ILLINOIS POLLUTION CONTROL BOARD
March 26, 1992

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

JON K. ELLIS APPEARED ON BEHALF OF PETITIONER;

RONALD L. SCHALLAWITZ APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by M. Nardulli):

This matter is before the Board on petitioners' September 5, 1991 filing of a petition for review pursuant to Section 22.18b(g) of the Environmental Protection Act. (Ill. Rev. Stat. 1989, ch. 111 1/2 par. 1022.18b(g).) Petitioners Clinton County Oil Co., Inc., Hoffman/Meier's Shell and Clarence Meier (collectively Clinton) seek review of the Illinois Environmental Protection Agency's (Agency) imposition of a $50,000 deductible on Clinton's claim for reimbursement from the Underground Storage Tank Fund (Fund) for corrective action costs associated with a release from an underground storage tank (UST) (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1022.18b(d)(3)(C)(ii)). A hearing was held on November 8, 1991, attended by members of the public. In addition to the parties' briefs, the Illinois Petroleum Marketers Association filed an amicus curiae brief.

FACTS

Clinton owned two USTs located Hofffman/Meier's Shell, Highway 161 and Main Street in Hoffman, Clinton County, Illinois. (Tr. 13-14.) Clinton supplied Hoffman/ Meier's Shell with gasoline. (Id.) A gasoline service station has been located at the site for over 40 years. (Tr. 61.) Clinton seeks reimbursement for corrective action costs associated with a 1,000 gallon UST and a 2,000 gallon UST installed in 1981, registered April 1, 1986 and taken out of service and removed December 19, 1988. (R. 3; Tr. 82.) There have been other USTs located in the same hole as the two tanks for which reimbursement is sought. (Tr. 68.)

The subject tanks were removed in 1988 for economic reasons. (R. 4) The Office of State Fire Marshall (OSFM) observed the tank removal. (Tr. 27.) Thomas Aaron of OSFM testified that the USTs

had not been leaking, that the visual appearance of the soil was clean and there was no odor and that he did not recommend that the Emergency Services and Disaster Agency (ESDA) be notified. (Tr. 28-34, 36-38.) According to Aaron, he has never left a site where he felt a release had occurred without the responsible party notifying ESDA for an incident number. (Tr. 34.)

Dale Wade, manager of Clinton Oil, testified that both tanks were wrapped in polyethylene and that he has never removed a tank wrapped in polyethylene that has leaked. (Tr. 20.) John Liening, maintenance supervisor for Clinton Oil, was present at the tank removal and testified that "[b]oth tanks were in good condition when we took them out", he did not recall seeing any holes in the tanks and that he did not smell any fumes. (Tr. 45, 48.) Clarence Meier, operator of Hoffman/ Meier Shell, testified that he was also present at the removal and that there were no leaks to his knowledge. (Tr. 53.) Wade also stated that he had no idea where the source of the contamination came from. (Tr. 69.)

Clinton's application states that it became aware of the release on March 25, 1991. (R. 3.) Those testifying on behalf of Clinton stated that the first time they became aware of the release was on March 25, 1991 when digging began for the installation of two new 5,000 gallon tanks. (Tr. 15, 55-58, 87.) The proposed location of the new tanks is approximately 30-40 feet from the location of the subject tanks. (Tr. 59; Pet. Ex. 2.) Extensive contamination was discovered during excavation for the 5,000 gallon tanks. (Tr. 121-22.) Also on March 25, 1991, ESDA was notified of the release. (Tr. 66, 70.)

Clinton's application for reimbursement states that the release is a "product overfill". (R. 4.) Vance Luksetich, secretary for Clinton Oil, testified that he helped prepare the application and that "product overfill" was checked because "[w]e knew it was not a tank leak ... [w]e didn't know of any product spills on the property, so we were left with the fourth... and only alternative to check this box." (Tr. 79-80.)

William Eves of the Agency testified that he reviewed Clinton's application and that he concluded that if the USTs "were removed in December of 1988 and there was contamination present, they would have been aware of that prior to the cutoff date of July 28, 1989." (Tr. 100.) Eves testified that it is the Agency's position that, in applying the $50,000 deductible, if a tank is removed prior to July 28, 1989, such removal constitutes constructive knowledge. (Tr. 104.)

On August 1, 1991, the Agency imposed the $50,000 deductible on the basis that Clinton had knowledge of the release prior to July 28, 1989. Subsequent to rendering its decision, on August 30, 1991, the Agency sent Clinton a letter requesting "additional information regarding the history of this site prior to March 25,

1991." (Resp. Brief Ex. A.) On November 4, 1991, Clinton responded to the Agency's request for more information. Clinton seeks review of the Agency's determination arguing that the correct deductible is $10,000 because it established that it did not have knowledge of the release until March of 1991.

