ILLINOIS POLLUTION CONTROL BOARD
December 4, 1997

INDIAN PRAIRIE COMMUNITY UNIT SCHOOL DISTRICT NO. 204,	)	
Petitioner,	)	
v.	)	PCB 93-80 (UST - Reimbursement)
THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

ORDER OF THE BOARD (by J. Theodore Meyer):

This matter is before the Board on cross motions for summary judgment filed on August 22, 1997, by petitioner, Indian Prairie Community Unit School District No. 204 (Indian Prairie), and on October 2, 1997, by respondent, the Illinois Environmental Protection Agency (Agency). Also on October 2, 1997, the Agency filed a motion to file *instanter* its motion for summary judgment; the Board grants such leave to file. In this matter, Indian Prairie is seeking reimbursement from the Underground Storage Tank Fund (Fund) for the costs of corrective action associated with the removal of a heating oil underground storage tank (UST) located at its Indian Plains Elementary School in Aurora, DuPage County, Illinois. The Agency denied Indian Prairie reimbursement because its heating oil UST was taken out of service prior to January 1, 1974, and therefore its UST was not "registerable." In their motions for summary judgment, Indian Prairie and the Agency each maintain that there exists no genuine issue of material fact in this matter, and, therefore, that each is entitled to judgment as a matter of law.

On September 22, 1997, the Agency filed its response to Indian Prairie's motion for summary judgment. On October 20, 1997, Indian Prairie filed its reply to the Agency's response. On November 10, 1997, Indian Prairie filed its response to the Agency's motion for summary judgment. The Agency did not file a reply to Indian Prairie's response. For the reasons stated below, the Board denies Indian Prairie's motion for summary judgment and grants the Agency's motion for summary judgment.

BACKGROUND

The following is a recitation of the undisputed facts in this matter. During the period of time prior to January 1, 1974, and continuing through July 14, 1992, a 2,500 gallon UST which contained heating oil was located on Indian Prairie's property at Indian Plains

Elementary School in Aurora, DuPage County, Illinois. MSJ[1] at 1-2. On April 22, 1997, Indian Prairie paid the Office of State Fire Marshal (OSFM) $100 for registration of its heating oil UST. MSJ at 2; R at 10-11. On May 22, 1992, the OSFM sent Indian Prairie a new "Notification Form for Underground Storage Tanks" (notification form), instructing Indian Prairie to "disregard the previous notification" form. MSJ, Exh. A. There is no indication from the record that the OSFM ever accepted Indian Prairie's notification form to register its heating oil UST.

On or about June 1, 1992, Indian Prairie reported a release from its heating oil UST to the OSFM. R. at 2. On or about June 16, 1992, Indian Prairie filed with the OSFM its notification form for permit to remove its heating oil UST. MSJ at 3, Exh. A. On July 6, 1992, the OSFM issued Indian Prairie's environmental engineers, Prairie Environmental Specialists, Inc., a UST removal permit. MSJ, Exh A. On July 14, 1992, 500 gallons of heating oil were pumped out of the heating oil UST and properly disposed by Prairie Environmental Specialists, Inc. MSJ at 3. Subsequently, on October 29, 1992, the Agency received a completed notification form for reimbursement from the UST Fund for the costs of corrective action associated with the removal of a heating oil underground storage tank. Resp. at 2; R at 1-8. On November 10, 1992, the Agency prepared and forwarded to the OSFM a "Confidential Intra-Agency Communications" form, seeking the OSFM's confirmation of Indian Prairie's registration of its heating oil UST and payment of the appropriate fees. Resp. at 3, R. at 12.

On December 8, 1992, , through its agents, Prairie Environmental Specialists, Inc., sent the OSFM a completed UST notification form. MSJ, Exh. C. In that completed notification form, Prairie Environmental Specialists, Inc., indicated that Indian Prairie's heating oil UST was last in use in "--/--/70." MSJ, Exh. C. The Agency noted on February 5, 1993, in its internal "Reimbursement Application Completeness Checklist" that there was insufficient information provided by Indian Prairie in its notification form as to the installation date and the date that the UST was taken out of service, and further that the OSFM needed additional information on the date that the UST was last used in order to verify its registration status. Resp. at 3; R. at 14.

