

ILLINOIS POLLUTION CONTROL BOARD  
November 4, 1993

DIVANE BROS. ELECTRIC CO.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 93-105
	)	(UST Fund)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

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

This matter comes before the Board on a second motion for summary judgment filed October 4, 1993 by the Illinois Environmental Protection Agency (Agency) and a cross-motion for summary judgment filed October 12, 1993 by Divane Bros. Electric Co. (Divane). Divane filed its response to the Agency's motion with its cross motion and attaches and incorporates the arguments made in its prior July 23, 1993 motion for summary judgment and August 12, 1993 reply. The Agency filed its response to the Divane's cross-motion on October 19, 1993.

For the reasons stated below, the Board grants the Agency's second motion for summary judgment and denies Divane's cross-motion for summary judgment, and dismisses this appeal.

This action pertains solely to the issue of eligibility to access the Underground Storage Tank Fund (Fund) for one 8,000 gallon heating oil tank serving other than residential units for consumptive use on the premises. The record indicates that on March 25, 1986 Divane completed Agency form 7530-1, Notification For Underground Storage Tanks. (Rec. 103-105.) On June 6, 1990 a permit for removal of petitioner's UST was issued by OSFM. (Rec. 32.) On June 28, 1990 Divane removed the tank and took other corrective action. (Rec. 33; 105-106.)

Divane's petition for review before this Board indicates that on March 13, 1992 Divane filed its application for reimbursement for corrective action costs with the Agency<sup>1</sup>. (Pet. at 1-2.) The record indicates that on July 17, 1992 the Agency received Divane's application for reimbursement. (Rec. 70-76.) The application was amended on January 13, 1993 to, inter alia, amend the tank removal date from August 24, 1990 to

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<sup>1</sup> The petition for reimbursement, though dated March 13, 1992, was mailed by Divane's attorney on July 14, 1992.

June 28, 1990. (Rec. 105-106.) On August 19, 1992 the Agency notified Divane through correspondence that it had received Divane's application, but had ceased reviewing it due to the Office of the State Fire Marshal (OSFM) needing additional information regarding Divane's UST. (Rec. 88-89.) On January 20, 1993 the OSFM received an incomplete Removal Notice from Divane, which was returned to Divane on March 3, 1993 as needing a required signature. (Rec. 100.) On March 4, 1993 the Agency received an intra-agency communication from the OSFM that listed Divane's tank as registered on March 25, 1986 with all fees paid but listing a Removal Notice as still needed by the OSFM. (Rec. 82.) On March 15, 1993 the Agency again notified Divane through correspondence that its review of Divane's UST had ceased due to an indication from the OSFM that the registration of Divane's UST was incomplete and that review would be resumed upon notification of registration completion from OSFM. (Rec. 107.)

On March 23, 1993 the OSFM received a completed Removal Notice from Divane. (Rec. 101.) On April 12, 1993 the Agency received a revised intra-agency communication from the OSFM listing Divane's tank as exempt from registration. (*Id.*) On April 19, 1993 the Agency denied eligibility because it believes the tank does not meet the requirements of Section 22.18(b)(a)(4) as follows:

- a. An 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 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 [OSFM].

The Agency stated in its denial letter that "[t]he [OSFM] lists [Divane's] tank as being 'exempt' from registration due to the date this tank was removed (6/28/90)". (Denial Letter at 2; Rec. 108.) In a "Reimbursement Application Review Memo" dated April 8, 1993, Karl Kaiser of the Agency indicated that

[information] was requested from OSFM on [July 28, 1992]. [August] 5, 1992 the Agency received [information] from OSFM and generated a OSFM deficiency

letter requesting submission of a removal notice. At this time OSFM listed the tank as registered and fees paid. Upon receipt of their removal notice OSFM changed their registration status to "exempt." It is my understanding that this is due to the date the tank was removed. Based on the most current OSFM registration status [received April 2, 1993] [Divane] would be ineligible to seek reimbursement. (Rec. 79; See also K. Kaiser affidavit, Exh. A to the Agency's second motion.)

Divane filed this appeal of the Agency's determination of ineligibility for reimbursement from the Fund on May 24, 1993.

