ILLINOIS POLLUTION CONTROL BOARD
December 6, 1991

WALTER J. MAQUET and MARLENE J. MAQUET, d/b/a MAQUET'S 66, Petitioners,	)	
v.	)	PCB 90-136 (Underground Storage Tank Fund)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

FREDERICK A. BERNARDI, APPEARED ON BEHALF OF THE PETITIONER;

RONALD SCHALLAWITZ, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, APPEARED ON BEHALF OF THE RESPONDENT.

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

This matter is before the Board on a petition for review filed on July 23, 1990, by Petitioners Walter J. Maquet and Marlene J. Maquet, doing business as Maquet's 66 (hereinafter "the Maquets"). The petition sought review of a decision by the Illinois Environmental Protection Agency (hereinafter "Agency") on June 20, 1990, determining that a $50,000 deductible should apply to the Maquet's request for reimbursement from the underground storage tank fund. A hearing was held on this matter in Pekin, Illinois on August 29, 1991. On October 1, 1991, Petitioner filed a Brief. On October 17, 1991, the Agency filed a Post Hearing Brief. On October 30, 1991, Petitioner filed a Reply Brief. On November 22, 1991, Petitioner filed a letter making a one-word correction to the October 30, 1991 Reply Brief.

This proceeding involves a retail gasoline dispensing station owned by the Maquets at 1311 N. 8th Street in Pekin, Illinois. In early 1989, the Maquets were considering a sale of the station to the Illico Independent Oil Company (hereinafter "Illico"). On Monday June 5, 1989, and continuing for two or three days afterward, the underground storage tanks, pump islands and concrete pad were removed. Soil samples were taken during tank removal; these soil samples later showed contamination. Since the tanks were removed in early June, 1989, contamination from the tanks must have occurred prior to that time. The question in this proceeding is whether the Maquets had actual or constructive knowledge of the contamination on the statutorily established date of July 28, 1989. After contamination was found, the appropriate state agencies were informed and the contamination was cleaned up.

As a result of the expenditures associated with clean up of the contamination, on May 22, 1990 the Maquets submitted an "Application for Reimbursement from the Underground Storage Tank Fund for Corrective Action Costs" to the Agency. The Agency's determination of June 20, 1990 (and the amended determination of August 22, 1990) concluded that the Maquets met all of the prerequisites for eligibility and reimbursibility under the Illinois Environmental Protection Act (hereinafter "the Act"), Ill. Rev. Stat, ch. 111 1/2, para. 1001, et. seq. The Agency further determined that the appropriate deductible was $50,000.00, because the Maquets had "actual or constructive knowledge" prior to July 28, 1989, that a release had occurred. The Maquets disagree that they had such knowledge. If the Maquets did not have such actual or constructive knowledge, the appropriate deductible under that provision would be $10,000. This presents the sole issue in the proceeding and it is primarily an issue of fact.

The provision of the Act governing the dispute in this proceeding is Section 22.18b(d)(3)(C)(ii), which provides:

> ii. If the costs incurred were in response to a release of petroleum which first occurred prior to July 28, 1989, and the owner or operator had actual or constructive knowledge that such a release had occurred prior to July 28, 1989, the deductible amount under subparagraph (A) of paragraph (3) of this subsection (d) shall be $50,000 rather than $10,000, unless subparagraph (B)(i) applies, in which case the deductible amount shall be $100,000. If the costs incurred were in response to a release of petroleum which first occurred prior to July 28, 1989, but the owner or operator had no actual or constructive knowledge that such a release had occurred prior to July 28, 1989, the deductible amount shall be as provided under subparagraph (A) or (B) of paragraph (3) of this subsection (d), whichever is applicable. It shall be the burden of the owner or operator to prove to the satisfaction of the Agency that the owner or operator had no actual or constructive knowledge that the release of petroleum for which a claim is submitted first occurred prior to July 28, 1989.

FACTUAL DISCUSSION

The Maquets leased the station from about 1967 until 1985 when they purchased the station. (Tr. 163). In early 1989 Mr. Brent Glassey, an agent with Clifton-Strode Real Estate Agency approached the Maquets about selling the station to Illico. On April 10, 1989 Illico caused soil samples to be taken from the property and sent for analysis to Randolph and Associates (Randolph and Associates subsequently became Environmental

Science and Engineering, Inc.; all subsequent references to either name will be "ESE"). Laboratory analyses showed no contamination. (Tr. 47; Pet. Ex. 1).

