

IN THE MATTER OF : **SITE NO. 407**

SHELL OIL COMPANY : **MAY 13, 1999**

PROPOSED FINAL DECISION

SUMMARY

Pursuant to Conn. Gen. Stat. ' 22a-449f(a), Shell Oil Company ("Shell") filed with the Underground Storage Tank Petroleum Clean-up Account Review Board ("the UST Board") two applications for reimbursement of costs it incurred cleaning up a release of unleaded gasoline. The gasoline leaked from a hole in the bottom of an underground storage tank ("the tank") located at a Shell gasoline station in East Hartford.

After reviewing the applications, the UST Board found that Shell had failed to comply with certain regulations governing the operation of the tank and denied Shell's applications. Pursuant to Conn. Gen. Stat. ' 22a-449f(c), Shell requested this hearing, which I conducted on October 29 and November 2, 3, and 9, 1998.

The parties to this proceeding are the staff of the DEP Underground Storage Tank Clean-up Fund Section ("the staff") and Shell. The staff opposes the applications and claims that Shell failed to operate the tank in conformance with regulatory requirements. The staff further contends that, pursuant to statute,

Shell's applications must be denied because, had the State incurred costs on account of this release, Shell would have been legally liable for such costs. Shell disagrees, contending that it complied with the applicable regulations in its operation of the tank and that, in any event, Shell's noncompliance, if any, was not the proximate cause of the release. Shell therefore argues that it is entitled to at least partial compensation for its clean up costs, even if it is found that Shell failed to comply with the applicable regulations.

I find that Shell failed to comply with several applicable regulations governing operation of the tank. In addition, I find that these failures were a proximate cause of the release in that they caused a significant delay in the detection of the leak and thereby a substantial increase in the amount of gasoline released. Based on these findings, I conclude that, pursuant to Conn. Gen. Stat. ' 22a-449f(b), the State could have recovered from Shell if the State had incurred clean-up costs due to the release. I therefore conclude that, pursuant to Conn. Gen. Stat. ' 22a-449f(a)(4), Shell must be denied compensation for the clean up and should not be awarded either full or partial reimbursement.

FINDINGS OF FACT

1. Shell Oil Company ("Shell"), the applicant in this case, is a corporation with a local office at 175 Capitol Boulevard, Suite 300, Rocky Hill, Connecticut. Shell is the owner of the gas station located at 131 Darlin

- Street in East Hartford (“the station”) and of the underground storage tanks located there. In 1987, one of these underground storage tanks, (“the tank”), leaked through a hole in its bottom. Shell subsequently incurred costs cleaning up the release. (Ex. APP-6)
2. Pursuant to Conn. Gen. Stat. ' 22a-449f(a), Shell filed two applications for reimbursement of clean-up costs with the Underground Storage Tank Clean-up Account Review Board (“the UST Board”).¹ The first, dated August 1995 was for \$260,475.92 and the second, a supplemental application dated August 1996, was for \$5,311.88. (Exs. APP-6, APP-7, DEP-5)
 3. On September 9, 1997, based on its finding that Shell had failed to comply with regulations governing storage tank operation, the UST Board denied both applications. (Ex. DEP-5) On September 29, 1997, Shell requested a hearing on these denials. (Ex. DEP-1) The UST Board responded by asking the Commissioner of Environmental Protection (“the commissioner”) to provide a hearing officer, as he is authorized to do under Regs. Conn. State Agencies ' 22a-449e-1(h)(6). (Ex. DEP-2) The commissioner then designated the director and staff of the DEP Office of Adjudications to hear the matter. (Ex. DEP-3)

¹ The UST Board is made up of representatives from government and the business community. Conn. Gen. Stat. ' 22a-449d(b). The UST Board reviews applications for reimbursements and payments from the underground storage tank clean-up account established under Conn. Gen. Stat. ' 22a-449(c). The UST

4. On October 29, 1998, I bifurcated the hearing, considering initially only the issue of whether, under Conn. Gen. Stat. ' 22a-449f(a), et seq., Shell was eligible for reimbursement of the costs it incurred cleaning up the release. (Tr. 10/29/98, p 2) If I had concluded that Shell was eligible, then I would have taken up the remaining issue, that of the specific amount of reimbursement due.

