

ILLINOIS POLLUTION CONTROL BOARD  
October 18, 2001

C.C. DILLON COMPANY (RACEWAY GAS )	)	
AND FOOD),	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 00-146
	)	(UST Appeal)
OFFICE OF THE STATE	)	
FIRE MARSHAL,	)	
	)	
Respondent.	)	

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

This matter is before the Board on cross-motions for summary judgment. At issue is whether the applicable deductible for certain underground storage tanks is \$10,000, as contended by petitioner, C.C. Dillon Company, or is \$100,000, as determined by the Office of the State Fire Marshal (OSFM).

For the reasons set forth below, the Board finds that there is no genuine issue of material fact. Additionally, pursuant to Section 57.9(b) of the Environmental Protection Act (Act) (415 ILCS 5/57.9(b) (2000)) the Board finds the OSFM correctly determined petitioner was eligible for the \$100,000 deductible. Accordingly, the Board denies the petitioner's motion for summary judgment and grants the OSFM's motion for summary judgment.

**BACKGROUND**

On March 8, 2000, petitioner filed a petition for review of the OSFM's February 2, 2000 determination that petitioner was eligible to seek reimbursement for costs associated with two underground storage tank (USTs). On September 6, 2001, petitioner filed a motion for summary judgment (Pet. Mot.). On September 25, 2001, the OSFM filed as one document a response to petitioner's motion and a motion for summary judgment (OSFM Mot.). Also on September 25, 2001, the OSFM filed a memorandum in support of its motion (OSFM Memo).

The site at issue is Raceway Gas and Food (site) located at 8407 Collinsville Road, Collinsville, Madison County, Illinois. Pet. at 1. On May 7, 1986, petitioner registered five USTs at the site. Pet. Mot. at 2, OSFM Memo at 1, Exh. 1.<sup>1</sup> Sometime later in 1986, petitioner replaced the five tanks with two 12,000 gallon tanks and one 6,000 gallon tank. Pet. Mot. at 2, OSFM Mot. at 2. On January 27, 2000, petitioner submitted to OSFM an application for an eligibility and deductibility determination regarding cleanup costs associated with the two 12,000 gallon tanks. Pet. at 1, Exh. A. On February 2, 2000, OSFM issued a determination that

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<sup>1</sup> Both parties attached exhibits to their pleadings. They will be cited at "Exh. \_\_\_ at \_\_\_."

petitioner was eligible for a \$100,000 deductible for the two 12,000 gallon tanks. Exh. B. It is this determination that is the subject of the motions for summary judgment.

### 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.

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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. (emphasis added)

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

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### PETITIONER'S MOTION

Petitioner asserts that there is no genuine issue of material fact regarding the tanks' registration and the registration fees. Pet. Mot. at 2. Petitioner argues it sent the amended registration form for the three tanks to OSFM on December 13, 1989, which is admittedly beyond the registration date of July 28, 1989, found at Section 57.9(b)(1) of the Act. Pet. Mot. at 2. However, because the OSFM had "actual notice" that the three tanks were replacing the previously registered five tanks, petitioner argues the tanks were timely registered. Pet. Mot. at 3.<sup>2</sup> Petitioner emphasizes that it paid the fees for the tanks on time. Pet. Mot. at 3.

Petitioner relies on Stroh Oil. v. Office of the State Fire Marshal and Pollution Control Board, 281 Ill. App. 3d 121, 665 N.E. 2d 540 (4th Dist. 1996). In Stroh, the appellate court held, in part, that the OSFM's supervision of petitioner's 1988 tank installation was insufficient for purposes of registration as required by the Gasoline Storage Act (430 ILCS 15/4 (2000)). Stroh, 281 Ill. App. 3d at 125, 665 N.E. 2d at 544. The petitioner in Stroh had argued that the OSFM's supervision of the tank's installation was sufficient to fulfill the notification requirements of the Gasoline Storage Act. In the instant case, petitioner argues that unlike Stroh, it filed a timely notification of the USTs when it filed the original notification of the five original tanks. Pet. Mot. at 4.

