ILLINOIS POLLUTION CONTROL BOARD
March 11, 1993

HILLSBORO GLASS CO.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 93-9
	)	(UST Fund)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by J. Anderson):

This matter is before the Board on petitioner's motion for summary judgment filed February 9, 1993 and respondent Illinois Environmental Protection Agency's (Agency) motion to file the record instanter filed February 23, 1993. Respondent filed its response to petitioner's motion for summary judgment on February 22, 1993. On February 23, 1993, petitioner filed a motion for leave to file a reply and reply.

First, the Board addresses respondent's motion to file the record instanter. The record was due to be filed with the Board no later than January 28, 1993. Therefore, the record is approximately one month late. The Board grants the Agency's motion to file the record instanter, but notes with concern the Agency's failure to file a motion for extension of time to file the record.

Second, the Board addresses petitioner's motion for leave to file a reply. Motions for leave to file a reply will be granted to prevent material prejudice. (35 Ill. Adm. Code 101.241(c).) Petitioner contends that its reply is needed to prevent material prejudice because the Agency's response has unnecessarily clouded the issue of law presented. Petitioner does not assert that the Agency has misstated any facts at issue requiring clarification through a reply. The Board is well equipped to assess the merit of the arguments raised in the Agency's response and finds that petitioner's motion for leave to file a reply need not be granted to prevent material prejudice.

The Board now addresses petitioner's motion for summary judgment. The following facts are undisputed. Petitioner filed its application for reimbursement from the Underground Storage Tank (UST) Fund on December 13, 1990 for a release from a 1,000 gallon tank. (R. Part One at 2.) On April 30, 1991, the Agency notified petitioner that it was eligible to access Fund monies subject to a $10,000 deductible. (R. Part One at 113.) On January 31, 1992, the Agency reached the second part of its review process and notified petitioner that $16,656.21 of the claimed $30,873.71 corrective action costs were reimbursable.

(R. Part One at 124.) Petitioner has received reimbursement of $16,656.21.

On December 9, 1992, on its own initiative, the Agency sent petitioner a letter stating that, based upon information dated November 6, 1989, respondent now determined that petitioner was ineligible for the Fund and requesting that the monies previously reimbursed be returned. (R. Part One at 128.) The November 6, 1989 letter, which respondent had in its possession prior to reaching its determination that petitioner was eligible for the Fund, indicated that "[t]he present 1,000 gallon tank is not leaking. The contaminant was released from a previous 500 gallon tank in the same location approximately that was replaced in early 1985." (R. Part Two at 6.) Based upon this information, which respondent discovered in a review of the application after it rendered its April 30, 1991 determination, respondent stated that petitioner was ineligible for the Fund because the 500 gallon tank had not been registered with the Office of State Fire Marshal. (R. Part One at 128.)

Petitioner contends that, as a matter of law, the Agency cannot reconsider or amend its final determination of April 30, 1991 finding petitioner eligible for the Fund subject to the minimum deductible. In support of its motion, petitioner cites Reichhold Chemicals, Inc. v. PCB (3d Dist. 1990), 204 Ill. App. 3d 674, 561 N.E.2d 1343, which holds that the Agency has no statutory authority to reconsider a permit decision and several Board opinions establishing that the Agency may not reconsider its finding of eligibility (see e.g., A.B. Dick Co. v. IEPA (July 9, 1992), PCB 92-99; Clinton County Oil v. IEPA (March 26, 1992), PCB 91-163).

The Agency contends that petitioner's filing of contradictory information raises a genuine issue of material fact that needs to be decided prior to applying the rule of law set forth in Reichhold that the Agency has no authority to reconsider a final decision. The Agency asserts that this matter should proceed to hearing so that the basis for this contradiction can be explained.