5. The station is in a commercial area in the western portion of the Town of East Hartford. The property consists of a paved yard, a service station with three service bays, and two dispenser islands covered by a canopy. The station has several other underground storage tanks but only the tank leaked. (Ex. APP-6, p SHEX 1947) At the time of the release, the tank held unleaded regular gasoline and had a maximum capacity of approximately 8,000 gallons (Ex. APP-6, SHEX 1814)

6. Shell discovered the release on April 23, 1987, when the tank failed a tightness test. At that time and at all relevant times before, the managers of the station were Gregory Hohmann and Michael Magliano. As station managers, they conducted day-to-day operations and kept daily inventory records of the station's tanks. (Ex. DEP-50) Based on all the information available to it, Shell concluded that the station managers' daily readings of

- the tank and recordings of sales and deliveries were reasonably accurate and without glaring errors or omissions. (Test. Bristol, Tr. 10/29/98, p 125, Tr. 11/2/98, pp 48, 52; test. O'Donnell, Tr. 11/2/98, pp 82-83)
7. In instructions dated August 13, 1986, Shell directed its station managers to keep accurate daily records and to report to Shell losses or gains of product in excess of 0.5 per cent of sales for any 30-day period. These instructions mention neither the weekly reconciliations of tank records that are required by Regs. Conn. State Agencies ' 22a-449(d)-1(g)(2)(A)² nor the quantity that equals an abnormal loss or gain of product as defined in Regs. Conn. State Agencies ' 22a-449(d)-1(a), namely, 0.5 per cent of weekly throughput. (Exs. APP-13, p SHEX 3472; DEP-77, pp. SHEL 583-587; See also Exs. APP-9, APP-11)
8. In November 1986, the station managers informed Shell that the tank was short of product. In response, in December 1986, Shell reviewed the station managers' November daily inventory records for the tank and found that the tank had an apparent loss of 718 gallons of product during the period November 1 through November 27, 1986. (Ex. APP-11, p SHEX 3448) As part of its investigation of the November inventory discrepancy, Shell checked the gasoline dispensers, meters, lines and

² Section 22a-449(d)-1(g)(2)(A) provides,
(T)he owner or operator of a new or existing facility shall assure that the following information is recorded: on a daily basis, the amount of product sold, used and received, and the level of water and product in the tank or container; and on a weekly basis, a

- visible parts of the tank and determined that these components were not the cause of the apparent product loss. However, neither the station managers nor Shell performed weekly reconciliations of the November daily tank inventory records in November 1986 or in 1987. (Test Bristol, Tr. 10/29/98, p 136, Tr. 11/2/98, pp. 112-120; Ex. APP-11, p SHEX 3444)
9. In January 1987, the station managers measured product in the tank immediately before and after a number of deliveries and thereby learned that several deliveries of unleaded regular gas to the station contained less gasoline than delivery records indicated. That is, the deliveries were “short.” (Ex. APP-11, p SHEX 3445) Using this data, and noting that the station managers had noticed shortages at the time of delivery in November 1986, Shell determined that short deliveries were the source of the apparent loss of gasoline in the November 1986- January 1987 time period. (Ex. APP-11, pp. SHEX 3443, 3444, 3449; Ex. DEP-50, p SHEL 151) Therefore, Shell did not further investigate or test the tank for tightness at that time. (Test. Bristol, Tr. 10/29/98, p 137)
10. In February 1987, Shell performed a two-month reconciliation of the tank’s December 1986 and January 1987 daily inventory records. Neither Shell nor the station managers performed weekly reconciliations of the daily

reconciliation comparing these figures to determine whether an abnormal loss or gain has occurred. . .