On August 26, 1993 the Board denied previous summary judgment motions and cross motions filed by the parties, finding that genuine issues of material fact existed. The order stated:

The pleadings indicate that it is a disputed fact that OSFM has decided to consider the tank "exempt", and has reported this to the Agency. Page 101 of the Agency record, cited by the Agency in support of its position that the tank is exempt, is a form sent to the Agency by OSFM. Page 101 indicates that the tank is exempt from registration and that the tank is not registered. The form is dated in three places, bearing an original date of July 28, 1992, and two revised dates, March 3, 1993 and March 31, 1993. These revised dates bear the signature of what appears to be "Jim Boone", near each date. This form at page 101 appears to be an altered version of the form at page 82. Page 82, cited by Divane in support of its contentions, does not contain the March 31, 1993 date and signature. Page 82 also shows the tanks were registered on March 25, 1986 and that fees were paid. Neither form contains any alleged reason OSFM found the tank exempt, contrary to the Agency's denial letter which states that OSFM "lists this tank as being 'exempt' from registration due to the date this tank was removed." (Denial letter at 2.)

Due to these factual discrepancies contained in the record which have not been clarified by the parties in their filings and supported by affidavit, the Board denies the motion and cross-motion for summary judgment as genuine issues of material fact remain. Should this matter proceed to hearing the Board orders the parties to address whether OSFM in fact registered this tank, and whether the tank registration was in effect at the time the application was filed. The parties shall also address whether the tank registration was ever revised or revoked by OSFM. (Divane v. IEPA, at 2.)

The Agency, as in its previous motion for summary judgment, argues that Divane was unable to satisfy Section 22.18b(a)(4) of the Act (quoted above) and is ineligible to access the Fund. In support of its contentions the Agency also cites Village of Lincolnwood v IEPA (June 4, 1992), PCB 91-83, 134 PCB 33; and City of Lake Forest v. IEPA (June 23, 1992), PCB 92-36, 134 PCB 337.

In answer to the Board's prior inquiries, the Agency in its second motion for summary judgment points to segments of the record that precede the March 31, 1993 determination of OSFM that the tanks were "exempt" and presents affidavits of OSFM and Agency personnel in an attempt to clarify the discrepancies cited by the Board in its August 1993 order. The affidavit of Jim Boone, OSFM indicates:

Any prior determination or indication that the tank at [Divane's] site was registered is incorrect and or was based upon incomplete information provided to the OSFM.  
 \* \* \* This same registration information is still accurate as of the date of this affidavit. [dated September 30, 1993] (Exh. B to the Agency's second motion.)

In its response, Divane contests the Agency's allegations that its tank was not registered with OSFM, and further relies upon its arguments made in its prior motion for summary judgment<sup>2</sup>. Divane relies primarily upon Rockford Drop Forge v. PCB (1991), 221 Ill.App.3d 505, 582 N.E. 2d 253 and argues that the law to be applied is that which is in effect at the time the application was filed. For purposes of eligibility for reimbursement from the Fund, Divane argues, the law in effect at the time the application was filed indicates that an underground storage tank shall include a heating oil underground tank and that "heating oil underground tank" is defined as a tank "serving other than farms or residential units that is used exclusively to store heating oil for consumptive use on the premises where stored". (Public Act 86-1050, effective July 11, 1990; Section 22.18(e)(1)(A) and (I) of the Act.)

From this, Divane argues that the Agency erred in denying eligibility because Divane's tank meets the definition of underground storage tank contained in the Act at the time of the filing of the application, and that should the Board uphold the Agency's determination, the Board would be finding that the date of removal of a registered tank determines eligibility for Fund reimbursement. (Divane's July 23, 1993 memo in support of motion

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<sup>2</sup> The Board notes that as was the case with its previous motion for summary judgment, Divane's current filing is not supported by affidavit.

for summary judgment at 8.) Divane essentially argues that the Agency should not have followed the OSFM's registration determination. (citing, Rockford Drop Forge.) Divane also recognizes that OSFM initially registered the tank, but that OSFM later altered the document which had indicated that the registration was complete, to show that the tank was not registered. (Second cross motion at 5; Rec. at 101.) Divane denies that it is contesting OSFM's determination in this action before the Board.

