ILLINOIS POLLUTION CONTROL BOARD
December 20, 1990

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

RICHARD W. COSBY AND ANTHONY YOUNG, COSBY AND BELL, APPEARED ON BEHALF OF PETITIONER.

RONALD L. SCHALLAWITZ APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by M. Nardulli):

This matter comes before the Board on a petition for review filed on August 1, 1990 by Pulitzer Community Newspapers, Inc. (Pulitzer) pursuant to Section 22.18b(g) of the Environmental Protection Act (Act) seeking review of the Illinois Environmental Protection Agency's (Agency) denial of Pulitzer's application for reimbursement from the Underground Storage Tank Fund (Fund) for costs of corrective action incurred in the removal of underground storage tanks. A hearing was held on this matter in Chicago, Illinois on October 16, 1990 at which no members of the public attended.

FACTS

Pulitzer, a wholly owned subsidiary of Pulitzer Publishing Company, is a newspaper publishing company located in Chicago, Illinois. In the spring of 1989, Pulitzer initiated steps to raze a building on a parcel of land at 5944 South Harlem Avenue across the street from Pulitzer's principal place of business, in order to construct a parking lot. (Tr. 12-14.)[1] The parcel was known to contain underground storage tanks. (Tr. 14.) Pulitzer contracted with Speedway Wrecking Company for the demolition of the building and removal of the tanks. (Tr. 14.) Speedway obtained the

[1] Tr. ___ indicates citation to the transcripts of the October 16, 1990 hearing. R. ___ indicates citation to the Agency record.

necessary permits from the Office of the State Fire Marshal (OSFM) for removal of the tanks. (R. 20-25.)

On approximately May 24, 1989, Speedway contacted Pulitzer to tell it that one of the tanks was damaged and that there had probably been a release. (Tr. 21.) On that same day, Thomas Jackson, senior vice-president at Pulitzer, telephoned the Agency and spoke to Mr. Janssen about the release. (Tr. 21-24; Pet. Ex. 8.) Janssen was identified at the hearing by the Agency as the manager of the "Immediate Removal Unit" who maintained a fairly active role in the day-to-day management of the Leaking Underground Storage Tank (LUST) program. (Tr. 164, 169.) Jackson testified that Janssen did not tell him to notify the Emergency Service and Disaster Agency (ESDA). (Id.) Janssen provided instructions concerning the procedures to be followed and indicated to Jackson that he had made proper notification to the Agency. (Tr. 23-24.)

In June of 1989, soil samples were taken and analyzed and special waste permits were applied for by Speedway and obtained by Land and Lakes, the landfill to which the contaminated soil was taken. (R. 55-66.) An engineering consultant was retained to supervise the remediation project. (R.40-42.) Between September 25, 1989 and October 5, 1989, 990 cubic yards of contaminated soil were removed from the site and disposed of by Land and Lakes. (R. 67.) Both testimony and documentary evidence indicate that Pulitzer was in frequent contact with the Agency during remediation. On July 28, 1989, Robert Moyer, vice president of operations for Pulitzer, spoke with Janssen. (Tr. 36.) Moyer noted Janssen's instructions to: (1) fill the hole after remediation was complete; (2) have a professional engineer file reports for all site excavations; (3) provide analytical data; and (4) provide results of a sieve analysis and liquid limit test. (Tr. 41; Pet. Ex. 16.) Janssen told Moyer of the preparation of a LUST guidance manual, not then completed. (Tr. 42.) In October, Moyer again spoke with Janssen about problems with continued excavation undercutting the highway and possible alternatives. (Tr. 46-47.) Janssen telefaxed a two page extract detailing soil clean up objectives for petroleum LUST sites. (Tr. 49-50.) Remediation was completed on October 5, 1989. (R. 124.)

