ILLINOIS POLLUTION CONTROL BOARD
June 5, 1997

TOLLES REALTY COMPANY	)	
	)	
Petitioner,	)	
	)	PCB 93-124
v.	)	(UST - FRD)
	)	
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY	)	
	)	
Respondent.	)	

OPINION AND ORDER OF THE BOARD (by K.M. Hennessey):

This case involves the petition of Tolles Realty Company (Tolles) for reimbursement from the Underground Storage Tank Fund (UST Fund) for certain costs that Tolles incurred when it removed four gasoline underground storage tanks (the gasoline tanks) from its site in Godfrey, Illinois in 1992. The Illinois Environmental Protection Agency (IEPA) initially informed Tolles that it was eligible for reimbursement from the UST Fund, but later reversed its decision. Tolles has appealed the IEPA's reversal.

Now pending before the Board are the motions of Tolles and the IEPA for a ruling on their respective motions for summary judgment, upon which the Board had deferred ruling pending the outcome of an appeal by Tolles before the Office of State Fire Marshal (OSFM). (Tolles Realty Co. v. IEPA (March 17, 1994), PCB 93-124.) Although that appeal is still pending, both Tolles and the IEPA now request a ruling on their respective motions for summary judgment.

Tolles had moved for summary judgment on the ground that the IEPA lacks authority to reverse the eligibility decision that it made in Tolles' favor. IEPA had moved for summary judgment on several grounds, including that the law requires IEPA to find Tolles' ineligible for reimbursement from the UST Fund.

In this opinion and order, the Board grants the motions for ruling, grants Tolles' motion for summary judgment, and denies IEPA's motion for summary judgment. In doing so, the Board finds that the IEPA's eligibility decision regarding Tolles was final and that IEPA lacks authority to reverse its final eligibility decisions.

This opinion and order begins with an overview of regulatory framework, followed by a statement of uncontested facts and the procedural history of this case. The Board then discusses the issues raised by the cross-motions for summary judgment and concludes with the order.

REGULATORY FRAMEWORK

In Illinois, both the OSFM and the IEPA have regulatory responsibilities regarding underground storage tanks (USTs). Under Section 4 of the Gasoline Storage Act (GSA), the OSFM registers tanks:

> 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 . . . shall register the tank with the Office of State Fire Marshal.

430 ILCS 15/4(b)(1)(A) (1994 and Supp. 1997). The OSFM also regulates the removal of USTs. (See 430 ILCS 15/2 (1994).)

Under the law in effect in 1992, when Tolles removed the gasoline tanks, the IEPA was responsible for handling requests for reimbursement of cleanup costs associated with USTs (*i.e.*, corrective action costs) from a state fund known as the Underground Storage Tank Fund (UST Fund). (See 415 ILCS 5/22.18b(d)(4) (1994).)[1] The IEPA was charged with determining whether requests for reimbursement satisfied a number of requirements, including that the owner or operator of the tank was eligible for reimbursement under subsections (a) and (c) of Section 22.18b of the Illinois Environmental Protection Act (Act). (415 ILCS 5/22.18b(a), (c) (1994).)

Subsection (a) of Section 22.18b sets forth a number of requirements that the IEPA had to apply when considering requests for reimbursement from the UST Fund. One of the requirements was that "[t]he owner or operator has registered the tank in accordance with Section 4 of the [GSA] and paid into the [UST] Fund all fees required for the tank in accordance with Sections 4 and 5 of that Act and regulations adopted by the [OSFM]." (415 ILCS 5/22.18b(a)(4) (1994).) The Act also required the IEPA to apply certain deductibles to requests for reimbursement, and to enforce a number of other requirements not at issue in this case. The decisions of the IEPA regarding reimbursement are appealable to the Board. (415 ILCS 5/22.18b(g) (1994).)

With this statutory framework in mind, the Board now turns to the facts.

