

ILLINOIS POLLUTION CONTROL BOARD  
September 1, 1994

CITY OF WHEATON, )  
 )  
 Petitioner, )  
 )  
 v. ) PCB 94-18  
 ) (UST Fund)  
 OFFICE OF THE ILLINOIS STATE )  
 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 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. Though the petitioner was served by first class mail, no response to the motion has been filed. For the reasons stated below, we hereby grant the motion for summary judgment and do so based on our review of the City's petition for review, the motion for summary judgment and supporting memorandum of law, and the record of appeal filed on February 17, 1994.

**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.<sup>1</sup> (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 registrable 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 OSFM appealed the OSFM's November 22, 1993 administrative order.

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<sup>1</sup>Our 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.

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 Tank #1 is ineligible to access the UST Fund because the tank had been removed prior to September 24, 1987 and that Tank #2 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 it should be entitled to only the \$10,000 deductible. While asking the Board to review the OSFM's application of the \$100,000 deductible, Wheaton explains that it originally, incorrectly registered Tank #1 - the 2,000 gasoline tank. According to the petition, which is unaccompanied by an affidavit or any other evidence supporting this point, the City intended to register the diesel tank in 1986 and not the gasoline tank, and it 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.

#### **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. (Mot. 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 was that 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 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 no where in the Gasoline Storage Act, which sets out the registration requirements, does it state that decisions of the OSFM are appealable to the Board. (Mot. 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 decision 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 it final and binding, and not now subject to review.

#### 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.)

Accordingly, 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.

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.

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 1<sup>st</sup> day of September, 1994, by a vote of 6-0.

  
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Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board