

ILLINOIS POLLUTION CONTROL BOARD
May 18, 1995

WOODSTOCK/NORTHERN FS, INC.,)
)
 Petitioner,)
)
 v.) PCB 94-258
) (UST Reimbursement)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
 Respondent.)

DANNY J. LEIFEL APPEARED ON BEHALF OF PETITIONER;

MELANIE A. JARVIS, OF ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
APPEARED ON BEHALF OF RESPONDENTS.

OPINION AND ORDER OF THE BOARD (by G. T. Girard):

On September 19, 1994, the petitioner, Woodstock/Northern FS, Inc. (FS) filed a petition for review of a September 6, 1994, determination by the Illinois Environmental Protection Agency (Agency) regarding reimbursement from the underground storage tank fund (UST fund). The Agency denied reimbursement for \$12,308.96 in tank removal costs, \$686.05 for excessive handling fees and \$33,834.21 for excessive early action activities. (Book I at 31-33.)¹ FS is asking the Board to review the Agency's denial of these charges. FS withdrew one issue it had raised in its petition at hearing. (Tr. at 6.)

Hearing was held before Board Hearing Officer Richard Sikes on February 28, 1995, in Woodstock, McHenry County, Illinois. No members of the public were present at the hearing. Briefs were filed by the parties on April 3, 1995 and April 19, 1995 for the petitioner and April 17, 1995 for the respondent.

For the reasons discussed below, the Board affirms the Agency's decision in this matter.

STATUTORY AND REGULATORY FRAMEWORK

Section 57.13 of the Act provides:

¹ The petition for review will be cited as "Pet. at ___"; the petitioner's brief will be cited as "Pet. Br. at ___"; the petitioner's reply brief will be cited as "Pet. RBr. at ___"; the Agency's brief will be cited as "Ag. Br. at ___"; the Agency's fiscal record will be cited as "R. at ___"; the Agency's technical record will be cited as "Book ___ at ___"; the hearing transcript will be cited as "Tr. at ___".

- a. If a release is reported to the proper State authority on or after the effective date of this amendatory Act of 1993, the owner or operator shall comply with the requirements of this title.
- b. If a release is reported to the proper State authority prior to the effective date of this amendatory Act of 1993, the owner or operator of an underground storage tank may elect to proceed in accordance with the requirements of this Title by submitting a written statement to the Agency of such election. (415 ILCS 5/57.13.)

35 Ill. Adm. Code 731.161 Initial Response, provides in pertinent part:

Upon Confirmation of a release or after a release from the UST system is identified in any other manner, owners and operators shall perform the following initial response actions within 24 hours of a release:

* * *

- b) Take immediate action to prevent any further release of the regulated substance into the environment.

* * *

And, 35 Ill. Adm. Code 731.162(a)(1) Initial Abatement Measures and Site Check, provides:

- a) Owners and operators shall perform the following abatement measures:
 - 1) Remove as much of the regulated substance from the UST system as is necessary to prevent further release to the environment.

ISSUE ON APPEAL

The sole issue on appeal before the Board revolves around which incarnation of the UST statute should apply in this case. If the tanks which were removed in October of 1993 were a continuation of the release reported in February of 1992, petitioner has elected to proceed under Section 22.18 *et seq.* of the Act. (415 ILCS 5/22.18 *et seq.*) Under Section 22.18 of the Act, the Board would need to remand the case for further determination by the Agency of the reasonableness of the costs associated with the clean-up of the site. If however, the tanks removed in October of 1993 constituted a new release, then Section 57 *et seq.* of the Act would apply to the clean-up and reimbursement. In this case, the Agency has reviewed the

reimbursement application as controlled by Section 57 of the Act. (Ag. Br. at 2.) Therefore, the Board must decide if the Agency correctly determined that the tank removal of October 1993 was a new release and properly applied the provisions of Section 57 of the Act in this case.

FACTS

The FS facility is located at 1001 S. Eastwood Drive, which is north of the Chicago and Northwestern railroad tracks in Woodstock, Illinois. (Book II at 504.) The facility is surrounded by commercial and residential properties. (*Id.*) The area includes a metal factory to the east with residences and office buildings to the north. (Book II at 504.)