- inventory records for December and January. (Test. Bristol, Tr. 11/2/98, pp 91, 185; Ex. DEP-83, p SHEL 624)
11. In March 1997, Shell performed a monthly reconciliation of the tank's February 1987 daily inventory records. That reconciliation showed that product loss during the month of February was within Shell's guideline, i.e., less than 0.5 per cent of monthly throughput. However, Shell failed to determine whether the Regs. Conn. State Agencies ' 22a-449(d)-1(g)(2) (A) standard of 0.5 per cent of weekly throughput had been exceeded in any week in February. (Test Bristol, Tr. 10/29/98, p 140; Tr. 11/2/98, pp. 75, 85; Exs. APP 6, 11)
 12. Shell performed a monthly reconciliation of the March 1987 daily inventory records that indicated the tank had lost an amount of product that exceeded Shell's guideline. The record does not establish when this reconciliation was completed. However, the record does indicate that Shell did not test the tank for tightness until after April 22, the date on which one of the two station managers, Gregory Hohmann, informed Shell that he would cease using the unleaded regular tank unless and until the tank was tested. The next day, April 23, 1987, Shell tested the tank and discovered that it was leaking. (Exs. APP-6, APP-11, APP-14, pp SHEX 3485-3486; DEP- 42)

13. In 1997, in support of its reimbursement applications, Shell engaged an engineering firm to analyze the tank's daily inventory records for the period from May 1, 1986 to April 21, 1987. The engineering firm used a computer-aided analysis that is approved by over 40 states and by the United States Environmental Protection Agency as a way to monitor storage tanks. Using this analysis, tanks are rated as "pass," "fail," or "inconclusive" based on each study of a month of daily inventory records. A "fail" indicates that there is a high probability that a tank is losing product and that an investigation should be made. The computer-aided method has a 95 per cent probability of being correct on the basis of one month's data and a 99 per cent probability of being correct if analyses of two consecutive months produce the same result, e.g. two "fails." (Test. Christensen, Tr. 10/29/98, pp. 15, 20, 51; Ex. APP-5)
14. The engineering firm conducted the computer-aided analysis of the tank's daily inventory records in two-month increments. For the period January 1, 1987 through March 1, 1987, the analysis produced a "fail" result with a notation indicating possible product loss. Analysis of the March 1, 1987 to April 21, 1987 records also produced a "fail." These results indicate a greater than 99 per cent probability that the tank began leaking in February 1987 and that the leak continued in March and April. Under the computer-aided analysis, two "fails" such as these indicate that investigation is warranted to determine whether or not the subject tank is

- leaking. (Test. Christensen, Tr. 10/29/98, pp. 27-28, 30, 37, 42; Ex. APP-5)
15. Shell does not have weekly inventory reconciliations dating from 1986 and 1987 and has provided no evidence that weekly reconciliations of the tank's daily inventory records were performed by anyone during those years. However, in the summer of 1997, the engineering firm that prepared Shell's reimbursement applications used the station's daily inventory records and other relevant records to perform retrospective weekly reconciliations. The reconciliations cover the period from the seven consecutive days ("the week") ending 5/1/86 to the week ending 4/21/87 and show many instances of abnormal loss or gain, as that term is defined in Regs. Conn. State Agencies ' 449(d)-1(a).³ (Ex. APP-23; Test. Bristol, Tr. 11/2/98, pp. 46-47)
16. While not all of these instances of abnormal loss or gain indicate a leaking tank, the seven consecutive weeks of abnormal loss from the week ending February 17, 1987 to the week ending March 31, 1987 do. The losses of product in the weeks ending February 17, February 24 and March 3, 1987

³ The section defines abnormal loss or gain as follows:

"(A)bnormal loss or gain" means an apparent loss or gain in liquid exceeding 0.5 percent of (1) the volume of product used or sold by the owner or operator during any seven consecutive day period, or (2) the volumetric capacity of the tank or container, whichever is greater, as determined by inventory measurements made in accordance with subsection (g) of these regulations.

totaled 409 gallons in all. ⁴ In the weeks ending March 10, 17, 24 and 31, 1987, the tank incurred consecutive abnormal weekly losses of product totaling 836 gallons in all. (Test. Bristol, Tr. 11/2/98, pp 183, 185; Ex. APP-23) These consecutive results indicate that the tank probably began leaking in the latter part of February and was definitely leaking in early to mid March. ⁵ (Test. Bristol, Tr. 11/2/98, pp 138, 179)

17. After the seven-week period, in the weeks ending April 14 and April 21, 1987, the tank incurred abnormal weekly losses of product totaling 1017 gallons in all. (Ex. APP-23)

