systems and the dispensing unit. (Resp at 12.) The Agency notes that the issue in Sparkling Springs was the application of the deductible and that Ramada's reliance on Sparkling Springs is misplaced. (Resp. at 13-14.) The Agency contends that its interpretation is consistent with USEPA's interpretation. (Resp. at 15.) The Agency further notes a distinction between the UST fund reimbursement provisions, and the clean-up provisions of the Act. (Resp. at 15.) The Agency maintains that its interpretation is consistent with the specified intent of the Act and the UST reimbursement fund. (Resp. at 16.) The Agency also contends that a narrow construction will preserve taxpayer funds and ensure continued availability of reimbursement.[2]

---

[2] The Board has previously found that the Agency does not have the authority to determine reimbursement based on the sufficiency of the fund. (See City of Roodhouse v. IEPA (September 17, 1992), PCB 92-31.

DISCUSSION

Reimbursement from the 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 the release was from an underground storage tank.

Section 22.18(e)(1)(A) of the Act states that "underground storage tank" shall have the same meaning as in Subtitle I of the Hazardous Solid Waste Amendments of 1984 (P.L. 98-616), of the Resource Conservation and Recovery Act of 1976 (P.L. 94-580). Underground storage tank is defined in the Board's regulations in Section 731.112 as "one or a 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 underground pipes connected thereto) is ten per centum or more beneath the surface of the ground." The regulations then proceed to list several exclusions from the definition of underground storage tank.[3]

The pump and the pump nozzle are not an underground storage tank. The pump system is not a tank or part of the underground pipes connecting the tank. 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.

While the Act references "release from an underground storage tank", the Agency denied eligibility on the basis that the release was not from an "UST system." The parties in their arguments do not make a distinction between the underground storage tank and an underground storage tank system and often discuss the two terms interchangeably. However, even if reimbursement was extended to include a release from an UST system, a release from the pump nozzle would be ineligible for reimbursement.

The Board's regulations define an "UST system" or "tank system" as "an underground storage tank, connected underground piping, underground ancillary equipment, and containment system, if any." (Section 731.112.) In addition to the UST tank (tank and underground piping) the UST system also includes underground ancillary equipment and any containment system.

---

[3] The definition and exclusions found in the Board's regulations are identical to the federal definition of underground storage tank and exclusions found at 40 CFR 280.1.

Ancillary equipment is defined at Section 731.112 as "any device including but not limited to, such devices as piping, fittings, flanges, valves, and pumps used to distribute, meter or control the flow of regulated substances from an UST." The fuel pump and pump nozzle satisfy the definition of ancillary equipment. It is the function of the fuel pump to control and meter the flow of gasoline for distribution. The pump and pump nozzle are located above ground level and are not underground ancillary equipment included in the definition of UST system.

The Board's rules and regulations on USTs do not provide a definition of containment system[4]. Because containment system is not specifically defined it must be given its ordinary meaning. A containment system holds or retains a substance. The pump and pump nozzle do not constitute part of the containment system. While the pump and pump nozzle do contain product, the function of these parts is to regulate the flow of the product for distribution. It is not the function of the pump nozzle to contain the contents of the tank.

The Board also finds that for a containment system to be part of a UST system it must be at least partially located underground. To hold otherwise would be contrary to the prevailing emphasis on underground systems found in the regulations. To hold that an aboveground tank or piping system is part of a UST system on the basis that it is a containment system would place equipment that is located totally above ground into the UST system. Many of the definitions and provisions found in the regulations clearly exclude above ground items. The Board finds no reason why the limitation of underground would not apply to the containment system.

The release at issue was from the nozzle of a fuel pump located above groundlevel. The release of petroleum was from ancillary equipment located above ground. The regulation specifically includes only the ancillary equipment located underground as part of the UST system. Ancillary equipment that is not located underground is not part of the UST system. The release from the pump was not a release from an UST system. Therefore, even if reimbursement was allowed for a release from a UST system, a release from the pump nozzle would not be eligible for reimbursement.

