

ILLINOIS POLLUTION CONTROL BOARD
September 15, 1994

PACE SUBURBAN BUS DIVISION)	
OF RTA,)	
)	
Petitioner,)	
)	
v.)	PCB 93-79
)	(UST Fund)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

OPINION AND ORDER OF THE BOARD (by G. T. Girard):

This matter is before the Board on cross-motions for summary judgement filed by PACE Suburban Bus Division of the Regional Transportation Authority (PACE) and the Illinois Environmental Protection Agency (Agency). The issue to be resolved is whether or not PACE is eligible for reimbursement from the underground storage tank (UST) fund for the removal costs of three PACE USTs. PACE filed its motion for summary judgement on July 29, 1994 and the Agency filed its motion on August 1, 1994. Responses to the motions were filed on August 12 (PACE) and August 16 (Agency). The Agency also filed a reply to PACE's response on August 29, 1994.

PACE's ability to access the UST fund is governed by the eligibility requirements of Section 22.18b of the Environmental Protection Act (Act) (415 ILCS 5/22.18b). (See, Chemrex v. Pollution Control Board, (No. 1-93-0804 (1st Dist.) (December 28, 1993).). Section 22.18b provides in pertinent part that:

- (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 of 1919 and paid into the Underground Storage Tank Fund all fees required for the tank in accordance with Section 4 and 5 of that Act and regulations adopted by the Office of State Fire Marshall.

* * *(emphasis added)

Therefore, if the Office of State Fire Marshal (OSFM) determines a tank is not registered or not eligible for registration, the owner or operator cannot access the UST fund for that tank.

The Agency notified PACE by letter dated March 29, 1993 that the 20,000 gallon diesel, 10,000 gallon diesel, and 1,000 gallon heating oil tanks were not eligible for reimbursement. (R. at 79-80.)¹ The Agency informed PACE that these tanks were not eligible for reimbursement because the OSFM had indicated that the three tanks "have been deemed exempt from registration". (R. at 80.) On April 30, 1993, PACE filed this appeal of the Agency's determination regarding the eligibility of the three USTs with the Board.

In making its determination the Agency relied on a document entitled "Confidential Intra-Agency Communications Proof of UST Registrations and Fee Payment" from the OSFM. (R. at 42.) The document contains several columns including one titled "Exempt from Reg.", one titled "Fees Paid" and one titled "Not Req.". On the form found in the Agency record at page 42 for each of the three tanks the columns are circled under each of the above named titles. The circles are crossed-out under the "Fees Paid" column. (Id.) The Agency therefore, determined that the three USTs were exempt from registration and by statute ineligible for reimbursement.

The Agency maintains that the record before it clearly indicated that the three USTs at issue were not registered. (Ag. Res. at 2.) Thus, according to the Agency, PACE is not eligible to receive money from the UST fund for the tanks. (Id.) Further, the Agency points out that neither the Agency nor the Board could review the OSFM determination regarding registration under the law as it existed in March 1993 pursuant to 415 ILCS 5/22.18b. (Ag. Res. at 3.) Thus, the issue of whether the tanks "should, could or might be registered is not material to the Board's review of the Agency's decision". (Ag. Res. at 3.) Therefore, the Agency accepted the confidential document from OSFM at page 42 of its record and conducted no further review.

PACE argues that the Agency incorrectly relied on the confidential OSFM document at page 42 of the Agency record. PACE argues that the record also includes copies of valid registration documents (R. at 31-31), sworn statements from the Petitioner that the tanks are registered (R. at 54-69) and a second "Confidential Intra-Agency Communications Proof of UST

¹The Agency's record will be cited as "R. at ___"; The Agency's response will be cited as "Ag. Res. at ___"; the April 30, 1993, Petitioner's Memorandum will be cited as "Pet. Memo. at ___"; the Petitioner's motion will be cited as "Pet. Mot. at ___"; the Petitioner's exhibits will be cited as "Pet. Exh. ___"; Petitioner's response will be cited as "Pet. Res. at ___"; the attachment to Petitioner's motion will be cited as "Pet. Mot. attachment".