⁴ The abnormal loss for the week ending February 17 was 169 gallons. The week ending February 24 showed an abnormal loss of 1221 gallons while the week ending March 3 showed an abnormal gain of 981 gallons. The juxtaposition of the last two variances indicates that misreporting of the time of the stick reading or misstatement of the time of delivery are likely explanations for the large abnormal loss in the week ending February 24 followed by the large abnormal gain in the week ending March 3. However, even accepting this explanation, 240 gallons of the February 24 loss of 1221 gallons remains unaccounted for by the March 3 abnormal gain of 981 gallons. This 240-gallon loss plus the 169-gallon loss in the week ending February 17, 1987 equal 409 gallons. (Ex. APP-23; Test. Bristol, Tr. 11/2/98, p 183)

⁵ An expert witness for Shell testified as follows:

Question: But you just told me you couldn't -you wouldn't want to go back up the line and start opining as to whether there was a leak or no leak at any given point on that slope? [The slope is a line Shell plotted to show the rate of recorded loss of product from the tank.]

Mr. Bristol: I'd say right about where the negative slope became increasing, that would be around February 24, possibly mid-week, the week before that, then the negative slope becomes greater and greater. Its consistent with the type of hole we saw in the tank, an increasing release.

(Tr. 11/2/98, p 138) Shell's expert witness also testified:

Question: So its your testimony that the first time you saw such a trend that would suggest a leaking tank, bas on the records alone- -or excuse me- -based on the entire record is in the late February then March - - clearly in March and April, is that correct, of '87?

Mr. Bristol: Yeah. And February is still somewhat questionable in my mind. March, you're really starting to see a trend.

(Tr. 11/2/98, p 179)

18. From the week ending February 17, when the weekly losses indicating a leak began, to the week ending April 21, 1987, only the week ending April 7 had a normal loss (-51 gallons). Although the record contains no explanation for this normal loss, the loss does not establish that the tank was tight in that week. The tank was leaking prior to that date, was not repaired prior to May 1987, and could not have spontaneously stopped leaking before it was repaired. (Test. Bristol, Tr. 10/29/98, p 159; Tr. 11/2/98, pp. 39, 183; Test. Christensen, Tr. 10/29/98, p 72; Ex. APP-23)
19. The abnormal losses in February, March and April 1987 are not explainable by spillage, temperature variations, short deliveries or other known causes⁶ and they document continuing and increasing losses of product. These increasing losses indicate that the hole through which the product was leaking was getting larger, as holes in fiberglass tanks normally do. (Test. Bristol, Tr. 10/29/98, p 127; Tr. 11/2/98, pp. 72, 88, 138, 191, 194)
20. A Shell expert witness testified that while the tank was likely leaking in February 1987, the leak was then so small that stick readings may not have detected it until after the first week in March 1987. (Test.

⁶ Section 22a-449 (g)(2)(E) states,
(W)hen inventory reconciliation indicates an abnormal loss or gain which is not explainable by spillage, temperature variations or other known causes, the owner or

Christensen, Tr. 10/29/98, p. 37) However, the retrospective weekly reconciliations based on daily stick readings of the tank from 1986 and 1987 identify abnormal losses in the weeks ending February 17, 21, and March 3, 1987 as well as in the succeeding weeks, thereby belying the expert's testimony. Therefore, I find that weekly reconciliations of the tank's daily inventory records performed in 1987 would have identified abnormal losses in February, in the first week of March 1987, and in the succeeding weeks, just as the retrospective reconciliations did. (Ex. APP-23)

CONCLUSIONS OF LAW

Shell applied to the UST Board for reimbursement pursuant to Conn. Gen. Stat. '22a-449f(a). Section 22a-449f(a) provides, in relevant part,

(A) responsible party may apply to the Underground Storage Tank Petroleum Clean-up Account Review Board . . . for reimbursement of costs incurred as a result of a release . . . The board shall order reimbursement or payment from the account for any cost paid . . . if, . . . (4) the board determines that the cost is for damage that was incurred as a result of the release, and that the grounds for recovery specified in subsection (b) of this section do not exist at the time such determination is made. . . .

Subsection 22a-449f(b) provides, in relevant part,

operator shall assure the immediate investigation and correction of the source of the abnormal loss or gain. . . .