### DISCUSSION

Divane is correct that the law in effect at the time the application is filed is the applicable law here. (See, Rockford Drop Forge, 582 N.E.2d 253, where court applied statutory definition in effect at the time the application was filed.) As the Board has previously stated:

It is true that when determining eligibility for reimbursement, the applicable law to be applied is that which is in effect on the date of the filing of the application for reimbursement [citations omitted]. (Galesburg Cottage Hospital v. IEPA (August 13, 1992), PCB 92-62, 135 PCB 319.)

The petitioner in Rockford Drop Forge, paid a registration fee to the OSFM in 1986. The petitioner was then denied eligibility by the Agency because the definition of USTs in the Act at the time of the filing of the application did not include certain heating oil tanks. OSFM regulations at the time would have included Rockford's heating oil tanks as USTs, contrary to the Act's definition. The Act was later amended, effective July 11, 1990, to include certain heating oil tanks. However, the court held that at the time of the filing of the application, petitioner's tanks were not included in the Act's definition and were not eligible. The court also held that the Board and Agency are not bound by the definition of underground storage tank contained in the OSFM regulations and applied by OSFM, but rather are bound by the definition contained in the Act. The court consequently upheld the Board's affirming the Agency's denial of eligibility.

In Lincolnwood and later in Lake Forest, the Board found that OSFM is the agency with the authority to register USTs, and that the owner or operator is only eligible if the tanks are registered with OSFM. The Board further found that "[t]he Board has no authority over registration of USTs, and therefore, the issue of whether the four USTs could, should, or might be registered is not material to the Board's review of the Agency's [decision]". (Lincolnwood at 2-3, 134 PCB 34-35.) In both Lincolnwood and Lake Forest, there was no dispute as to whether the tanks were in fact registered; they were not.

Although the instant situation seems similar to Rockford Drop Forge, it differs because central to the situation in Rockford Drop Forge was whether the UST in question came under the definition of UST in the Act, and thus met the eligibility requirements of the Act. In the instant matter, the issue is whether OSFM registered the tank. The similarity to Rockford Drop Forge also involves the Board's, Agency's, and OSFM's roles which was later addressed in Lincolnwood and Lake Forest.

Both the Agency and Divane agree that the applicable law is the law in effect at the time of the filing of the application. The applicable law indicates that Divane's tank may have been "registerable". However, whether or not a tank is "registerable" under the Act at the time of application is not the issue before the Agency. (See, Lincolnwood and Lake Forest.) The issue for the Agency is whether the tank was registered by OSFM, as OSFM is the agency responsible for registering tanks. The record and summary judgment filings indicate that the OSFM initially determined the tank was registered and then later determined it was exempt from registration. Although the applicable law shows the tank may have been "registerable", the Board has no authority to overturn a decision of the OSFM so it will conform to that law<sup>3</sup>. Similarly, the Board has no authority over whether OSFM may or may not revise its earlier determination that petitioner's tank was registered.

The Board finds that the facts have now been sufficiently clarified and indicate that OSFM has in fact not registered the subject tank. Petitioner may appeal OSFM's determination through the proper appeal process for that determination. The Board therefore finds that the Agency was correct in denying eligibility based on the fact that the tank was not registered by OSFM.

For the reasons stated above, the Board hereby denies Divane's cross-motion for summary judgment and grants the Agency's second motion for summary judgment.

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

#### ORDER

The Illinois Environmental Protection Agency's October 4, 1993 motion for summary judgment is hereby granted. This docket is closed.

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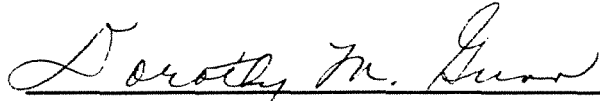
<sup>3</sup> PA 88-496, which gives the Board authority to review certain OSFM determinations was not effective until September 13, 1993, and is not applicable to this matter which was filed on May 24, 1993.

IT IS SO ORDERED.

Board Member J. Anderson dissented.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1992)) provides for the appeal of final Board orders within 35 days. 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 4<sup>th</sup> day of November, 1993, by a vote of 5-1.

  
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Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board