On November 21, 1989, Pulitzer applied to the Agency for reimbursement from the Fund for its corrective action costs. (R. 112.) On December 21, 1989, the Agency sent Pulitzer an application for reimbursement form. (Pet. Ex. 11.) Between November 21, 1989 and December 21, 1989, Pulitzer telephoned the Agency twice regarding the status of its application. (Tr. 93, 57; R. 114.) The Agency indicated that Pulitzer would be eligible for reimbursement. (Id.) A telephone conversation on December 4, 1989 confirmed that Pulitzer would need an ESDA incident number to complete its application. Pulitzer was confused as to whether Speedway had obtained the ESDA number because the ESDA number was similar in form to the special waste permit number. (Tr. 53, 75-

76, 89, 93.) On December 15, 1989, Pulitzer telephoned ESDA and was told it had not been issued an ESDA incident number. (Tr. 52-54.) ESDA then issued Pulitzer "incident number 892655." (R. 120.)

On January 4, 1990, Pulitzer submitted its second application on the form provided by the Agency. (Pet. Ex. 11.) On January 17, 1990, the Agency notified Pulitzer that it was eligible for reimbursement, subject to a deductible of $10,000. (R. 143.) Between January 17, 1990 and July 3, 1990, the Agency made five requests to Pulitzer for additional information. (R. 144, 147, 148, 152-57, 166, 167, 175, 176.) On June 20, 1990, Douglas Oakley, an account technician for the Agency who reviews applications for reimbursement, noted that Pulitzer did not obtain an ESDA incident number until December 15, 1989, approximately two months after corrective action was completed. (Tr. 223.) The Agency testified that applications for reimbursement from the Fund are dealt with in a two-step process. (Tr. 124-25.) In the first step, the Agency determines whether the applicant meets general eligibility requirements and the applicable deductible. (Id.) In the second step, the Agency determines pursuant to Section 22.18b(d)(4)(C) whether the costs incurred are reasonable. (Id.) On July 3, 1990, the Agency notified Pulitzer that it was not eligible for reimbursement from the Fund because:

> 1. All of the costs for which reimbursement is being requested were accrued prior to the [ESDA] receiving notification of the release of a regulated substance. The Application for Reimbursement indicates that ESDA was notified on December 15, 1989, with the corrective action costs all accrued prior to the notification date.
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> 2. The owners and operators of an underground storage tank system shall report to ESDA within 24 hours ... the discovery ... released regulated substances ... . (35 Ill. Adm. Code 731.150(a).)
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> 3. Requests for partial or final payment for claims under this Section shall be sent to the Agency and shall satisfy all of the following: The owner or operator notified the State of the release of petroleum in accordance with applicable requirements. (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1022.18b(d)(4)(D).) (R. 185.)

Because the Agency determined that Pulitzer was not eligible for reimbursement, it never reached the issue of reasonableness of the costs of corrective action incurred by Pulitzer. On August 1,

1990, Pulitzer filed its petition for review from the Agency's denial of its application for reimbursement from the Fund. On November 19, 1990, the Board received from the hearing officer a written statement submitted on behalf of the Illinois Petroleum Marketers Association (IPMA). On November 20, 1990, Pulitzer filed an objection and response to the IPMA's statement and the Agency filed a response to the IPMA's statement. We agree with Pulitzer that the IPMA's written statement is more properly characterized as an amicus curiae brief rather than a statement offered pursuant to 35 Ill. Adm. Code 103.203. Based upon IPMA's position as a representative of "jobbers, marketers and suppliers of petroleum products in every county in the State of Illinois" (IPMA's Brief at 1), that this case is one of first impression for the Board and that the parties were allowed to respond to the IPMA, the Board accepts filing of the IPMA's amicus curiae brief.

DISCUSSION

The main issue presented is whether costs of corrective action incurred by Pulitzer prior to notification to ESDA are reimbursable from the Underground Storage Tank Fund. Section 22.18b(a) of the Act provides that an owner or operator is eligible to receive money from the Fund for costs of corrective action incurred as a result of a release of petroleum from any underground storage tank where certain conditions are met. (1989 Ill. Legis. Serv. 1299-1300 (West) P.A. 86-125.) In its denial letter, the Agency cites 35 Ill. Adm. Code 731.150(a) which provides that "[o]wners and operators of UST systems shall report to the ESDA within 24 hours ..." as support for its denial of the application. (R. 185.) The Agency also cites Section 22.18b(d)(4)(D) of the Act which provides that requests for reimbursement shall establish that "[t]he owner or operator notified the State of the release of petroleum in accordance with applicable requirements" as statutory support for denial of Pulitzer's application for reimbursement. (1989 Ill. Legis. Serv. 1299-1300 (West) P.A. 86-125.)

