

ILLINOIS POLLUTION CONTROL BOARD
May 17, 2001

DONALD HOING d/b/a DON'S SERVICE)
)
 Petitioner,)
)
 v.) PCB 98-146
) (UST - Appeal)
 OFFICE OF THE STATE)
 FIRE MARSHAL,)
)
 Respondent.)

AMY SIPES JOHNSON, CHRISTINE G. ZEMAN, ESQ., AND THOMAS G. SAFLEY,
OF HODGE & DWYER, APPEARED ON BEHALF OF PETITIONER; and

DEBORAH L. BARNES, ASSISTANT ATTORNEY GENERAL, ATTORNEY
GENERAL'S OFFICE, APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by R.C. Flemal):

This matter is before the Board on the April 23, 1998, petition for review filed by Donald Hoing d/b/a Don's Service (petitioner). Petitioner seeks review of the Office of the State Fire Marshal's (OSFM) March 12, 1998 determination that it could not process petitioner's "Reimbursement Eligibility and Deductibility Application" (application) because of his failure to pay underground storage tank registration fees. Petitioner had filed the application to determine his eligibility for reimbursement for corrective action costs associated with an underground storage tank (UST) release.

For the reasons explained below, the Board finds that the OSFM correctly determined that petitioner has not paid the annual registration and late fees. Pursuant to Section 57.9(a) of the Environmental Protection Act (Act) (415 ILCS 5/57.9(a)(1998)), petitioner does not meet the eligibility requirements to access the UST fund because petitioner has not paid the fees.

BACKGROUND

Petitioner owns a site at 225 Buchanan Street, Carthage, Hancock County, Illinois. Pet. at 1.¹ The site is a former gasoline service station which petitioner now operates as a motor

¹ Citations to the petitioner's petition will be "Pet. at ___." Citations to the record filed in this matter will be "R. at ___." Citations to petitioner's posthearing brief will be "Pet. Br. at ___." Citations to OSFM's posthearing brief will be "OSFM Br. at ___." Citations to petitioner's reply brief will be "Pet. Reply Br. at ___."

repair business. Pet. at 1. The site contained three USTs when he bought the site in 1983. Pet. at 1; Tr. at 41.

In early 1992 or 1993, the OSFM was notified about fumes coming from the sewers in Carthage, Illinois. Tr. at 55-56. At that time, William Carl, storage tank safety specialist with the OSFM, contacted petitioner and told him that gas fumes had been discovered in the sewer near his property. Pet. Br. at 1, citing Tr. at 17-18; 56-57. Subsequent to Carl's conversation with petitioner, petitioner filed a notification form with the OSFM on February 11, 1993; and on May 13, 1993, the OSFM gave the site an identification number of #3-032053. R. at 47.

Carl inspected the site on May 3, 1993. R. at 45. Subsequent to the inspection, Carl returned and spoke with petitioner, who told Carl that he had bought the site from William Rampley. Tr. at 69. Carl checked the OSFM list and discovered that Rampley had registered USTs in Carthage, Illinois. Tr. at 70. At some point following this visit, Carl concluded that the USTs Rampley had previously registered were on petitioner's site. Tr. at 70. He conveyed this conclusion to petitioner. Tr. at 77. Petitioner testified that Carl also told him that the deductible for removal costs would be \$10,000. Tr. at 25. Carl testified that he could not say for certain that he told petitioner his deductible would be \$10,000. Tr. at 77. He testified that the OSFM had a strict policy that he should not discuss deductibility, because that was not his area of expertise. Tr. at 77. However, he did say he probably told petitioner that "in most cases if . . . the tanks were registered by a certain date and the fees were paid then in most cases the deductibility is \$10,000." Tr. at 77. Carl also testified that he would never have told petitioner what his deductible was, but would have told him his options. Tr. at 78.

When the OSFM assigned the site its identification number on May 13, 1993, it also sent petitioner a bill for \$1,800 for annual registration and late registration fees for the three USTs. Pet. Br. at 3; R. at 38. Petitioner thought that Rampley had previously registered the USTs, so he called Carl. Pet. Br. at 3; Tr. at 22. Carl told petitioner that he should return the invoice to the OSFM and to write that the notification was a transfer, not a new registration. Tr. at 22. Petitioner followed Carl's instructions and returned the bill. Tr. at 23.

On May 19, 1993, the OSFM sent petitioner an administrative order stating, among other things, that the OSFM inspector had found on May 3, 1993, that the tanks were not registered. R. at 41-43.