DISCUSSION

The issue is whether Clinton met its burden of establishing that it did not have knowledge of the release prior to July 28, 1989 such that the Agency incorrectly applied the higher deductible. The Agency asserts that, not only did Clinton fail to meet its burden, it actually established that corrective action costs were not incurred as a result of a release from registered USTs. Therefore, the Agency now asserts that Clinton is not even eligible to access the Fund. Clinton alleges that the Agency cannot now assert that it is ineligible for the Fund and that the only issue is whether the deductible determination is correct.

The Board first addresses whether the Agency can change its mind and assert lack of eligibility as its reason for denying access to the Fund. The Agency based its new determination on a November 4, 1991 letter sent by Clinton in response to the Agency's request for more information and upon testimony at hearing. The Agency made no attempt to introduce this November letter at hearing or to supplement the record with the letters.

The Board has previously noted that, pursuant to Section 22.18b(g) of the Act, UST determinations are governed by permit appeal procedures. (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1022.18b(g); Rosman v. IEPA (December 19, 1991), PCB 91-80 at 4-7; Pulitzer Community Newspaper v. IEPA (December 20, 1990, PCB 90-1425-6.) Consequently, the Agency is bound on review by the reasons given in its denial letter regarding access to the Fund. (Pulitzer (PCB 90-1420 at 7.) Fundamental fairness would be violated if the Agency were free to cite a new basis for its Fund determination after it has taken final action and after hearing has been held. (Pulitzer (December 20, 1990), PCB 90-142 at 7.) The Board concludes that the Agency cannot assert lack of eligibility to access the Fund for the first time in its post-hearing brief. The Agency's arguments in this regard will not be considered by the Board on review.

Additionally, it is well established that an administrative agency has no inherent authority to amend or change its decision and may undertake reconsideration only where authorized by statute. (Pearce Hospital v. Public Aid Commission (1958), 15 Ill.2d 301, 154 N.E.2d 691; Reichold Chemicals Inc. v. PCB (3d Dist. 1991), 204 Ill. App. 3d 674, 561 N.E.2d 1343.) Although the Board possesses such power, the appellate court has held that the Agency has no such reconsideration powers. (Reichold, 561 N.E.2d 1343.)
Here, the Agency deemed Clinton eligible to access the Fund and

then determined the appropriate deductible amount. The Agency has no power to reconsider this final decision. Arguments raised by the Agency after hearing contending that Clinton is not eligible for the Fund are not properly before the Board on review.

Lastly, the Agency's request for more information after it had rendered a final decision on Clinton's application for reimbursement and Clinton's response are outside the record and will not be considered by the Board in its review. The Agency made no attempt to introduce this information at hearing[1], nor did the Agency move to supplement the record. Therefore, not only was this information sought and obtained after the Agency rendered its final decision, the Agency made no valid attempt to introduce the documents into the record before the Board. The Board also notes that the Agency did not utilize its procedure initiated in July of 1991 of requesting supplemental information on when an applicant first had knowledge of the release where the application indicated tank removal prior to July 28, 1989. (First Busey Trust & Investment Co. v. IEPA February 27, 1992), PCB 91-213 at 7.) Had the Agency followed this procedure, the information discovered at hearing would likely have been available to the Agency prior to rendering its final decision.

Based upon the above, the Board concludes that the issue of eligibility is not before the Board on Clinton's appeal of the Agency's deductible determination. Because the Agency's argument of lack of eligibility is outside the record on review, the Board will not rule upon the Agency's allegation that Clinton failed to meet its burden of establishing a release from a UST.

The only remaining issue is whether Clinton established that it did not have constructive knowledge that the release occurred prior to July 28, 1989. (Ill. Rev. Stat. 1989, ch. 111 1,2, par. 1022.18b(d)(3)(C)(ii).) Section 22.18b(d)(3)(C)(ii) of the Act provides that if costs incurred were in response to a release of petroleum which first occurred prior to July 28, 1989 and the owner/operator had actual or constructive knowledge that such a release occurred prior to that date, the deductible is $50,000 rather than $10,000. (Id.) The Act imposes a burden on the applicant to show that it did not have such knowledge. (Id.)

The Agency presumed constructive knowledge from the fact that Clinton's USTs were removed prior to July 28, 1989. The IPMA's brief challenges this presumption. Previously, the Board stated

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[1] The affidavit of Tod Rowe, an Agency LUST division employee, states that Clinton's response was hand delivered to the Agency four days before hearing. The affidavit also states that the information in the letter is virtually identical to testimony given at hearing. (Agency Brief Ex. A.)

that the Agency may presume a release occurred prior to July 28, 1989 when the UST is removed before that date. (Lawrence Cadillac v. IEPA (February 6, 1992), PCB 91-133 at 3.) The applicant then has the burden to establish that it did not have actual or constructive knowledge of the release prior to July 28, 1989. (Id.) However, the Board questions the Agency's practice of presuming knowledge based solely on the date of tank removal because the date of tank removal does not conclusively establish the date of knowledge of the release. The Board notes that the Agency's new application form developed in July of 1992 now asks the applicant to submit information on the date of knowledge of the release with the application. (First Busey Trust & Investment Co. v. IEPA (February 27, 1992), PCB 91-213 at 7.)