(T)he Attorney General, upon request of the board, may institute an action in the superior court for the judicial district of Hartford to recover the amounts specified in this section from the responsible party if . . . (3) the release occurs from an underground storage tank or system which is not in compliance with an order issued by the commissioner or with the general statutes and regulations governing the installation, operation and maintenance of underground storage tanks and such lack of compliance was a proximate cause of such release. . . .

Shell bears the burden of proving that it is entitled to reimbursement under these statutes. *In re Appeal of the Town of Woodstock, Site No. 430 (5/20/97)* and cases cited therein. Shell did not carry this burden. Instead, the record demonstrates that Shell failed to operate the tank as required by the applicable regulations and that this failure was a proximate cause of the release for which Shell seeks reimbursement. Therefore, pursuant to Conn. Gen. Stat. ' ' 22a-449(f)(a) and 22a-449(f)(b), Shell is not entitled to reimbursement from the UST Board for expenses Shell incurred cleaning up the release.

Shell's Noncompliance with the Regulations

From at least November of 1986 to April 22, 1987, Shell failed in four ways to comply with certain regulations governing the operation of the tank. Shell failed to reconcile daily inventory records in order to determine whether the tank had suffered an abnormal gain or loss as that term is defined in Regs. Conn. State Agencies ' 22a-449(d)-1(a). Shell also failed to reconcile tank records on a

weekly basis, as is required by Regs. Conn. State Agencies ' 22a-449(d)-1(g)(2)(A) and failed to do so within seven days of the daily records being recorded, as that regulation requires. Finally, Shell failed to immediately investigate abnormal gains or losses of inventory as required by Regs. Conn. State Agencies ' 22a-449(d)-(1)(g)(2)(E).

(1) Shell failed to reconcile daily inventory records in order to determine whether the tank had suffered an abnormal loss or gain as defined in Regs. Conn. State Agencies ' 22a-449(d)-1(a). That section defines an abnormal loss or gain as

. . .an apparent loss or gain in liquid exceeding 0.5 percent of (1) the volume of product used or sold by the owner or operator during any seven consecutive day period, or (2) the volumetric capacity of the tank or container; whichever is greater, as determined by reconciliation of inventory measurements made in accordance with subsection (g) of these regulations.

Shell determined whether the tank had sustained an abnormal loss or gain in inventory based on a standard of 0.5 per cent of monthly, rather than 0.5 per cent of weekly, throughput. (F.F. 7-12, 15)

(2) Shell failed to reconcile the tank records on a weekly basis, as required by the regulations. Section 22a-449(d)-1(g) states:

(T)he owner or operator of a new or existing facility shall assure that the following information is recorded: on a daily basis, the amount of product sold, used and received, and the level of water and product in the tank or container; and on a weekly basis, a

reconciliation comparing these figures to determine whether an abnormal loss or gain has occurred. Separate records shall be maintained for each system of interconnected tanks or containers and serving pumps or dispensers

From at least November 1986 through April 1987, Shell failed to reconcile the tank's daily records for any seven consecutive day period. Shell did not reconcile the November 1986 records until after November 27, 1986 and then reconciled them on a monthly basis. Shell did not reconcile the December 1986 and January 1987 inventory records until February 1987 and then reconciled them on a two-month basis. Shell did not reconcile the February 1987 inventory records until March 1987 and then did so on a monthly basis. Shell also reconciled the March 1987 and April 1987 inventory records on a monthly basis. (F.F. 7-12, 15)

- (3) Shell failed to reconcile the daily inventory records within seven days after seven consecutive days of inventory records for the tank had been recorded, as required by the regulations. (F.F. 7-12, 15) Section 22a-449(d)-1(g) states: "(T)he owner or operator shall review such records and attest to their accuracy by signing them no later than seven days following their recording." The records referred to in Regs. Conn. State Agencies ' 22a-449(d)-1(g) are the daily inventory records required by that regulation.

- (4) Because Shell failed to comply with the regulations as noted in the preceding numbered paragraphs 1-3, Shell lacked timely notice of the leak and therefore did not immediately investigate and correct that leak.

