

ILLINOIS POLLUTION CONTROL BOARD  
March 20, 2003

HERR PETROLEUM CORPORATION, an	)	
Illinois corporation,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 03-86
	)	(UST Fund)
OFFICE OF THE STATE FIRE MARSHAL,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by L.P. Padovan):

Herr Petroleum Corporation (Herr Petroleum) petitioned the Board to review a determination of the Office of the State Fire Marshal (OSFM) concerning Herr Petroleum’s gasoline station, which is located at 319 E. Main Street, Route 150, in Knoxville, Knox County. The OSFM determined that Herr Petroleum must pay a \$100,000 deductible before it could be reimbursed from the State’s Underground Storage Tank (UST) Fund for costs of a leaking UST environmental cleanup at the gasoline station. *See* 415 ILCS 5/57.9(c)(2) (2002); 35 Ill. Adm. Code 101.300(b), 105.504(b). Herr Petroleum contends that the OSFM erred in determining that a \$100,000 deductible applied instead of a \$10,000 deductible. The Office of the Attorney General, on behalf of the OSFM, filed a motion to dismiss Herr Petroleum’s petition or, in the alternative, for summary judgment in favor of the OSFM.

For the reasons below, the Board grants the OSFM’s motion for summary judgment and affirms the OSFM’s \$100,000 deductible determination. The Board first describes the procedural history of this case and the applicable statutory provisions. Next, the Board sets forth the undisputed facts, followed by the parties’ arguments. The Board then discusses the law and renders its decision.

**PROCEDURAL HISTORY**

On December 18, 2002, Herr Petroleum filed a petition with the Board to review the OSFM’s November 12, 2002 determination of the applicable UST Fund deductible.<sup>1</sup> On January 9, 2003, the Board accepted the petition for hearing. The OSFM filed a motion to dismiss or, in the alternative, for a judgment in its favor, on February 6, 2003. Herr Petroleum filed a response to the motion on February 20, 2003.<sup>2</sup> On February 28, 2003, the OSFM filed the record on which it based its determination.<sup>3</sup>

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<sup>1</sup> The Board cites Herr Petroleum’s petition as “Pet. at \_.”

<sup>2</sup> The Board cites the OSFM’s motion as “Mot. at \_” and Herr Petroleum’s response as “Resp. at \_.”

### APPLICABLE STATUTORY PROVISIONS

The UST Fund was created under the Environmental Protection Act (415 ILCS 5/1 *et seq.* (2002)) in the 1980s. The Fund may be accessed by eligible UST owners and operators to help pay for the environmental clean up of leaking petroleum USTs. In addition, the UST Fund is used to satisfy the financial assurance requirements of owners and operators. *See* P.A. 84-1072, eff. July 1, 1986; *see also* 415 ILCS 5/57.11 (2002). The UST Fund consists of monies received as fees under the Gasoline Storage Act (430 ILCS 15/4, 5 (2002)) and the Motor Fuel Tax Law (35 ILCS 505/1 *et seq.* (2002)).

Under the Environmental Protection Act, the OSFM decides whether persons are eligible to have their cleanup costs reimbursed from the UST Fund and, if so, which deductible applies. The UST owner or operator may appeal the OSFM's decision to the Board. *See* 415 ILCS 5/57.9(c)(2) (2002); 35 Ill. Adm. Code 105.Subpart E. Eligibility to access the UST Fund is based on several criteria, including the following: (1) cleanup costs must be in response to a confirmed release of specified types of petroleum from a UST; and (2) the UST owner or operator must have registered the UST with and paid all fees to the OSFM. *See* 415 ILCS 5/57.9(a) (2002). Herr Petroleum's *eligibility* to access the UST Fund is not at issue. The OSFM decided that Herr Petroleum is eligible. What is at issue today is Herr Petroleum's *deductible*. The OSFM decided that the highest deductible applied and Herr Petroleum has appealed that decision to the Board.

Section 57.9(b) of the Environmental Protection Act sets forth the applicable deductibles (\$10,000, \$15,000, \$50,000, or \$100,000) for accessing the UST Fund:

- b. An owner or operator may access the Underground Storage Tank Fund for costs associated with an [Illinois Environmental Protection] 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  
 . . . .
  2. A deductible of \$50,000 shall apply if any of the underground storage tanks were registered prior to July 28, 1989, and the State received notice of the confirmed release prior to July 28, 1989.
  3. A deductible of \$15,000 shall apply when one or more, but not all, of the underground storage tanks were registered prior to July 28,

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<sup>3</sup> The Board cites the OSFM's record as "R. at \_."

