

ILLINOIS POLLUTION CONTROL BOARD  
February 28, 1991

PULITZER COMMUNITY	)	
NEWSPAPERS, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 90-142
	)	(Underground Storage
	)	Tank Reimbursement)
	)	
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by M. Nardulli):

This matter comes before the Board on a motion for reconsideration filed January 18, 1991 by the Illinois Environmental Protection Agency (Agency). On January 23, 1991, Pulitzer Community Newspapers, Inc. (Pulitzer) filed its response.

By its motion, the Agency asks that the Board reconsider its December 20, 1990 opinion and order reversing the Agency's determination that Pulitzer is not eligible for reimbursement from the Underground Storage Tank Fund (Fund). Because this case is one of first impression, the Board will address the arguments raised by the Agency's motion.

In denying Pulitzer's request for reimbursement, the Agency stated that Pulitzer's corrective action costs were incurred prior to notification to the Emergency Services and Disaster Association (ESDA), that owners and operators of USTs shall report "to ESDA within 24 hours ... the discovery of ... released regulated substances ... (35 Ill. Adm. Code 731.150(a))" and that the statute requires that the owner or operator notify the State of the release in accordance with applicable requirements (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1022.18b(d)(4)(D)). Based upon Pulitzer's failure to properly notify ESDA of the discovery of the release, the Agency denied reimbursement.

The Board concluded that, because neither the Board regulation requiring notice to ESDA within 24 hours of the discovery of the release nor Section 22.18b(d)(4)(D) of the Act requiring that notice be given in accordance with applicable requirements were in effect at the time of the instant release, Pulitzer cannot be held to comply with these notice provisions and the Agency cannot deem Pulitzer ineligible on this basis.

The Agency argues that the Board applied P.A. 86-125 effective July 28, 1989, which created the "notice to the State in accordance

with applicable requirements" provision, inconsistently. According to the Agency, if the Board concludes that there was no notice provision applicable to Pulitzer pursuant to P.A. 86-125, then there was also no right to reimbursement. The Agency states that "[i]f the Board focuses on the date when [Pulitzer] became aware of the release (i.e., May 24, 1989) for establishing applicable criteria for judging reimbursability of the claim, then the claim should be judged by Section 22.18 of the Act as it existed on May 24, 1989." According to the Agency, Section 22.18 of the Act, as it existed on May 24, 1989, did not provide for owner/operator reimbursement from the Fund.

The Agency incorrectly states that the Board focused on the date of discovery of the "release (i.e., May 24, 1989) for establishing applicable criteria for reimbursement." The applicable criteria for determining Pulitzer's eligibility for reimbursement are those criteria set forth at Section 22.18b(d)(4)(D), which became effective July 28, 1989 with the enactment of P.A. 86-125, because these provisions were in effect at the time Pulitzer filed its application for reimbursement on November 21, 1989. P.A. 86-125 requires that an applicant satisfy certain criteria to be eligible for reimbursement. One of those criteria is that "[t]he owner or operator notified the State of the release of petroleum in accordance with applicable requirements." The Board focused on the date of discovery of the release for purposes of determining what notification duties applied to Pulitzer. This approach is logical given that discovery of the release triggers the duty to notify. The Board concluded that it would have been impossible for Pulitzer to give notice to ESDA within 24 hours of discovery of the release in accordance with the statute and regulation given that those provisions did not become effective until approximately three months after the release. However, at the time Pulitzer filed its application, the statute clearly provided for reimbursement.

The Agency's second contention is that the Board misconstrued Section 22.18b(d)(4)(D) of the Act which provides that the owner or operator of a UST shall notify the State of the release "in accordance with applicable requirements." In particular, the Agency points to the Board's statement that "in the absence of a statutory provision requiring that proper notification is a prerequisite to the right to reimbursement, the Agency may not deny reimbursement on the basis of OSFM and ESDA regulations." The Agency argues that this statement is tantamount to saying that notification must be in accordance with Board regulations.

The Agency's contention is directed to the Board's conclusion that the Agency cannot rely upon ESDA and OSFM notification regulations as a basis for denial of Pulitzer's claim for reimbursement. The Agency's assertion ignores the context in which the Board reached this conclusion. First, the Board concluded that the Agency could not use the ESDA and OSFM "notification

regulations" as a basis for denial because these regulations were not cited as reasons for denial in the Agency's denial letter. The Agency does not challenge this determination. The Board went on to state that, in any event, Section 22.18b(d)(4)(D) of the Act requiring that notice be given in accordance with applicable requirements was not in effect at the time of the release and, therefore, the ESDA and OSFM regulations were not tied to the right to reimbursement. This does not mean that the Board has equated "applicable requirements" with "Board regulations"; the Board recognizes that the OSFM and ESDA may adopt regulations governing notice requirements and that such regulations had in fact been adopted by these agencies. However, in the instant case because of the time frames involved, no provision of the Act was in effect bringing those notice provisions within the purview of the Act's reimbursement provisions. Therefore, the Board concluded that, in addition to not being proper bases for denial because no notification of these regulations was given in the denial letter, these regulations were not a proper basis for denial.