Section 22a-449(d)-1(g)(2)(E) states:

(W)hen inventory reconciliation indicates an abnormal loss or gain which is not explainable by spillage, temperature variations or other known causes, the owner or operator shall assure the immediate investigation and correction of the source of the abnormal loss or gain. At a minimum, the owner or operator shall take as many of the following steps as necessary to confirm an abnormal loss or gain:

- (i) When an inventory record error is not apparent, a recalculation to determine abnormal loss or gain shall be made starting from a point where the records indicate no abnormal loss or gain:
- (ii) A detailed visual inspection of those components of the facility which are readily accessible for evidence of failure shall be performed;
- (iii) The dispensers of the particular oil or petroleum liquid in question shall be checked for proper calibration;
- (iv) A failure determination shall be performed on the piping system between the storage tank or container and dispenser(s) in accordance with section (i) of these regulations; and
- (v) A failure determination shall be performed on the tank or

container in accordance with subsection (i) of these regulations.

The record clearly shows that, had Shell performed weekly reconciliations in 1987, it would have had notice by February 24, 1987 (seven days after the week ending February 17, 1987), that the tank had incurred an abnormal loss requiring immediate investigation. In fact, the week ending February 17 was the first of seven consecutive weeks of otherwise unexplained abnormal losses and the weeks ending April 14 and April 21 had abnormal losses as well. However, Shell did not perform weekly reconciliations in 1987. (F.F. 16-18) Shell's only reconciliations of the tank's inventory from February 1987 through April 1987 were on a monthly or, in the case of December 1986 and January 1987, bi-monthly basis. (F.F. 7, 8, 10-12)

The dictionary definition of the word "immediate" is

. . .having nothing coming between; with no intermediary; specif., a) not separated in space; in direct contact; closest nearest b) close by; near [*immediate neighbors*] c) not separated in time; acting or happening at once; without delay; instant. . .

Webster's New World Dictionary, 3d College Edition, 1988) Therefore, Shell failed to assure the *immediate investigation and correction* of the source of the abnormal loss or gain as required by Regs. Conn. State Agencies ' 449(d)-1(g)(2)(E).

An expert witness for Shell testified that the leak wasn't large enough to have been detected by stick readings until the second week of March 1987. However, even if I had credited this testimony (see F.F. 20) it would fail to provide an excuse for Shell's failure to investigate the tank's condition until April 23. On that date, and only at the station managers' firm insistence, Shell tested the tank for tightness and thereby learned that it was leaking. (F.F. 12)

Shell's noncompliance with the regulations governing reconciliation of inventory records caused Shell's failure to discover and correct the release in February or March 1987. To insulate an applicant from the requirement that it immediately investigate and correct releases because that applicant has failed to keep required inventory records would reward that failure and would not be protective of the environment. Shell proposes reading Regs. Conn. State Agencies ' 22a-449(d)-1(g)(2)(E) to permit weeks of abnormal loss or gain to occur before the complete investigation set out in the regulation is required. Such a reading is inimical to the immediate detection and correction of releases required by the regulation and therefore falls afoul of the rule that environmental legislation should be interpreted to effectuate its remedial purpose. Starr v. Department of Environmental Protection, 226 Conn. 358, 382 (1993); Manchester Environmental Coalition v. Stockton, 184 Conn. 51, 57 (1984)

Proximate Cause

Shell argues that a hole in the bottom of the tank, rather than Shell's noncompliance with the regulations, was a proximate cause of the release. Shell contends that it is therefore entitled to at least partial compensation, even if it is found that Shell's noncompliance with the regulations was also a proximate cause. I disagree. Shell failed to comply with the applicable regulations as set out above and this noncompliance was a proximate cause of the release. Therefore, Shell is not entitled to reimbursement for the clean up of the release. Conn. Gen. Stat. ' ' 22a-449f(a), 22a-449f(b)