The Agency does not dispute that it unilaterally changed its eligibility determination approximately 20 months after it reached its final decision and approximately 11 months after it reimbursed petitioner $16,656.21 for corrective action costs. (R. Part One at 124.) It is well established that the Agency cannot reconsider or amend its final decision. (Reichhold, 561 N.E.2d 1343; Waste Mangement of Illinois v. PCB (1st Dist. 1992), 231 Ill. App. 3d 278, 595 N.E.2d 1171, 1185; see generally, Weingart v. Department of Labor (1988), 122 Ill. 2d 1, 521 N.E.2d 913; A.B. Dick Co. v. IEPA (July 9, 1992), PCB 92-99; Clinton County Oil v. IEPA (March 26, 1992), PCB 91-163.) In its appeal to the appellate court of the Board's Clinton County Oil

decision, the Agency has challenged the Board's ruling that it may not reconsider eligibility decisions. However, in that appeal, the Agency argues that such a decision remains final until the applicant files a petition for review with the Board. (IEPA v. PCB and Clinton County Oil, No. 5-92-0468 Agency Brief at 16.) In the instant case, the Agency has unilaterally reconsidered its final eligibility decision before any petition for review was filed by the applicant. Unlike Clinton County Oil, where the Agency waited until Clinton sought Board review before it attempted to reconsider its eligibility decision, in the instant case the Agency's reconsideration triggered petitioner's appeal to the Board. The position taken by the Agency appears inconsistent with that argued on appeal that it is the filing of a petition for review by the applicant that allows the Agency to reconsider its heretofore final decision.

The Board finds that the distinction between the instant case and Clinton County Oil in terms of the timing of the Agency's attempted reconsideration necessitates a different result than Clinton County Oil. Although this matter comes before the Board on a motion for summary judgment, the Board finds that the instant case actually presents a jurisdictional issue. Because an administrative agency has no power beyond that conferred by statute, a decision by an agency which lacks the statutory power to enter the decision is void. (Business & Professional People v. Commerce Commission (1989), 136 Ill. 2d 192, 555 N.E.2d 693, 716-17.) The Board concludes that the Agency had no statutory authority to reconsider its April 30, 1991 decision finding petitioner eligible for the Fund subject to a $10,000 deductible. Consequently, the Agency's December 9, 1992 decision finding petitioner ineligible for the Fund and demanding that the reimbursed costs of $16,656.21 be returned is void. Because there was no decision entered by the Agency pursuant to its statutory authority, there was no final decision from which petitioner could file a petition for review so as to confer jurisdiction on the Board pursuant to Section 22.18b(g) of the Act. (415 ILCS 5/22.18b(g) (1992).) Therefore, the Board concludes that the instant matter should be dismissed for want of jurisdiction.

If the Board were to find that it does have jurisdiction to reach petitioner's motion for summary judgment, it would find that summary judgment would be proper. The Agency's claim that it should not be bound by the rule that it has no authority to reconsider because the instant case involves contradictory information is without merit. The Agency makes no allegation that newly discovered evidence has led it to question its earlier eligibility determination. Rather, based upon the identical information available at the time it rendered its April 30, 1992 decision, the Agency now alleges some 20 months later that a discrepancy exists. In its response, the Agency states that it is possible, although it declines to specifically allege, that

this discrepancy results from petitioner's intentional falsification of information. The Agency cannot avoid the rule that it has no statutory authority to reconsider by making unsupported allegations 20 months after it has reached a final decision that some discrepancy in information previously submitted necessitates a hearing. Moreover, the Agency should not be allowed, 11 months after it has reimbursed Fund monies, to defeat a motion for summary judgment by making unsupported allegations that a hearing is needed to determine if an applicant knowingly falsified its application.

Whatever doubts the Agency had as to petitioner's eligibility should have been addressed prior to rendering its eligibility determination. An applicant who has relied on the Agency's final Fund decision is entitled to a degree of certainty that that decision cannot simply be unilaterally reconsidered by the Agency at some unknown future date. Therefore, if the Board were to reach the issue of summary judgment, it would conclude there is no genuine issue of material fact as to whether the Agency attempted to reconsider its final decision and that, as a matter of law, the Agency cannot so reconsider where the Agency's attempt to reconsider is based solely upon information previously submitted to the Agency by the applicant prior to the Agency's rendering a final decision.

For the foregoing reasons, this matter is dismissed for want of jurisdiction.

IT IS SO ORDERED.

B. Forcade abstains.

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. (But see also, 35 Ill. Adm. Code 101.246, Motions for Reconsideration, and Casteneda v. Illinois Human Rights Commission (1989), 132 Ill. 2d 304, 547 N.E.2d 437.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 11th day of March, 1993 by a vote of 5-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board