ILLINOIS POLLUTION CONTROL BOARD
September 5, 1996

KEAN OIL COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 92-60
	)	(UST - FRD)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
	)	
Respondent.	)	

JOHN K. WHEELER APPEARED ON BEHALF OF PETITIONER;

DANIEL P. MERRIMAN, ASSISTANT COUNSEL, APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by M. McFawn):

This matter is before the Board on an April 23, 1992 petition for review filed by Kean Oil Company (Kean). Kean seeks review of a March 20, 1992 determination by the Illinois Environmental Protection Agency (Agency) which found Kean ineligible to access the Underground Storage Tank Fund (UST Fund).

A hearing was commenced in this matter on February 2, 1995. On that date, the parties agreed to continue this matter because of the similarity of issues to those pending before the First District Appellate Court in Board of Education, Community Consolidated School District No. 15 of Cook County v. Armstead, docket no. 1-92-4145 (February 2, 1995 Tr. at 2, 5-7.)[1] Subsequently, hearing in this matter was recommenced on June 5, 1995. Kean filed its post-hearing brief on August 4, 1995. The Agency has not filed a brief in this matter.

BACKGROUND

Kean is the owner of a service station located in McHenry County (the site). On September 9, 1990, Kean began removal of two 2,000 gallon gasoline tanks from the site. During removal of these tanks, a release of petroleum was detected, and a 1,150 gallon tank was discovered. Kean applied for and received permits from the Office of the State Fire Marshal (OSFM) for removal of the newly discovered tank. During subsequent excavation, Kean discovered two additional 1,150 gallon tanks. Kean also applied for and received OSFM permits for the removal of these tanks. The two 2,000 gallon tanks were found to be in sound condition, but the three previously undiscovered 1,150 gallon tanks were found to be leaking.

Kean applied to the Agency for reimbursement from the UST Fund in June 1991. On July 25, 1991, Kean received a letter from the Agency informing Kean that it was required to submit to the Agency a statement from the OSFM that all the tanks at the site were registered, and that all fees were paid. On October 31, 1991 Kean obtained from the OSFM a statement confirming that Kean had registered all tanks and paid all fees. Kean then resubmitted its reimbursement request to the Agency, including the OSFM statement.

On January 2, 1992, the Agency sent Kean a letter stating that the OSFM had informed the Agency that the tanks at the site were not properly registered, and that a proper registration form must be filled out and sent to the OSFM before Kean's reimbursement request could be processed. Upon contacting the OSFM, Kean was

[1] The First District's opinion was subsequently issued on April 17, 1996 at 665 N.E.2d 409, 216 Ill. Dec. 349 (1996).

informed that the original registration of its tanks did not contain a date as to when the 1,150 gallon tanks were "taken out of service." Subsequently, at the direction of OSFM personnel, Kean filled out a new registration form, indicating that the tanks had been taken out of service prior to 1966. On March 20, 1992, the Agency issued its final determination letter, denying Kean's request for reimbursement on the grounds that the tanks were taken out of service prior to 1974, and were therefore unregistrable according to the OSFM. As grounds for denial, the March 20, 1992 letter stated:

> Corrective action costs associated with the 1,150 gallon gasoline tanks are ineligible and no claim may be made to the Fund for the following reason: The tanks failed to meet the eligible requirement of number 4 above. Specifically, the OSFM indicates that the three 1,150 gallon gasoline tanks are unregisterable (sic) as they were taken out of service prior to 1974.

(Ag. Rec. at 105.)

Requirement "number 4" referenced in the stated denial reasons refers to the following:

> The owner or operator has registered the tank in accordance with Section 4 of the Gasoline Storage Act and paid into the Underground Storage Tank Fund all fees required for the tank in accordance with Section 4 and 5 of that Act and regulations adopted by the Office of the State Fire Marshal (OSFM);

(Ag. Rec. at 104.)

At hearing, Kendra Brockamp, a project manager for the Agency testified that she was responsible for making the eligibility determination on Kean's reimbursement application. (Tr. at 79.) Ms. Brockamp testified that correspondence received from Kean indicated that Kean had been unaware of the presence of the three 1,150 gallon tanks prior to the purchase of the property. Ms. Brockamp also testified that she received correspondence from the OSFM which indicated that the tanks had been registered. She therefore communicated to the OSFM that the tanks had been taken out of service prior to April 1966. The OSFM requested an amended notification form, and Ms. Brockamp forwarded this request to Kean. In response, Kean filled out new notification forms, which indicated that the tanks had been taken out of service prior to 1966. The OSFM subsequently informed the Agency that the tanks in question were exempt from registration. Based upon this information, Ms. Brockamp determined that the tanks were ineligible for reimbursement.

ARGUMENTS OF THE PARTIES

In support of its contention that it is entitled to reimbursement from the UST Fund, Kean argues that it has fully complied with the registration requirements of the Gasoline Storage Act (GSA). Kean asserts that when the three tanks were discovered, each contained approximately 200-250 gallons of liquid. (Pet. Br. at 4.) Kean asserts that this liquid consisted of hydrocarbons, gasoline, and water. (Pet. Br. at 4; Ag. Technical Rec. at 8.) Kean further asserts that it owns the tanks, and that it paid all required registration fees.

