ILLINOIS POLLUTION CONTROL BOARD
June 6, 1991

MARJORIE B. CAMPBELL, Petitioner,	)	
v.	)	PCB 91-5 (UST Reimbursement)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

OPINION AND ORDER OF THE BOARD (by J.D. Dumelle):

This matter comes before the Board on Petitioner's appeal of the Illinois Environmental Protection Agency's ("Agency") determination that Petitioner is subject to the $100,000 deductible under the provisions of the Underground Storage Tank Reimbursement Fund. The appeal was filed on January 7, 1991 and hearing was held on March 6, 1991. The sole issue in this case involves the interpretation of Ill. Rev. Stat. 1989 ch. 111-1/2, par. 1018b (3)(B)(i)(b).

FACTS

In 1982, Marjorie Campbell inherited a gas station from her mother. (Tr. at 9). The station had existed since 1930, but from 1979 until April of 1989 the property was leased to the operator, Tom Doran. (Tr. at 10). In April of 1989, Mr. Doran filed for bankruptcy and the station ceased operating. On October 19, 1989, the Office of the Illinois State Fire Marshall ("OSFM") recognized the site as an abandoned station and required petitioner to either remove the tanks or take them out-of-service pursuant to its regulations. (Tr. at 11). Petitioner received a permit from OSFM to remove the tanks on November 1, 1989.

On November 27, 1989, the petitioner removed the tanks from the site. (Tr. at 14). Mr. Douglas Kirk, a representative of OSFM, was present at this time. Upon removal, Mr. Kirk informed petitioner that the USTs were not registered and, further, there was an indication that a release of petroleum had occurred. The petitioner immediately completed a form to register the tanks and notified the Emergency Services and Disaster Agency ("ESDA") of the suspected release. On November 28, 1989, petitioner sent a check to OSFM for late registration of the tanks. (Tr. at 14-15).

Petitioner subsequently sought engineering assistance and ultimately hired Berns and Clancy, Inc. They in turn subcontracted Goodwin and Broms, Inc. ("Goodwin"), an environmental engineering firm in Springfield. These firms did some initial testing and were

prepared to undertake a full cleanup. (Tr. at 16-22). In April of 1990, Goodwin sent in an application on behalf of the petitioner to access the UST Fund. On May 3, 1990, the Agency sent a letter to the Petitioner stating that she was eligible to access the UST Fund and that her deductible was determined to be $100,000. Although Goodwin requested reconsideration[1] on Petitioner's behalf, the Agency denied this request. Petitioner testified that based on this knowledge, she hired counsel. (Tr. at 22). She further testified that, as explained to her by the engineering firms, her maximum deductible would be $15,000. In the event that the costs to petitioner would be $100,000, she would have to secure a loan in order to raise the necessary capital to achieve compliance. (Tr. at 28). As a consequence, work on the site was interrupted and a full clean-up has not been achieved.

DISCUSSION

The Agency first argues under which law Petitioner's application falls. In a somewhat confusing manner, the Agency maintains that P.A.958, effective December 5, 1989 is the appropriate statute. There is no contention by the petitioner that such is not the case. In fact, the entire issue surrounding this case revolves around Section 22.18b(d)(3)(B)(i) of the Act. In Pulitzer Community Newspaper, Inc. v. EPA, PCB 90-142 (December 20, 1990), we stated that the applicable law is that which is in effect upon the date of filing an application for reimbursement. Because the application in the instant case was submitted on April 19, 1990, there is no doubt but that P.A.958 is the appropriate benchmark.

Turning to the substantive issue, section 22.18b(d)(3)(B)(i) of the Act states:

> If prior to July 28, 1989, the owner or operator had registered none of the underground storage tanks in use on that date at the site, the deductible amount under subparagraph (A) of paragraph (3) of this subsection (d) shall be $100,000 rather than $10,000. After the $100,000 deductible amount has been paid, the deductible amount shall thereafter be as provided under subparagraph (A) of paragraph (3) of this subsection (d).

The bone of contention in this case involves the phrase "in use on that date at the site". The Agency contends that "in use",

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[1]Subsequent to April of 1990, in Reichhold Chemicals v. EPA, 204 Ill. App 3d 674, 561 N.E.2d 1343, (3d Dist. 1990), the appellate court held that the Agency is without the statutory authority to entertain motions for reconsideration.

as it pertains to an UST, is anything which is not properly taken out-of-service or removed. In support thereof, the Agency has supplied the Board with various definitions such as "tank", "regulated substance" and "operational life", which include the word "contain". In short, it is the Agency's assertion that any UST containing any petroleum which is not abandoned or taken out-of-service pursuant to regulation is "in use". The Agency maintains this position even though it was flatly rejected in AKA Land, Inc. v. EPA, PCB 90-188 (March 14, 1991).

In AKA, the Board stated that the "in use" language inherent in section 22.18b(d)(3)(B)(i) denoted an affirmative action such as dispensing or storing. (See also, Dissenting Opinion by J.D. Dumelle and J.T. Meyer). To do otherwise, the Board stated, would effectively render the "in use" language as mere surplusage. Despite the fact that the Agency attempted to distinguish AKA from the instant case, the same principle applies in toady's case.

