BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

VOGUE TYRE & RUBBER COMPANY,	)	
	)	
Petitioner,	)	
	)	PCB No. 96-10
v.	)	(UST Appeal)
	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGNECY,	)	
	)	
Respondent.	)	

NOTICE OF FILING

TO: Ms. Dorothy Gunn, Clerk of the Board
Illinois Pollution Control Board
State of Illinois Building
100 West Randolph Street - Suite 11-500
Chicago, Illinois 60601

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
State of Illinois Building
100 W. Randolph Street – Suite 11-500
Chicago, Illinois 60601

John J. Kim
Illinois Environmental Protection Agency
Division of Legal Counsel
1021 North Grand Avenue East
Springfield, Illinois 62794-9276

PLEASE TAKE NOTICE that on July 30, 2003, we filed with the Office of the Clerk of the Pollution Control Board Vogue Tyre & Rubber Company's Response to Motion for Summary Judgment, a copy of which is attached hereto and hereby served upon you.

VOGUE TYRE & RUBBER COMPANY

By: _____
One of its Attorneys

David M. Allen
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CERTIFICATE OF SERVICE

I, Jeffrey E. Schiller, one of the attorneys for Vogue Tyre & Rubber Company, certify that I caused copies of the foregoing Response to Motion for Summary Judgment to be served by hand-delivery before the hour of 4:30 p.m., to:

Ms. Dorothy Gunn, Clerk of the Board
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street - Suite 11-500
Chicago, Illinois 60601

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph Street – Suite 11-500
Chicago, Illinois 60601

and by depositing same in the United States Mail, first class postage prepaid, at One Prudential Plaza, 130 East Randolph Street, Chicago, Illinois, to:

John J. Kim
Illinois Environmental Protection Agency
Division of Legal Counsel
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276

on this 30th day of July 2003.

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	)	
Respondent.	)	

PETITIONER'S RESPONSE TO MOTION FOR SUMMARY JUDGEMENT

Petitioner, Vogue Tyre & Rubber Company ("Vogue"), hereby responds to the Motion for Summary for Summary Judgment (the "Motion") filed by the Illinois Environmental Protection Agency ("IEPA") as follows.

Introduction

By and large, the essential facts pertinent to this case are not in dispute. Vogue previously owned two properly registered 10,000 gallon underground storage tanks ("USTs") at its facility located at 4801 Golf Road in Skokie, Illinois (the "Site"). Vogue removed these USTs in 1986. In 1994, Vogue discovered, for the first time, releases of gasoline from the USTs, which had the potential to cause significant damage to property and human health. Vogue promptly reported this discovery to the Illinois Emergency Management Agency ("IEMA"), and remediated the Site. Vogue petitioned the Office of the State Fire Marshall ("OSFM") and the IEPA for reimbursement for the costs expended for remediation. Both have denied Vogue's request.

What is truly ironic is that Vogue's requests for reimbursement have been turned down for reasons completely contradictory with one another. The OSFM deregistered Vogue's USTs, and thus claimed that Vogue was not entitled to reimbursement, based on regulations adopted after the

release and registrations had occurred. This Board upheld the OSFM's decision. Now, the IEPA argues that Vogue is not entitled to reimbursement from the Leaking Underground Storage Tank ("LUST") Program because the registrations and release occurred before the effective date of the LUST Program. (IEPA Br. p.5).

It is plain to see that Vogue is being unfairly treated. Vogue acted promptly in the public interest, and has been told by state agencies that its efforts are not eligible for reimbursement on completely opposite grounds. There is no principled basis for these dual positions. The IEPA's Motion should be denied.

Argument

Although the IEPA purports to make three separate arguments in support of the Motion, in reality, these arguments boil down to one – although Vogue's claim and remediation efforts occurred well after enactment of the LUST Program, the fact that Vogue's USTs were removed prior to the enactment date precludes application of the statute. This argument fails.

First, the IEPA argues that this Board's decision in Chuck and Dan's Auto Service v. Illinois Environment Protection Agency (PCP 92-203) ("Chuck and Dan's") establishes that the law to be considered was the law in place at the time that Vogue removed its USTs and not the law in effect when remediation occurred. However, the Chuck and Dan's case simply does not stand for that proposition. Chuck and Dan's involved an attempt by the IEPA to utilize an amendment to a regulation enacted after remediation to preclude recovery of remediation costs. The Board rejected this attempt. Here, there was no new law enacted after remediation - - rather, remediation occurred after the law had been changed. Thus, Chuck and Dan's provides no support for the IEPA's position.

The IEPA quotes the Chuck and Dan's case to the effect that "when a statute involves 'prior activity or a certain course of conduct...the applicable law is the statue in place at the time of tank removal'". This quote, however, leaves out a critical previous sentence in the Opinion which states that "the applicable law is the statute in effect on the day of the filing of the application for reimbursement." (Chuck and Dan's, p.6, fn. 2 (emphasis added)) The key to reconciling these two quotes is to determine what constitutes "prior activity or a certain course of conduct" as defined by the Board. Here, removal of the USTs by Vogue does not fit this definition. What Chuck and Dan's holds is that the agency cannot prevent a responsible party from recovery by changing the rules after remediation. It does not hold that remediation performed after the change (where discovery and submission of claim were also after the change) is not eligible for reimbursement.

Second, the IEPA asserts that public policy precludes the application of the LUST Program to this case. Specifically, the IEPA argues that "to allow for the submission of these reports by Vogue Tyre would effectively reward them for conduct and activity" (IEPA Br. p.6), (emphasis added)). This assertion is completely and totally off the mark. There is nothing in the record to suggest that Vogue acted belatedly – indeed, the evidence is that Vogue acted promptly and in the public interest. Vogue does not seek a reward; rather, it seeks statutory reimbursement for actions taken in the public interest and as required by law.

Nor would application of the LUST Program to this case allow owners or operators of USTs to "backdoor" themselves into eligibility for compensation in the future as suggested by the IEPA. If a release was, or should have been discovered, and was not reported or remediated, an owner or operator of USTs is subject to substantial penalties under state law, and significant exposure from private suits. There is no basis for assuming, or believing, that business will seek

to piggyback on Vogue's eligibility for LUST Program reimbursement, nor would the IEPA be required to approve such applications if they were forthcoming. This is a unique case, which will not seek a precedent antithetical to public policy.

Finally, the IEPA asserts that application of the LUST Program to Vogue "would increase Vogue Tyre's liability for past conduct...[and] would impose new duties on Vogue Tyre..." (IEPA Br. p.7). This vague and unspecific claim provides no basis for the IEPA's Motion. There is no enumeration of the duties and liabilities which would now be present. There is no discussion as to whether Vogue has already fulfilled the new duties supposedly imposed by and through the remediation and its submissions to IEPA. It is not enough for the IEPA to label the LUST Program statutes as "not intend[ed] ... to be applied retroactively" without providing these specifics.

Conclusion

For the foregoing reasons, Vogue asked that the Board enter an order denying the IEPA's Motion for Summary Judgment and set the matter for hearing.

Respectfully submitted,

VOGUE TYRE & RUBBER COMPANY

By: _____
One of its Attorneys

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