ILLINOIS POLLUTION CONTROL BOARD
January 6, 1994

FIATALLIS NORTH AMERICAN, INC.,	)	
Petitioner,	)	
v.	)	PCB 93-108 (UST Fund)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

ORDER OF THE BOARD (by M. Nardulli):

This matter is before the Board on the Illinois Environmental Protection Agency's (the Agency) motion for reconsideration of the Board's October 21, 1993, order in this matter. The Agency challenges our finding that the Agency's reconsideration of the deductibility determination in this Underground Storage Tank Fund (the Fund) matter is void, with the result that a $10,000 deductible applies in this case. On December 13, 1993, Fiatallis North American, Inc., (Fiatallis or petitioner) filed a response to the motion and a motion for leave to cite additional authority instanter. In its motion to cite additional authority, Fiatallis sought to direct the Board's attention to the Illinois Appellate Court's decision in Illinois Environmental Protection Agency v. Illinois Pollution Control Board, No. 5-92-0468 (5th Dist. Nov. 23, 1993) (Clinton County Oil). The Agency did not respond to petitioner's motion. The Board hereby grants Fiatallis' motion to cite additional authority.

In ruling upon a motion for reconsideration the Board is to consider, but is not limited to, error in the decision and facts in the record which may have been overlooked. (35 Ill. Adm. Code 101.246(d).) In Citizens Against Regional Landfill v. County Board of Whiteside (March 11, 1993), PCB 93-156, we stated that "[t]he intended purpose of the motion for reconsideration is to bring to the court's attention newly discovered evidence which was not available at the time of hearing, changes in the law or errors in the court's previous application of the existing law. (Korogluyan v. Chicago Title & Trust Co. (1st Dist. 1992), 213 Ill. App.3d 622, 572 N.E.2d 1154, 1158.)" We grant the motion for reconsideration so that we can address several arguments made by the Agency. However, we reaffirm our October 21, 1993, opinion and order finding that the Agency may not reconsider its final deductibility determination.

Background

This case arises from the removal of two underground storage tanks (USTs) at Fiatallis' Engineering Center, in Springfield, Illinois. During removal, a leak was discovered and remedial action ensued. Fiatallis applied for reimbursement from the Fund on January 3, 1990. On February 26, 1990 the Agency notified Fiatallis that a deductible of $10,000 would be applied to Fiatallis' application for reimbursement for the Fund.

Over three years later, on May 17, 1993, the Agency notified petitioner that "[u]pon review of the information provided to the Agency, the Agency has determined that the appropriate deductible for this occurrence is $50,000.00." The Agency's May 17, 1993, decision was based on the same information as the Agency's February 26, 1990 determination. There is no allegation that Fiatallis withheld information from the Agency.

The Board's October 21, 1993 order in Fiatallis

Fiatallis appealed the Agency's imposition of a $50,000 deductible. Fiatallis relied upon Reichhold Chemicals, Inc. v. PCB (3d Dist. 1990), 204 Ill. App. 3d 674, 561 N.E.2d 1343, which held that the Agency lacked statutory authority to reconsider a final determination. In response, the Agency argued that the Board's decision in Ideal Heating (January 23, 1992), PCB 91-253, compels the conclusion that the deductibility determination was not final.[1] The Agency argued "it is clear that a deductible determination is not appealable until the juncture (determination of corrective action costs) is reached, general principles of appellate practice support a conclusion that it is not final until this juncture is reached." Thus, the Agency argued that if the deductibility determination is not ripe for appeal until a determination of all costs has been made, then the deductibility determination must also not be final until that juncture. The Agency offered no support for the "general principles of

