ILLINOIS POLLUTION CONTROL BOARD
June 4, 1992

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| VILLAGE OF LINCOLNWOOD, a Municipal Corporation, Petitioner, | ) | |
| v. | ) | PCB 91-83 (Underground Storage Tank Fund Reimbursement) |
| ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent. | ) | |

ORDER OF THE BOARD (by M. Nardulli):

This matter is before the Board on a motion for summary judgment filed by the Illinois Environmental Protection Agency (Agency) on April 27, 1992. On May 20, 1992, the Village of Lincolnwood (Village) filed its motion for leave to file its response instanter and a motion to supplement the record. The Village's motion to file its response instanter is granted.

On February 1, 1991, the Village filed an application for reimbursement from the Underground Storage Tank Fund (Fund) for corrective action costs associated with seven underground storage tanks (USTs). Three USTs were registered with the Office of State Fire Marshal (OSFM) on February 20, 1990. The remaining four USTs (referred to as the "four abandoned tanks"), which were discovered during the removal of the three registered USTS, have not been registered with the OSFM. All seven USTs were removed under the guidance of OSFM and the Agency and corrective action costs of $510,823.48 have been incurred by the Village (R. 21.).

On February 1, 1991, the Village filed an application seeking reimbursement from the Fund. The application states that the date the four abandoned tanks were taken out of service is unknown, that the contents of the tanks was "unknown/sand" and that they were not registered because they were "exempt/abandoned before 1970". (R. 17-20.) On April 15, 1991, the Agency issued its denial letter stating that the three USTs are subject to a $100,000 deductible pursuant to Section 22.18b(d)(3)(B)(i) of the Environmental Protection Act (Act) because none of the tanks on site were registered prior to July 28, 1989. (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1022.18b(d)(3)(B)(i).) The Agency also found that corrective action costs associated with the four abandoned tanks were not eligible for reimbursement from the Fund because the tanks were not registered with the OSFM as required by Section 22.18b(a)(4) and because the application indicated that the contents of the tanks were unknown and, therefore, the costs were not incurred as a result of a release of petroleum

(Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1022.18(b)(a)(3).) On May 20, 1991, the Village filed its petition seeking review of the Agency's Fund decision. In its prayer for relief, the Village asks that the Agency's denial of eligibility be reversed, or alternatively, that the Board direct the OSFM to register the four abandoned tanks.

The Agency contends that there is no genuine issue of material fact as to whether the four abandoned tanks are registered with the OSFM and that, as a matter of law, corrective action costs associated with these tanks are not eligible for reimbursement from the Fund. The Village contends that a genuine issue of material fact exists as to whether the four tanks can be registered.

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 also, Sparkling Spring Mineral Water v. IEPA (March 14, 1991), PCB 91-9.) The Village seeks to avoid summary judgment by asserting that a genuine issue of material fact exists as to whether the OSFM should have registered the four USTs. According to the Village, if this case proceeded to hearing, the Village could prove that two of the four tanks were not taken out of service until the late 1970's and early 1980's. The Village has attached affidavits in support of this contention.[1] The Village has also attached a letter to OSFM requesting reconsideration of its decision and the affidavit of the Village's attorney attesting to a conversation with the OSFM concerning reconsideration of the OSFM's determination that the four abandoned tanks cannot be registered.

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 eligible for reimbursement from the Fund only if the 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

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[1] The Village filed a motion to supplement the record with affidavits and letters attached to its repsonse. The Board will consider these documents in determining whether a genuine issue of material fact exists, but denies the motion to supplement the Agency record.

not material to the Board's review of the Agency's motion for summary judgment.

Because it is undisputed that the four abandoned USTs are not registered with the OSFM, and because the Act requires that tanks be registered on order to qualify for reimbursement, the Board finds that there are no genuine issues of material fact and the Agency's denial of eligibility is correct as a matter of law.

The Agency also moves for summary judgment on its determination that the three registered tanks are subject to a $100,000 deductible pursuant to Section 22.28b(d)(3)(B)(i) of the Act. In Ideal Heating Co. v. IEPA (January 23, 1992), PCB 91-253, the Board held that Agency determinations on the applicable deductible amount are not ripe for Board review. Consequently, only those Agency UST decisions which: (1) deny eligibility or; (2) reach a complete determination on both the applicable deductible and the reimbursement of costs are appealable to the Board.

The instant situation presents an issue of first impression for the Board as to how Ideal Heating applies to an Agency denial of eligibility and application of a deductible in a single denial letter. Because an Agency denial of eligibility alone is appealable under Ideal Heating, the Board concludes that such a determination remains appealable even when coupled with a deductible determination as in the instant case. However, an Agency deductible determination is still not ripe for review even when coupled with a denial of eligibility. Therefore, the Board finds that the Agency's motion for summary judgment on its determination that the three registered tanks are subject to a $100,000 deductible is denied as this deductible determination is not ripe for review pursuant to Ideal Heating.

Summary judgment is granted in favor of the Agency as to its determination that costs of corrective action associated with the four abandoned USTs are not eligible for reimbursement from the Fund. Summary judgment is denied as to the Agency's deductible decision pursuant to Ideal Heating. This docket is closed. Any appeal of an Agency final determination as to the three registered tanks should be filed as a new petition for review.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (Ill. Rev. Stat. 1989, 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 the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 4th day of June, 1992 by a vote of 7-0.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board