On August 7, 1993, petitioner reported a confirmed release of gasoline from one of the USTs at the site. R. at 40. On September 10, 1993, petitioner spoke with Betty Carlisle of the OSFM regarding the \$1,800 bill, and told her that based on his previous conversation with Carl, petitioner believed the USTs were already registered. Pet. Br. at 5. Carlisle took notes on the conversation and wrote that Carl told her the tanks had been registered under #3-016671. R. at 39.

Petitioner removed the tanks on December 21, 1994. Pet. Br. at 5. Carl issued a report on the same day indicating, among other things, that the tanks were removed and the facility registration was "ok'd". R. at 30. On January 5, 1995, the OSFM sent petitioner a

letter saying that the OSFM determined that petitioner had complied with the May 19, 1993, administrative order. R. at 29.

Petitioner filed a “Reimbursement Eligibility and Deductibility Application” (application) with the OSFM on May 24, 1995. R. at 27. The OSFM returned the application seeking notification of the removal of the tanks and additional information on the capacity of one of the tanks. R. at 27. After submitting the requested information, petitioner filed another application on October 4, 1996. R. at 17-18. The OSFM returned this application for information regarding, among other things, the number of tanks at the site. R. at 18.

In November 1996, Jim Boone, an OSFM employee who, in his former position with the OSFM reviewed eligibility applications, concluded that the OSFM had merged the files of #3-016671 and #3-032053. R. at 11. He believed the two numbers were for two different sites. Pet. at 2, Exh. A. He further concluded that the fees for site #3-016671 were paid, but the fees for #3-032053 were still outstanding. R. at 11. Consequently, on December 6, 1996, and July 8, 1997, the OSFM sent petitioner an invoice requesting payment of \$1,800 for the registration and late fees. R. at 9.

Petitioner sent a third application for reimbursement on February 24, 1998, providing documents to clarify the registration and ownership issues. R. at 4-8. On March 12, 1998, the OSFM returned the application and notified petitioner that the OSFM would not process the application because “[t]he annual and/or late registration fees for the facility have not been paid All applicable fees must be paid before we can process your request.” Pet. at 2, Exh. B; R. at 1. Petitioner concluded from this statement that the OSFM determined that the three USTs were not registered by September 24, 1987, since the demand for fees reflected at least \$500 per tank. Pet. at 3; citing 41 Ill. Adm. Code 170.442(a).

Petitioner filed this petition on April 23, 1998, in response to the OSFM’s March 12, 1998 correspondence. Petitioner argues that the letter was “an implicit or *de facto* determination that the three USTs were not timely registered with the OSFM.” Pet. at 4. Petitioner also alleges that the OSFM made a *de facto* determination that petitioner must pay a \$100,000 deductible before it is eligible for reimbursement from the fund. Pet. at 5. A hearing on the petition was held on January 22, 2001. Petitioner filed a posthearing brief on February 26, 2001. The OSFM filed a posthearing brief on March 13, 2001. Petitioner filed a reply brief (Reply Br.) on March 28, 2001.

APPLICABLE STATUTES

Section 57.9 of the Act contains the requirements for accessibility to the UST Fund, which states, in pertinent part:

- a. The Underground Storage Tank Fund shall be accessible by owners and operators who have a confirmed release from an underground storage tank or related tank system of a substance listed in this Section. The

owner or operator is eligible to access the Underground Storage Tank Fund if the eligibility requirements of this Title are satisfied and:

1. Neither the owner nor the operator is the United States Government.
2. The tank does not contain fuel which is exempt from the Motor Fuel Tax Law.

* * *

4. The owner or operator registered the tank and paid all fees in accordance with the statutory and regulatory requirements of the Gasoline Storage Act.

- b. An owner or operator may access the Underground Storage Tank Fund for costs associated with an Agency approved plan and the Agency shall approve the payment of costs associated with corrective action after the application of a \$10,000 deductible, except in the following situations:

1. A deductible of \$100,000 shall apply when none of the underground storage tanks were registered prior to July 28, 1989, except in the case of underground storage tanks used exclusively to store heating oil for consumptive use on the premises where stored and which serve other than farms or residential units, a deductible of \$100,000 shall apply when none of these tanks were registered prior to July 1, 1992.

* * *

- c. Eligibility and deductibility determinations shall be made by the Office of the State Fire Marshal.

* * *

2. Within 60 days of receipt of the "Eligibility and Dedutibility Determination" form, the Office of the State Fire Marshal shall issue one letter enunciating the final eligibility and deductibility determination, and such determination or failure to act within the time prescribed shall be a final decision appealable to the Illinois Pollution Control Board. 415 ILCS 5/57.9 (1998).