Subsequently, a "Contract to Purchase Real Estate" was negotiated between the Maquets and Illico. That contract was signed April 28, 1989, and an addendum was signed May 8 and 15, 1989; the contract called for a closing date on or before June 25, 1989. (Tr. 130-132; Record 000053-000054). Illico retained Misco Services to remove the underground storage tanks (Tr. 17); that removal took place from about June 4 to June 6. (Tr. 81-82). During the removal Mr. Donald May of Illico was present and took soil samples from the tank bed for conveyance to ESE. (Tr. 83). The closing did not take place on June 25, because the real estate agent, Mr. Glassey, had moved to Florida and the soil sample analysis results were not finished. (Tr. 15). On July 19, the soil analysis results from ESE were received by Illico, they showed significant contamination; Illico did not inform the Maquets of the soil analysis results. (Tr. 19). Nine days later, July 28, 1989, is the statutory time of significance.

In September 1989 Mr. Stropes of the Stropes Real Estate Agency approached the Maquets about selling the station and entered into an exclusive listing contract with them on September 14 or 17, 1989. (Tr. 43, 51, 136). Mr. Stropes approached Mr. Golwitzer of Illico about purchasing the station and on October 25, 1989 a Contract to Purchase was signed. (Tr. 52; Record 000055). Mr. Golwitzer and Illico kept the results of the June 5, 1989 soil samples from the Maquets until after this October 25, 1989 signing. On October 27, 1989, the Maquets received the test results (showing contamination) for the first time. (Tr. 55-56, 148). On behalf of the Maquets, Mr. Stropes contacted the Emergency Services and Disaster Agency on October 27, 1989, to report the release. (Record 000003). On November 10-14, 1989, the Maquets signed a contract with ESE to develop a clean up proposal. They had never previously had a contract with ESE or any other organization regarding testing at the station. (Tr. 137-139; Pet. Ex. 2). The contamination was subsequently cleaned up and the Maquets applied for reimbursement from the fund.

I. Agency Position

The Agency does not specifically argue that the Maquets had "actual" knowledge of the contamination before July 28, 1989. The Agency states that it had no information to establish actual knowledge and premised its decision on "constructive" knowledge. (Tr. 251-253). The Agency decision was premised upon two factors. The first factor was a telephone conversation of June 14, 1990 between Mr. Bur Filson of the Agency and Mr. Don May of Illico. The second factor was the Agency's assumption that ESE was retained for the June 5, 1989 sample analysis by the Maquets, rather than by Illico.

The June 14, 1990 telephone conversation forms the primary basis for the Agency decision. Mr. Filson of the Agency initiated the call because he had information indicating that, "there should have been some knowledge that the release first occurred prior to July 28, 1989." (Tr. 205). Mr. Filson summarized the conversation with Mr. May of Illico on an Agency telephone conversation record sheet. (Record 000063-000064). That record attributes the following statement to Mr. May, "Everything was fine around the UST's, however a problem was discovered around one of the islands. At that point some additional digging was done to try to find the extent and I left the site." (Record 000063). At hearing, Mr Filson elaborated to state that Mr. May had identified the problem as petroleum contamination. (Tr. 205). Several of the comments attributed to Mr. May during that conversation specifically state or clearly imply that Mr. Maquet knew or should have known of the problem. (Record 000063-000064; Tr. 202-207).

The second factor relied upon by the Agency was an assumption regarding the relationship between ESE and the Maquets. When the application for reimbursement was submitted, ESE was an Agent for the Maquets. ESE did the analytical testing on the June 5 soil samples which showed contamination, and ESE had the results on July 13, 1989. (Record 000056). Mr. May in his conversation with Mr. Filson indicated that the testing on June 5, 1989 was left up to the Maquets. (Record 000063). Consequently, the Agency was under the impression that ESE was an Agent of the Maquets in June and July 1989, and that ESE had knowledge of the contamination prior to July 28, 1989. (Tr. 249-250). Therefore, the Agency concluded that the Maquets had constructive knowledge of the contamination prior to the statutory date and that a $50,000 deductible should apply.

II. The Maquet's Position

The Maquets asserted that they had no actual knowledge of contamination and that they had no agents to whom knowledge could be attributed. Mr. Maquet testified that he did not retain anyone to analyze soil samples prior to July 28, 1989, and that none of the people involved in the business transaction regarding the sale informed him that the property was contaminated prior to July 28, 1989. (Tr. 138-141). Prior to July 28, 1989 neither ESE nor Illico was an agent of the Maquets. (Tr. 138-142). During tank removal Mr. Maquet would occasionally view the operation, but the smell of gasoline did not indicate to him that contamination was present. (Tr. 145). Mr. Maquet testified that from about 1985 until the tanks were removed there was no loss of inventory which would indicate leakage and that the pumps dispensing gasoline never lost their prime (a pump losing prime would indicate leakage). (Tr. 146-148).

