ILLINOIS POLLUTION CONTROL BOARD
June 4, 1992

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| CLINTON COUNTY OIL CO., INC., HOFFMAN/MEIER'S SHELL and CLARENCE MEIER, | ) | |
| Petitioners, | ) | |
| v. | ) | PCB 91-163 |
| | ) | (Underground Storage Tank |
| ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, | ) | Fund Reimbursement) |
| Respondent. | ) | |

ORDER OF THE BOARD (by M. Nardulli):

This matter is before the Board on the April 30, 1992 motion for reconsideration filed by the Illinois Environmental Protection Agency (Agency). On May 11, 1992, petitioners filed their response.

The Agency seeks reconsideration of the Board's March 26, 1992 decision reversing the Agency's determination that petitioners' claim for reimbursement from the Underground Storage Tank Fund (Fund) is subject to a $50,000 deductible. Petitioners appealed the Agency's decision that petitioners were eligible to access the Fund subject to a $50,000 deductible. Based upon evidence adduced at hearing, the Agency argued for the first time before the Board that petitioners were not even eligible to access the Fund. The Board found that the Agency was bound by its initial determination of eligibility and concluded that the Agency's imposition of the $50,000 deductible was erroneous.

Petitioners contend that the Agency's motion for reconsideration should be denied because the Agency has failed to raise any new facts or issues which were not previously considered by the Board. The Board agrees that the Agency's motion does not raise any new facts. However, the motion does raise a new argument in support of the Agency's contention that the Board erred in refusing to consider the issue of eligibility. Therefore, the Board will consider the merits of the Agency's motion.

Both the Board and the Agency agree that the UST review process, like the permit review process, is an administrative continuum which is not complete until the Board holds a hearing and issues its final determination. However, relying on this principle the Agency contends that it should be allowed to reach a new UST determination where it is surprised by the evidence introduced at hearing. The Agency asks that this case be remanded to the Agency to "amend" its UST determination. The Agency argues that this case should be remanded for a second determination because "new"

evidence "unavailable" to the Agency when it reached its initial determination of eligibility was introduced by petitioners at the Board hearing. This "new" evidence is simply petitioners' testimony of the facts surrounding the removal of the USTs and installation of new tanks. This testimony is not inconsistent with petitioners' application and was offered in support of petitioner's contention that it did not have constructive knowledge of the release before July 28, 1989. There is nothing indicating that the Agency was prevented from obtaining this information during its review of petitioner's application. In fact, the record indicates that the Agency sought more information only after it had rendered its final determination on petitioners' application.

Under the permit review process, which applies to UST decisions (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1022.18(g)), a hearing is not held at the Agency level, but is provided before the Board when an applicant challenges the Agency's UST determination. In appealing to the Board, an applicant is seeking review of the Agency's decision. The Agency's UST decision frames the issue on review. (See e.g., Pulitzer Community Newspaper v. IEPA (December 20, 1990, PCB 90-142 at 7.) At the Board hearing the applicant and the Agency may, as happened here, present evidence in support of their respective positions regarding accessing the UST Fund. While it is true that the Agency's decision is not final for purposes of review by the appellate court, the Agency is bound by its determination on review before the Board. In this sense, the Agency's determination is "final". If the Agency were free to change its mind after it had reached its "final" determination, the Agency's initial determination would be rendered meaningless.

Under the Act, the Agency reviews applications for reimbursement from the Fund and determines what costs are reimbursable. (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1022.18b(d)(4).) The Board sees no reason to depart from its prior holding that, upon making its determination, the Agency is bound by that decision before the Board. The Board has reconsidered its decision of March 26, 1992 and affirms its determination that eligibility was not at issue and that the Agency's imposition of the $50,000 deductible must be reversed.

IT IS SO ORDERED.

R. Flemal and B. Forcade dissent.

Section 41 of the Environmental Protection Act (Ill. Rev. Stat. 1989, 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 order was adopted on the 4th day of June, 1992 by a vote of 5-2.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board