[J-81-2011] [MO: Todd, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

YOUNG'S SALES AND SERVICE,	:	No. 6 MAP 2011
	:	
Appellee	:	Appeal from the Order of the
	:	Commonwealth Court entered on July 20,
	:	2009 at No. 58 C.D. 2009 vacating and
v.	:	remanding the decision of the
	:	Underground Storage Tank
	:	Indemnification Board dated December
UNDERGROUND STORAGE TANK	:	15, 2008 at No. UT06-12-014
INDEMNIFICATION BOARD AND	:	
UNDERGROUND STORAGE TANK	:	978 A.2d 1051 (Pa. Cmwlth. 2009)
INDEMNIFICATION FUND,	:	
	:	
Appellants	:	ARGUED: November 29, 2011

CONCURRING OPINION

MR. JUSTICE SAYLOR **DECIDED: June 17, 2013**

I agree that the Underground Storage Tank Indemnification Board's adjudication should be reinstated. However, I reach this conclusion based on the nature of the claim that was submitted to the Fund, and not on the premise that Section 706 implicitly incorporates the statute's definition of "underground storage tank" into its substantive provisions. Therefore, I cannot join the reasoning of the Opinion Announcing the Judgment of the Court ("OAJC").

As the Commonwealth Court correctly observed, Section 706 of the Storage Tank and Spill Prevention Act speaks in terms of individual tanks. See Young's Sale & Serv. v. Underground Storage Tank Indem. Bd., 978 A.2d 1051, 1054 (Pa. Cmwlth. 2009). This is reflected in the list of preconditions to receipt of indemnification from the

Fund. Among such prerequisites are that: "(1) [t]he claimant is the owner, operator or certified tank installer of the tank which is the subject of the claim[;] (2) [t]he current fee required under section 705 has been paid [; and] (3) [t]he tank has been registered in accordance with the requirements of section 503." 35 P.S. §6021.706 (emphasis added). See generally OAJC, slip op. at 8-9 (listing all six prerequisites). Thus, as can be seen – particularly in items (1) and (3) – the requirements are phrased in terms of the singular: "the tank" from which there was a release.[1] Notably, there is nothing in Section 706, read as a whole, to suggest a fee-currency requirement as to multiple tanks. Interpreting Section 706 to subsume such a mandate because subsection (2) – which does not use the term "tank" or "underground storage tank" – references a fee described in a different section of the Act, seems tenuous at best. This is particularly true because the word "fee" is cast in the singular.[2] It thus seems more likely that subsection (2)'s reference to "[t]he current fee required under section 705" signifies the fee for "the tank" that is the subject of the claim. See generally O'Rourke v. Commonwealth, 566 Pa. 161, 173, 778 A.2d 1194, 1201 (2001) (noting that statutory words should be read with reference to the context in which they appear).

The OAJC also suggests that the statutory definition of "underground storage tank" can be made to depend on the features of a particular claim lodged with the Fund.

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[1] The OAJC avoids the obvious singular character of the word "tank" by suggesting it may be "an abbreviated reference" to "underground storage tank," a technical term defined by statute. OAJC, slip op. at 13. It seems improbable that the General Assembly would utilize such an abbreviation after going to the trouble of defining "underground storage tank," particularly as that term is defined in terms of "one or [a] combination of tanks." 35 Pa.C.S. §6021.103.

[2] The other indemnification prerequisites are also stated in the singular: subsection (4) refers to "the permit or certification," and subsection (5) references "the release" that is the subject of the claim.

See OAJC, slip op. at 13 (indicating that the "combination" here is all tanks owned by Appellee); id. at 15 n.8 (suggesting that this result obtains because Appellee requested reimbursement for all of the tanks located on his property). This seems likely to lead to confusion concerning the appropriate standard for determining when multiple tanks constitute a "combination" for purposes of the statutory definition – and, by extension, for purposes of Section 706(2). The definitional section of the Act is unhelpful, as it is silent on the question of how to ascertain whether multiple tanks form a "combination." See 35 Pa.C.S. §6021.103. The OAJC, for its part, arguably offers two distinct standards, compare OAJC, slip op. at 13 (implying that a "combination" is all tanks on a landowner's property), with id. at 15 n.8 (suggesting that a "combination" is all tanks subsumed within a single claim), which I believe will only add to the confusion.