STATEMENT OF UNCONTESTED FACTS

Tolles owns a former gasoline service station and automotive car outlet at 5785 Godfrey Road, Godfrey, Madison County, Illinois (the site). (Pet. at 1.)[2] Four underground storage

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[1] This section of the Illinois Environmental Protection Act (Act) was repealed and replaced by Section 57 of the Act effective September 15, 1993. However, for releases reported prior to the effective date, as in this case, the Act provides that reimbursement from the UST Fund is governed by the then existing law -- in this case, 415 ILCS 5/22.18b. (415 ILCS 5/57.13(b) (1994 and Supp. 1997).)

[2] Tolles' June 24, 1993 petition to the Board is cited as "Pet."

gasoline tanks were located on the site, but had been closed in place in April, 1974. (*Id*.) Two other tanks -- a heating oil tank and a used oil tank -- also were present at the site, but are not at issue in this case.

During renovation of the site in July, 1992, Tolles' consultant, Fugro McClelland (Fugro), noticed a gasoline odor, which it believed came from the gasoline tanks. (See Exh. 5 to IEPA's Response to Petitioner's Motion for Ruling on Petitioner's Motion for Summary Judgment, Fugro McClelland Groundwater Investigation Plan IEPA, at 5.) Fugro contacted the OSFM to discuss the registration and removal of these tanks. Fugro states that "the OSFM representative in charge of the site stated that since the USTs were properly closed in-place they were non-regulated tanks and no registration or permitting was required for removal of the USTs." (*Id*. at 5.) Fugro also contacted the IEPA regarding the reimbursement status of the site, and an IEPA employee told Fugro "that the reimbursement eligibility could not be determined until the IEPA reviewed the project documentation submitted upon completion of the project." (*Id*.)

On July 22, 1992, Fugro began to remove the tanks. Fugro observed some gasoline in three of the tanks and product in the soil around the tanks. (*Id*. at 6.) Fugro completed the excavation of the tanks on August 8, 1992. (*Id*.)

By letter dated August 28, 1992, Tolles (through Fugro) submitted an "Application for Reimbursement for Corrective Action Costs" for the costs of removing the gasoline tanks to the IEPA. (See Exh. 3 to IEPA's Response to Petitioner's Motion for Ruling on Petitioner's Motion for Summary Judgment, Application for Reimbursement from the UST Fund for Corrective Action Costs.) The application included Tolles' request for reimbursement for the costs of removing the four gasoline tanks. For each of the four gasoline tanks, Tolles indicated that the requirement to register the tanks with the OSFM was not applicable. (*Id*.) The application also indicated that the tanks were closed in April, 1974. (*Id*.) Tolles submitted additional reports containing this information to IEPA in September, 1992. (See Exh. 5 to IEPA's Response to Petitioner's Motion for Ruling on Petitioner's Motion for Summary Judgment, Fugro McClelland Groundwater Investigation Plan IEPA; Exh. 1 to Petitioner's Reply to Respondent's Response to Petitioner's Motion for Summary Judgment and Response to Respondent's Cross-Motion for Summary Judgment, Affidavit of George Newson of the OSFM; and Affidavit of Robert Johnson, attached to Petitioner's Reply to Respondent's Response to Petitioner's Motion for Summary Judgment and Response to Respondent's Cross-Motion for Summary Judgment.)

In October, 1992, the OSFM asked Tolles to add the gasoline tanks to a notification form that Tolles had submitted for the other tanks at the site. Tolles' attorney wrote to the OSFM on October 22, 1992 and stated in part: "We are enclosing an amended notification in order to avoid further action by you, not because we believe it to be required." (Exh. 4 to IEPA's Response to Petitioner's Motion for Ruling on Petitioner's Motion for Summary Judgment, Letter to OSFM from Coburn, Croft & Putzell at 1.) Neither party has provided the form to the Board, so it is not clear whether the amended form includes the gasoline tanks. However, Tolles paid a registration fee for the four gasoline tanks to the OSFM on or about February 24, 1993. (Pet. at 2.)

In a letter dated March 29, 1993, the IEPA notified Tolles that it was eligible to seek corrective action costs in excess of a deductible of $15,000 from the UST Fund for the six tanks at the site, including the four gasoline tanks. (Exh. A to Pet. at 1.) The IEPA also stated that the determination on the deductible was preliminary, but that the letter "constitutes the [IEPA's] final decision concerning your eligibility." (*Id*. at 2.)