OSFM rules codified at Title 41 of the Illinois Administrative Code, Section 170.442 contains UST registration fee information:

- a) For USTs, with the exception of USTs containing heating oil for consumptive use on the premises where stored:

The owner of any petroleum or hazardous substance underground storage tank required to be registered with the Office of the State Fire Marshal prior to September 24, 1987, and who did not so register, shall do so and pay the Office a registration fee of \$500 per tank on or before 90 days from the date on the invoice requesting payment of the fee. The payment is to be by check or money order made payable to "Office of the State Fire Marshal." For purposes of this subsection (a), "owner" refers only to the last owner as of September 23, 1987. 41 Ill. Adm. Code 170.442(a).

The OSFM received petitioner's application on February 24, 1998, and returned it on March 12, 1998, because it believed petitioner had failed to pay the annual and/or late registration fees for the facility. Rec. at 1. Petitioner filed this appeal pursuant to Section 57.9(c)(2) of the Act, because petitioner asserts that the OSFM's refusal to determine petitioner's eligibility for reimbursement constitutes a final decision, and appeals that decision. Pet. at 1.

ANALYSIS

Section 57.9 of the Act requires the OSFM to make two separate determinations within 60 days of receipt of the application: first, whether a party is eligible to access the UST Fund under Section 57.9(a); and second, if eligible to access the fund, what deductible is appropriate under Section 57.9(b). In the instant case, the OSFM determined within 60 days of receipt of the application that petitioner's application could not be processed, and therefore no eligibility and deductibility determination could be made until the petitioner paid the appropriate fees.

The briefs and arguments of the parties are not directly on point, as neither party has specifically addressed whether petitioner is eligible to access the UST fund. Rather, both parties focus on what deductible is appropriate. The Board will first analyze whether petitioner is eligible to access the UST fund.

Pursuant to Section 57.9(a) of the Act, an owner or operator is eligible to access the UST Fund if, among other things, "the owner or operator registered the tank and paid all fees in accordance with the statutory and regulatory requirements of the Gasoline Storage Act." 415 ILCS 5/57.9(a)(4). If the petitioner is not eligible to access the UST Fund, then the issue of what deductible is appropriate is moot.

Much of the parties' arguments concern whether and when the tanks were registered. This issue is not properly before the Board at this time. The Board does not review OSFM registration determinations. Farrales v. OSFM (May 7, 1998), PCB 97-186; Divane Bros. Electric Co. v. IEPA (November 9, 1993), PCB 93-105; Village of Lincolnwood v. IEPA (June 4, 1992), PCB 91-83. The evidence in this record, including a stipulation of facts

(H.O. Exh. 1), as well as information in the hearing record, demonstrates that the OSFM determined on March 12, 1998, that the tanks were registered. The OSFM did not specify the registration date of the tanks. It did, however, determine that registration fees had not been paid.

The Board finds that petitioner has not paid the necessary fees to access the fund. OSFM sent petitioner bill for \$1,800 for the annual fees and late fees for the three tanks, prior to their removal. R. at 38. The bill was due on September 15, 1993. Petitioner believed that the previous owner of the site had registered the site. Pet. Br. at 3. Petitioner, at Carl's instruction, returned the invoice to the OSFM, and explained that the previous owner registered the site. Pet. Br. at 3. The record contains no information to controvert OSFM's determination that no one has ever paid the registration fees. The statutory language in Section 57.9(a) is clear; if an owner or operator does not register the tanks and pay the fees, the owner or operator cannot access the UST fund. Petitioner has not paid the fees, and therefore he cannot access the fund until he pays the fees.

The Board notes that petitioner asserts that he should not have to pay the fees before the OSFM will rule on his application. Pet. at 5. The Board finds no merit to this argument. The statute is clear that the fees must be paid to be eligible for the UST fund. Any arguments concerning the date of tank registration and amount of fees owed must be initially addressed to and decided by the OSFM. Arguments concerning the amount of the deductible are premature.

CONCLUSION

The Board finds that the OSFM correctly determined that petitioner had failed to pay the annual registration and late fees. Petitioner may not access the UST fund if the fees are not paid, pursuant to Section 57.9(a) of the Act.

This opinion constitutes the Board's findings of fact and conclusions of law in this matter.

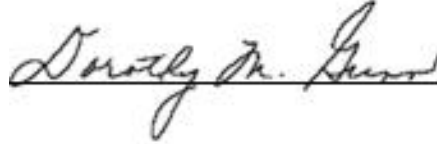
ORDER

The Board hereby affirms the OSFM's finding that as of March 12, 1998, petitioner had failed to pay the annual registration and late fees for the USTs at 225 Buchanan Street, Carthage, Illinois.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1998)) 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 172 Ill. 2d R. 335; see also 35 Ill. Adm. Code 101.520, 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 17th day of May 2001 by a vote of 7-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board