February 2016

I 40/76 Family Pantry vs. ENVIRONMENT AND CONSERVATION

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February 2, 2016

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RE: In the Matter of: A-One Enterprises, LLC d/b/a I 40/76 Family Pantry  
Docket No. 04.44-131300J

Enclosed is an Initial Order rendered in connection with the above-styled case.

Administrative Procedures Division  
Tennessee Department of State

/aem
Enclosure
STATE OF TENNESSEE
UNDERGROUND STORAGE TANKS
AND SOLID WASTE DISPOSAL CONTROL BOARD

IN THE MATTER OF:

A-One Enterprises, LLC
d/b/a I 40/76 Family Pantry,
Petitioner,
Vs.

Dept. of Environment & Conservation,
Division of Underground Storage Tanks,
Respondent.

DOCKET NO: 04.44-131300J

INITIAL ORDER

This matter was heard on October 7, 2015 before Steve R. Darnell, Administrative Law Judge, assigned by the Secretary of State, Administrative Procedures Division, and sitting for the above referenced Board. Attorney Ashley Ball represented the Department of Environment and Conservation (Department), and attorney Randall Womack represented Petitioner, A-One Enterprises, LLC d/b/a I 40/76 Family Pantry. The parties filed post-hearing memorandums of law. The record closed on December 15, 2015.

ISSUE FOR DETERMINATION

Did Petitioner show, by a preponderance of the evidence, that its underground storage (petroleum) tanks (UST) were in compliance with the “performance standards” as that term is used in Rule 0400-18-01-.02, and therefore entitled to coverage under the UST Fund for corrective action?

SUMMARY OF DETERMINATION

It is DETERMINED that Petitioner has shown, by a preponderance of the evidence, that it complied with the requirements for reimbursement from the UST Fund for the incident
described herein. This determination is based upon the following Findings of Fact and Conclusions of Law.

**FINDINGS OF FACT**

1. Petitioner owned and operated an UST system comprised of 3 tanks and related piping located at Interstate 40 and Highway 76. Petitioner’s UST were governed by the Tennessee Petroleum Underground Storage Tank Act and identified by the Division of Underground Storage Tanks (Division) as Facility ID 8-380059.

2. Petitioner’s UST were constructed of steel and coated with a “suitable dielectric materials” with a cathodic protection system consisting of galvanic or sacrificial anodes.

3. Sacrificial anodes are among several forms of cathode protection for UST systems that are subject to corrosion. Sacrificial anodes are highly active metal devices used to prevent a less active material surface (in this case the UST) from corroding. Sacrificial Anodes are created from a metal alloy with a more negative electrochemical potential than the other metal it will be used to protect. Sacrificial anodes are consumed in place of the metal it is protecting, which is why it is referred to as a "sacrificial" anode. When significantly corroded or “consumed” the anodes in sacrificial anode cathodic protection systems must be replaced.

4. Petitioner’s facility experienced a “slow flow” in dispensing “regular” gasoline. Upon inspection, a leak was discovered in the piping at a joint in the fiberglass reinforced plastic piping in close proximity to one of the gasoline dispensers. This segment of the piping, because of the material from which it is constructed, is not subject to cathodic protection.

5. Petitioner discovered a release and a need for corrective action. On November 21, 2014, the Division was notified of the issue.
6. By a letter dated November 26, 2014, the Division directed Petitioner to take certain actions required under the UST regulations. In compliance with the Division’s letter, Petitioner retained an approved corrective action contractor to respond and correct issues associated with the release.

7. On December 16, 2014, Petitioner submitted an “Application for Fund Eligibility” to the Division seeking reimbursement from the UST Fund for eligible environmental response costs associated with the release.

8. On December 18, 2014, an Environmental Specialist for the Division performed a compliance inspection of Petitioner’s facility. The Division determined that Petitioner was in compliance with all requirements applicable to owners and/or operators of UST systems with the exception of the requirement that a cathodic protection test of the UST system be conducted every 3 years.

9. Petitioner’s last evaluation of the cathodic protection for the UST system was on June 15, 2011.

10. After receiving notice of this deficiency, Petitioner had its UST system tested on January 5, 2015. This evaluation confirmed that Petitioner’s cathodic protection system in place for the UST was functioning as designed and effectively preventing corrosion. A report of the January 5, 2015 evaluation was provided to the Division.

