

ILLINOIS POLLUTION CONTROL BOARD
December 1, 1994

CITY OF WHEATON,)
Petitioner,)
v.) PCB 94-18
OFFICE OF THE ILLINOIS STATE) (UST Fund)
FIRE MARSHAL,)
Respondent.)

OPINION AND ORDER OF THE BOARD (by C.A. Manning):

This matter is before the Illinois Pollution Control Board ("Board") on a petition for review filed by the City of Wheaton ("Wheaton" or "City") on January 7, 1994. Wheaton is appealing the Office of State Fire Marshal's (OSFM) final deductibility determination regarding the City's ability to access the underground storage tank ("UST") fund rendered on December 6, 1993. The final determination letter issued by the OSFM found that of two USTs owned by the City, one was ineligible to access the fund altogether and the second was eligible but would be subject to a \$100,000 deductible because none of the USTs on the site were registered prior to July 28, 1989. (415 ILCS 5/57.9(b)(1993).) The petition solely challenges the OSFM's application of the \$100,000 deductible.

No hearing in this matter has been held. According to the status reports submitted by the respondent, in both April and May, the parties have been pursuing settlement of this case and have been negotiating a stipulation toward that end. On June 22, 1994, the OSFM, by and through its counsel, the Office of the Attorney General, filed a motion for summary judgment. The City of Wheaton did not file a response. On September 1, 1994, the Board entered an opinion and order granting the OSFM's motion for summary judgment finding that the OSFM's application of the \$100,000 deductible was proper. Thereafter on October 4, 1994, the City of Wheaton, alleging that it never received service of the motion for summary judgment, filed a Motion to Vacate the Opinion and Order of the Board, and a Memorandum in Response to the Office of the Illinois State Fire Marshal's Motion for Summary Judgment. The OSFM has not filed a responsive filing.

We hereby vacate our opinion and order entered on September 1, 1994, and allow the City of Wheaton's response to the OSFM's motion for summary judgment. However, for the reasons stated below, we grant the motion for summary judgment.

FACTUAL BACKGROUND

The City of Wheaton is the owner/operator of two underground storage tanks which, prior to their removal, were located at the Wheaton Police Department Headquarters on 119 N. Wheaton Ave, Wheaton, Illinois, in DuPage County. (R. at 1, 3 and Pet. at 1.) Though the petitioner is not challenging the OSFM's final decision that Tank #1 is ineligible to access the UST Fund, registration information about this tank is relevant to our review of whether the OSFM applied the correct deductible to Tank #2. Tank #1 was registered on March 14, 1986 when the City submitted the federally-required "Notification for Underground Storage Tanks" form to the OSFM. Though the notification form listed the status of the tank as a 2,000 gallon gasoline tank, "permanently out of service" and last used in January of 1978, the City did not indicate that the tank had been removed from the ground.

The second tank, Tank #2, was registered on March 15, 1991 as a 1,000 gallon diesel tank that was "currently in use." In order to register the tank, the City paid a \$100 registration fee and a \$500 late registration fee. (R. at 3-6, and 10.) Simultaneously, the City also submitted a tank removal permit application for Tank #2, which the OSFM granted on March 26, 1991. When Wheaton pulled Tank #2 on August 12, 1991, the City's tank removal contractor verified the tank was not 1,000 gallons, but was instead a 2500-gallon tank. (R. at 11.) The contractor sent this new information to the OSFM who amended the permit to show the new capacity size (Tank #2). (R. at 9 and 13.)

For reasons not provided in the record, on November 12, 1993, the City of Wheaton re-submitted a third "Notification for Underground Storage Tanks" form. Again, the City of Wheaton changed Tank #2's capacity size, from 2,500 to 3,000 gallons, and also clearly indicated for the first time that Tank #1 had been removed from the ground on June 1, 1982.¹ (R. at 18-19)

Upon receipt of this third UST notification form, the OSFM issued an administrative order on November 22, 1993 changing the registration status of Tank #1. The order read as follows:

A review of our records indicates that the following underground storage tank(s) is not or is no longer

¹Our copy of the March, 1991 UST notification form contained in the record of appeal, shows in the column concerning "Additional information (for tanks permanently taken out of service)", that the City marked the appropriate box to indicate that Tank #1 was filled with inert material and also, in barely legible handwriting, written above the box are the words, "tank removed." The petitioner's copy shows that under the box, the words, "pulled 1982." are written in.

registerable because: Tank #1 (2,000 gallon gasoline) was removed prior to September 24, 1987.