Kean asserts that the Agency is improperly imposing a condition that, in addition to containing petroleum products, its USTs must have been operational or "in use" subsequent to January 1, 1974.[2] Kean

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[2] Section 4 of the GSA provides in relevant part:

> The owner of an underground storage tank, other than a heating oil underground storage tank, which at any time between January 1, 1974, and September 24, 1987, contained petroleum or petroleum products or hazardous substances, with the exception of hazardous wastes, shall register the tank with the Office of the State Fire Marshal.

(430 ILCS 15/4(b)(1)(A) (1992.))

relies on First America Trust Company v. Armstead, 171 Ill. 2d 282, 664 N.E.2d 36, 215 Ill Dec. 639 (1996), in asserting that the GSA does not require a tank to be operational or "in use" prior to registration. Kean further cites Campbell v. Illinois Environmental Protection Agency, PCB 91-5 (June 6, 1991), and A.K.A. Land, Inc. v. Illinois Environmental Protection Agency PCB 90-177 (March 14, 1991), in asserting that the Board has dismissed the Agency's contention that "contained" is synonymous with "in use." (Pet. Br. at 5.) Kean contends that OSFM has conceded that there is no requirement that tanks be operational after January 1, 1974 in order to be eligible for registration. Kean concludes that the Agency is exceeding its authority in requiring that tanks be operational or "in use" subsequent to January 1, 1974 in order to be eligible for registration. (Pet. Br. at 5-6.)

Kean asserts that the three tanks discovered at its site are eligible for reimbursement from the UST Fund. Kean asserts that five tanks at the site were properly registered with the OSFM prior to July 28, 1989. (Pet. Br. at 6, *citing* Ag. Rec. at 43.) Subsequently, Kean discovered the three previously undiscovered tanks in the Fall of 1990. Kean refers to Section 22.18b(d)(3)(B) in asserting that it is therefore entitled to a $15,000 deductible, rather than a $10,000 deductible. This section of the Act provided in relevant part:

> (ii) If prior to July 28, 1989, the owner or operator has registered one or more but not all of the underground storage tanks at the site on that date, the deductible amount . . . shall be $15,000 rather than $10,000.

(415 ILCS 5/22.18b(d)(3)(B).)

Kean asserts that the statute fully anticipates the circumstances it faces, and specifically allows coverage from the Fund. Kean concludes that, since a properly registered UST existed at the site prior to July 28, 1989, it is entitled to access the UST Fund for the three previously undiscovered USTs which were discovered at the site when two registered tanks were being excavated.

Kean also asserts that it is entitled to access the Fund to recover for contamination at the site which resulted from spills and overfills from the five tanks at the site which were properly registered prior to July 28, 1989. Kean asserts that these tanks were in use for an expansive period of time, and that a considerable amount of the contamination at the site is attributable to product overflow and spillage from these tanks (Pet. Br. at 8.) Kean admits that it did not attribute any contamination to overflow or spillage from these tanks on its application for reimbursement, but provides two reasons for this discrepancy. First, Kean states that at the time the reimbursement application was submitted all tanks at the site were registered, and that the source of contamination was a moot point, since any contamination would have necessarily come from a then-registered tank. Second, Kean states that the application asks for the date the spillage or overflow occurred, and that this information would have been impossible to provide, since the spills and overfills would have occurred over a twenty-five year period. (Pet. Br. at 8.)

Finally, Kean asserts that the Agency's position is contrary to the spirit and intent of the Act. Kean asserts that the Agency's position introduces uncertainty, and makes it tougher on those who seek to take proper corrective action.

As previously stated, the Agency did not file a brief in this matter. Therefore, the only arguments made on the Agency's behalf were the arguments presented by the Agency's attorney at hearing. The Agency argues that the narrow issue before the Board is whether the Agency's March 20, 1992 decision was correct based upon the application that was submitted to the Agency. The Agency seeks to rely on Divane Brothers Electric Co. v. Illinois Environmental Protection Agency, PCB 93-105 (November 4, 1993) in stating that whether or not the tank is properly registrable under the Act at the time of the application is not the issue before the Board. Rather, the Agency argues that the issue before the Board is whether the tank was registered by OSFM. The Agency asserts that the Board has acknowledged that it has no authority to review OSFM registration decisions.

Applying this rule to the Kean application, the Agency asserts that the OSFM communicated to the Agency that the three 1,150 gallon tanks were exempt from registration since they had not been in use since

1966. Therefore, the Agency asserts that it correctly denied eligibility for Kean to access the Fund. The Agency asserts that Kean's proper remedy is to seek to have the OSFM reverse its registration decision. The Agency believes that, based on the information Kean has presented, the tanks should be considered registered, but until the OSFM makes this determination, the Agency is bound by the OSFM's determination that the tanks are ineligible for registration. (Tr. at 116.)