"Proximate cause" is a legal concept, a hybrid construct that is the result of balancing philosophic, pragmatic, and moral approaches to causation. Suarez v. Sordo, 43 Conn. App. 756, 685 A2d 1144 (1996), *cert. denied* 240 Conn. 906, 688 A 2d 334; Stewart v. Federated Department Stores, Inc., 234 Conn. 597, 662 A2d 753 (1995). "Proximate cause" establishes a reasonable connection between the act or omission of the defendant and the harm suffered by the plaintiff." *Id.* It is an actual cause that is a substantial factor in the resulting harm, and the fundamental inquiry in the substantial factor test is whether the harm which occurred was of the same general nature as the foreseeable risk created by the defendant's acts and omissions. Coste v. Riverside Motors, Inc., 24 Conn. App. 109, 585 A2d 1263 (1991); Fleming v. Garnett, 23 Conn. 77, 646 A2d 1308 (1984)

The tank had abnormal losses in inventory from the week ending February 17, 1987 to April 24, 1987, when Shell emptied the leaking tank.⁷ Had Shell complied with the applicable regulations by performing weekly reconciliations of daily tank inventory records, it would have had, from the week ending February 24, 1987 to the week ending April 21, 1987, a number of opportunities to discover that the tank was leaking. One expert called by Shell testified that the leak was large enough by the second week of March 1987 to have been detected using the methods described in the regulations but that it may not have been large enough earlier. The retrospective weekly reconciliations performed by another expert for Shell relied on the 1987 daily stick readings and disclosed an abnormal loss of product in the weeks ending February 17, February 24, March 3 and in the succeeding weeks. Thus, by the latter Shell expert's testimony and evidence, Shell could have learned that the tank was leaking and could have undertaken the immediate investigation and correction of the leak as required by Regs. Conn. State Agencies ' 22a-449(d)-1(g)(2)(E) in February, March, or early April of 1987. By the first Shell expert's testimony, Shell may not have been able to do so before the second week of March 1987. (F.F. 16,17, 20)

Otherwise unexplained abnormal weekly losses from the tank equaled 409 gallons in February, 836 gallons in March and 1017 gallons in April, 1987. Both Shell's computer-aided retrospective analysis and Shell's retrospective weekly

⁷ The week ending April 7, 1987 had a normal loss of product. Although this result remains unexplained, it does not indicate that the tank was tight during that week. (F.F. 18)

reconciliations indicate that these losses were the result of a release from the tank that began in February, or in March at the latest, and increased in rate of release and total product lost as time passed and as the hole in the tank grew larger. (F.F. 16-20) Shell's failure to detect and correct the leak in February or March, or even in early April, substantially increased the amount of the release. (Id.) This increase is just the sort of foreseeable harm that can result from the failure to properly reconcile tank inventory records and to immediately investigate and correct abnormal losses or gains as the applicable regulations require. Thus, Shell's failure to comply with these regulations was a proximate cause of the release.

Shell argues that the hole in the tank was a proximate cause of the release and that therefore Shell is entitled to at least partial reimbursement. However, when the actor's acts or omissions create risk of a particular harm and are a substantial factor in causing that harm, the fact that the harm is brought about through the intervention of another force does not relieve the actor of liability. The only exception to this rule is when the harm is intentionally caused by a third person and is not within the scope of the risk created by the actor's conduct. D'Arcy v. Shugrue, 5 Conn. App. 12, 496 A.2d 967 (1985). In the instant case, the leak began through a hole that grew larger in a manner characteristic of fiberglass tanks and without any intentional human intervention. (F.F. 19) This enlargement is not an intervening cause that falls within the scope of the just mentioned exception. Rather, Shell's acts and omissions predictably and substantially

created the increased release by delaying discovery and repair of the hole. Furthermore, no third person's acts created a risk beyond the scope of that created by Shell's acts and omissions. Thus, Shell's acts and omissions are a proximate cause of the release, even though they are not the sole cause, and Shell is not relieved of liability because of the existence of the hole or the fact that the hole increased in size. Because Shell would be responsible under Conn. Gen. Stat. ' 22a-449(f)(b) had the state incurred clean-up costs due to the release, Shell is not entitled to either partial or full reimbursement from the Underground Storage Tank Clean-up Fund for the costs Shell incurred cleaning up the release. Conn. Gen. Stat. ' 22a-449(f)(a).

RECOMMENDATION

Based on the findings and conclusions stated above, I respectfully recommend that the Board deny Shell's applications for reimbursement.

Date

Deborah Green, Hearing Officer