In November of 1991, Dahl and Associates (Dahl) completed a site-assessment for the FS facility. (Book II at 499-512.) Dahl had been retained in July of 1990 to provide environmental property evaluation services for FS. (Book II at 505.) Dahl initially extracted soil samples from seven test borings around the facility. (Book II at 503.) The analyses of the soil samples confirmed the presence of petroleum hydrocarbons in six of the test borings. (Book II at 505.) Dahl then performed tightness tests on the three 10,000 gallon tanks. After two tests, the north and south 10,000 gallon tanks, Tank 2 and Tank 3, at issue in this appeal, were certified as tight and no report was given for the west (Tank 1) gasohol tank. (Book II at 505, 626.)

A second site assessment phase was undertaken with an additional seven test borings and three groundwater monitoring wells. (Book II at 505, see also 527.) Soil samples from all 14 test borings had field photoionization detector (PID) values that ranged from less than 1 to 170 parts per million (ppm) when screened in the field. (Book II at 506.) Volatile organic compounds were detected in six of the fourteen test borings and the samples were submitted for laboratory analyses for benzene, toluene, ethylbenzene, total xylenes and hydrocarbons. (*Id.*) In two of the test borings (TB), TB5 and TB6, the levels exceeded the Agency cleanup levels for soils. (Book II at 506.) Test borings 5 and 6 are west northwest of Tank 1. (Book II at 527.) Based on the data collected, Dahl recommended that the release be reported to the proper authorities and that the 10,000 gallon gasohol UST (Tank 1) be removed. (Book II at 510-511.)

On January 24, 1992 a leak from an underground tank was reported to the Illinois Emergency Services and Disaster Agency (known currently as Emergency Management Agency) (IEMA) by the petitioner. (Pet. Br. at 3; Book II at 628.) The site number issued to the site by IEMA at that time was 92-0217. (*Id.*) On February 25, 1992, Tank 1 was removed. (Pet. Br. at 3; Book II at 626.) Although the tank was not visibly corroded and no holes

were found, the tank had failed two tightness tests. (Book II at 626.) Contamination was found on the north floor and north walls. (*Id.*)

On April 9, 1992, Dahl submitted a 45-day report to the Agency on behalf of the petitioner. (Book II at 452-470.) The report notes that a "significant" release for which the petitioner would be seeking reimbursement had occurred. (Book II at 458.) The report further indicates that the "only soil sample that exceeded IEPA LUST cleanups levels was from the tank bottom at the north end . . .". (Book II at 463.) Dahl stated that overexcavation was not attempted because "a previous site investigation [the November 1991 assessment] indicated that contaminated soils were found over 100ft west of the tank". (*Id.*) The 45-day report also established that the soil, which was suspected of contamination had been excavated and stockpiled on plastic at the site pending laboratory analysis and then the soil was manifested for offsite disposal. (Book II at 464, 465.)

In February of 1993, the Agency received an "Underground Storage Tank Fund Reimbursement Eligibility and Deductible Application". (R. at 165-168.) On this certified and notarized form, petitioner indicated that there had been a release from only one tank (Tank 1). (R. at 166.) The petitioner also stated that the other two 10,000 gallon tanks (Tank 2 and Tank 3) had not had a release and the tanks were still in service. (R. at 168.) After the submission of the eligibility and deductible application, several correspondences were exchanged due to some minor confusion relating to tanks which are not at issue in this appeal. The confusion was resolved and on May 17, 1993, the Agency informed petitioner that it was eligible to seek reimbursement. (R. at 159-160.) The eligibility letter indicated that any corrective action associated with five of the tanks at the site were eligible for reimbursement. (R. at 159.) The five tanks which were eligible according to the letter were:

- 3 - 10,000 gallon gasoline USTs
- 1 - 1,000 gallon diesel UST
- 1 - 560 gallon used oil UST

(R. at 159.)

Only the three 10,000 gallon tanks (Tank 1, Tank 2 and Tank 3) are of concern in this appeal.

In the summer of 1993, FS terminated its relationship with Dahl. (Tr. at 33.) Mr. Riley Johnson, the manager for FS, hired Environmental Contractors (ECI), a former subcontractor of Dahl's in August or September 1993 to continue the site remediation. (Tr. at 33-34.)

On September 13, 1993, the Office of State Fire Marshal

(OSFM) received from ECI and FS an application for a permit to remove USTs. (Book I at 210.) The form indicates that the 10,000 gallon tanks are still in use. (*Id.*) The form also indicates that the reason for removal is "property transfer". (Book I at 210.) This form was signed by Matt Warneke, a representative of ECI who had been on site during the removal of Tank 1 in February of 1992. (Tr. at 43; Book I at 211.)