11. By letter dated February 3, 2015, the Division notified Petitioner that the clean-up costs associated with the petroleum release were not eligible for UST Fund coverage solely because Petitioner was overdue by about 5 months for a cathodic protection test at the time of the discovery of the release.

12. Petitioner appealed this determination prompting the instant hearing.
CONCLUSIONS OF LAW

1. Petitioner bears the ultimate burden to show, by a preponderance of the evidence, that it is entitled to reimbursement from the UST Fund. Rule 1360-4-1-.02. An agency’s interpretation of its Rules may be given deference, however, the Division’s interpretation in this matter is not entitled to deference.

2. Rule 0400-18-01-.09 (10) provides in pertinent part that an “eligible owner and/or operator ... conducting UST corrective actions is entitled to coverage of reasonable cost from the fund, subject to the provisions set forth in this paragraph.

3. The foregoing Rule establishes the criteria for reimbursement for corrective action. The parties stipulated that Petitioner met all the criteria except for that found in Rule 0400-18-01-.09 (10)(c)(1) which provides that the “owner and/or operator shall submit documentation to the division verifying that the tanks are in compliance with the upgrading and performance standards set forth in paragraphs (3) and (4) of Rule 0400-18-01-.02. (emphasis added).

4. The parties disagree on what the performance standards are in paragraphs (4)(c) of Rule 0400-18-01-.02. This Rule provides in relevant part as follows:

   (c) Operation and maintenance of corrosion protection.

   All owners and/or operators of steel UST systems with corrosion protection shall comply with the following requirements to ensure that releases due to corrosion are prevented for as long as the UST system is used to store petroleum:
   1. ....
   2. ...
   (i) Frequency. All cathodic protection systems shall be tested within six (6) months of installation and at least every three (3) years thereafter;

5. Petitioner asserts that this testing requirement is not a performance standard while the Division asserts that it is. The determination of this case turns on this point alone. It is noted that the term performance standards is not defined by the Board’s or TDEC’s statutes or rules.
There is no administrative or judicial authority identified by either party defining the term performance standards from Tennessee or any other jurisdiction. Tennessee’s rules of statutory construction must be employed to determine the meaning of the term performance standards.

6. When a rule’s language is clear and unambiguous it must be construed by applying its plain meaning. *Shelby Cnty. Health Care Corp. v. Nationwide Mut. Ins. Co.*, 325 S.W.3d 88, 92 (Tenn. 2010). Merriam Webster defines performance as “the execution of an action” and standard(s) as “a level of quality, achievement, etc., that is considered acceptable or desirable.” Combining these terms into performance standards and applying these definitions to UST produces plain meaning that Petitioner’s UST system was executing an action (or performing) to an acceptable level of quality.

7. The Rule in question required Petitioner to “submit documentation to the division verifying that the tanks are in compliance with … performance standards …. The use of the present tense word are indicates a requirement to show compliance with the performance standards at the time of the release and/or claim for reimbursement. Petitioner did so.

8. It is also noted that the Rule in question does not require compliance with all requirements in Rule 0400-18-01-.02 (3) and (4), but only requires compliance with the performance standards in these parts.

9. Finally, Rule 0400-18-01-.02 (4) 5 offers some guidance. It provides in relevant part:

   For UST systems using cathodic protection, records of the operation of the cathodic protection shall be maintained … to demonstrate compliance with the performance standards in this paragraph. (emphasis added).

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1 http://www.merriam-webster.com/
This language indicates that the Rule was drafted and promulgated with an understanding that performance standards as a separate concept from “all” the requirements of the Rule and specifically record keeping.

IT IS CONCLUDED THAT Petitioner has shown, by a preponderance of the evidence, that it submitted documentation that its UST system was in compliance with the performance standards for a cathodic protection system.

IT IS THEREFORE ORDERED that Petitioner is entitled to coverage from the UST Fund for reimbursement for the cost of its corrective action.

This Order entered and effective this 2ND day of FEBRUARY 2016.

[Signature]
Steve R. Darnell
Administrative Law Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 2ND day of FEBRUARY 2016.