On April 19, 1993, an IEPA reviewer, Karl Kaiser, sent a memo to OSFM requesting a "re-evaluation of registration status." (Exh. 5 to Petitioner's Reply to Respondent's Response to Petitioner's Motion for Summary Judgment and Response to Respondent's Cross-Motion for Summary Judgment.) In the memo, Mr. Kaiser stated: "The attached technical documentation suggests that the tanks were properly closed in place in April of 1974 and should have been considered exempt from registration. It is the IEPA's understanding that OSFM registered the tanks on information that the tanks were not properly closed in place." (*Id*.)

In an administrative order dated May 3, 1993, the OSFM notified Tolles that the four gasoline underground storage tanks were no longer registerable because they had been properly abandoned in place. (Exh. B to Pet.) In doing so, the OSFM apparently relied upon 41 Ill. Adm. Code 170.400(jj)(1)(J), which provides that a tank "abandoned by filling with inert material in compliance with regulations issued by the [OSFM]" is not considered a UST. The OSFM also notified Tolles that it was entitled to a refund of its registration fee. (*Id*.) Tolles appealed the OSFM's order on May 18, 1993. (Exh. C to Pet.) That appeal is still pending.

In a letter dated May 24, 1993, the IEPA informed Tolles that "current registration information obtained from the [OSFM], on May 4, 1993, indicates that the OSFM now considers the four (4) gasoline USTs 'exempt' from registration." (Exh. D to Pet. at 4.) As a result, the IEPA found that Tolles was not eligible to seek reimbursement of costs of corrective action associated with the gasoline tanks. (*Id.* at 2-3.) The IEPA stated that the letter constituted the IEPA's final decision regarding eligibility. (*Id*. at 3.)

PROCEDURAL HISTORY

Tolles filed a petition for review of the IEPA's decision with the Board on June 24, 1993. Tolles and the IEPA then filed cross-motions for summary judgment in early 1994, both of which were fully briefed.

On March 17, 1994, the Board deferred ruling on the motions for summary judgment. The Board found that whether the tanks were registered was an issue of fact that could only be resolved through a decision on the pending appeal before the OSFM. The Board also denied Tolles' request for attorneys' fees under Section 57.8(1) of the Act.

Tolles revived its motion for summary judgment through a motion for ruling that it filed on April 7, 1997. Tolles stated that the OSFM has indicated that it has no funding for a hearing until fiscal year 1998 and that Tolles' efforts to settle this matter with the OSFM have been

unsuccessful. Tolles accordingly requested that the Board grant Tolles' motion for summary judgment. Tolles did not renew its request for attorneys' fees.

On April 30, 1997, the IEPA filed a motion for ruling on its cross-motion for summary judgment. The IEPA also filed a response to Tolles' motion for ruling in which it contests Tolles' claim that OSFM will not hold a hearing. (IEPA's Response to Petitioner's Motion for Ruling on Petitioner's Motion for Summary Judgment at 12-15.)

On May 12, the Agency filed a motion for leave to file instanter a response to petitioner's motion for ruling on petitioner's motion for summary judgment. On May 16, 1997, Tolles filed a motion for leave to file a reply brief to the Agency's response to petitioner's motion for ruling. The Board grants both motions and accepts both briefs. All motions have now been fully briefed.

DISCUSSION

The first issue the Board must decide is whether there still remains an issue of fact that precludes summary judgment. The Board concludes that no issue of fact precludes summary judgment and then turns to the arguments of the parties regarding their cross-motions for summary judgment.

