ILLINOIS POLLUTION CONTROL BOARD
March 14, 1991

A.K.A. LAND, INC., Petitioner,	)	
v.	)	PCB 90-177 (UST Reimbursement)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

DISSENTING OPINION (by J.D. Dumelle and M. Nardulli):

In today's case, the Board was asked to interpret a statute which effectively defined the scope of the Illinois UST program. That is, by virtue of the briefs submitted in this case, an issue presented itself as to who was an "owner" or "operator" under Ill. Rev. Stat. 1989 chap. 111-1/2 section 22.18b. We disagree with the majority opinion because it ignores basic principles of statutory construction and creates a legal fiction which expands the class of "operators" under the Illinois statute. Because we believe that the reasoning is flawed and the that ramifications which might result from defining AKA as an operator are inconsistent with the Act, we dissent.

FACTS

With the exception of one general characterization, we agree with the facts as put forth by the majority. The majority opinion states that at hearing, Mr. Thomas Armstrong, president of AKA, testified that the company had been in the business of buying, selling and developing real estate for about two years. Yet many other facts were revealed at hearing which proved this characterization to be misleading. For example, Mr. Armstrong, the sole owner and president of AKA, had been previously employed by another corporation in a capacity where he oversaw the development of sites for future gasoline stations. Further, the purchase which is the subject of this litigation was the only site AKA ever bought and it did so with the express intent of leasing it as a gasoline station on a long-term basis to an oil company. It was only upon initial testing by the potential lessee that hydrocarbons were found to be present in the soil. We note this because inherent in the majority opinion lies the premise that AKA is somehow an "innocent purchaser" who acted in good faith upon discovery of the leaking USTs. The record does not support such a characterization.

OWNER/OPERATOR AS AN ISSUE

Both parties initially submitted that the only issue before the Board is whether the USTs were "in use" on July 28, 1989, thereby setting the applicable deductible of $100,000 pursuant to Section 22.18b(d)(3)(B)(i) of the Act. AKA asserted that its interpretation of "in use" was consistent with the statute as a whole. In supporting the proposition that "in use" refers to an affirmative action, petitioner put forth the statutory definition of "owner".

> "Owner" means (A) in the case of an underground storage tank in use on November 8, 1984, or brought into use after that date, any person who owns an underground storage tank used for the storage, use, or dispensing of regulated substances, and (B) in the case of any underground storage tank in use before November 8, 1984, but no longer in use on November 8, 1984, any person who owns such tank immediately before discontinuation of its use. 42 U.S.C. §6991(3).[1]

By raising the definition of "owner" in support of its interpretation of the statute, AKA brought forth the question as to whether the company was even eligible for reimbursement under the Fund. In order to gain access to the Fund, an entity must either be an owner or an operator (Ill. Rev Stat. 1989 chap. 111-1/2, par. 1022.18b(a).). The only way AKA could be an owner under subsection (A) would be if the USTs were "in use on November 8, 1984 or brought into use after that date". If that were the case, then AKA would automatically be subject to the $100,000 deductible under section 22.18b(d)(3)(B)(i) because AKA failed to register its tanks with the State Fire Marshal before July 28, 1989.

> 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...shall be $100,000 rather than $10,000.

Sec. 22.18b(d)(3)(B)(i).

Thus the meaning of "in use" was essential for establishing whether AKA was an "owner". The Agency and IPMA read this phrase to mean that if a storage tank in a UST system contains even a residual amount of a regulated substance on or before July 28, 1989, then those tanks were "in use" and a $100,000 deductible would be appropriate if those tanks were not registered. In short, the Agency and IPMA contend that "in use" should be

equated with "containing petroleum". To do otherwise would, according to the IPMA, contravene the intent of the statute because such an interpretation would allow owners and operators of underground storage tanks which have long ceased dispensing fuel, regardless of whether or when such tanks were properly registered with the Office of the State Fire Marshal, to be eligible to seek reimbursement for the costs of corrective action resulting from releases of petroleum from the Underground Storage Tank Fund at the minimum $10,000 deductible amount. (Amicus Br. at 5). Such a construction would inadvertently expand the scope of the program, deplete the fund and defeat the purpose and intent of this very important program and its implementing legislation. (Id. at 5). The Agency joins in this argument and further asserts that the words "in use" are necessary to insure that USTs installed after July 28, 1989 will not be assigned a $100,000 deductible (Resp. Br. at 23).