[Signature]
J. Richard Collier, Director
Administrative Procedures Division
APPENDIX A TO INITIAL ORDER

NOTICE OF APPEAL PROCEDURES

Review of Initial Order

This Initial Order shall become a Final Order (reviewable as set forth below) fifteen (15) days after the entry date of this Initial Order, unless either or both of the following actions are taken:

(1) A party files a petition for appeal to the agency, stating the basis of the appeal, or the agency on its own motion gives written notice of its intention to review the Initial Order, within fifteen (15) days after the entry date of the Initial Order. If either of these actions occurs, there is no Final Order until review by the agency and entry of a new Final Order or adoption and entry of the Initial Order, in whole or in part, as the Final Order. A petition for appeal to the agency must be filed within the proper time period with the Administrative Procedures Division of the Office of the Secretary of State, 8th Floor, William R. Snodgrass Tower, 312 Rosa L. Parks Avenue, Nashville, Tennessee, 37243. (Telephone No. (615) 741-7008). See Tennessee Code Annotated, Section (T.C.A. §) 4-5-315, on review of initial orders by the agency.

(2) A party files a petition for reconsideration of this Initial Order, stating the specific reasons why the Initial Order was in error within fifteen (15) days after the entry date of the Initial Order. This petition must be filed with the Administrative Procedures Division at the above address. A petition for reconsideration is deemed denied if no action is taken within twenty (20) days of filing. A new fifteen (15) day period for the filing of an appeal to the agency (as set forth in paragraph (1) above) starts to run from the entry date of an order disposing of a petition for reconsideration, or from the twentieth day after filing of the petition, if no order is issued. See T.C.A. §4-5-317 on petitions for reconsideration.

A party may petition the agency for a stay of the Initial Order within seven (7) days after the entry date of the order. See T.C.A. §4-5-316.

Review of Final Order

Within fifteen (15) days after the Initial Order becomes a Final Order, a party may file a petition for reconsideration of the Final Order, in which petitioner shall state the specific reasons why the Initial Order was in error. If no action is taken within twenty (20) days of filing of the petition, it is deemed denied. See T.C.A. §4-5-317 on petitions for reconsideration.

A party may petition the agency for a stay of the Final Order within seven (7) days after the entry date of the order. See T.C.A. §4-5-316.

YOU WILL NOT RECEIVE FURTHER NOTICE OF THE INITIAL ORDER BECOMING A FINAL ORDER

A person who is aggrieved by a final decision in a contested case may seek judicial review of the Final Order by filing a petition for review in a Chancery Court having jurisdiction (generally, Davidson County Chancery Court) within sixty (60) days after the entry date of a Final Order or, if a petition for reconsideration is granted, within sixty (60) days of the entry date of the Final Order disposing of the petition. (However, the filing of a petition for reconsideration does not itself act to extend the sixty day period, if the petition is not granted.) A reviewing court also may order a stay of the Final Order upon appropriate terms. See T.C.A. §4-5-322 and §4-5-317.
BEFORE THE COMMISSIONER OF THE TENNESSEE
DEPARTMENT OF ENVIRONMENT & CONSERVATION

IN THE MATTER OF:  A-ONE
ENTERPRISES, LLC D/B/A I
40/76 FAMILY PANTRY

DOCKET NO.04.44-131300J

NOTICE

ATTACHED IS AN INITIAL ORDER RENDERED BY AN ADMINISTRATIVE
JUDGE WITH THE ADMINISTRATIVE PROCEDURES DIVISION.

THE INITIAL ORDER IS NOT A FINAL ORDER BUT SHALL BECOME A
FINAL ORDER UNLESS:

1. THE ENROLLEE FILES A WRITTEN APPEAL, OR EITHER PARTY
FILES A PETITION FOR RECONSIDERATION WITH THE ADMINISTRATIVE
PROCEDURES DIVISION NO LATER NO LATER THAN **February 17, 2016**.

YOU MUST FILE THE APPEAL, PETITION FOR RECONSIDERATION WITH
THE ADMINISTRATIVE PROCEDURES DIVISION. THE ADDRESS OF THE
ADMINISTRATIVE PROCEDURES DIVISION IS:

SECRETARY OF STATE
ADMINISTRATIVE PROCEDURES DIVISION
WILLIAM R. SNODGRASS TOWER
312 ROSA PARKS AVENUE, 8th FLOOR
NASHVILLE, TENNESSEE 37243-1102

IF YOU HAVE ANY FURTHER QUESTIONS, PLEASE CALL THE
ADMINISTRATIVE PROCEDURES DIVISION, **615/741-7008** OR **741-5042**, FAX
**615/741-4472**. PLEASE CONSULT APPENDIX A AFFIXED TO THE INITIAL
ORDER FOR NOTICE OF APPEAL PROCEDURES.