On its face, the OSFM administrative order also provided that it was appealable within 10 days and that a failure to appeal would result in forfeiture of the right to appeal. The record before us does not show that the City of Wheaton appealed the OSFM's November 22, 1993 administrative order.

On November 12, 1993, the City also submitted an application to the OSFM in order to determine eligibility to access the UST Fund and the applicable deductible. In the past, the Agency made the eligibility and deductibility determination; however, on September 13, 1993, Illinois' new LUST law became effective (415 ILCS 5/57 et seq) and the OSFM had become the governmental entity now responsible for such determinations. On December 6, 1993, the OSFM made a final determination that with regard to Tank #1, the City was ineligible to access the UST Fund because the tank had been removed prior to September 24, 1987 and with regard to Tank #2, the City was eligible to seek reimbursement for corrective action, but only for costs in excess of a deductible of \$100,000. The letter does not state why \$100,000 is the applicable deductible rather than the other statutory available deductibles of \$10,000, \$15,000, or \$50,000. The final determination also notified the City of Wheaton that the OSFM's decision was appealable to the Board. (R. at 23-25.)

As stated above, the instant appeal was filed on January 7, 1994. The petition for review seeks review of the \$100,000 deductible decision on the basis that several errors were made by the City in relaying information about its USTs, but ultimately the City should be entitled to only the \$15,000 deductible.² While asking the Board to review the OSFM's application of the \$100,000 deductible, Wheaton explains that the City originally, incorrectly registered Tank #1 - the 2,000 gasoline tank. The City intended to register the diesel tank in 1986 and not the gasoline tank, and the diesel tank had been in the ground and was still currently in use. The City claims to have acted in good faith, albeit in error. (Pet. 1-3.) Thus the City of Wheaton is asking that we ultimately determine whether the OSFM made the correct decision when it issued the administrative order on November 22, 1993 taking Tank #1 out of registration.

²The petition for review originally sought the application of a \$10,000 deductible. However, after having its counsel review the matter, the City clarified that the amount of the deductible should be \$15,000. (Response at 3.)

MOTION FOR SUMMARY JUDGMENT

The OSFM contends it is entitled to summary judgment in this matter because none of the tanks located on the City of Wheaton's Police Station Headquarters were ever properly registered prior to July 28, 1989, and as such the \$100,000 deductible is the appropriate deductible under Section 57.9(b)(1) of the Act. This subsection provides:

- 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 * * *

In support, the OSFM argues that Tank #2's registration does not satisfy Section 57.9(b)(1) because it was clearly not registered until March of 1991. (Motion at 6.) The OSFM further argues that even though Tank #1 was registered from 1986 to 1993, its registration was based upon mistaken information regarding the tank's status and therefore it was never properly registered. The OSFM registered this tank relying upon the certification of the City of Wheaton that Tank #1 was "permanently out of use", but still in the ground when petitioner submitted the federally-required "Underground Storage Tank Notification" form in March of 1986. Not until the City filed its second and third UST notification forms did the OSFM learn the true status of Tank #1, i.e., that it had been removed prior to September 24, 1987 and was therefore not registrable under the law. The OSFM cites to the Gasoline Storage Act which provides that tanks pulled prior to September 24, 1987 are not registrable:

The owner of an underground storage tank that was not taken out of operation before January 2, 1974, and that 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 Office of the State Fire Marshal. No underground storage tank taken out of operation before January 2, 1974, may be registered under this Act. No underground storage tank otherwise required to be registered under this subparagraph (a) may be registered under this Act if that tank was removed before September 24, 1987.

