ILLINOIS POLLUTION CONTROL BOARD
June 23, 1992

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

MURRAY R. CONZELMAN APPEARED ON BEHALF OF PETITIONER, AND

DANIEL P. MERRIMANN APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by J. C. Marlin):

This matter comes before the Board on the February 26, 1992 petition for review filed by the City of Lake Forest (City), Lake County, pursuant to Sections 22.18b(g) and 40 of the Illinois Environmental Protection Act (Act) (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1022.18b(g) and 1022.40). The City challenges the January 27, 1992 decision of the Illinois Environmental Protection Agency (Agency) denying the City's November 21, 1991 application for reimbursement from the Underground Storage Tank Fund (Fund). The City sought $36,924 in corrective action costs associated with removal of a 750 gallon abandoned underground storage tank which was exempt from registration by the Office of State Fire Marshal (OSFM). Hearing was held on May 14, 1992; no members of the public attended. Pursuant to schedule, the City filed its opening brief on May 22, 1992. The Agency's brief, due June 1, was not filed, and no reply brief was filed by the City.

FACTS

There is no factual dispute in this case. Rather, the City disputes denial of access to the Fund under the facts of the case, which it alleges presents a "Catch-22" situation in which it could not register a UST which it had not known existed prior to its discovery during the process of a planned removal of another, registered UST.

At hearing, the City presented the testimony of two witnesses. The first was Max L. Slankard, Assistant to the City's Director of Public Works. (Tr. pp. 6-21.) The second was Patricia Kirschhoffer, President of Kirschhoffer Construction Co., whose company was retained by the City to remove the USTs at issue. (Tr.

pp. 22-42.) The Agency presented one witness, Kendra Schmidt, the project manager in the Agency's UST Section, Bureau of Land, who reviewed the City's reimbursement application.

The site at issue is the Deerpath Park Golf Course. The City was aware of two USTs at the site, a gasoline storage tank which it proposed to leave in place, and a 500 gallon waste oil tank which it proposed to remove. The City also planned to remove another tank on Waverly Road. Removal commenced on July 16, 1990. Persons present included Mrs. Kirschhoffer, to perform the removal, and Ms. Susan Dwyer of the OSFM, to observe that removal. (Tr. pp. 17, 24, 54 & Pet. Exh. 1.) During the course of the removal of the 500 gallon waste oil UST, the west wall of the excavation fell away and exposed the end of a previously unknown tank located at a higher elevation. (Tr. p. 23 & Pet. Exh. 2.) This UST was discovered to be a 750 gallon tank, partially filled with gasoline and sand; in the past, sand or other inert materials were often introduced into USTs during the process of "abandonment in place" or closure. As the second unknown tank was exposed, a strong gasoline odor was present in the air, and gasoline was leaking from the tank. Vapors from the tank were monitored, and because "the explosion level was too high", the excavation was closed while the contractor went through the OSFM process of tank registration and permitting necessary prior to tank removal. (Tr. pp. 24-26.) The incident was duly reported to the Emergency Service and Disaster Agency (ESDA) and logged as Incident # 901982. OSFM issued its UST removal permit on August 1, 1990. (Pet. Exh. 1, pp. 1-2.)

Actual tank removal began on October 26, 1990. There is no dispute that the tank was appropriately removed, transported, cleansed, and disposed of. Six hundred and fifty cubic yards of gasoline contaminated soil was excavated and removed for appropriate disposal between October 26 and November 2, 1990. As costs for the project had increased 970% over the City's estimates, the City stopped excavation and closed the site in order to further evaluate the remediation process.

Soil borings performed in mid-March, 1991 indicated two areas of contamination on the south side of the original excavation. Consequently, one year after the discovery of the unknown UST, the site was again excavated. As the result of discussions with the Agency and the City's remediation consultants, Soil and Material Consultants, Inc., the City determined to attempt landfarming as a remediation method. This consisted of layered placement of soil exhibiting traces of odor or visual contamination on an asphalt parking lot, with subsequent working and turning of the soil with a small tractor.

On July 19, 1991, the City returned the treated soil to the excavation and closed the site. The results of soil samples received by August 14, 1991 led the City to believe that remediation had been successfully completed. The cost of this year

long project was $36,924. (Pet. Exh. 1, pp. 12-13.)

The City submitted an application for reimbursement for these costs from the Fund on November 21, 1991. The application sought reimbursement for costs associated with corrective action for 1) the known, registered 500 gallon waste oil UST and 500 gallon gasoline UST and 2) the unknown, unregistered 750 gallon gasoline-sandfilled tank. (Pet. Exh. 1.)

The Agency issued its letter of determination on February 26, 1992. (Agency Rec. pp. 64-65). The Agency determination concerning the 500 gallon USTs was not challenged, so it will not be set forth here. As to the 750 gallon gasoline UST, the Agency stated that "[c]orrective action costs associated with [it], which was the only tank indicated to have had a release, are not eligible for reimbursement...This tank failed to meet the eligible requirement (sic) of [Section 22.18b(a)(4)]. Specifically, (1) the OSFM indicates the tank was filled with sand (and) is exempt from registration, and (2) the fees have not been paid for the tank".