On October 18, 1993 all the remaining tanks were removed and it was determined that releases had occurred from at least five of the tanks. (Pet. Br. at 6.) Mr. Warneke testified that the notification was amended because "before the state fire marshal would leave the site, she requested that it [the release] be called in to the Illinois EPA". (Tr. at 49-50.) On November 29, 1993, OSFM received from the petitioner an "Underground Storage Tank Fund Eligibility and Deductibility Application". (R. at 154-156.) That application indicated that the occurrence number for which petitioner sought reimbursement was "92-0217 AMENDED 10-18-93". (R. at 155.) On December 21, 1993, the OSFM sent a letter to Mr. Johnson stating that FS was eligible to seek reimbursement for corrective action associated with three 10,000 gallon tanks. (R. at 151.)

On May 10, 1994, ECI submitted a 45-day report on the October 1993 tank removal to the Agency. (Book I at 159-178.) The report indicates that gasoline had been released and the tank system removed. (Book I at 161.) The report further indicates that contaminated soil was removed from the site. (Book I at 164.)

FS submitted an application for reimbursement to the Agency on May 9, 1994 and supplied additional information on August 11, 1994. (Pet. Br. at 7; R. at 6, 84.) FS requested a total of \$89,574.53. (R. at 28.) On September 6, 1994, the Agency notified FS that the amount the Agency would reimburse is \$32,745.31. (R. at 28.)

ARGUMENTS

The Agency argues that there were two separate releases occurring and confirmed at the same site; the first release confirmed on February 25, 1992 and the second confirmed on October 18, 1993. (Ag. Br. at 4.) In support of its position, the Agency points to the OSFM log which indicated that the area of contamination found when Tank 1 was removed in February 1992 was located on the north floor and the north walls of the excavation. (Ag. Br. at 5 citing Book II at 626 and 628.) Further, the Agency points out that Dahl prepared a soil contamination map indicating that the estimated area of soil contamination encompassed test borings 5 and 6 and extended northwest from the February 1992 excavation. (Ag. Br. at 5-6; Book II at 312.) The tanks at issue on appeal (Tank 2 and Tank 3

on the maps) are located southeast of the February 25, 1992 excavation. (Ag. Br. at 6.)

The 45-day report for the February 1992 tank removal also indicated that a south side wall, the south tank bottom, the southeast sidewall and the southwest sidewall of the February 1992 excavation were "clean of contamination". (Ag. Br. at 8, citing Book II at 472.) Thus, the Agency maintains that "[s]ince a clean wall existed between the two excavations, it is clear that two separate releases occurred at the Northern F.S. site." (Ag. Br. at 9.)

The Agency also argues that the site-assessment performed in November of 1991 indicated that the tank (Tank 1) removed in February of 1992 was leaking but not the two tanks (Tank 2 and Tank 3) removed in October of 1993. (Ag. Br. at 7.) The Agency points out that Tank 2 and Tank 3 passed tank tightness tests in 1991, while Tank 1 failed the February 1992 tank tightness tests. (Book II at 505.)

To further bolster its argument, the Agency points out that on February 23, 1993, petitioner submitted an eligibility and deductibility application which indicated that there had been a release from only one underground storage tank. (Ag. Br. at 11, citing R. at 165-166.) Further, the petitioner indicated that the two tanks (Tank 2 and Tank 3) removed in October of 1993 were still in service and had not had a release. (R. at 168.)

With regards to the tanks removed in October 1993 (Tank 2 and Tank 3), the Agency points out that the petitioner again notified IEMA of a release and submitted a second eligibility and deductibility application. (Ag. Br. at 15; Book II at 306; R. at 154.) Petitioner also indicated on the permit for removal that the reason for removal of Tank 2 and Tank 3 was property transfer. (Book I at 210.) Further, the permit removal indicated that as of September 8, 1993 the two tanks were still in use. (Ag. Br. at 21, citing Book I at 210.)²

The Agency also discusses the fact that the 45-day report for the October 1993 tanks "indicate that the wall of the October 18, 1993 excavation in the direction of the February 25, 1992 excavation was clean of contamination. Specifically, the Northeast Bottom, the middle of the North Wall, the Northwest

² The Agency also argues that if the two tanks (Tank 2 and Tank 3) were suspected of leaking since 1992, the failure to remove those tanks from service violates Board regulations. (Ag. Br. at 20.) Specifically, the Agency maintains that Sections 731.161(b) and 731.162(a)(1) require the removal of a tank from service if a leak is suspected. (*Id.*)

wall and the West Wall to the North were all found to be below detection limits". (Book I at 173, 283; Tr. at 73-75; Ag. Br. at 18.) In summary the Agency states that it is reasonable to conclude from the analytical data that two releases occurred at the site. (Ag. Br. at 19.)