(P.A. 87-1088, eff. Sept. 15, 1992 amending ch. 127 1/2, Ill. Rev. Stat. par. 154, sec. 4(b)(1)(A). This section is now cited as 415 ILCS 15/4(b)(1)(A). Emphasis added by the Board.)

Moreover, the OSFM argues that because petitioner is actually seeking review of the OSFM's November 22, 1993 administrative order taking Tank #1 out of registration, rather than the OSFM's final deductibility determination, the Board has no jurisdiction to review this matter. The OSFM argues that nowhere in the Gasoline Storage Act, which sets out the registration requirements, does it state that decisions of the OSFM are appealable to the Board. (Motion at 7.) The OSFM also cites several cases decided by the Board prior to the passage of the new LUST Law for the proposition that the Board itself recognizes that OSFM registration decisions are not reviewable to the Board. (*Id.*, citing, *Divane Bros. Electric Co. v. Illinois EPA*, PCB 93-105 (November 4, 1993) and *Village of Lincolnwood v. IEPA*, PCB 91-83 (June 4, 1992).) Further, the OSFM argues that the City of Wheaton had a right to appeal the administrative order to circuit court and it failed to do so, rendering the decision final and binding, and not now subject to review.

In its response to the motion for summary judgment, the City of Wheaton essentially argues that once the registration for Tank #1 was submitted to the OSFM, the OSFM had no statutory authority to reject or otherwise alter that registration. The City argues that Section 15/4(b)(1)(A) of the Gasoline Storage Act does not grant the OSFM any authority to grant, deny or change registration: "the simple act of filing the registration under the specific language of the statute constitutes a legally valid registration." (Response at 5.) As a creature of statute, the OSFM is without the statutory authority to reject the City's registration of Tank #1, and the Board should find the City's registration in conformance with the Gasoline Storage Act.

DECISION

The OSFM issued its administrative order on November 22, 1993. In critical part, the OSFM found Tank #1 "is not or is no longer registrable because: Tank #1 (2,000 gallon gasoline) was removed prior to September 24, 1987." The OSFM informed the City of Wheaton at that time that the administrative order must be appealed within ten days or the right to appeal would be forfeited. The City did not appeal the order. In our opinion, it therefore constitutes a final and binding administrative decision. We must, therefore, accept the final unappealed decision of the OSFM that Tank #1 is no longer registrable pursuant to the Gasoline Storage Act. Since registration is a condition precedent to determining eligibility and the appropriate deductible, the \$100,000 deductible is proper. Since the City did not appeal the OSFM registration determination, it

has waived any right it may have had otherwise. We therefore reach no other issue. (See Lindsay Klein v. OSFM (August 11, 1994), PCB 93-255 and Christ Episcopal Church v. OSFM (December 1, 1994), PCB 94-192.)

Accordingly, as no material issues of fact remain in this matter, we therefore grant the respondent's motion for summary judgment and affirm the decision of the OSFM applying a \$100,000 deductible to the City of Wheaton's eligibility to access the UST Fund. The OSFM decision is affirmed and this docket is closed.

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

ORDER

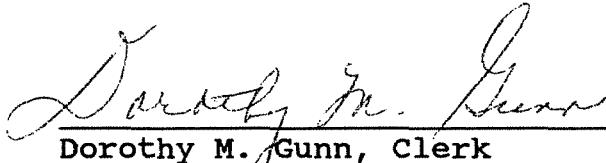
The Board hereby grants the OSFM's motion for summary judgment and affirms the OSFM's December 6, 1993 determination that the City of Wheaton may access the UST Fund subject to a \$100,000 deductible.

IT IS SO ORDERED.

Board Member J. Yi abstained.

Section 41 of the Environment Protection Act (415 ILCS 5/41 (1992) 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.

I, Dorothy M. Gunn, Clerk of the Pollution Control Board, hereby certify that the above opinion and order was adopted on the 1st day of December, 1994, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board