AKA maintained that "in use on that date at the site" denotes an affirmative connotation which relates to an intended purpose. An abandoned tank, for example, is not in use. AKA relies on the term "in use" as set forth in the definition of owner and asserts that "in use" refers to storing, pumping and dispensing. We agree. We find the meaning of "in use" espoused by AKA to be the most pursuasive indication of what the term refers to. The plain meaning of "in use" denotes that which is being employed for an intended purpose. The evidence establishes that Texaco was the last known functioning entity to employ the tanks, and it ceased operations in 1975. AKA did not store, dispense or pump any regulated substance in this UST system. In connection with these uncontested facts, we have reviewed the Federal Preamble as it pertains to "in use".

> Indications that a tank is permanently out of use are: (a)If it is filled with inert solid material or otherwise rendered unusable, or (b)if there is reason to believe that it will not be used in the future (e.g., the owner abandoned the tank, intakes and vents are paved over, access piping is disconnected or removed, or the tank was sold to a person who had no use for the tank, such as a residential real estate developer).

Fed. Reg. Vol. 50, No. 27, pg. 46605. (Emphasis added).

Accordingly, we have concluded and agree with the Majority Opinion that the tanks at issue were no longer "in use" and thus AKA is not an "owner" under this definition.

DISSENTING OPINION OF "OPERATOR"

Both the majority and the dissent agree that the remaining inquiry is whether AKA is an "operator" under state and federal regulations. Operator is defined consistent with the federal statutory definition as follows:

> "Operator" means any person in control of, or having responsibility for, the daily operation of the UST system.

35 Ill. Adm. Code 731.112. (Emphasis added.)

The Agency contended that AKA was not an operator because the gas station had not been operated (i.e., in use) since Texaco closed the station in 1975 (Resp. Br. at 28). AKA on the other hand, viewed the Agency's position as a red herring in that an "operator includes any person having control of an UST" (Reply Brief at 3).

Since AKA, by its own admission, never used the tanks prior to removal, there is a rebuttable presumption that AKA failed to have "control of the daily operation of the UST system". AKA's only participation in regards to the UST was to undertake corrective action. In our view, to hold, as the majority does, that corrective action equates with "daily operation of the UST system" would broaden the definition and, in the process, enlarge the scope of eligibility for certain parties in direct contravention of the plain language of the Act. We read "daily operation" to be a limiting factor which denotes an ongoing activity with the UST system. The majority's interpretation of AKA as an operator ignores the use of the term "daily" in the definition of "operator".

Furthermore, RCRA defines the term "non-operational storage tank":

> The term "non-operational storage tank" means any underground storage tank in which regulated substances will not be deposited after the date of the enactment of the Hazardous and Solid Waste Amendments of 1984 (November 8, 1984).

42 U.S.C. Section 9001(7).

There is no question that AKA falls within the confines of this definition. Since we believe that the UST system which AKA had control of was a "non-operational storage tank", it would be difficult, if not impossible to suggest that the petitioner had "control over the daily operation of the UST system". Put another way, one cannot operate that which is non-operational. Having concluded that AKA is neither an "owner" nor an "operator" within the meaning of the Act, we would hold that AKA is ineligible to access the Fund under Section 22.18b et. seq.

MAJORITY OPINION OF "OPERATOR"

Contrary to our interpretation, the majority finds that AKA satisfies the dictates of "operator" as defined by statute. The majority comes to this conclusion despite the following language:

> It is clear that AKA was not the current operator of a filling station, or used the tanks for that purpose. However, the Board has concluded that AKA became an operator of the UST system when it became subject to the UST closure regulations. We do not construe the definition of operator as applying only to those persons in daily operational control only of tanks in active service. (Emphasis added).