In support of its motion for summary judgment, Tolles relies primarily on a line of cases holding that the IEPA has no authority to change final decisions, including decisions regarding USTs. The IEPA argues that the principle set forth in these cases either does not apply or should not be applied for several reasons. First, IEPA argues that OSFM may change its decisions regarding registration and that IEPA can as well. Second, IEPA argues that it must follow the decisions of the OSFM. Third, IEPA argues that the IEPA would violate the law by reimbursing Tolles. Fourth, the IEPA argues that the cases that Tolles relies upon are distinguishable. Fifth, IEPA argues that the tanks are not registerable. Finally, IEPA argues that if summary judgment is awarded to Tolles, Tolles will receive taxpayer funds to which it is not entitled.

The Board has carefully considered the arguments of both Tolles and IEPA. While the issue is a difficult one, the Board concludes that the principle upon which Tolles relies must prevail.

Is Summary Judgment Proper?

In terms of the case itself, little has changed since 1994; Tolles' appeal of the OSFM's reversal is still pending. However, there have been further developments in the case law, both at the Board and in the courts, that now make it clear that the outcome of this matter does not depend on the OSFM appeal. Accordingly, the Board no longer believes that any issue of fact precludes summary judgment. The Board has authority to reconsider its own decisions and, given the unusual facts of this case, will do so. (See, *e.g.*, Reichhold Chemicals, Inc. v. IPCB, 204 Ill. App. 3d 674, 678, 561 N.E.2d 1343, 1345 (3d Dist. 1990); Modine Mfg. Co. v. PCB, 40 Ill. App. 3d 498, 501, 351 N.E.2d 875, 878 (2d Dist. 1976).

IEPA's Authority to Reverse its Final Decisions.

Tolles relies primarily on Reichhold. In that case, the IEPA denied an operating permit for Reichhold's batch polyester plant. Reichhold asked IEPA to reconsider its decision. The IEPA did not reply and Reichhold filed a petition for review of the permit denial with the Board. The Board granted the IEPA's motion to dismiss the appeal on the ground that Reichhold's request for reconsideration was still pending with the IEPA.

The Appellate Court reversed the Board. Relying on Pearce Hospital v. Public Aid Commission, 15 Ill. 2d 301, 154 N.E.2d 691, the court stated that "an administrative agency has no inherent authority to amend or change a decision and may undertake a reconsideration of a decision only where authorized by statute." (Reichhold, 204 Ill. App. 3d at 677, 561 N.E.2d at 1345.) The court held that while the Board has authority to modify its decisions, "no such authority to modify or reconsider its decisions has been granted by statute to the Agency, and no such procedures have been provided by rule." (*Id.*) The court remanded the case for hearing before the Board.

The Board has applied this principle to IEPA even when the IEPA clearly has made an error in its decision. In Fiatallis North American, Inc. v. IEPA (October 21, 1993), PCB 93-108, petitioner registered certain tanks in February, 1989 and removed them in April, 1989 and applied for reimbursement from the UST Fund. The IEPA originally decided that a $10,000 deductible would be applied to plaintiff's reimbursement request. Three years later, however, the IEPA decided that the proper deductible was $50,000 and issued a second final decision imposing a $50,000 deductible. Petitioner appealed to the Board.

The Board agreed that $50,000 was the proper deductible, but held that under Reichhold, the IEPA's initial determination was final and IEPA could not reconsider it. The Board noted that there was no allegation that petitioner had withheld or misrepresented information, and remanded the case to IEPA with instructions to reimburse petitioner subject only to a $10,000 deductible.

The Board has issued similar rulings in other cases. (See Clinton County Oil Co., Inc. v. IEPA (March 26, 1992), PCB 91-163, aff'd, No. 5-92-0468 (5th Dist. Nov. 23, 1993) (on petitioner's appeal of IEPA's imposition of a $50,000 deductible, Board held that IEPA could not argue on appeal that tanks were not eligible for reimbursement at all); TNT Holland Motor Express, Inc. v. OSFM (May 18, 1995), PCB 94-133 (Board granted summary judgment for petitioner, holding that OSFM lacked power to reconsider its prior final determination that petitioner was eligible to seek reimbursement); Hillsboro Glass Co. v. IEPA (March 11, 1993), PCB 93-9 (Board refused to uphold IEPA's attempt to order petitioner to refund a $16,000 reimbursement from the UST Fund even though IEPA had concluded that the reimbursement was erroneously issued); R.P. Lumber Company, Inc. v. OSFM (July 7, 1995), PCB 94-184 (Board held that OSFM lacked the power to change a decision on deductible).