STANDARD OF REVIEW

In UST appeals, as in permit appeals, the petitioner bears the burden of proving that the application, as submitted to the Agency, would not violate the Act or the Board's regulations. (Graham v. Illinois Environmental Protection Agency, PCB 95-89 (August 24, 1995) slip op. at 5, *citing* City of Herrin v. Illinois Environmental Protection Agency (March 17, 1994), PCB 93-195; *see also* Browning Ferris Industries of Illinois, Inc. v. Pollution Control Board, 179 Ill.App.3d 598, 534 N.E.2d 616 (Second Dist. 1989).) The sole question before the Board is whether the applicant proves that the application, as submitted to the Agency, demonstrated that no violations of the Environmental Protection Act would have occurred if the requested approval had been issued. (Graham at 5, *citing* John Sexton Contractors Co. v. Illinois, PCB 88-139, (February 23, 1989).)

APPLICABLE LAW

The Board has consistently held that the law to be applied is that which is in effect upon the date the application is filed. (Pulitzer Community Newspaper, Inc. v. Illinois Environmental Protection Agency, PCB 90-142 (December 5, 1989); Marjorie B. Campbell v. Illinois Environmental Protection Agency, PCB 91-5 (June 6, 1991); First Busey Trust & Investment Co. v. Illinois Environmental Protection Agency, PCB 91-213 (February 27, 1992).) Kean's final application for reimbursement from the UST Fund was received by the Agency on January 2, 1992, and the Agency issued its final determination letter denying Kean's application for reimbursement on March 20, 1992. At that time, the Agency was responsible for making eligibility determinations.[3]

The Act sets forth criteria that an applicant to the Fund must satisfy in order for the applicant's cost to be reimbursable. At the time Kean submitted its application for reimbursement, Section 22.18b of the Act provided:

> (a) The owner or operator is eligible to receive money from the Underground Storage Tank Fund for the 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 and paid into the Underground Storage Tank Fund all fees required for the tank in accordance with Sections 4 and 5 of that Act and regulations adopted by the Office of the State Fire Marshal.

(415 ILCS 5/22.18b (1992).)

Thus, in order to be eligible for reimbursement from the Fund, Kean's tanks were required to be properly registered pursuant to the requirements of the Gasoline Storage Act (GSA).

ANALYSIS

[3] As a result of P.A. 88-496, also known as "H.B. 300," effective September 13, 1993, responsibility for making eligibility/deductibility determinations was transferred to the OSFM.

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 requirements 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 registrable 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 tank was registered by the OSFM. (Divane Bros. Electric Co. v. Illinois Environmental Protection Agency, (November 4, 1993) PCB 93-105, slip op. at 6, *citing* Lincolnwood v. Illinois Environmental Protection Agency, (June 4, 1992) PCB 91-83, 134 PCB 33, and Lake Forest v. Illinois Environmental Protection Agency, (June 23, 1992) PCB 92-36, 134 PCB 337.)

In this matter, the record is clear that the tanks were not registered with the OSFM at the time 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 OSFM. As previously indicated, the Board does not have authority to review the registration decision made by OSFM. These arguments would be properly raised in circuit court in a challenge to the OSFM's decision denying registration.

Kean's arguments concerning Section 22.18b(d)(3)(B) are similarly misplaced. Section 22.18b(d)(3) sets forth the appropriate deductibles to be imposed on applications for reimbursement for tanks that are eligible to access the Fund; it does not establish criteria for eligibility. Since Kean's tanks fail to satisfy the eligibility criteria set forth in Section 22.18b(a), the deductible criteria in Section 22.18b(d) are inapplicable.

We also reject Kean's arguments concerning overfills at the tanks which were registered. As previously stated, the question before the Board is whether the applicant demonstrates that the application, as submitted to the Agency, would not cause a violation of the Act or Board regulations. Here, Kean did not indicate on its reimbursement application that there was any contamination associated with overfills at the properly registered tanks. Therefore, at the time the Agency made its decision, there was no information before it that there were any releases from those tanks which were eligible for reimbursement. However, at hearing, the Agency's witness Kendra Brockamp indicated that overfills are recognized as a source of contamination. Therefore, Kean's proper remedy is to submit an application seeking reimbursement for that contamination associated with overfills at the properly registered tanks.

Finally, we do not find that the Agency's actions are contrary to public policy, since the Agency acted in accord with the division of responsibilities established in the regulatory scheme. Since neither the Agency nor the Board has authority to review tank registration decisions made by the OSFM, the Agency was bound to accept the OSFM's registration decision. Given the OSFM's determination that the tanks were not properly registered, the Agency properly concluded that Kean was ineligible to access the Fund for contamination related to these tanks.

ORDER

The March 20, 1992 decision of the Illinois Environmental Protection Agency denying Kean Oil Company's application for eligibility to access the Underground Storage Tank Fund is hereby affirmed.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1994)) provides for the appeal of final Board orders within 35 days of the date of service of this order. The Rules of the Supreme Court of Illinois establish filing requirements. (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 opinion and order was adopted on the _____ day of _____, 1996, by a vote of _____.

_____
Dorothy M. Gunn, Clerk
Illinois Pollution Control Board