At hearing, the Agency acknowledged that at the close of hearing "[a]s far as the registration fee is concerned, it's our understanding that they do not owe a fee. We have no concern over that". (Tr. p. 80). The Board accordingly finds that the Agency's second reason for denial, non-payment of fees, was in error, and will not further discuss this reason.

The testimony of the City is uncontroverted that the existence of the 750 gallon gasoline-sandfilled tank was unknown to the City, and that the tank had not been used since before 1973 (Tr. pp. 27-28). Pursuant to Section 4(b) of the Gasoline Storage Act (Ill. Rev. Stat. 1989, ch. 127 1/2, par. 156(b), the OSFM has taken the position that it cannot register tanks taken out of service prior to January 1, 1974. (See Sparkling Spring Mineral Water v. IEPA, (March 14, 1991) PCB 91-9.) The substance of the testimony of the Agency's Ms. Schmidt is that, based on the information provided to her by OSFM (Agency Rec. pp. 59-62) eligibility was denied because the tank was not registered. Ms. Schmidt agreed that if OSFM had informed her that the tank was registered, that her decision would have changed to a determination that the tank was eligible "[p]roviding all other criteria were met". (Tr. 75-76). The Agency's position was further underscored in response to questioning by the Board's Hearing Officer:

Hearing Officer Hurwitz: You don't care whether [OSFM is] right or wrong, is that what you are saying, you just go by what they tell you?

The Witness: I made this decision based on the information they gave me, yes.

Hearing Office Hurwitz: So that with respect to whether or not a tank should be registered or exempt, that's not your decision, that's the State Fire Marshall's decision?

The Witness: Exactly. (Tr. p. 77).

ARGUMENT

The City's position in this case is best presented by quoting its own language. In the City's view,

> The only dispute is about registration. Petitioner couldn't have registered the tank before July 1990 because it didn't know the tank existed and the minute the tank was uncovered the State Fire Marshal would have refused to accept the registration because the tank was "exempt from registration".
>
> The good purpose of the Statute is to rid the environment of leaking underground storage tanks. A rule which discourages their removal because reimbursement is refused by bureaucratic whim or caprice is directly contrary to the good purpose of the Statute.
>
> The City...did everything it was supposed to do. It did not know of the existence of the seven hundred fifty gallon tank, but when that tank was uncovered it immediately took steps to obtain necessary permits and it removed the tank. It followed the law precisely and it carried out the purposes for which the law was enacted. To now say that it is not entitled to reimbursement, not because it won't pay fees because those have been tendered, but because it didn't register a tank it didn't know about and because the State Fire Marshal would not have accepted registration because he found that the tank was "exempt from registration", that presents a ludicrous situation having nothing to do with the purpose of the Statute. That can only be explained by a bureaucrat's rigid adherence to form over substance and purpose.
> (City Brief, pp. 5-6).

DISCUSSION

The Board sympathizes with the City's position, and agrees that the City finds itself in a "Catch-22" situtation. However, the Board must implement the statutory scheme as adopted by the legislature. As the Board has recently stated in a similar case, Village of Lincolnwood v. IEPA (June 4, 1992), PCB 91-83, involving a municipality's inability to register unknown, abandoned tanks with consequent ineligibility for reimbursement from the UST

Fund:

> The Board's opinions in UST cases illustrate the confusion encountered by Fund applicants. (See e.g., Rockford Drop Forge Co. v. IEPA (December 20, 1990), PCB 90-46; Lawrence Cadillac v. IEPA (February 6, 1992), PCB 91-133.) However, under the statutory division of authority, the OSFM is the agency with the authority to register USTs. (Ill. Rev. Stat. 1989, ch. 127 1/2, par. 156.) The parties agree that the four abandoned USTs are not registered. Under Section 22.18b(a)(4) of the Act, an owner or operator of a UST is registered with the OSFM. (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1022.18b(a)(4).) The Board has no authority over registration of USTs and, therefore, the issue of whether the four USTs could, should, or might be registered is not material to the Board's review of the Agency's [decision].

Any remedy for this sort of situation can come only from the legislature; the Board has no authority to rewrite the statutory scheme to cover this type of case. Had the legislature wished to provide that USTs exempt from registration were eligible to access the Fund, it could have so stated. Under these circumstances, the Board can only find that the Agency correctly determined that the City is ineligible to access the UST fund.

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

ORDER

The Board hereby affirms the Agency's January 27, 1992 determination that corrective action costs associated with a 750 gallon gasoline tank removed from Deerpath Golf Course are ineligible for reimbursement from the UST fund.

IT IS SO ORDERED.

J. Anderson dissented.

Section 41 of the Environmental Protection Act (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1041) provides for the appeal of final Board orders within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements.

I, Dorothy M. Gunn, Clerk of Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 23rd day of June, 1992, by a vote of 6-1.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board