On or about March 19, 1993, the Agency received an amended "Confidential Intra-Agency Communications" form from the OSFM indicating that the OSFM had received additional information. Resp. at 4. The OSFM amended its "Confidential Intra-Agency Communications" form by striking the March 5, 1992, UST registration date and the notation that the fees were paid, and by further indicating that Indian Prairie's heating oil UST was exempt from registration. Resp. at 4; R. at 16. On March 29, 1993, the Agency notified Indian Prairie that it had determined that Indian Prairie was ineligible to seek UST Fund

[1] Indian Prairie's motion for summary judgment will be referred to as MSJ at __; the Agency's response will be referred to as Resp. at __; the Agency's motion for summary judgment will be referred to as MSJ2 at __; Indian Prairie's response will be referred to as Resp.2 at __; the Agency's administrative record will be referred to as R at __; exhibits will be referred to as Exh.

reimbursement for corrective action costs associated with the removal and remediation of its heating oil UST. Resp. at 4; R. at 20. On April 7, 1993, the OSFM directly advised Indian Prairie that its UST was no longer registerable because it was not in operation at any time since January 1, 1974. MSJ, Exh. D; Resp. at 5.

On April 19, 1993, Indian Prairie requested administrative review of the OSFM's administrative order dated April 7, 1993. MSJ, Exh. E; Resp. at 5. On May 20, 1993, the OSFM advised Indian Prairie that it was not at that time scheduling hearings because they were awaiting decisions on that issue from cases already pending before the courts. MSJ, Exh. F; Resp. at 5. No hearing has been held to date, and Indian Prairie's appeal is still pending before the OSFM. Resp. at 5.

STATUTORY AUTHORITY

Prior to the enactment of Title XVI of the Act by P.A. 87-1088, former Section 22.18b(a) of the Illinois Environmental Protection Act provided the statutory requirements for eligibility to access the UST Fund for reimbursement of costs of corrective action. The statutory provision stated:

> a) [a]n owner or operator is eligible to receive money from the Underground Storage Tank Fund for costs of corrective action or indemnification only if all of the following requirements are satisfied:
>
> * * *
>
> (4) The owner or operator has registered the tank in accordance with Section 4 of the Gasoline Storage Act . . ." 415 ILCS 5/22.18b(a) (1993).

Prior to September 15, 1992, Section 4(b)(1)(B) of the Gasoline Storage Act (GSA) provided, in pertinent part:

> (B) The owner of a heating oil underground storage tank that at any time between January 1, 1974 and July 11, 1990, contained heating oil shall register the tank with the Office of the State Fire Marshal. 430 ILCS 15/4(b)(1)(B) (1991).

The General Assembly has twice recently amended the UST registration requirements of Section 4 of the GSA.[2] Since September 15, 1992, Section 4(b)(1)(B) of the GSA, provides, among other things, that:

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[2] On July 11, 1990, the General Assembly amended Section 4 of the GSA to include heating oil USTs in the leaking underground storage tank program for the first time, provided that they had a capacity of less than 1,100 gallons. On September 6, 1991, the GSA was again

> (B) No heating oil underground storage tank that was taken out of operation before January 2, 1974, may be registered under this Act. 430 ILCS 5/4(b)(1)(B) (1993).

Section 4(b)(1)(D) of the GSA also provides that the term "operation," as used in Section 4(b) of the GSA:

> ". . . means that the tank must have had input or output of petroleum, petroleum products, or hazardous substances, with the exception of hazardous wastes, during the regular course of its usage. "Operation" does not include . . . (ii) the mere containment or storage of petroleum, petroleum products, or hazardous substances, with the exception of hazardous wastes." 430 ILCS 5/4(b)(1)(B) (1993).

STANDARD OF REVIEW

The Illinois Supreme Court set forth the standards for considerations of motions for summary judgment in Jackson Jordan, Inc. v. Leydig, Voit & Mayer, 158 Ill. 2d 240, 249, 633 N.E.2d 627, 630 (1994):

> A motion for summary judgment is granted if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. [735 ILCS 5/2-1005(c) (1983).] The pleadings, depositions, admissions, and affidavits on file must be construed against the movant and in favor of the opponent of the motion, although the opponent cannot rely simply on his complaint or answer to raise an issue of fact when the movant has supplied facts which, if not contradicted, entitle him to judgment as a matter of law. Summary judgment is a drastic means of disposing of litigation, so the right of the moving party to obtain summary judgment must be clear and free of doubt. Where doubt exists as to the right to summary judgment, the wiser judicial policy is to permit resolution of the dispute by a trial.