(Maj. Op. at p. 12)

To summarize the majority's reasoning in this case, it appears they are holding that once corrective action is initiated, an entity becomes an operator. Otherwise, a person who engaged in corrective action of abandoned tanks would not be subject to the jurisdiction of the Agency under section 22.18b et, seq. The majority has chosen to attack the problem backwards by focusing on who takes corrective action as determinative of who is an "operator". What they fail to understand is that being an owner or an operator is a condition precedent to both eligibility and liability under section 22.18b. Merely removing tanks as a commercial necessity does not make a party an operator; the limitations inherent in the statutory definition prevail over incidental compliance of one aspect of the regulations for the UST program. Indeed, under the majority's ruling, one could deduce that if a person complied with any portion of the UST rules for any reason, they would become an owner or an operator.

In support of this tenuous holding, the majority cites UST reimbursement forms, a landfill case, some ambiguous USEPA language from a rulemaking preamble and a distinguishable court decision. The majority fails to address, however, how an abandoned tank can be operated - let alone on a daily basis. In an attempt to hold AKA liable under the UST provisions, thereby allowing access to the Fund, the majority has ignored the term "daily" and has strained the bounds of logical reasoning in order to fulfill its "environmental" agenda.

The majority fails to understand that under the definitions at issue in this case, there is always an "owner" and therefore always a liable party under the existing statute. That party may also be the operator, but such is not necessarily the case. According to the testimony, Texaco would be the owner in the case

at bar. Whether or not there is a franchisee or lessee who may be the "operator" is unclear on the information we have. Even so, the point that an identifiable "owner" exists - the very party who caused this pollution - is crucial. If anything can be gleaned from the plain meaning of the disputed definitions, it is that the intent is to hold those responsible for the pollution liable for clean-up costs.

Today's majority opinion accomplishes a completely contrary effect. A holding here that AKA is eligible for reimbursement leads to an inequitable result in that the taxpayers and gasoline consumers of Illinois wind up funding a clean-up of the site while the party who caused the pollution (i.e., Texaco) walks away from any prospect of liability. This is undisputable. The majority has chosen this route despite language in the Act which provides AKA with alternative remedies. Section 22.18(a)(A) of the Act states:

> Nothing in this Section shall affect or modify in anyway the obligations or liability of any person under any other provision of this Act or State or Federal law, including common law, for damages, injury or loss resulting from a release or substantial threat of a release of petroleum from an underground storage tank. (Emphasis added.)

AKA is therefore not without recourse even if it is found to be ineligible to access the Fund. In addition to a wealth of common-law theories, the company could sue in state court under various other sections of the Act.

On the other hand, AKA, by becoming an operator under the majority opinion, is now subject to all federal and state regulations pertaining to USTs. Violations of these requirements carries a maximum civil penalty of $10,000 for each tank, for each day, for each regulatory violation. RCRA, Section 9006(d); 35 Ill. Adm. Code 731 et, seq. Given the timeframe involved in the instant case in addition to the six tanks involved, the potential penalty AKA might receive could conceivably run into millions of dollars. Whereas the Illinois and federal EPA may choose to exercise prosecutorial discretion, both state and federal law permits citizens to file civil actions against regulatory violators. This Board, and the federal courts, cannot exercise discretion to avoid hearing such suits. While AKA can find comfort in the majority's decision finding them eligible to access the Fund, this relief is short-lived when AKA's potential liability as an operator is confronted.

What is perhaps even more disconcerting is the inherent inconsistency within the majority opinion as evidenced by the fact that the majority finds AKA to be an operator after it

denies the company "ownership" status. In interpreting "owner", the majority, as pointed out earlier, holds that "in use" denotes something affirmative rather than the passive meaning put forth by the Agency. The majority correctly states that to equate "in use" with "contains" would effectively limit the "in use" phrase to mere surplusage. On the other hand, when analyzing the definitional scope of "operator", the majority seems eager to embrace the reference to "daily operation" as irrelevant or somehow redundant. 35 Ill. Adm. Code 731.112 defines an "operator" as:

> ...any person in control of, or having responsibility for, the daily operation of the UST system.

