ILLINOIS POLLUTION CONTROL BOARD
March 14, 1991

SPARKLING SPRING MINERAL WATER CO.,	)	
Petitioner,	)	
v.	)	PCB 91-9
	)	(Underground Storage
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	Tank Reimbursement)
Respondent.	)	

ORDER OF THE BOARD (by J. Theodore Meyer):

This matter is before the Board on a motion for summary judgment filed by the Illinois Environmental Protection Agency (Agency) on February 5, 1991. The Agency contends that there are no questions of law or fact in dispute. Petitioner Sparkling Spring Mineral Water Company (Sparkling Spring) did not file a response.

Sparkling Spring applied to the Agency for reimbursement of the costs of removing two underground storage tanks (USTs). On December 14, 1990, the Agency denied Sparkling Spring's request for reimbursement for the costs of removing a 1000 gallon tank, and determined that Sparkling Spring was subject to a $50,000 deductible for the costs of removing a 2000 gallon tank. On January 17, 1991, Sparkling Spring filed this appeal of the Agency's determination. The Agency now asks that the Board enter summary judgment upholding its decisions on both tanks.

After reviewing the Agency's motion and the record in this case, the Board grants the Agency's request for summary judgment on the Agency's determination that the costs of removing the 1000 gallon tank are not eligible for reimbursement. It is undisputed that the 1000 gallon UST was last used prior to 1972. (Agency Record (Rec.) at 000007.) The Agency notes that one of the criteria for establishing access to the UST fund is that the UST has been registered with the Office of the State Fire Marshal (OSFM). (Section 22.18b(a)(4) of the Environmental Protection Act (Act), Ill.Rev.Stat. 1989, ch. 111 1/2, par. 1022.18b(a)(4).) The Agency also states that OSFM will not register an UST that was not operated on or after January 1, 1974 (Ill.Rev.Stat.1989, ch. 127 1/2, par. 156(b)), and has provided an affidavit of an Agency employee which states that OSFM indicated that the 1000 gallon tank is considered unregisterable by OSFM because that tank was last operated before January 1, 1974. Although Sparkling Spring did not file a response to the Agency's motion for summary judgment, it did indicate in its application for reimbursement and in its petition

review of the Agency decision that the 1000 gallon UST cannot registered. (Agency Rec. at 000007; Pet. at 1-2.) Because it undisputed that the 1000 gallon tank is not and cannot be istered, and because the Act requires that tanks be registered order to qualify for reimbursement, the Board finds that there no genuine issues of material fact or law on the issue of the 0 gallon tank. Therefore, summary judgment is granted in favor the Agency on its determination that the 1000 gallon tank is not gible for reimbursement.

The Agency's request for summary judgment on its determination t the 2000 gallon tank is subject to a $50,000 deductible is e complicated. First, the Agency notes that Sparkling Spring's ition before this Board states that "the 2,000 gallon tank was leaking when removed from the ground, as evidenced by the State e Marshall [sic] on site." (Pet. at 1.) Sparkling Spring's lication to the Agency for reimbursement has indicated that the 0 gallon tank was leaking. (Agency Rec. at 000006.) The Agency ntains that the Act allows reimbursement for the costs of rrective action", and argues that the definition of "corrective ion" pertains only to releases of petroleum. (Section 18b(a)(3) and (e)(1)(c) of the Act.) The Agency therefore ues that Sparkling Spring is not entitled to reimbursement ause the 2000 gallon tank did not leak.

The Board is not persuaded. It is impossible to determine, m the statement in Sparkling Spring's petition or from ormation provided by the Agency, whether the tank was not king when it was removed from the ground, or that it never ked. The Board believes that there is a genuine issue of erial fact, so that summary judgment is not appropriate.

Second, the Agency apparently contends that there is no uine issue of material fact as to its determination that the 0 gallon tank is subject to a $50,000 deductible. The $50,000 uctible was applied based upon Section 22.18b(d)(3)(c)(ii), ch provides that if the costs are related to a release of roleum which first occurred prior to July 28, 1989, the uctible shall be $50,000 or $100,000 if the owner or operator actual or constructive knowledge of the release, and a lesser unt (usually $10,000) if the owner or operator did not have ual or constructive knowledge of the release. The owner or rator must prove that it had no actual or constructive knowledge at the release of petroleum for which a claim is submitted first urred prior to July 28, 1989." The Agency points out that it undisputed that the 2000 gallon tank was taken out of service February 1, 1988. (Agency Rec. at 000006.) The Agency then cludes that because the 2000 gallon tank was not operated after ruary 1, 1988, the contamination from that tank could not have urred after that date. Consequently, the Agency asserts that release occurred prior to July 28, 1989 and that Sparkling ing did not prove that it did not have constructive knowledge

of that release, and that therefore the deductible for the 2000 gallon tank must be $50,000.

Again, the Board is not persuaded that there is no genuine issue of material fact as to the amount of the deductible. The Board does not agree with the Agency's conclusion that simply because the 2000 gallon tank was taken out of service before July 28, 1989, the release must have occurred prior to that date. It is possible that the release happened sometime after the tank was taken out of service. In essence, it is impossible for the Board to determine when the release occurred, based on the facts before it. The Agency's request for summary judgment in its favor as to the 2000 gallon tank is denied. This case will proceed to hearing in accordance with the Board's January 24, 1991 order.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 14th day of March, 1991, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board