The Board does not find Sparkling Springs to be controlling on determining the eligibility of a release of petroleum from a

---

[4] The federal UST regulations provide the requirements for secondary containment systems in 40 CFR 280.42(b)(1).

pump nozzle.[5] In its original application Sparkling Springs noted that the tanks were removed because of leakage. In an amended application Sparkling Springs identified the release as a product overfill. At hearing testimony was presented that there was spillage and overfill from both the filling of the UST and filling the delivery trucks. The Board stated that "regardless of which version of events is applied its deductible remains the same." The eligibility determination in Sparkling Springs would not have been altered by a finding that a release from the pump nozzle were ineligible for reimbursement. The reported source of contamination also involved overfills on filling the UST tank. Any implication in Sparkling Springs that spills from the filling of vehicles were eligible for reimbursement was dicta and is not controlling. Based on the Board's review of the statute and regulations pertaining to USTs the Board finds such implication in error.

The Board is likewise not persuaded by the other arguments presented in the amicus curiae brief. The Board agrees that the effects on the environment and human health are the same whether the release is from a leak in the tank or from the nozzle. However, the Board notes that the Act allows for reimbursement for certain activities, not for all environmental consequences. Additionally the Board notes that the Act denies reimbursement from the fund in other cases where the same environmental effects are found (i.e., unregistered tanks, failure to notify ESDA and exempt fuels).

The Board does not find any authority to suggest that the Board's interpretation is contrary to the federal interpretation of the UST regulations. Nor does the Board believe that this interpretation is contrary to the intent of the statute or the intent of the UST fund.

Where the federal regulations discuss spills and overfills these incidents appear to be limited to the transfer of product to the UST system. (40 CFR 280.20(c).) The explanatory opinion accompanying the USEPA's adoption of the federal UST regulations in discussing spills and overfills notes that:

> ...there is an even more prevalent source of release that takes place at the tank fill port during filling. Although usually small in volume, spill and overfill releases are probably the most common causes of releases from UST systems.

* * *

---

[5] The issue before the Board in Sparkling Springs was the amount of the deductible. The source of contamination was not at issue.

> Spills most often occur at the fill pipe opening when the delivery truck's hose is disconnected, usually releasing only a few gallons. .....Overfills generally result from a release from loose or nonoperational components located above the tanks...., or from the tank's vent pipes as product is forced out during overfilling the system.
>
> 53 Fed. Reg. 185, 37090 (1988)

The regulations appear to extend the UST regulations to include the fill port and cover releases that occur while filling the UST. While the regulations expressed a concern for releases on filling the tank, the regulations do not expressly mention releases during the transfer of product from the UST. While the Board recognizes that releases frequently occur from the pump nozzle, the Board does not find an intent in the regulations for releases from the pump nozzle to be covered by the UST regulations.

In Illinois, the Office of the State Fire Marshal (OSFM) regulates gasoline storage tanks under the auspices of the Gasoline Storage Act (Ill. Rev. Stat. 1991, ch. 127 1/2, par. 152.1 - 159). The OSFM regulations on the "storage, transportation, sale and use of petroleum and other regulated substances" are found at 41 Ill. Adm. Code Part 170. Similar definitions and provisions are found in the OSFM's regulations, the Board's regulations and the federal regulations. The OSFM regulations contain provisions on the registration, installation, leak detection, leak reporting, repair, etc. The OSFM regulations also contain separate provisions on the dispensing of gasoline or other regulated substances from USTs. The OSFM regulations draws a distinction between UST systems and the dispensing system. While not controlling, the OSFM regulations buttress the Board's conclusion.

Dispensing systems are not regulated under the federal UST regulations or the Board's regulations. OSFM is authorized to regulate the storage of petroleum and provides separate provisions on UST systems and dispensing equipment. The fact that the federal and Board regulations do not mention dispensing systems or the transfer of petroleum from the UST system implies that this area was not intended to be covered by the UST regulations. The fact that the OSFM regulations cover dispensing equipment and USTs in separate provisions supports the conclusion that the pump nozzle is not part of the UST system.

CONCLUSION

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.

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

ORDER

The Board affirms the Agency's determination that a release of petroleum from the pump nozzle is ineligible for reimbursement from the underground storage tank fund.

IT IS SO ORDERED.

Board Members J. Theodore Meyer and M. 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.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 16th day of October, 1992, by a vote of 5-2.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board