The IEPA itself has argued that Reichhold applies to the IEPA in cases involving USTs. In Kean Oil v. IEPA (May 1, 1997), PCB 97-146, for example, Kean Oil submitted application for reimbursement from the UST Fund. The IEPA denied it, and Kean Oil filed no appeal during the 35-day appeal period following that decision. Sometime later, Kean Oil resubmitted the same

application, which the IEPA again denied. Kean Oil then filed an appeal before the Board. In a motion to dismiss the appeal, the IEPA argued that "'it may not alter or reconsider its final determination regarding applications for payment from the UST Fund, nor may it re-confer jurisdiction upon the Board or the Appellate Courts where no petition for review of an appealable final determination was filed by simply issuing a subsequent determination with the same findings.'" (Kean Oil (May 1, 1997), PCB 97-146, slip op. at 6 (quoting IEPA's motion to dismiss).) The Board agreed and dismissed the appeal.

In this case, however, the IEPA argues that the Reichhold principle either does not apply or should not be applied for several reasons. First, IEPA argues that OSFM may change its decisions regarding registration and that IEPA can as well. Second, IEPA argues that it must follow the decisions of the OSFM. Third, IEPA argues that the IEPA would violate the law by reimbursing Tolles. Fourth, the IEPA argues that the cases that Tolles relies upon are distinguishable. Fifth, IEPA argues that the tanks are not registerable. Finally, IEPA argues that if summary judgment is awarded to Tolles, Tolles will receive taxpayer funds to which it is not entitled. The Board addresses these arguments in turn.

OSFM's Authority To Reverse Decisions. First, the IEPA cites case law holding that the OSFM may alter, amend, rescind, or revoke a registration. In OK Trucking Co. v. Armstead, 274 Ill. App. 3d 376, 653 N.E.2d 863 (1st Dist. 1995), petitioner appealed from a circuit court order affirming OSFM's decision to revoke registration of one tank. The tank was in place when plaintiff purchased the property in 1967, but petitioner did not discover it until 1990. Petitioner removed the tank and later registered it. Two years later, the OSFM rescinded the tank's registration.

The court found that the tank was not registerable because it no longer existed at the time plaintiff applied to register it and therefore could no longer be considered an "underground storage tank." The court noted,

> [T]he Act provides for the registration of underground storage tanks, not the registration of tanks that were formerly in the ground or of those sites where underground storage tanks once were located. As plaintiff recognizes in its brief, the registration requirements are designed to promote the identification and monitoring of tanks which pose a threat of contamination, i.e., those tanks that are in the ground. During oral argument the plaintiff's attorney admitted the possibility that [the tank] had leaked and that plaintiff may have potential liability for the cleanup of spilled petroleum. If owners of underground storage tanks were permitted to simply remove tanks from the ground and later decide to register them based upon discovered liability, the legislature's intention of identifying and monitoring environmental hazards before they occur would be seriously undercut.

(*Id*. at 380, 653 N.E.2d at 866.)

The IEPA argues that in OK Trucking, the court necessarily concluded that the OSFM has authority to change registration decisions. While the OK Trucking court did not discuss Reichhold or related cases, the Board agrees that the OK Trucking court must have decided that

the OSFM has statutory authority to change its decisions, or that the case was otherwise distinguishable from Reichhold. Indeed, the OSFM's regulations assert that the OSFM does have such statutory authority: "Authority for . . . the revocation of the registration of an underground storage tank is located in Section 2 of the GSA." (41 Ill. Adm. Code 170.900.) But even if the OSFM does have statutory authority to revoke a registration -- and even if that authority could be properly used against Tolles in this case -- neither the GSA nor OK Trucking can be read as a grant of authority to the IEPA to revoke eligibility decisions.[3]

IEPA's Duty To Follow The OSFM's Decisions. Second, the IEPA argues that it must follow the rulings of the OSFM in making eligibility determinations. In support of this argument, the IEPA relies on Divane Bros. Electric Co. v. IEPA (November 4, 1993), PCB 93-105. In Divane Bros., petitioner attempted to register a tank with the OSFM and requested that the IEPA approve its request for reimbursement of its corrective action costs from the UST Fund. The OSFM had notified IEPA that the tank was registered but that the OSFM still needed a removal certificate for the tank. Petitioner supplied that certificate, but the OSFM then decided that the tank was exempt from registration and so notified IEPA. IEPA then denied petitioner's request for reimbursement. Petitioner appealed IEPA's decision to the Board.