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[1] In Ideal Heating the Board held, that in the interests of judicial economy, only those Agency UST decisions which: (1) deny eligibility or; (2) reach a complete determination on both the applicable deductible and the reimbursement of costs, are ripe for appeal to the Board. Prior to Ideal Heating, an appeal of the deductibility determination had to be filed within thirty-five days after notification of the determination. Typically this notification was made before the Agency reached a final determination on reimbursement of corrective action costs. As explained in Ideal Heating, this practice allowed for as many as three separate appeals for a single UST matter. In Ideal Heating the Board determined, that in the interests of judicial economy, the Board would hear appeals of the deductibility determination only after a determination on all costs had been made. We note that the Agency did not appeal the Ideal Heating decision at the time it was decided.

appellate practice" on which it relied. In response, the Board considered U.S. and Illinois Supreme Court caselaw concerning final agency action and "ripeness." Based upon that inquiry, the Board determined that an agency action can be both "final" and "not ripe."

The Board concluded that the Agency's February 26, 1990, deductibility determination was both final and not ripe. Furthermore, the Board found that pursuant to Reichhold Chemicals, the Agency could not reconsider its February 26, 1990 decision because it had no statutory authority to do so. Citing the Board's decision in Clinton County Oil, the Board stated:

> [I]t is well established that an administrative agency has no inherent authority to amend or change its decision and may undertake reconsideration only where authorized by statute. (citations omitted) Although the Board possesses such power, the appellate court has held that the Agency has no such reconsideration powers. (citing Reichhold)

Accordingly, the Board found the Agency's initial deductibility determination was final and that the Agency's reconsideration of that decision was void, with the result that a $10,000 deductible applied to Fiatallis.

Agency's Motion for Reconsideration

The Agency states that the cases cited by the Board do not support the conclusion that the deductibility decision was both final and not ripe. The Agency argues:

> If all of the facts needed to make a deductibility determination are available to the Agency when it determines a deductible amount, why should a claimant not be able to appeal a deductible determination within 35 days of pronouncement? Unlike A.E. Staley [A.E. Staley Manufacturing Company v. Illinois Commerce Commission 166 Ill. App. 3d 202; 519 N.E. 2d 1130] and Toilet Goods Association, Inc. v. Gardner, [Toilet Goods Association, Inc. v. Gardner, 87 S. Ct. 1520] no contingencies or circumstances arise in the wake of the pronouncement to ripen the deductibility determination for appeal. If a claimant is entitled to some degree of certainty in Agency decisions, why should that claimant not be allowed to achieve a greater degree of certainty concerning its deductible by appealing an unfavorable deductible to the Board within 35 days of its issuance? Under Abbott Laboratories v. Gardner (87 S. Ct. 1507) and Gardner v. Toilet Goods Association (87 S. Ct. 1526), it is clear that a deductible determination is ripe for appeal upon its pronouncement.

Although we are not certain we follow the Agency's argument, we believe it is the Agency's position that a claimant's certainty in Agency decisions is undermined by Fiatallis. We reject this argument on three bases.

First, if we understand the Agency correctly, the Agency appears to indirectly attack Fiatallis by arguing that Ideal Heating was wrongly decided. The Agency essentially argues that a claimant ought to be allowed to appeal the deductibility decision within 35 days of its pronouncement. Aside from the purely pragmatic observation that Fiatallis was unlikely to appeal a favorable determination, under the Agency's proposed standard Fiatallis should have appealed the deductibility decision in March or April of 1990. We are unable to understand how this supports the Agency's argument that it ought to be allowed to reconsider a final decision, absent statutory authority to do so, three years after making the decision. Moreover, we are unable to understand how this result will increase the claimant's certainty.

Second, it appears that the Agency is merely reprising its argument below that if the deductibility decision is not ripe upon notification, the decision must also not be final. We again reject this argument as contrary to U.S. Supreme Court precedent. In Abbott Laboratories, the U.S. Supreme Court adopted a two-step test to determine when an administrative agency decision is ripe for appeal. The Court directed reviewing courts to evaluate both the fitness of the issues for judicial review and the hardship to the parties of withholding court consideration to determine ripeness. (87 S. Ct. at 1515). The Court characterized "finality" as an "element" of the first step of the ripeness test. (Id. at 1516) Thus, ripeness does not determine finality; rather finality is an element of ripeness. Therefore, notwithstanding the Agency's "certainty" arguments, the Board's decision in Ideal Heating that the deductibility determination is not ripe for appeal until a determination has been made on all other costs, does not lead to the conclusion that the deductibility determination is not final upon notification.