The appellate court explained the burden of each party in prosecuting or defending against a motion for summary judgment in Estate of Sewart, 236 Ill. App. 3d 1, 7-8, 602 N.E.2d 1277, 1282 (1st Dist. 1992) (citations omitted):

> The party seeking summary judgment may meet its initial burden of persuasion by presenting facts which, if uncontradicted, would entitle it to judgment as a matter of law. Once the party seeking the summary judgment produces such

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amended to eliminate the requirement that heating oil USTs be greater than 1,100 gallons in capacity in order to be registered. 430 ILCS 15/4(b)(1)(B) (1991).

> evidence, the burden of production shifts to the party opposing the motion, who may not rely solely on allegations in the complaint, but is required to come forth with some facts which create a material issue of fact. Although a [party] opposing a motion for summary judgment need not prove her case at this point, she must provide some factual basis which would arguably entitle her to judgment under the applicable law. If the respondent fails to produce such evidence, summary judgment is properly granted.

ARGUMENTS

Indian Prairie's Motion for Summary Judgment

In support of its motion for summary judgment, Indian Prairie argues that, at the time that it registered and removed its heating oil UST, the UST was fully registerable under the existing Section 4 of the GSA. MSJ at 3. On September 15, 1992, after Indian Prairie's heating oil UST was registered and removed, the legislature amended Section 4 of the GSA to provide additional prerequisites to registration. MSJ at 3. One such prerequisite mandates that the UST had to be in operation, between January 1, 1974, and July 11, 1990. MSJ at 4. Indian Prairie maintains that this new requirement does not apply to its heating oil UST as it was enacted after it had initially registered its heating oil UST. Finally, Indian Prairie alleges that this new requirement can be invoked to block Indian Prairie's right to reimbursement only if the September 15, 1992, amendments are given retroactive effect. MSJ at 4.

In support of its claims, Indian Prairie relies on the Supreme Court's decision in First of America Trust Company v. Armstead, 171 Ill. 2d 282, 664 N.E.2d 36 (1996). In this decision, the Supreme Court articulated that, in determining whether amendments to the GSA should apply to requests for reimbursement from the UST Fund, the "vested rights" approach should be used. First of America, 171 Ill. 2d 282, 664 N.E.2d 36. Indian Prairie maintains that under the old statutory scheme, its UST was definitely registerable, and therefore, eligible for reimbursement from the UST Fund. MSJ at 6. Indian Prairie claims that it registered its tank, paid its fee, applied for permission to remove the tank, and paid the requisite removal fee, all before the law changed on September 15, 1992. MSJ at 6. By the time the new statute was enacted, Indian Prairie alleges that its right to reimbursement from the Fund vested due to its reliance on the statutory scheme that was previously in place.

In response to Indian Prairie's arguments, the Agency maintains that UST registration is a mandatory prerequisite to UST Fund eligibility. Resp. at 6. Section 57.13(b) of the Act (415 ILCS 5/57.13(b) (1996)) provides that the owner or operator of an UST who reports a release prior to September 13, 1993, must elect to proceed in accordance with the requirements of Title XVI of the Act (Sections 57 through 57.17) or proceed in accordance with the law as it existed prior to that date.[3] Resp. at 6. The Agency asserts that prior to the enactment of Title XVI of the Act, former Section 22.18b(a)(4) of the Act provided the

[3] Indian Prairie reported the release from its heating oil UST prior to September 13, 1993, and has not opted into the Title XVI Leaking Underground Storage Tank Program.

statutory requirements for eligibility to access the UST Fund for reimbursement of costs of corrective action. Resp. at 6. Thus, the Agency argues that UST registration is a mandatory prerequisite for an owner or operator to receive UST Fund reimbursement for any costs of corrective action. Resp. at 7.

In addition, the Agency maintains that USTs taken out of service prior to January 1, 1974, are unregisterable as stated in Section 4 of the GSA (415 ILCS 15/4 (1996)). Resp. at 7. In its "Amended Notification Form" (MSJ, Exh. C), the Agency argues that Indian Prairie admitted its heating oil UST was last in operation in 1970. Citing Board of Education, Community Consolidated School District No. 15 Cook County v. Armstead, 279 Ill. App.3d 922, 665 N.E.2d 409 (1st Dist. 1996), the Agency asserts that Indian Prairie's heating oil UST is exempt from registration because it was taken out of operation prior to January 2, 1974, and therefore Indian Prairie is ineligible to access the UST Fund for reimbursement of corrective action.