The Board held:

> [W]hether or not a tank is "registerable" under the Act at the time of the application is not the issue before the Agency. The issue for the Agency is whether the tank was registered by OSFM, as OSFM is the agency responsible for registering tanks. The record and summary judgment filings indicate that the OSFM initially determined the tank was registered and then later determined it was exempt from registration. Although the applicable law shows that the tank may have been "registerable," the Board has no authority to overturn a decision of the OSFM so it will conform to that law. Similarly, the Board has no authority over whether OSFM may or may not revise its earlier determination that petitioner's tank was registered.

(*Id*. at 6.) The Board granted the IEPA's motion for summary judgment.

Relying on Divane, the IEPA argues that registration is within the OSFM's exclusive jurisdiction, and the Board may not review those decisions. Here, the IEPA argues, the OSFM has determined that Tolles' tanks are exempt from registration, and the Board may not interfere with that decision.

The Board finds Divane distinguishable. It is certainly true that the OSFM is the entity responsible for registering tanks, and the IEPA must rely on the OSFM's determinations

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[3] The Board further acknowledges that OK Trucking is not consistent with the Board's ruling in TNT Holland Motor Express, Inc. v. OSFM (May 18, 1995), PCB 94-133, and R.P. Lumber Company, Inc. v. OSFM (July 7, 1995), PCB 94-184, in which the Board held that the OSFM lacked power to reconsider its determinations. For the reasons given above, however, that conflict is not material to the Board's decision.

regarding registration. But in Divane, in contrast to this case, the IEPA never issued a final decision finding petitioner's tanks eligible. Thus, the Board concludes that Divane does not require the Board to grant the IEPA's motion for summary judgment.

Whether IEPA Would Violate The Law By Reimbursing Tolles. The IEPA also argues that if it does not follow the OSFM's decision, the IEPA will disburse funds in violation of the law. Under Sections 22.18b(a) and (d)(4) of the Act, the IEPA may only reimburse for corrective action costs related to tanks that are registered under the GSA. At the time that the reimbursement would be tendered to Tolles, the IEPA argues, the tanks would no longer be registered and therefore the reimbursement would be *ultra vires* and in violation of the law.

IEPA interprets the statute as follows:

> [T[he statute contemplates a . . . "two-tiered" eligibility determination. Section 22.18b(a) requires the owner or operator to meet the stated eligibility requirements in order to be initially declared eligible to access the UST Fund, but in addition, when the Agency authorizes payment from the Fund to the applicant, Section 22.18b(d)(4)(A) requires that the owner or operator also meet the eligibility requirements of Section 22.18b(a), including OSFM registration and fee payment pursuant to Section 22.18b(a)(4). To interpret Section 22.18b(d)(4)(A) otherwise, it is submitted, would be to read that subsection as an unnecessary redundancy, in contradiction of proper application of the canons of statutory construction.

(IEPA Response to Petitioner's Motion for Summary Judgment and Cross-Motion for Summary Judgment at 14.)

The Board disagrees. Section 22.18b(d) sets forth the prerequisites to reimbursement from the UST Fund. One of those requirements is that the owner or operator is "eligible under subsections (a) and (c) of this Section." (415 ILCS 5/22.18b(4)(A) (1994).) This language simply provides that eligibility is one of the necessary prerequisites to reimbursement. It cannot be read as a grant of authority to IEPA to overturn eligibility decisions.