Registrations and Fee Payment" from the OSFM on page 41 of the record which indicates that the USTs were registered. Thus, according to PACE the record was inconsistent and the Agency should have investigated the facts supporting the fund determination. PACE cites to IEPA V. Illinois Pollution Control Board, No. 5-92-0468 (5th Dist. November 23, 1994) (Clinton Oil). PACE asserts that in Clinton Oil the court reproached "the Agency for failing to investigate the facts supporting a Fund eligibility application." (Pet. Memo. at 5.)

PACE further points out that it did not receive notification that the three USTs were allegedly not eligible for registration until April 6, 1993 when Keith H. Immke, legal counsel for the Division of Petroleum Chemical Safety for OSFM notified PACE by letter that the registration had been revoked. (Pet. Exh. A.) PACE timely appealed the OSFM decision and in a stipulation with OSFM dated April 4, 1994, the OSFM withdrew the letter of April 6, 1993 revoking registration. (Pet. Exh. B and C.) Finally, PACE presented an affidavit of Mr. Immke dated July 28, 1994, which indicates that the three USTs "currently are and remain registered with the OSFM". (Pet. Mot. attachment.) Thus, the OSFM now considers the three USTs as registered.

PACE therefore argues that even if the Agency could have properly relied on the single document in the record, the evidence is clear that the OSFM now considers the USTs to be registered. Therefore, PACE argues that the Board should issue an order granting PACE's eligibility. (Pet. Mot. at 6.)

The Agency argues that the documents filed with petitioner's motion for summary judgement were all executed after the Agency made its determination and were not nor could not be a part of the record before it. (Ag. Res. at 4.) Further, the Agency points to testimony at the Board's hearing on July 27, 1994, in a related case, (PACE Suburban Bus Division of RTA v. IEPA, PCB 94-145) in which OSFM's Mr. Immke indicates that the stipulation (Pet. Exh. B) and the withdrawal of the revocation (Pet. Exh. C) do not necessarily mean that the USTs are registered. (Ag. Res. at 6.) Finally, the Agency states that:

It might be argued that the Agency's inability to alter or amend its March 29, 1993 final decision places Petitioner in an administrative "Catch-22" position. At first glance it may seem so. However, the Petitioner is in a quandrey of its own making. It need not require the Agency to undo its correct March 29, 1993, final decision. All the Petitioner need do is simply submit an amended or new application for UST-Fund reimbursement with the new information it believes establishes the eligibility of the three (3) USTs to the OSFM pursuant to Title 57 of the Act. This will place the registration question within the purview of the agency that governs it and the eligibility question immediately after it

in the same place, the OSFM.

(Ag. Res. at 7.)

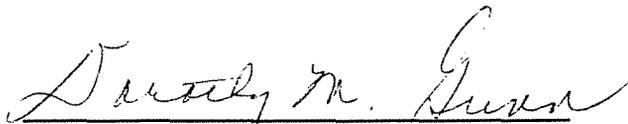
The Board finds that the three USTs at issue in this appeal are now and have been registered with the OSFM. In making this determination the Board must rely on OSFM and Mr. Immke's affidavit. Mr. Immke's affidavit, dated July 28, 1994, indicates that the tanks are now registered and the attempted revocation of the registration by OSFM was improper. Further, the Board notes that the Agency record included two contradictory forms from OSFM. Thus, the information before the Agency when making its determination was confusing. However, the record before the Board is clear. Therefore, in the interest of judicial economy, administrative ease and expedient use of state resources, the Board will not simply uphold the Agency's determination to deny eligibility, which was based on OSFM's misinformation, and ask PACE to resubmit an application amended merely to indicate the clear registration of the tanks to the Agency. Rather, the Board will remand this proceeding to the Agency to determine the deductible which is appropriate and the proper reimbursements in light of the OSFM determination that the USTs are registered.

ORDER

The Board hereby remands this proceeding to the Agency for determination of deductibility and cost determinations.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 15th day of September, 1994, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board