

ILLINOIS POLLUTION CONTROL BOARD
August 26, 1993

CONSOLIDATION COAL COMPANY,)	
)	
Petitioner,)	
)	
v.)	PCB 93-84
)	(UST Fund)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

PATRICK JOYCE and DENISE M. DRUHOT, of BROWN, HAY & STEPHENS,
APPEARED ON BEHALF OF PETITIONER

TODD RETTIG, of the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
APPEARED ON BEHALF OF THE RESPONDENT

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

On May 6, 1993, Consolidation Coal Company ("CCC") filed a Petition for Review of an UST Fund Reimbursement Denial. This matter was accepted for hearing on May 20, 1993. The Illinois Environmental Protection Agency ("Agency") filed the record on May 26, 1993. The hearing was held on Thursday, July 15, 1993. CCC filed its brief on July 30, 1993. The Agency filed its brief on August 2, 1993.

There is no factual dispute in this case. The decision revolves around the proper interpretation of one statutory clause.

FACTS

On January 13, 1993, CCC filed an application for Reimbursement from the Underground Storage Tank Fund with the Agency. The Agency requested CCC to amend the application for clarification of what products were in tank nos. 2 through 5. The Agency informed CCC in a letter dated April 5, 1993, that CCC was ineligible to seek payment of corrective action costs for: 1) tank no. 2 containing 90 weight oil, 2) tank no. 3 containing fleet 10 oil, 3) tank no. 4 containing fleet 30 oil and 4) tank no. 5 containing antifreeze. The tanks in question are located at Consolidation Coal's facility at Burning Star No. 4 Mine, R.R. #1, in Perry County, Illinois. The Agency denied reimbursement to CCC for tank nos. 2, 3, 4, and 5, because the content of these tanks did not meet the definition of "petroleum" as found in Section 22.18b(a)(5). Subsequently, CCC withdrew its request regarding tank No. 5 containing antifreeze. The parties stipulated that the sole issue on review is whether the 10, 30 and 90 weight lubricating oils meet the definition of petroleum.

Section 22.18b(a)(5) of the Illinois Environmental Protection Act ("Act") states as follows:

"(5) The release petroleum is within one or more of the following categories:

- (A). Fuel, as that term is defined in Section 1.19 of the Motor Fuel Tax Law.
- (B). Aviation Fuels, heating oil, or kerosene.
- (C). Used oil. For the purposes of this Section, "used oil" means any oil that has been refined from crude oil used in a motor vehicle, as that term is defined in Section 1.3 of the Motor Fuel Tax Law, and that, as a result of that use, is contaminated by physical or chemical impurities.

415 ILCS 5/22.18b(a)(5) (1992)

In this proceeding CCC is asserting that the materials in question are "Motor Fuels" as stated in (A) above. Therefore the definition of motor fuel is relevant to this proceeding. Section 1.1 of the Motor Fuel Tax Law provides as follows:

"1.1 "Motor Fuel" means all volatile and inflammable liquids produced, blended or compounded for the purpose of, or which are suitable or practicable for, operating motor vehicles. Among other things, "Motor Fuel" includes "Special Fuel" as defined in Section 1.13 of this Act".

35 ILCS 505/1.1 (1992)

DISCUSSION

CCC argues that the materials in question are volatile or inflammable liquids and that they are used for the purpose of operating motor vehicles. CCC does not assert that these materials are used motor oils. CCC provided testimony, by Mr. Gefferth, that the 10, 30, and 90 weight oil is used in the cars, trucks, pick up trucks, earth moving bulldozers and Caterpillar scrapers at the mine. (R. 19). The materials in the underground tanks are all virgin motor oils because they have never been added to a motor vehicle. Mr. Gefferth also testified that those materials are volatile or inflammable. (R. 23). Mr. Gefferth stated that these motor vehicles would not be able to operate

without such lubricating materials. (R. 22-23).

The Agency argues that the materials in question are not motor fuel. The Agency asserts that Section 22.18b(a)(5)(C) specifically lists "used motor oil", but no portion of the Act lists virgin motor oil. The Agency asserts that because the Act specifically includes used motor oil, the lack of language regarding virgin motor oil means the General Assembly intended to exclude it. The Agency also asserts that lubricating oils do not meet the definition of "fuel" and that accordingly, lubricating oils could never meet the definition of motor fuel. The Agency notes that lubricating oils are not burned in the engine to produce energy, and that "The American Heritage Dictionary of the English Language (1982)" defines fuel as, "anything consumed to produce energy". The Agency provided testimony, by Mr. Paul Lake, that the Agency has consistently denied virgin motor oil for reimbursement under the UST fund and those decisions have never been appealed to the Board. (R. 54-56).

CONCLUSIONS

The parties agree that if the lubricating oils meet the definition of "motor fuel" from the Motor Fuel Tax Law, then reimbursement is appropriate; if they do not meet the definition, reimbursement is not appropriate. However, that definition is not a statutory provision standing in isolation. The definition is part of a comprehensive statute, the Motor Fuel Tax Law, administered by the Department of Revenue. If a material meets the definition of "motor fuel", then it is subject to the taxes and collection protocols contained in the statute and administered by the Department of Revenue. In such circumstances, any interpretation provided by the Department of Revenue would be quite persuasive. However, CCC has provided no testimony or argument to show that the Department of Revenue was requested to provide such interpretation or, in fact, considers lubricating oils to be "motor fuel" subject to the Motor Fuel Tax Law. Nor has CCC provided judicial interpretations providing that lubricating oils are subject to taxation under that statute. Moreover, CCC has admitted that it has never paid Illinois Motor Fuel Tax on the contents of tanks 2, 3, and 4. (Motion to Amend Record Instantly July 22, 1993, Affidavit of John Gefferth, ¶4). The Board finds that CCC has failed to demonstrate that lubricating oils meet the definition of "motor fuel" as found in the Motor Fuel Tax Law.

Accordingly, the Board concludes that the lubricating oils in question here (tanks 2, 3, and 4) are not, "Fuel, as that term is defined in Section 1.19 of the Motor Fuel Tax Law." [Section 22.18b(a)(5)(A)]. Therefore, they are not "within one of the following categories of released petroleum" as stated in Section 22.18b(a)(5) of the Act. The Agency decision to deny eligibility was appropriate and the Board affirms the Agency decision.

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

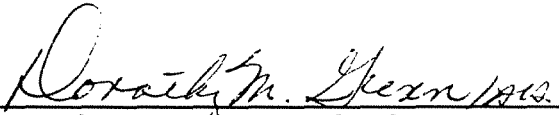
ORDER

The Board hereby affirms the Agency decision of April 5, 1993, denying eligibility for tanks 2, 3, and 4, at Consolidation Coal Company's facility at Burning Star No. 4 Mine, R.R. #1, in Perry County, Illinois.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1992)) provides for the appeal of final orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill. Adm. Code 101.246, Motion for Reconsideration.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 26th day of August, 1993, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board