Prior Case Law. The IEPA attempts to distinguish Hillsboro and Clinton on the grounds that in each of those cases the IEPA either had, or could have had, the information that justified the IEPA's second decision at the time that IEPA made its initial decision. Here, the IEPA argues, the OSFM changed Tolles' registration status after the IEPA made its initial eligibility determination; thus, the information that led to IEPA's second eligibility decision was not available to IEPA when it made its first eligibility decision.

The Board does not agree that those cases may be distinguished on that ground. First, these cases did not turn on whether the IEPA initially had all of the relevant information; instead, they turned on the IEPA's lack of authority to reconsider its final decisions. Second, while in this case the OSFM changed the registration status of the tanks after the IEPA's first eligibility decision, the information that led OSFM to do so was available to the IEPA before the IEPA made its first eligibility decision. For example, Tolles' application for reimbursement indicated

that the tanks had been taken out of service in April, 1974, and that it deemed the registration requirement not applicable. (See Exh. 3 to IEPA's Response to Petitioner's Motion for Ruling on Petitioner's Motion for Summary Judgment, Application for Reimbursement from the UST Fund for Corrective Action Costs.) Thus, as in Divane, the IEPA was on notice that the registration status of the tanks was questionable before it made its first eligibility determination.

The Registerability of the Tanks. The IEPA also argues that the tanks are not USTs under the Act and are not registerable. In doing so, IEPA cites a number cases in which of courts have held that a tank closed in place and filled with sand has been taken out of service and is not registerable. (See First of America Trust Company v. Armstead, 171 Ill. 2d 282, 664 N.E.2d 36 (1996); Board of Education v. Armstead, 279 Ill. App. 3d 922, 665 N.E.2d 409 (1st Dist. 1996); City of Lake Forest v. IEPA (June 23, 1992), PCB 92-36; Village of Lincolnwood v. IEPA (June 4, 1992), PCB 91-83; Sparkling Spring Mineral Water Co. v. IEPA (March 14, 1991), PCB 91-9.) Again, however, none of these cases involved an attempt by the IEPA to change its final decision regarding eligibility; accordingly, the Board does not find them relevant.

Receipt of Funds from the UST Fund. The IEPA's last, and perhaps most compelling, argument is that if summary judgment is granted to Tolles, Tolles will receive funds from the UST Fund to which it is not entitled. While the Board need not decide whether Tolles' tanks were in fact registerable, it is undeniably true that in some instances, the application of the Reichhold principle will deprive the IEPA of the opportunity to correct mistakes. It is also true that sometimes these mistakes will result in taxpayer funds being paid to those not contemplated by the legislature. Although the IEPA's desire to prevent that result is certainly understandable and appropriate, the Act as currently written simply does not allow the IEPA to reverse itself. The legislature can grant the IEPA that power; the Board cannot.

The Board also notes that it holds today only that Tolles must be considered eligible for reimbursement under Sections 22.18b(a)(4), and cannot be refused reimbursement on the grounds of the OSFM's reversal of its registration decision. The Board is *not* holding that Tolles is entitled to reimbursement for all of the costs it has included in its application for reimbursement; Tolles must still meet the other prerequisites to reimbursement set forth in the Act.

This opinion and order constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

1. The motions for ruling submitted by Tolles and IEPA are granted.

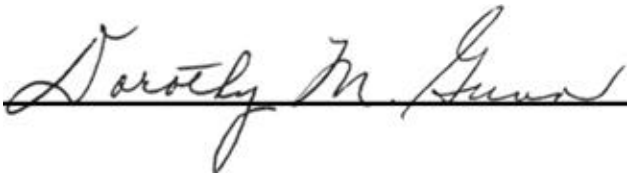
2. Tolles' motion for summary judgment is granted. IEPA's motion for summary judgment is denied.

3. This case is dismissed and the docket is closed.

IT IS SO ORDERED.

Section 41 of the Illinois Environmental Protection Act (415 ILCS 5/41 (1994) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of the date of service of this opinion and order. The Rules of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill. Adm. Code 101.246, "Motions for Reconsideration.")

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 5th day of June, 1997, by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board