The Agency further asserts that the GSA grants the OSFM, rather than the Board, exclusive jurisdiction and authority over UST registration issues. Resp. at 8; see 430 ILCS 15/4 (1993). Only the OSFM has the authority to revoke, rescind, or revise its initial UST registration decisions based on new information or changes in law. Resp. at 9; see OK Trucking Company v. Armstead, 274, Ill. App.3d 376, 653 N.E.2d 863 (1st Dist. 1995), *app. den.*, 167 Ill. 2d 557, 667 N.E.2d 1059 (1996).

Finally, the Agency maintains that Indian Prairie's contentions about "vested rights" is not an issue of material fact warranting summary judgment in its favor. Resp. at 10. In this matter, the Board does not have decisionmaking authority over registration of USTs. Resp. at 12. The Agency contends that contested final decisions of the OSFM are reviewable under the Administrative Review Act (735 ILCS 5/3-101 (1983)), in the circuit court, and the Board is not granted with jurisdiction to review or modify the OSFM UST registration decisions. The Agency argues that the issue properly before the Board is not whether the OSFM ought to have registered Indian Prairie's heating oil UST, but whether the OSFM did deem Indian Prairie's heating oil UST registered at the time that the Agency made its eligibility decision. Resp. at 12-13; see Kean Oil Company v. IEPA (September 5, 1996), PCB 92-60.

The Agency's Motion for Summary Judgment

In its motion for summary judgment, the Agency reiterates several of the same arguments that it addressed in its response to Indian Prairie's motion for summary judgment. First, the Agency maintains that the GSA grants the OSFM exclusive regulatory authority over UST registration issues. MSJ2 at 9; see First of America Trust Company v. Armstead, 171 Ill. 2d 282, 284-85, 664 N.E.2d 36, 37 (1996); Village of Lincolnwood v. IEPA (June 4, 1992), PCB 91-83. Contested final decisions of the OSFM, the Agency argues, are reviewable under the Administrative Review Act (735 ILCS 5/3-101 (1983)) in circuit court (430 ILCS 15/2(3)(e) (1993)).

The Agency further asserts that Indian Prairie admitted that its heating oil UST was taken out of service prior to January 2, 1974. MSJ2 at 10; see MSJ, Exh. C. In a document issued to the OSFM by Indian Prairie's environmental engineers, Prairie Environmental Specialists, Inc, Indian Prairie admitted that its heating oil UST was last in use in 1970. MSJ2 at 10. The Agency argues that this correspondence is an admission because Prairie Environmental Services, Inc. acted as an agent of Indian Prairie and was acting within the scope of its agency in corresponding with the OSFM on behalf of the District. MSJ2 at 10, citing Bafia v. City International Trucks, Inc., 258 Ill. App.3d 4, 629 N.E.2d 666 (1st Dist. 1994); Miller v. J.M. Jones Co., 225 Ill. App.3d 799, 587 N.E.2d 654 (4th Dist. 1992); and Taylor v. Checker Cab Company, (34 Ill. App. 3d 413, 339 N.E.2d 769 (1st Dist. 1975).

Moreover, the Agency alleges that Indian Prairie's heating oil UST, a UST taken out of service prior to January 2, 1974, is unregisterable. MSJ2 at 12. On September 15, 1992, Section 4 of the GSA (430 ILCS 15/4(b)(1)(B) (1993)) was amended to expressly prohibit the registration of heating oil USTs that were taken out of operation prior to January 2, 1974. MSJ2 at 12. The Agency maintains that a tank that remains underground and contains some amount of petroleum product or residue, but is not actively being emptied or filled, is not in "operation" in accordance with Section 4(b)(1)(D) of the GSA (430 ILCS 15/4(b)(1)(D) (1993)). The Agency states that since Indian Prairie's heating oil UST was last used in 1970, and that since the tank was taken out of operation prior to January 2, 1974, the UST therefore is not registerable by Indian Prairie, is not registered, and is properly considered exempt from registration by the OSFM pursuant to Section 4 of the GSA. MSJ2 at 14.