1989, and the State received notice of the confirmed release on or after July 28, 1989. 415 ILCS 5/57.9(b) (2002) (emphasis added).

## **FACTS**

The facts of this case are undisputed. Herr Petroleum owns a gasoline station at 319 E. Main St., Route 150, in Knoxville, Knox County. Pet. at 1. Herr Petroleum has been the owner of this site since a gasoline service station was built there in 1988. *Id.* at 2. Five USTs were installed at the Knoxville site in March 1988: three USTs for gasoline (one 8,000 gallon capacity, two 4,000 gallon); one UST for diesel fuel (2,000 gallon); and one UST for kerosene (1,000 gallon). R. at 3, 19. Product was placed in the USTs in May 1988. *Id.*

In the late 1980s, Robert J. Herr was the president of Herr Petroleum and responsible for the corporation's operations. Pet. at 2. In approximately 1986, Mr. Herr began to experience "symptoms of forgetfulness and the onset of dementia." *Id.* Mr. Herr is now 77 years old and "in advanced stages of Alzheimer's disease." *Id.*

In November 1990, Herr Petroleum registered the Knoxville site's five USTs with the OSFM. R. at 3. Also in November 1990, the OSFM assigned the site a facility number (3-026408) and assessed Herr Petroleum the "1988 annual tank fee of \$100 per tank," resulting in a total amount due of \$500 for the five USTs. R. at 5.

When the OSFM assessed these fees for the Knoxville site, the OSFM also charged Herr Petroleum the annual \$100 tank fee for USTs at three other Herr Petroleum sites (facility numbers 3-015290, 3-015291, and 3-026407), as well as a "a late registration fee of \$500 per tank" for USTs at one of these other three sites. R. at 5; Pet. at 2. The OSFM imposed no "late registration fee" on Herr Petroleum for the Knoxville site. R. at 5.; Pet. at 2

In March 2002, Herr Petroleum reported to the Illinois Emergency Management Agency (IEMA) a release from the three gasoline USTs at the Knoxville site. IEMA assigned the release an "incident number" (02-0407). R. at 141; Pet. at 1. In October 2002, Herr Petroleum applied with the OSFM for a determination of eligibility for UST Fund reimbursement and the applicable deductible. R. at 147-50. On November 12, 2002, the OSFM determined that Herr Petroleum was eligible to be reimbursed cleanup costs associated with the three gasoline USTs over \$100,000, *i.e.*, a \$100,000 deductible applied. R. at 141-43.

## **PARTIES' ARGUMENTS**

### **Herr Petroleum's Petition**

Herr Petroleum claims that it is entitled to a \$10,000 deductible under the UST Fund. Pet. at 2-3. According to Herr Petroleum, "any failure to timely register the tanks at this property was a clerical or innocent error caused by Robert J. Herr's medical and mental condition." *Id.* at 2. Additionally, Herr Petroleum asserts that it "reasonably relied to its detriment upon the fact that no late registration fee was assessed for this site," maintaining that it "took no actions from 1990 to the present time to minimize the costs which it would incur in remediating petroleum

contamination” because the OSFM’s failure to assess a late fee led Herr Petroleum to reasonably believe it would have a \$10,000 deductible. *Id.* at 3. Herr Petroleum concludes that under these circumstances, imposing the \$100,000 deductible would constitute a “severe hardship,” a “penalty . . . disproportionate to any harm or violation which has occurred,” an “unconstitutional taking,” and failure of due process. *Id.*

### **OSFM’s Motion**

The OSFM has moved the Board to dismiss Herr Petroleum’s petition or, in the alternative, to enter a judgment in the OSFM’s favor. Mot. at 1. The OSFM argues that, regardless of Herr Petroleum’s reasons for not registering the USTs before July 28, 1989, the USTs were in fact not registered by then. *Id.* at 2. According to the OSFM, the plain and unambiguous statutory language on deductibles contains no exception of any aid to Herr Petroleum, and the Board cannot read one into the Environmental Protection Act. *Id.* at 3.

### **Herr Petroleum’s Response**

In its response to the OSFM’s motion, Herr Petroleum states that as a gasoline station owner in Illinois, it has fulfilled its obligations to pay sums into the UST Fund and to register its USTs. Resp. at 1, 3. Herr Petroleum reiterates that beginning in 1986, Robert J. Herr “was beset by forgetfulness and experiencing the onset of dementia.” *Id.* at 3. Herr Petroleum maintains that the USTs at its Knoxville gasoline station were not registered by July 28, 1989, because by that time Robert J. Herr was “gripped by senility and mentally unable to function as an owner/operator under the statute.” *Id.* Under these circumstances, Herr Petroleum argues, it should be subject to the “default deductible” of \$10,000 instead of the “heightened deductible of \$100,000.” *Id.* at 3.