Mr. May of Illico also provided testimony for the Maquets. Mr. May's testimony highlighted that he had misunderstood the relationship between the Maquets and ESE. Throughout his participation in the tank removal and continuing through his conversation with Mr. Filson of the Agency, Mr. May thought that ESE had been retained by the Maquets to conduct the soil analysis; Mr. May now understood that ESE had been retained by Illico throughout this time period to do the analysis. (Tr. 85, 94). Mr. Golwitzer, President of Illico, testified that he had retained and paid ESE to do all of the analytical work during June and July of 1989 on behalf of Illico. (Tr. 17-22).

Additionally, Mr. May testified that he did not tell Mr. Filson in the phone conversation that the problem surrounding tank removal was a petroleum contamination problem because in June of 1989 Mr. May did not know that there was a petroleum contamination problem at the site. (Tr. 90, 101). When Mr. May discussed the problem during that conversation, he was referring to the problem of the property sale not taking place on time due to the sample results not being ready. (Tr. 95-96).

CONCLUSIONS

The statutory burden placed on the Maquets is to prove they had no actual or constructive knowledge of the contamination on the date in question. Section 22.18b(d)(3)(C)(ii). The Maquets provided information to the Agency in the form of a June 6, 1990 letter from ESE which repeatedly stated that the Maquets first became aware of the contamination on October 27, 1990. (Record 000058-000059). The Agency accepted this as true. (Tr. 236).

The Board finds that ESE did have actual knowledge of the contamination of July 13, 1989 and that Illico had actual knowledge on July 19, 1989. This much is undisputed. The Agency has argued that Illico became the agent of the Maquets when Illico agreed to remove the tanks, a burden placed on the Maquets in the original contract. The Agency cites no legal precedent to support a conclusion that contract negotiations between a seller and buyer regarding duties and purchase price makes the buyer an agent of the seller. The Board has reviewed the remaining Agency arguments imputing ESE or Illico's knowledge to the Maquets and finds those arguments without merit. The Board finds that neither ESE nor Illico was an agent of the Maquets prior to July 28, 1989 such that their knowledge can be attributed to the Maquets.

Consequently, the Board finds no basis for the Agency determination that the Maquets had "constructive" knowledge of the contamination prior to July 28, 1989. Accordingly, the Board will reverse the Agency determination and remand the matter for further action consistent with this Opinion.

PROCEDURAL MATTERS

At page 23 of the Respondent's Post Hearing Brief the Agency states, "Because of the error of the hearing officer in not allowing an offer of proof to be made by the Agency, the Agency requests a SANCTION of either...." This presents several problems. First, while not specifically required by the Procedural Rules, requests for sanctions are traditionally presented to the Board by motion rather than by a request in the middle of a Brief. Second, sanctions are traditionally sought regarding conduct of a party of other person for unreasonably failing to comply with a procedural rule or order of the Board or hearing officer. See 35 Ill. Adm. Code 101.280 - 281. Here, the Agency seems to seek a sanction against the Maquets premised on a ruling of the hearing officer. When the Agency contests a ruling of the hearing officer, the appropriate mechanism is to seek review of that ruling pursuant to 35 Ill. Adm. Code 101.247(b), either in interlocutory appeal or upon final Board review of the proceeding.

Finally, the Agency asserts as a basis for its procedural contentions, "The hearing officer did not let Respondent's counsel make any offer of proof (see top of page 76 of the hearing transcript)." (Respondent's Brief, p. 22). At this stage of the proceeding the Agency was conducting recross examination of Mr. Stropes during the petitioner's case in chief. Upon objection by petitioner, the hearing officer ruled that a question by the Agency was beyond the scope of redirect. At that point, the Agency attempted to call the witness during the petitioners case in chief, a request the hearing officer denied. The Agency then stated its intention to call the witness during its case in chief. The hearing officer noted that the Agency had not subpoenaed the witness, and that the hearing officer lacked the authority to hold the witness there. Then on page 76 of the transcript:

[Agency]: So, although this is an adversarial proceeding --

[H.O.]: I'm not arguing with you, counsel, over my rulings. I have ruled. I don't have to argue with you.

[Agency]: Thank you very much.

At no point in this exchange, or the transcript as a whole, does the Agency request an opportunity to make an offer of proof. Absent some request by the Agency to make an offer of proof, the Board can find no error in the record. The Board finds the Agency's concerns about procedural impropriety by the hearing officer and respondent's counsel without merit.

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

ORDER

The June 20, 1990 Agency determination of a $50,000.00 deductible in this matter is hereby reversed and this matter is remanded to the Agency.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1987, ch. 111½, par. 1041, provides for appeal of final Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

IT IS SO ORDERED

Board Member J. Anderson Dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 6th day of December, 1991, by a vote of 6-1.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board