Petitioner argues that the record clearly supports the fact that only one incident occurred and was reported in February of 1992. (Pet. Br. at 10.) Mr. Riley Johnson, FS manager, stated that the relationship with the original consultant, Dahl, was terminated because FS believed that the contamination reported in the November 1991 site-assessment was not being cleaned-up. (Tr. at 33-34.)

Petitioner relies on the testimony of Mr. Warneke, a representative of ECI. (Pet. RBr. at 10.) At hearing, Mr. Warneke stated:

At that time [August/September of 1993], based on a review of some of the investigation work Dahl had done and the soil and groundwater surrounding the additional tanks that were on site, the two 10,000, two abandoned 500 gallon tanks, it appeared that there were hits in the soil surrounding those tanks.

And we recommended that it was likely that they might be a source of contamination and that they should be removed. (Tr. at 45.)

Mr. Warneke went on to state that it was his opinion that the site could not be cleaned up without removal of the remaining tanks. (Tr. at 45-46.) Further, the petitioner points out that the fact that contamination was found when the tanks were removed in October of 1993 also supports the fact that only one incident occurred at the site. (Pet. Br at 9.)

Petitioner also maintains that the Agency's decision that two releases occurred was based solely on the filing of the second incident report. (Pet. Br. at 10.) Petitioner argues that confusion over what paperwork needed to be filed after the amendment to the UST law resulted in a second eligibility and deductibility form being filed. (Pet. RBr. at 10.) Petitioner states that it "should not be penalized for following the law and insuring that state officials were made aware of the contamination at the Woodstock Site". (Pet. Br. at 10.)

CONCLUSION

After a careful review of the record the Board affirms the Agency's determination. The record supports the proposition that the two tanks (Tank 2 and Tank 3) removed in October of 1993 had not had a release in February of 1992. Mr. John Wilson, an employee of petitioner responsible for "all of the environmental

activities" (Tr. at 10) testified that at the time of the submission of the eligibility and deductible application in February 1993 "[w]e had no knowledge of any release at that point in time" from the other tanks. (Tr. at 27.) Further, that application, a certified, notarized document, which was submitted one year after Tank 1 was removed, states that only one tank had had a release and that the tanks which were later removed were still in use. (R. at 165-168.) Thus, by the petitioner's own admission a release was not known in February of 1992 for the remaining tanks (including Tank 2 and Tank 3 at issue in this appeal).

Further, with the exception of one test boring (TB 3) the record establishes that the estimated soil contamination was in the opposite direction from the two tanks removed in October of 1993. (Book II at 312, 499-523.) In addition, the tightness tests performed on Tank 2 and Tank 3 as a part of the initial site-assessment indicated that the tanks were "tight" at the time of the initial assessment. (Book II at 505.) Thus, the record supports a determination that only Tank 1 had had a release in February 1992.

With regards to the decision to remove the other tanks, the Board finds highly persuasive the fact that the two 10,000 gallon tanks removed (Tank 2 and Tank 3) in October of 1993 were still in service as of September 1993. (Book I at 210.) The new consultant group ECI, even after determining that removal of the tanks was necessary, did not immediately remove the tanks from service. (Tr. at 59.) Further, Mr. Warneke opined that it was necessary to remove the tanks to fully remediate the site; however, the basis for that opinion was the data originally collected by the first FS consultant engineer, Dahl and Associates. Dahl had used the same data to estimate that the soil contamination extended northwest of Tank 1, which was the opposite direction of Tank 2 and Tank 3 at issue in this appeal. Further, Dahl used the data to determine that only Tank 1 should be removed. Therefore, the Board finds that the tanks removed in October 1993 were a separate incident and are properly considered pursuant to Section 57 of the Act.

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

ORDER

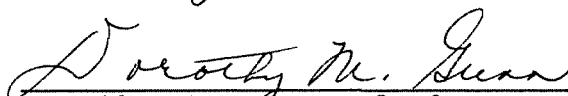
The Board affirms the determination by the Illinois Environmental Protection Agency that the tank removal of October 1993 was in response to a new release, and, therefore, the Agency properly applied the provisions of the Section 57 *et seq.* of the Illinois Environmental Protection Act in calculating reimbursement from the underground storage tank fund.

This docket is hereby closed.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 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 18th day of May, 1995, by a vote of 6-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board