Petitioner further argues that the replacing the five tanks with the three tanks "grew out of the same transaction" and involved the same site. Pet. Mot. at 5. It argues that the December 1989 registration form "relates back" to the timely registered five tanks. Pet. at 5.

### **OSFM MOTION**

OSFM argues that petitioner admits the three tanks were not registered until December 1989. OSFM Memo at 4. OSFM further argues that payment of fees does not constitute registration of the tanks. OSFM Memo at 5. OSFM notes that Section 57.9(a)(4) of the Act requires that the tanks be registered and all fees paid to be eligible to access the UST Fund. OSFM Memo at 5. OSFM determined that petitioner was eligible to access the fund. OSFM Memo at 5. OSFM further argues that Section 57.9(b) refers only to the tanks' registration date, not the payment of fees. OSFM Memo at 5. OSFM also argues that petitioner cannot "bootstrap" the registration of the five tanks to the unregistered three replacement tanks. OSFM Memo at 5.

### **STANDARD FOR SUMMARY JUDGMENT**

Summary judgment is appropriate when the pleadings and depositions, together with any affidavits and other items in the record, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 693 N.E.2d 358 (1998). In ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370.

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<sup>2</sup> The OSFM had representatives at the site when the five tanks were replaced. Pet. Mot. at 3.

Summary judgment “is a drastic means of disposing of litigation,” and therefore it should be granted only when the movant’s right to the relief, “is clear and free from doubt.” Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370, citing Purtill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must “present a factual basis which would arguably entitle [it] to a judgment.” Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

To grant either motion for summary judgment, the Board must find that there is no genuine issue of material fact and that the undisputed facts show that the party that filed the motion’s right to the relief requested is “clear and free from doubt.” *See Dowd*, 181 Ill. 2d at 483, 693 N.E.2d at 370, citing Purtill, 111 Ill. 2d at 240, 489 N.E.2d at 871.

### **ANALYSIS**

The UST reimbursement statute is clear that a \$100,000 deductible applies when no USTs are registered before July 28, 1989. *See* 415 ILCS 5/57.9(b)(1) (2000). It is uncontested that petitioner did not file the registration form for the three USTs until December 1989, more than five months after the statutory deadline. Both parties agree that petitioner is eligible to access the UST fund. There are no genuine issues of fact in this instance.

The only issue is one of law: namely, whether petitioner’s registration of the five tanks in 1986 transfers to the three tanks petitioner installed to replace the properly registered five tanks. The Board finds that nothing in the Act supports the theory that tank registration is transferable.

The Board further finds that petitioner’s payment of fees is only relevant in determining whether petitioner is eligible to access the UST fund, pursuant to Section 57.9(a)(4) of the Act. Whether petitioner is eligible to access the fund is undisputed. Therefore, petitioner’s argument that he paid the fees for the tanks is irrelevant to the issue of what deductible applies.

### **CONCLUSION**

The Board finds that the OSFM correctly determined that petitioner registered the tanks after July 28, 1989. The Board also finds that the undisputed facts show that OSFM’s right to the relief requested is clear and free from doubt.

This opinion constitutes the Board’s findings of fact and conclusions of law.

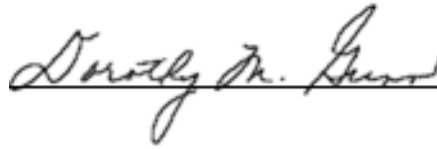
### **ORDER**

The Board hereby affirms the OSFM’s finding that petitioner is eligible for the \$100,000 deductible pursuant to Section 57.9(b) of the Act. Petitioner’s motion for summary judgment is denied. OSFM’s motion for summary judgment is granted. As there are no remaining issues in this case, the docket is closed.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2000); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on October 18, 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