

ILLINOIS POLLUTION CONTROL BOARD
August 26, 1993

DIVANE BROS. ELECTRIC CO.,)	
)	
Petitioner,)	
)	
v.)	PCB 93-105
)	(UST Fund)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by R.C. Flemal):

This matter comes before the Board on a motion for summary judgment filed July 23, 1993 by Divane Bros. Electric Co. (Divane) and a cross-motion for summary judgment filed August 5, 1993 by the Illinois Environmental Protection Agency (Agency). The Agency filed its response to Divane's motion with its cross motion¹, and Divane filed its response to the Agency's cross-motion on August 12, 1993².

For the reasons stated below, the Board denies the motion and cross-motion for summary judgment.

This action pertains solely to the issue of eligibility to access the Underground Storage Tank Fund (Fund) for one 8,000 gallon heating oil tank serving other than residential units for consumptive use on the premises. Divane alleges that it registered the tank with the Office of the State Fire Marshal (OSFM) on or about March 25, 1986 and paid required fees. On June 28, 1990 Divane first became aware that a release had occurred from the tank, subsequently removed the tank and took other corrective action. On March 13, 1992 Divane filed its application for reimbursement for corrective action costs with the Agency. (Pet. at 1-2.) The application was amended on

¹ Divane also filed an open waiver of the decision deadline and motion to continue the hearing. The Agency filed a motion to file its response to Divane's motion instanter. The motion to continue and motion to file were granted by the hearing officer by order of August 3, 1993.

² Divane also filed this document as a reply to the Agency's response to Divane's motion for summary judgment. Divane did not ask leave to file such reply, and this document will be considered as the response to the Agency's cross-motion for summary judgment.

January 13, 1993. (Divane motion at 3.) Divane filed this appeal of the Agency's determination of ineligibility for reimbursement from the Fund on May 24, 1993. On April 19, 1993 The Agency denied eligibility because it believes the tank does not meet the requirements of Section 22.18(b)(a)(4) as follows:

- 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 and paid into the Underground Storage Tank Fund all fees required for the tank in accordance with Sections 4 and 5 of that Act and regulations adopted by the [OSFM].

The Agency stated in its denial letter that "[t]he [OSFM] lists [Divane's] tank as being 'exempt' from registration due to the date this tank was removed (6/28/90)". (Denial Letter at 2.)

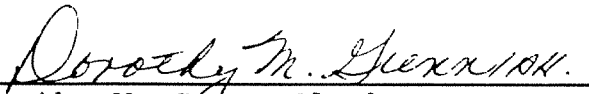
The parties also present argument on the proper law to be applied in UST registration. The Board does not reach this issue because it is obvious at the onset that genuine issues of material fact remain.

The pleadings indicate that it is a disputed fact that OSFM has decided to consider the tank "exempt", and has reported this to the Agency. Page 101 of the Agency record, cited by the Agency in support of its position that the tank is exempt, is a form sent to the Agency by OSFM. Page 101 indicates that the tank is exempt from registration and that the tank is not registered. The form is dated in three places, bearing an original date of July 28, 1992, and two revised dates, March 3, 1993 and March 31, 1993. These revised dates bear the signature of what appears to be "Jim Boone", near each date. This form at page 101 appears to be an altered version of the form at page 82. Page 82, cited by Divane in support of its contentions, does not contain the March 31, 1993 date and signature. Page 82 also shows the tanks were registered on March 25, 1986 and that fees were paid. Neither form contains any alleged reason OSFM found the tank exempt, contrary to the Agency's denial letter which states that OSFM "lists this tank as being 'exempt' from registration due to the date this tank was removed." (Denial letter at 2.)

Due to these factual discrepancies contained in the record which have not been clarified by the parties in their filings and supported by affidavit, the Board denies the motion and cross-motion for summary judgment as genuine issues of material fact remain. Should this matter proceed to hearing the Board orders the parties to address whether OSFM in fact registered this tank, and whether the tank registration was in effect at the time the application was filed. The parties shall also address whether the tank registration was ever revised or revoked by OSFM.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 26th day of August, 1993, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board