As the heating oil UST on Indian Prairie's property is unregisterable, the Agency asserts, that Indian Prairie is ineligible to access the UST reimbursement Fund. MSJ2 14-15. UST registration as required pursuant to Section 4 of the GSA, is a mandatory prerequisite for an UST owner or operator in order to receive UST Fund reimbursement for any costs of corrective action associated with a release of petroleum from such UST. MSJ2 at 14-15, citing Kean Oil Company v. IEPA (September 5, 1996), PCB 92-60; Divane Bros. Electric Co. v. IEPA (November 4, 1993), PCB 93-105; City of Lake Forest v. IEPA (June 23, 1992), PCB 92-36; Village of Lincolnwood v. IEPA (June 4, 1992), PCB 91-83; Sparkling Spring Mineral Water Co. v. IEPA (March 14, 1991), PCB 91-9.

In addition, the Agency asserts that the OSFM has the authority to revoke, rescind, or revise its initial UST registration decision based on new information or changes in law. MSJ2 at 15, citing OK Trucking Company v. Armstead, 274 Ill. App.3d 376, 653 N.E.2d 863 (1st Dist. 1995), *app. den.* 16 Ill.2d 557, 667 N.E.2d 1059 (1995).

Finally, the Agency maintains that Indian Prairie's vested rights claim is immaterial to the matter before the Board. In citing Board of Education, Community Consolidated School District No. 15, Cook County v. Armstead, 279 Ill. App.3d 922, 665 N.E.2d 409 (1st Dist. 1996), the Agency asserts that Indian Prairie has no vested right in the registration of its heating oil UST, even though it had filed its registration and paid its required fees before the statute was amended.

In response to the Agency's motion, Indian Prairie reiterates that its right to reimbursement is vested and that the Legislature's enactment of Public Act 87-1088, which amended the requirements for the registrability of USTs, cannot be retroactively applied to bar that reimbursement. Resp.2 at 6. Specifically, Indian Prairie contends that this more stringent requirement that USTs are exempt from registration if taken out of operation prior to January 2, 1974, was not the law when Indian Prairie registered its heating oil UST with the USFM (February 1992), paid its registration fee (April 1992), applied for permission to remove the tank (June 1992), and removed the tank (July 1992). Resp.2 at 6.

Indian Prairie alleges that in First of America v. Armstead, 171 Ill. 2d 282, 664 N.E. 2d 36 (1996), the Illinois Supreme Court recognized that under certain circumstances a vested right to reimbursement from the Fund would exist so as to prohibit application of a later adopted amendment. Resp.2 at 9. Indian Prairie maintains that its situation can be compared to the situation in ChemRex, Inc. v. Pollution Control Board, 257 Ill. App. 3d 274, 628 N.E. 2d 963 (1993). In ChemRex, the appellate court determined that ChemRex, the tank owner, had established a vested right to reimbursement from the Fund prior to the change in law that occurred on September 6, 1991. The appellate court found that prior to the effective date of the new law, ChemRex had registered its tanks, paid its fees, completed corrective action and filed its reports with the Agency. Resp.2 at 9. The appellate court concluded that ChemRex had a right to reimbursement because it had satisfied its eligibility criteria prior to its application. Resp.2 at 10. Finally, Indian Prairie maintains that the Agency's reliance upon prior decisions of the Board are misplaced as they do not directly address the question of retroactive application of a statutory amendment. Resp.2 at 11.

DISCUSSION

After a careful review of the record in this matter, the Board denies Indian Prairie's motion for summary judgment. The Board finds that the Agency has adequately demonstrated that no issue of material fact exists, and therefore grants the Agency's motion for summary judgment.

The Board previously addressed this issue with a similar factual situation in Kean Oil Company v. IEPA (September 5, 1996), PCB 92-60. In that decision, the Board stated the following:

> The Agency denied Kean's application for eligibility to access the Fund on the grounds that the three tanks reported to have released regulated substances were not registered pursuant to the requirements of the GSA, in violation of the requirement set forth in Section 22.18b(a)(4). The Agency based this determination on an "Intra-Agency Communication" it received from the OSFM which indicated that the tanks were exempt from registration. (Rec. at 97.) This communication informed the Agency that the OSFM had reversed its October 31, 1991 statement confirming that Kean had registered all tanks and paid all fees, essentially "deregistering" the tanks.