The Board believes the above discussion addresses the Agency's contentions regarding reconsideration. However, the Board will address several statements made by the Agency in its motion which the Board finds particularly troublesome. In support of its contention that the Board misconstrued Section 22.18b(d)(4)(D) of the Act by limiting the notice requirements to Board regulations, the Agency states that:

Section 22.18b(d)(4)(D) requires notification of the State in accordance with applicable requirements and these requirements are the OSFM and ESDA regulations and not the Board's regulations. By agreement between the Agency and OSFM, the Agency enforces only 35 Ill. Adm. Code Subpart F, Sections 731.160 through 731.167, which does not include the Board's notification requirement found in 35 Ill. Adm. Code 731.150.

The Board finds this statement to be inconsistent with the Agency's denial letter. The Agency is saying it does not enforce 35 Ill. Adm. Code 731.150 of the Board's regulations. Yet, this is the only regulation cited by the Agency as a basis for denial in its letter denying Pulitzer's claim for reimbursement.<sup>1</sup>

The Agency also states that by virtue of a "Memorandum of Understanding" (Resp. Ex. 14) between the OSFM, ESDA and the Agency, the Agency only enforces certain Board regulations relating

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<sup>1</sup> The Board notes that its December 20, 1990 opinion incorrectly states that the Agency testified that it has no authority to enforce OSFM regulations. (PCB 90-142 at 8.) The Agency testified that it does not enforce the Board's notice regulation. (Tr. 147-50.)

to USTs and does not enforce the Board's regulation requiring notice to ESDA (35 Ill. Adm. Code 731.150). However, this "Memorandum of Understanding" does not provide that the Agency shall not enforce 35 Ill. Adm. Code 731.150, nor does it make any reference to any regulation. (Resp. Ex. 14.) The memorandum provides that ESDA is the primary agency responsible for coordination of response to environmental emergencies involving "fire/explosion hazards" because the primary concern of agencies such as ESDA is to "protect life and property with secondary concern to the protection of the natural environment." (Resp. Ex. 14 at 1.) "as a result the [O]SFM shall be considered the State's Assisting Agency for preventing or mitigating a fire/explosion type incident." (Id.) The Agency also become an "Assisting Agency" when there is a threat to life and property if "an actual or potential release of toxic fumes or runoff ... threatens the general public", "[i]f the air, water or lands of the state could be seriously harmed" or "[i]f a public water supply, sewage treatment system or waste disposal site ... could be adversely affected." (Id. at 1-2.)

While it may be true that ESDA is the agency to notify of a release or threatened release from a UST, that does not mean that the Board is deprived of its statutory authority to adopt regulations requiring that notice be given to ESDA, nor does it mean that the Agency may delegate its statutory authority to implement the Act and Board regulations. The Board has previously stated that simply because an agency has implementing authority does not mean that agency has exclusive rulemaking authority. (In the Matter of: UST State Fund, R89-19 at 5 (April 26, 1990).) While we do not read the "Memorandum of Understanding" as delegating the Agency's authority to enforce any Board regulation, it is clear that such a delegation would be improper given that administrative agencies possess only that authority conferred upon them by statute. (Village of Lombard v. PCB, 363 N.E.2d 814 (1977).) Moreover, we fail to see how the Agency can say that it does not enforce the Board's regulation requiring notice to ESDA given that the Agency has the duty to enforce the provisions of the Act and Board regulations. (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1004.) The Agency's interpretation that Section 22.18b(d)(4)(D) refers to the "OSFM and ESDA regulations and not the Board's regulations" and that the Agency does not enforce the Board's notice regulations leads to the absurd result that there is no enforcement of the Board's regulation by the agency with the statutory directive to carry out such enforcement.

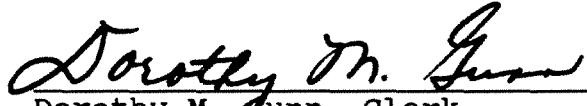
For the foregoing reasons, the Board has considered the Agency's motion for reconsideration and hereby denies the relief requested.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (Ill. Rev.

Stat. 1989, ch 111 1/2, par. 1041) provides for 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 20<sup>th</sup> day of February, 1991 by a vote of 6-0.

  
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Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board