

ILLINOIS POLLUTION CONTROL BOARD  
June 23, 1992

THE CITY OF LAKE FOREST, A	)	
MUNICIPAL CORPORATION OF	)	
ILLINOIS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	PCB 92-36
	)	(Underground Storage Tank
	)	Fund Reimbursement
ILLINOIS ENVIRONMENTAL	)	Determination)
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

DISSENTING OPINION (by J. Anderson):

The gist of my problem with the outcome of the majority is best expressed by quoting the following questions and answers from page 74 of the hearing transcript in this case; it involves testimony of the Agency in response to questions from Lake Forest's attorney and an exchange between the hearing officer and the attorney:

Q. If you had known on January 27, 1992, that the tank was filled partly with sand and partly with gasoline, would you have reached a different conclusion?

A. No.

Q. Why not?

A. Because the fact of the matter is the tank was not registered.

Q. But it was exempt from registration?

A. That is correct.

Q. And from the payment of fees?

A. Correct.

[Hearing Officer] Is there a Catch-22 here that I'm missing as a Hearing Officer?.

[Attorney] Yes. It's called the State of Illinois.

I agree with the Board's holdings that the Agency was bound to accept the OSFM's decision that the tank in question here was not registered, and could not be, because it was exempt from registration.<sup>1</sup> However, I suggest that it was error to conclude that this ended the issue as a matter of law. In so saying, I fully share the ongoing difficulty the Board has had with the

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<sup>1</sup> It is difficult, though, to understand - certainly from an environmental perspective - how finding sand in a tank not emptied of its gasoline is an activity that would have the result of exempting the tank from a subsequent registration requirement.

statutory language of the UST fund.<sup>2</sup>

The "registration required" language that allows access to the UST Fund is in the Environmental Protection Act, not the Gasoline Storage Act. Thus, the interpretation of the "exempt" question is within the purview of the Board.

I would argue that being exempt from registration satisfies the registration and fee requirements of Section 22.18b(a)(4). That Section requires that the person seeking access to the UST fund is to register "in accordance with" Section 4 of the Gasoline Storage Act and pay all fees required "in accordance with" Sections 4 and 5 of that Act (and OSFM regulations); if Section 4 exempts a person, and Sections 4 and 5 accordingly do not require payment of fees, then should the Board not hold that Section 22.18b(a)(4) is satisfied?<sup>3</sup>

I do not believe that Section 22.18b(a)(4) is plain on its face, and I know of no other statutory language related to the UST Fund that would make plain the "exempt" question. I would argue, therefore, that we should construe the section from the environmental perspective embodied in the Environmental Protection Act as a whole, including its purpose as expressed in Section 2.

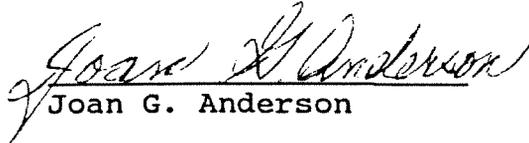
Our fundamental perspective, after all, is not limited solely to questions of monetary claims, or implicitly to husband the UST Fund for particular classes of tank owners. The majority's decision can have a chilling effect on goal of cleaning up the pollution caused by these leaking underground storage tanks and I believe that shutting out a Lake Forest entirely from the corrective action program does this. After all, the UST Fund exists to make it easier to comply with RCRA requirements for corrective action for UST's; indeed, the environmental-related concerns flowing from the RCRA program are why the Agency-administered UST Fund for corrective action is in the Environmental Protection Act in the first place.

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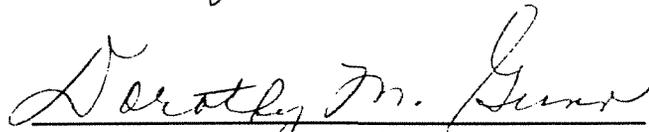
<sup>2</sup> While there are certain facts distinguishing this case from the Village of Lincolnwood v. IEPA (June 4, 1992), upon further reflection and for the reasons presented here, I have concluded that my vote in that case was in error.

<sup>3</sup> Note that Lake Forest will tender whatever fees are necessary if it's a question of paying registration fees (See Tr. p. 42.) Note also that the Agency acknowledged that Lake Forest's failure to pay a fee was no longer a concern. (See Tr. p. 80.)

It is for these reasons that I respectfully dissent.

  
Joan G. Anderson

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board hereby certify that the above Dissenting Opinion was submitted on the 14 day of July, 1992.

  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board