Herr Petroleum also asserts that the State of Illinois failed to provide it “adequate process under the law” because the “‘notice’ embodied by the statute was inadequate to inform Robert J. Herr of the need to register the tanks by mid-1989.” Resp. at 3. Herr Petroleum continues:

The state’s subsequent failure to inform Herr Petroleum of the late registration or bring attention to the situation via imposition of a “late registration fee” when the tanks were eventually registered exacerbated the failure of the state to provide notice to Robert J. Herr. *Id.* at 3-4.

Herr Petroleum concludes that “[b]ut for the state’s failure of process,” Herr Petroleum would be entitled to the \$10,000 deductible. *Id.* at 4.

### **DISCUSSION**

Before analyzing the issues and ruling on the OSFM’s motion for dismissal or, alternatively, for judgment in its favor, the Board discusses the standard for reviewing the OSFM’s motion.

### **Standard for Reviewing the OSFM's Motion**

Initially, the Board notes that the OSFM's motion does not contest the sufficiency of Herr Petroleum's petition for review, but rather asserts that there are no disputed facts in this case and that the OSFM is entitled to judgment as a matter of law. Mot. at 2-3. Therefore, the motion, besides being untimely as a motion to dismiss,<sup>4</sup> is best construed as a motion for summary judgment.

Summary judgment is appropriate when the pleadings, depositions, admissions, 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. *See Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998); *see also* 35 Ill. Adm. Code 101.516(b). When 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.

Summary judgment "is a drastic means of disposing of litigation," and therefore the Board should grant it 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 *Putrill v. Hess*, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986). "Even so, while the nonmoving party in a summary judgment motion is not required to prove [its] case, [it] must nonetheless 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 (2d Dist. 1994).

### **Board Analysis**

The Environmental Protection Act states that a \$10,000 deductible applies before a UST owner or operator will be reimbursed its cleanup costs from the UST Fund, but the deductible increases to \$100,000 if *none* of the USTs at the site were registered before July 28, 1989. *See* 415 ILCS 5/57.9(b)(1) (2002). Herr Petroleum concedes that none of the USTs at its Knoxville gasoline station were registered before July 28, 1989. It is undisputed that all five USTs were registered in November 1990. Nevertheless, without citing any supporting legal authority, Herr Petroleum argues that it is entitled to the \$10,000 deductible for several reasons.

### **Alleged Failure of the State to Provide Adequate Process**

Herr Petroleum does not claim that the OSFM made any misrepresentations to it, let alone a misrepresentation with knowledge of its falsity, as minimally required to establish equitable estoppel against a public entity. *See Community Landfill Co. v. PCB*, 331 Ill. App. 3d 1056, 1061-62, 772 N.E.2d 231 (3d Dist. 2002). Instead, Herr Petroleum argues that it is entitled to the lowest deductible because the State *statute* served as inadequate notice of the company's legal duty to register the USTs "by mid-1989." Resp. at 3. Further, according to Herr

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<sup>4</sup> A motion to dismiss must be filed within 30 days after service of the challenged document. *See* 35 Ill. Adm. Code 101.506.

Petroleum, the OSFM should have notified it that the company was late in registering, including by assessing a \$500 per tank “late registration fee.”

Herr Petroleum misunderstands the applicable statutes. At the time, the Gasoline Storage Act required Herr Petroleum to register the five USTs not by mid-1989, but by early 1988. The statute required USTs being *installed after September 24, 1987*, to be registered with the OSFM *before installation*. See P.A. 85-861, eff. Sept. 24, 1987 (adding Section 4(b)). Herr Petroleum was therefore required to register its USTs before their March 1988 installation. The date of July 28, 1989, was not a registration deadline under the Gasoline Storage Act, but rather the effective date of the deductible provisions under the Environmental Protection Act.

Regulated entities, such as UST owners and operators, are responsible for complying with the laws that apply to them. This responsibility cannot be foisted upon the State, as Herr Petroleum argues. “It is the responsibility of companies doing business in Illinois to determine whether they are complying with Illinois’ environmental laws. \* \* \* Companies cannot . . . simply assume that they are not violating Illinois’ environmental laws.” People v. Panhandle Eastern Pipe Line Co., PCB 99-191, slip op. at 21 (Nov. 15, 2001) (rejecting alleged affirmative defense and penalty mitigation based on State’s failure to uncover company’s violations sooner).