> In reviewing eligibility/deductibility determinations, the Board is not reviewing registration decisions. Registration decisions constitute separate, appealable determinations made by the OSFM which can be challenged in circuit court. Therefore, whether or not a tank is registerable under the GSA at the time of an owner or operator's application for reimbursement is not the issue for the Agency. The issue for the Agency is whether the tanks were registered by the OSFM. (Divane Bros. Electric Co. v. IEPA (November 4, 1993), PCB 93-105, slip op. at 6, *citing* Lincolnwood v. IEPA (June 4, 1992), PCB 91-83, and Lake Forest v. IEPA (June 23, 1992), PCB 92-36.
>
> In this matter the record is clear that the tanks were not registered with the OSFM at the time that the Agency made its eligibility determination, since the OSFM had "deregistered" the tanks, as indicated in the "Intra-Agency Communication." Since registration is a condition precedent to eligibility to access the Fund pursuant to Section 22.18b of the Act, we find that the Agency's determination denying Kean eligibility to access the Fund was proper.
>
> Kean's arguments concerning whether or not the tanks were required to be "in use" are misplaced. These arguments address whether or not the tank should have been registered by the OSFM. As previously indicated, the Board does not have authority to review the registration decisions made by the OSFM. These arguments would be properly raised in circuit court in a challenge to the OSFM's decision denying registration.

Despite Indian Prairie claims, the Board finds, as it did in Kean, that in reviewing eligibility/deductibility determinations, the Board is not reviewing registration decisions. Registration decisions constitute separate, appealable determinations made by the OSFM which can be challenged in circuit court. The issue before the Board is not whether the tank is registerable under the GSA at the time of Indian Prairie's application for reimbursement, but whether the tank was registered by the OSFM. As we find that Indian Prairie's heating oil UST was not registered at the time it submitted its application for reimbursement, Indian Prairie is ineligible to access the UST Fund for reimbursement of costs associated with conducting corrective action.

The Board finds that Indian Prairie's heating oil UST was not registered by the OSFM at the time the Agency made its eligibility determination. As in Kean, Indian Prairie completed a registration notification form and paid its fees. Unlike Kean, from the evidence before the Board, the OSFM never officially accepted Indian Prairie's notification for registration of its heating oil UST. While in or around April 1992, Indian Prairie completed a registration form and paid $100 to register its heating oil UST, on May 22, 1992, the OSFM sent Indian Prairie a new notification form, instructing Indian Prairie to "disregard the previous notification" form. This record contains no indication that the OSFM ever advised Indian Prairie that its heating oil UST had been registered following the submittal of Indian Prairie's April 1992, notification form and payment of fees. Upon receipt of the new notification form, Indian Prairie did not complete and forward the notification form to the

OSFM until December 8, 1992, nearly 3 months after the statutory change made Indian Prairie's heating oil UST specifically non-registerable.

Although Indian Prairie removed its heating oil UST in July 1992, it could not have reasonably relied on the fact that its heating oil UST was registered, as the OSFM had sent Indian Prairie a new registration notification form in May 1992, informing it to disregard the prior notification form. On September 15, 1992, when the GSA was amended, Indian Prairie's registration process was ongoing. Consequently, Indian Prairie had no vested right to reimbursement from the UST Fund prior to the amendment of the GSA. See First of America Trust Company v. Armstead, 171 Ill. 2d 282, 664 N.E.2d 36 (1996). Indian Prairie "had not satisfied the statutory prerequisites so as to create a reasonable expectation of reimbursement from the Fund prior to the amendment." See First of America, 171 Ill. 2d at 293, 664 N.E.2d at 36.

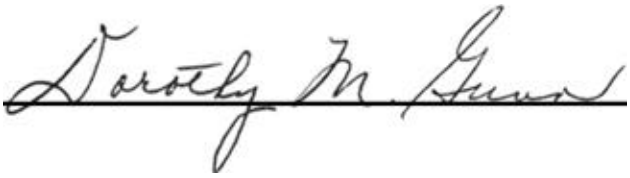
As the Board finds that Indian Prairie is ineligible to access the Fund for corrective action costs, we further find that no genuine issues of material fact remain in this matter. Therefore, we grant the Agency's motion for summary judgment.

In conclusion, the Board denies Indian Prairie's motion for summary judgment and grants the Agency's motion for summary judgment.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act, 415 ILCS 5/41 (1996), provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of service of this order. Illinois Supreme Court Rule 335 establishes such filing requirements. See 145 Ill. 2d R. 335; see also 35 Ill. Adm. Code 101.246, Motions for Reconsideration.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 4th day of December 1997, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board