I note as well that the OAJC's ultimate disposition is based almost entirely on its view of the consequences of reading Section 706 as applying to a single tank. In this regard, the OAJC states that the Appellants "have persuaded us" that the Fund's solvency would be threatened by such a reading. OAJC, slip op. at 14. Critically, however, the OAJC does not cite to any factual finding or other evidence of record that could support the concept that this is a likely outcome. The "persuasion" referenced by the OAJC thus appears to be based entirely the assertions that the agency makes in its brief.

It would be preferable, in my view, to recognize that, pursuant to the most natural reading of Section 706 as contemplating a single tank, that provision simply does not purport to specify how the Fund should handle a claim, such as the present one, that includes multiple tanks. Because of the lack of statutory guidance, the question is appropriately left to the agency's discretion to resolve. See Am. Petroleum Inst. v. EPA, 706 F.3d 474, 480 (D.C. Cir. 2013) (recognizing that "an agency may flesh out the

interstices of a technical regime"); see also S&H Riggers & Erectors, Inc. v. Occupational Safety & Health Review Comm'n, 659 F.2d 1273, 1283 n.12 (5th Cir. 1981) ("[T]he decision whether to fill the interstices in a statutory scheme by rulemaking or by ad hoc adjudication 'is one that lies primarily in the informed discretion of the administrative agency'" (quoting SEC v. Chenery Corp., 332 U.S. 194, 203, 67 S. Ct. 1575, 1580 (1947))). Here, the Board resolved the dispute by observing that the soil contamination stemmed from the regulated substances in both the kerosene tank and the gasoline tanks. It concluded, therefore, that Appellee bore the burden to prove fee currency as to all such tanks as a condition of indemnification. See In re Young's Sales & Svc., No. UT06-12-014, Adjudication and Order, at 4-5 (Underground Storage Tank Indemnification Board, Dec. 15, 2009), reproduced in R.R. 407-08. Because Appellee failed to carry its burden, the Board denied relief. In my view, the Board acted within its discretion in disposing of the claim in this manner.[3]

In light of the above, I agree with the OAJC to the extent it may be understood to conclude that, for purposes of the present controversy, and in view of Appellee's particular circumstances and the scope of its claim, "Section 706(2)'s fee payment requirement may be construed [as it was by the Board] to apply to all of Appellee's tanks[.]" OAJC, slip op. at 13. However, I see no need to reach this conclusion by applying the definition of "underground storage tank" or otherwise determining that Section 706 specifies that recovery from the Fund was not intended by the Legislature to be established on a per-tank basis. Perhaps the Commonwealth Court's decision to

[3] If Appellee had been able to prove fee currency on a subset of the tanks, and that those tanks were alone responsible for the remediation costs for which Appellee was seeking indemnification, perhaps it could have sought to amend its claim. In that event, the question would have arisen whether fee delinquency on the intact tank(s) was fatal to its amended claim. Appellee did not, however, seek to amend, and hence, that question never arose before the agency.

remand for further agency findings led the agency to frame the issue for our review in such terms, which we then adopted for purposes of the allocatur grant. See Young's Sales & Svc. V. Underground Storage Tank Indemnification Bd., 609 Pa. 500, 501 17 A.3d 331, 331 (2011) (per curiam) (questioning whether "eligibility for recovery from the Underground Storage Tank Indemnification Fund is on a 'per tank' basis"). Nevertheless, for the reasons given above, I am able to discern from the record before us that the agency-level adjudication was proper under the circumstances, without overlaying a judicial gloss on Section 706 stating that the word "tank" connotes a combination of several tanks.

Accordingly, I would reverse the order of the Commonwealth Court and remand for reinstatement of the Board's order without construing Section 706(2) to contain an implicit reference to a "combination" of tanks.

Mr. Chief Justice Castille joins this Concurring Opinion.