Finally, the Agency argues that a claimant's certainty would be increased if the Board allowed the Agency to reconsider a decision three years after initially making the decision. The Board fails to see how this outcome will increase a claimant's certainty.

The Agency also argues that the Fiatallis decision creates notice difficulties for the Agency. The Agency argues:

> Fiatallis states that the deductible determination is a final decision. Therefore, the Agency must apprise a claimant of this fact along with the appeal rights. Then, and only then, would all of the applicable laws be

> satisfied. If a claimant does not file an appeal within the 35 day period, the Board does not have jurisdiction to hear the appeal and the parties involved with the case are certain as to what the deductible is. If the Agency does not notify the claimant of these rights when a deductible determination is made, then the Agency could be viewed as deliberately causing appeal periods to be tolled. Such omissions would indicate that the Agency is not being responsible in its actions, and would not increase the certainty level concerning deductible determinations.

The Board appreciates the Agency's desire to not mislead claimants.[2] However, we believe that the notice difficulties are not insurmountable. Indeed, we believe that the Agency's difficulties arise from the Agency's failure to follow Ideal Heating. Under Ideal Heating, where there has not been a determination on all other costs, there is no real danger that the appeal period of the deductibility determination will toll. The Board emphasizes, however, that this does not relieve the Agency of its notice obligations.

Finally, the Agency argues that implementation of Fiatallis in compliance with the applicable statutes and cases will reverse any judicial economy attained in Ideal Heating. The Agency bases this argument on the belief that the deductibility determination is both final and ripe. We rejected this argument above and will not reconsider it here except to note that Fiatallis does not alter Ideal Heating's holding that the final deductibility determination is not ripe for appeal until a final determination has been made on all costs.

Clinton County Oil

On November 23, 1993, the Appellate Court of Illinois, Fifth District decided Illinois Environmental Protection Agency v. Illinois Pollution Control Board, Clinton County Oil Co., et al., No. 5-92-0468 (5th Dist. Nov. 23, 1993). The Clinton County Oil court considered whether the Agency could reconsider an eligibility decision in a UST matter where new evidence was presented at hearing before the Board. The court found that the

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[2] We note that the Agency has recently revised its notice language concerning appeals of UST decisions. The Agency notification currently states that an appeal may be brought within "35 calendar days from the date the Comptroller mails the accompanying check to file a petition for a hearing with the Board." (emphasis added) In addition, the Agency cites 35 Ill. Adm. Code 105.102(a)(2), which provides, in pertinent part, "an applicant who seeks to appeal the Agency decision shall file a petition for a hearing before the Board within 35 days of the date of mailing of the Agency's final decision." (emphasis added)

Agency could not reconsider a final determination. The court stated "it would therefore, violate principles of fundamental fairness to allow the Agency to notify a applicant of its 'final decision' and then to allow the agency to change that decision on appeal before the Board." The Clinton County Oil court held the rule prohibiting Agency reconsideration of a final decision applies "even if the Agency discovers new evidence at the Board hearing which would have altered its decision had the Agency been aware of the evidence prior to making an eligibility determination." (Slip opinion at 7.)

The Board believes that the Clinton County Oil decision supports our decision in Fiatallis, in which we held that the Agency may not reconsider a final decision absent statutory authority to do so.

In sum, we reaffirm our October 21, 1993, decision finding that the Agency's reconsideration of the deductibility determination is void, with the result that a $10,000 deductible applies in this case. The Board concludes that the Agency has failed to bring to our attention any error in the Board's decision below or to raise facts that were overlooked. In addition, the Board believes the appellate court's decision in Clinton County Oil supports the Board's earlier decision.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 6th day of January, 1994, by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board