The only differences between AKA and the case at bar articulated by the Agency remain irrelevant factual distinctions. These distinctions are bound to occur in every case, yet they do not alter the meaning of how a specific section should be interpreted where those facts are not related to the term being construed. If this Board were to hold that "in use" means "containing" simply by virtue of extraneous factual differences, the results would undoubtedly be arbitrary and capricious. In short, the precedent set by AKA as it applies to section 22b(d)(3)(B)(i) will be adhered to absent a legislative change.

The Agency is equally unpersuasive when it states that "in use" should be equated with "containing" because without such a meaning, any new tank would only be subject to a $10,000 deductible regardless of the actions of the owner or operator. Taking the provisions of the Fund in its entire context, such a rationale is simply unconvincing. For example, Section 22.18(b)(c) states:

> Notwithstanding subsection (a) or (b), no owner or operator is eligible to receive money from the Fund for costs of indemnification or corrective action for any underground storage tank installed after July 28, 1989, unless the owner or operator demonstrates to the Agency that the tank was installed and operated in accordance with regulations adopted by the Board. For purposes of this subsection, certification by the Office of the State Fire Marshal that the underground storage tanks were installed in accordance with Board rules, shall be prima facie evidence that the owner or operator so installed such underground storage tanks. (Emphasis added).

Further, Section 22.18b(d)(3)(A) reads:

> If an owner or operator submits a claim or claims to the Agency for approval under this Section 22.18b, the Agency shall deduct from the amount approved a total of $10,000 for each site for which a claim is submitted.

Read together, these two sections clearly take into account the inevitability of tanks being installed subsequent to July 28, 1989. In order to be eligible for reimbursement under the Fund, an owner or operator would have to install and operate their tanks in accordance with Board regulations. If that were that case, then the owner/operator will be subject to the $10,000 deductible. If the USTs in question were not operated pursuant to the regulations, then the owner/operator would not be eligible for reimbursement at all. Read in its entirety, this makes sense. We note that all of the subsections contained within Section 22.18b(d)(3)(B) contain the date July 28, 1989. These subsections contain various punitive provisions to those owners/operators who were in business (i.e., utilizing USTs) and failed to perform certain duties by certain dates. All of these subsections require that the USTs in question were being used on July 28, 1989.

In the case at bar, it is indisputable that the USTs ceased functioning in April of 1989. That such was the case was officially confirmed by OSFM. In its letter of October 19, 1989, the OSFM recognized that the tanks were out-of-service. (Tr. at 57). The Agency notes that OSFM used the word "temporarily" and insists that the tanks were still capable of being used. While we agree with this possibility, the fact remains that they were not used from April of 1989 until they were removed on November 27, 1989. Accordingly, they were not "in use".

The only remaining issue, then, is what deductible pertains to the petitioner. Because neither the $15,000 nor the $100,000 provisions apply, the only alternatives are the standard $10,000 deductible or the $50,000 deductible as enumerated in Section 22.18b(C)(ii). This section states:

> 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 [(i.e., $10,000)]. 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.

Based on the evidence before this Board, it is possible, although unlikely, that the petitioner in today's case may fall under this provision. It is almost certain, for instance, that the contamination occurred prior to July 28, 1989. The station was built in 1930 and taken out of service in April of 1989. The only issue left, therefore, is whether the petitioner had actual or constructive knowledge of the release. The testimony at hearing revealed that the petitioner had never operated the station. Moreover, the petitioner has responded diligently to every request imposed upon her by State authorities. She has complied with the regulations of OSFM, paid her late registration fees, removed the abandoned tanks and initiated a complex clean-up arrangement with two professional firms. This being the case, the Board is doubtful that petitioner had either constructive or actual knowledge of a release prior to July 28, 1989. Nevertheless, hearing was not held in this regard and it is possible that evidence might exist which would lead to a contrary conclusion. Accordingly, we will reverse and remand.

As a final note, the Agency has, throughout hearing and within its closing brief, repeatedly submitted that 22.18b et. seq. is a reimbursement fund. That is, once an applicant is determined to be eligible, an appropriate deductible is ascertained and clean-up is completed, only then is a petitioner able to access the Fund. Although not explicitly stated, the argument seems to be that petitioner is not eligible because a full clean-up of the site has not been accomplished. Notwithstanding the potential merits of this argument, it is irrelevant in the case at bar. The issue before this Board concerns an appeal of a final administrative determination as it pertains to an appropriate deductible. As such, the Agency is precluded from arguing eligibility or withdrawing its deductibility determination.

ORDER

The $100,000 deductible determination of the Agency is hereby reversed. The case is remanded to the Agency for a determination

of whether a deductible of $10,000 or $50,000 applies to the petitioner.

IT IS SO ORDERED.

Board Member B. Forcade concurred.

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 June, 1991 by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board