This is clearly a definition with two prongs. The first tier is satisfied once either control or responsibility is established. Under the limited definition which is present in both state and federal statutes, it is abundantly clear that to be an operator one must have control or responsibility of the daily operation of the UST system. Yet the majority readily dismisses "daily operation"; or perhaps more accurately, construes it as "identifying the non-owner person in daily responsible charge." (Maj. Op. at 15). In any event, the result is the same; "daily operation of the UST system "is completely disregarded by the majority. If "daily operation of the UST system" refers to the person in charge, why was it inserted given the fact that the first prong of the definition explicitly refers to responsible or controlling parties? To make this holding as the majority did is to ignore the plain meaning and render the second aspect of the definition as mere surplusage, Niven v. Siqueria, 109 Ill. 2d 357 (1985), a method which was clearly rejected by the majority in its earlier analysis of "in use".

Other problems are associated with the majority's analysis. After citing the federal preamble for regulations which apply only to owners and operators, the majority states that "anyone who removes a closed or abandoned tank must be either an owner or an operator who must comply with the closure provisions if so directed by the Agency" (Op. at 14). We interpret this language to mean that one becomes an owner or operator by virtue of Agency labeling. It is difficult for us to imagine a more arbitrary or capricious ruling; we do not believe the Act and regulations give the Agency the discretion to define who is an operator by virtue of a directive to comply with closure provisions. What the majority is stating is that regardless of the definitional limits, a person is an owner or operator "if so directed by the Agency". This statement disregards the plain language as well as the intent of the statute.

Moreover, the majority also misrepresents the stance of the Agency. The majority states that:

> Compliance with the corrective action requirements involves repeated notifications to the Agency, and the filing and approval of a series of plans and studies. (35 Ill. Adm. Code 731.161, 731.162(b) and Section 22.18b(d)(4)). There is no indication that the Agency ever objected on the basis that AKA was not strictly speaking, an "operator".

(Maj. Op. at 14)

To the contrary, the Agency has steadfastly maintained that it is impossible for AKA to be an operator in that the company admittedly never operated the tanks. In this regard, AKA's assertion that it is an operator is somewhat interesting. In its reply brief and its response to the Interim Order by this Board, AKA made this argument but failed to supply the Board with the entire definition of "operator". We would suggest that this was not for purposes of saving space, but was rather an intentional omission given the fact that the company's testimony at hearing made it impossible to fulfill the "daily operation of the UST system" requirement.

Finally, the majority's reliance upon Union Petroleum Company v. United States, 651 F2d 734 (Ct. Cl.1981) is misplaced. In Union there was never any question that Union was an owner and operator of an oil terminal facility. There was also no question that Union was responsible for the leak which eventually found its way into a navigable waterway. The only issue in Union was whether the tank cars from where the spill originated was part of Union's facility. Since the Federal Water Pollution Act defined facility as virtually anything, the court justifiably answered in the affirmative. The portion of Union quoted by the majority is contained in a footnote which references the Uniform Commercial Code and is wholly inapplicable to the case at bar.

In conclusion, we disagree with the majority's analysis of "operator". Contrary to well-established law, the opinion disregards the plain meaning of the statute. See Heritage Bank and Trust Co. v. Harris, 88 Ill. Dec. 87 (1985); Doran v. Dept. of Labor, 72 Ill. Dec. 186 (1983); Chicago Health Clubs v. Picur, 108 Ill. Dec. 431 (1987). Had the majority's decision rendered a harmonious effect as it relates to the statute as a whole, we would feel differently as the authority exists for us to engage is such a process. People v. Jordan, 103 Ill. 2d 192 (1984). Yet the precedent espoused today is devoid of any environmental or legal benefits and, at the same time, further confuses a statute which, as drafted, is already less than a model of

clarity. In short, the majority's result-oriented approach ignores well-founded precepts of statutory construction. Because we find this approach unacceptable, we respectfully dissent.

Jacob D. Dumelle, P.E.
Board Member

Michael L. Nardulli
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Dissenting Opinion was submitted on the 20th day of March, 1991.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board