Herr Petroleum’s statement that because the company assumed a \$10,000 deductible would apply, it “took no actions” for twelve years “to minimize the costs which it would incur in remediating petroleum contamination” (Pet. at 3) is as irrelevant as it is troubling. Moreover, contrary to Herr Petroleum’s suggestion, the \$500 “late registration fee,” which the OSFM assessed against Herr Petroleum for another site, did not apply to the Knoxville site. Under the Gasoline Storage Act, the late fee applied to unregistered USTs that contained petroleum *between January 1, 1974, and September 24, 1987*. See P.A. 85-861, eff. Sept. 24, 1987, P.A. 85-1324, eff. Jan. 1, 1989; see also 13 Ill. Reg. 14992, eff. Sept. 11, 1989 (adding 41 Ill. Adm. Code 170.72). Product was not placed in the USTs at the Knoxville gasoline station until *May 1988*. The Board finds no deprivation of adequate process.

### **Alleged Hardship and Penalty**

Herr Petroleum argues that applying the \$100,000 deductible would constitute a severe hardship and a disproportionate “penalty.” Pet. at 3. In this case, the Board is in no different a position than was the Fourth District Appellate Court in Stroh Oil Co. v. OSFM & PCB, 281 Ill. App. 3d 121, 130, 665 N.E.2d 540, 547 (4th Dist. 1996): “Even if we regarded the \$85,000 difference in deductibles as excessive [\$100,000 instead of \$15,000 deductible], those concerns are properly addressed to the legislature, not the courts.”

Herr Petroleum was two and one-half years late in registering the five USTs. The law made failing to register a UST a “business offense punishable by a fine of not more than \$10,000 per day.” P.A. 85-361, eff. Sept. 24, 1987. Under similar facts, the Stroh Oil court stated:

Stroh could have been assessed statutory fines in excess of \$7 million for its failure to register its USTs from September 24, 1987, to October 28, 1989. Thus Stroh cannot justifiably object to imposition of the \$100,000 deductible for failing

to fulfill its statutory obligations after 764 days of noncompliance, especially where Stroh is merely attempting to access state funds to cover costs for which Stroh could legitimately be held liable in the absence of the UST Fund. Stroh Oil, 281 Ill. App. at 130-31, 665 N.E.2d at 548.

The Board likewise finds no merit in Herr Petroleum's position.

### **Taking**

Herr Petroleum asserts that applying the \$100,000 deductible in this case constitutes an "unconstitutional taking" by the government. Pet. at 3. The case law rejects this position. Payment of the \$100 per UST registration fee into the UST Fund is "similar to an automobile owner paying a fee to register his car with the State or his locality rather than being an insurance premium entitling the payor to coverage." Rockford Drop Forge Co. v. PCB, 221 Ill. App. 3d 505, 582 N.E.2d 253, 259 (2d Dist. 1991) (denial of eligibility, despite payment of registration fee, is not a governmental taking of private property without just compensation). The Board finds no taking here.

### **Robert J. Herr's Mental Condition**

Herr Petroleum argues that Robert J. Herr's mental condition in the late 1980s entitles it to the lowest deductible. Again, Herr Petroleum offers no supporting legal authority for its position. No one questions that Robert J. Herr's described condition is most unfortunate. The Environmental Protection Act's language, however, is clear and affords no exceptions. The Illinois Supreme Court has held:

Where, as here, the language in a statute is clear and unambiguous, we are not at liberty to depart from the plain language and meaning of the statute by reading into it exceptions, limitations, or conditions that the legislature did not express. Citizens Organizing Project v. Department of Natural Resources, 189 Ill. 2d 593, 599, 727 N.E.2d 195, 198 (2000); *see also In re D.D.*, 196 Ill. 2d 405, 419, 752 N.E.2d 1112, 1120 (2001).

As the OSFM argues, the Board is without power to accept Herr Petroleum's invitation to ignore a statutory requirement.

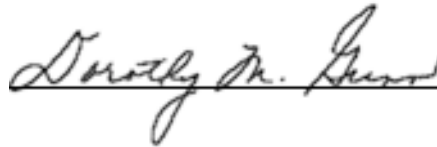
### **CONCLUSION**

Herr Petroleum has presented no factual basis that would arguably entitle it to prevail in this appeal. Considering the pleadings strictly against the OSFM and in favor of Herr Petroleum, the Board finds that there are no genuine issues of material fact and that the OSFM is entitled to judgment as a matter of law. The Board therefore grants the OSFM's motion for summary judgment and affirms the OSFM's decision to apply a \$100,000 deductible before Herr Petroleum can be reimbursed from the UST Fund. The Board closes the docket.

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) (2002); *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 order on March 20, 2002, by a vote of 7-0.

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

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board