Here, the record establishes that when the two USTs, as well as lines, pumps and dispensers, were removed on December 19, 1988, it did not appear to anyone present that there had been a release. In addition to persons employed by Clinton and Hoffman/Meier's Shell (Tr. 45, 48, 53), Thomas Aaron of the OSFM testified that it did not appear that the tanks had leaked, he neither saw or smelled any evidence of contamination and he did not recommend that ESDA be notified as he normally would have had he suspected a release. (Tr. 28-34, 36-38.) Aaron testified that, at that time, OSFM was operating under the "sight and smell procedure and visual appearance of the soil" and that the trenches appeared clean. (Tr. 28.) According to Clinton's witnesses, they first became aware of the release on March 25, 1991 while excavating the area in preparation of installing new tanks about 30-40 feet from the location of the subject UST. (R. 3; Tr.15, 55-58, 87; Pet. Ex. 2.) ESDA was notified of the release on March 25, 1991. (R. 3; Tr. 66,70.)

The Agency argues that, due to the extensive contamination revealed during the March 1991 excavation, Clinton must have been aware of the release at the time the tanks were removed. The Agency also argues that since Clinton indicated that the release was a product of overfill, such a release would have been visible. Agency project manager Karl Leiser testified that such extensive contamination would have been apparent upon excavation. (Tr. 132.)

The record does indeed reveal extensive contamination. However, the record also establishes that those present when the tanks were removed in 1988, including a representative of OSFM, did not see or smell any contamination indicating a release, nor did they see any holes in the tanks which would indicate a release. The testimony of Thomas Aaron completely supports Clinton's position that it did not have actual or constructive knowledge of the release when the tanks were removed in 1988. While the Agency may feel that Clinton must have known of the release when the tanks were removed because of the extensive contamination, the testimony of those present at the removal indicates otherwise. The Agency's presumption that Clinton had the requisite knowledge at the time

the tanks were removed because of the extent of the contamination is not supported by any testimony of those actually present at the tank removal.

The Agency also relies on the fact that, on its application form, Clinton stated that the release was "a product of overfill" in support of its contention that Clinton had constructive knowledge of the release. Again, the Agency presumes that since the tank was removed before July 28, 1989, the overfill must have occurred before that date. This presumption is reasonable. As with the Agency's argument that Clinton must have been aware of the release at tank removal due to extensive contamination, the Agency's argument with regard to the visibility of overfill is not borne out by the testimony of those present at the site. The Agency also appears to allege that Clinton intentionally misled the Agency by answering that the release was a product of overfill. However, Vance Luksetich, secretary for Clinton who completed the application form with the assistance of Ron Beavers of Armor Shield, testified that they were somewhat confused by the form. According to Luksetich, "We didn't know what else to put down. We knew it was not a tank leak. System leak did not seem possible. we didn't know of any product spills on the property, so we were left with the fourth ... and only alternative to check in this box." (Tr. 79-80.)

The Agency's application limits the applicant to a series of form answers which may not accommodate all factual situations. (R. 4; see also, Lawrence Cadillac v. IEPA (February 6, 1992) PCB 91-133 at 1-2.) Here, Clinton was unsure as to the type of release involved and was uncertain as to how to complete the Agency's form. The Board finds that this uncertainty about filling out the form provided by the Agency does not warrant imposition of the constructive knowledge deductible.

The Board concludes that Clinton has met its burden of establishing that it did not have constructive knowledge of the release prior to July 28, 1989. Therefore, the Agency's decision is reversed and this case is remanded to the Agency for imposition of a $10,000 deductible.

The Board also notes that it has decided to remand to the Agency those determinations of eligibility which did not reach the issue of reimbursibility of costs because such incomplete determinations are not appealable. (Ideal Heating v. IEPA (January 23, 1992), PCB 91-253.) However, this procedure has only been applied in cases where no hearing has been held. (Id.) Because a hearing had already been held in this case, the Board has decided the case on the merits.

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

ORDER

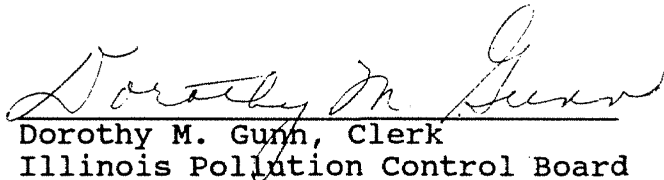
The Agency's imposition of the $50,000 deductible is reversed and this case is remanded for imposition of the $10,000 deductible.

IT IS SO ORDERED.

R.C. 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. 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 26th day of March, 1992 by a vote of 5-2.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board