Pulitzer argues that 35 Ill. Adm. Code 731.150(a) did not become effective until June 12, 1989, approximately 1 month after the release was discovered on May 24, 1989, and, therefore, the regulation may not be used as a basis for denying Pulitzer's application for reimbursement. The Board agrees with Pulitzer's argument. Pulitzer cannot be required to comply with a regulation requiring notification of a release which was not in effect at the time of the discovery of the release. Therefore, the Board's regulation requiring notice to ESDA cannot be used as a basis for denying reimbursement.

Although Pulitzer does not raise this argument, the Board finds a similar problem with the Agency's reliance upon Section 22.18b(d)(4)(D) of the Act. This section of the Act became effective July 28, 1989. (1989 Ill. Legis. Serv. 1299-1300 (West) P. A. 86-125.) The Board notes that the UST provisions of the Act

have undergone frequent legislative change (see e.g., P.A. 85-1324; P.A. 86-125; P.A. 86-958) and have in fact been amended subsequent to P.A. 86-125 in P.A. 86-958, effective December 5, 1989. (1989 Ill. Legis. Serv. 5220-22 (West) P.A. 86-958.) The Board determines, with the exception explained below, that P.A. 86-125, effective July 28, 1989, is applicable to Pulitzer because Pulitzer's application for reimbursement was filed November 21, 1989. (R. 112.) [2] However, the Board fails to see how, at the time of the instant release on May 24, 1989, Pulitzer can be held to comply with a statutory provision requiring notification to the State which was not in effect at the time of the release. A review of the UST provisions in effect at the time of the release in May of 1989 has failed to yield any comparable notice requirement. The Board concludes that the Agency cannot rely on Section 22.18b(d)(4)(D) of the Act in denying Pulitzer's application because that section did not become effective until approximately 2 months after the release.

Although the above-cited Board regulation and section of the Act are the only provisions cited by the Agency in its denial letter, the Agency argued at hearing, and in its post-hearing brief, that various state and federal regulations also support its interpretation that notification to ESDA is a prerequisite to reimbursement. (Resp. Ex. 12, 13 and 15.) The Agency cites 41 Ill. Adm. Code 170.560 of the OFSM's regulations, effective April 21, 1989, which provides that owners and operators of USTs must notify ESDA within 24 hours of a release. The Agency also cites 29 Ill. Adm. Code 430.30 of ESDA's regulations, effective February 6, 1989, and characterizes this regulation as pertaining "to release of reportable quantities of flammable substances." (Agency Brief at 3.) The Agency also relies on 40 CFR 280.50.

The Board must address the Agency's reliance upon regulatory provisions in support of its denial at the Board level which were not cited as bases for denial in the July 3, 1990 denial letter. (R. 185.) Section 22.18b(g) provides that, "[i]f the Agency

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[2] The record establishes that on November 21, 1989, Pulitzer sent the Agency a letter requesting reimbursement. (R. 112.) On November 22, 1989, Pulitzer sent the Agency a letter correcting the amount of costs incurred as set forth in the November 21, 1989 letter. (R. 113.) In approximately December of 1989, the Agency apparently completed preparation of its reimbursement forms. (R. 118.) On January 4, 1990, Pulitzer sent the completed form requesting reimbursement to the Agency. (R. 118-140.) In light of the fact that no standard forms were available to Pulitzer in November, the Board accepts November 21, 1989 as the date the application for reimbursement was filed and, therefore, P.A. 86-125, effective July 28, 1989, applies to Pulitzer's application rather than P.A. 86-958, effective December 5, 1989.

refuses to reimburse ..., the affected owner or operator may petition the Board for a hearing in the manner provided for review of permit decisions in Section 40 of the Act." (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1022.18b(g).) Section 40 of the Act provides for Board review of the Agency's denial of a permit application or imposition of permit conditions. (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1040.) When the Agency denies a permit, it must issue a statement in accordance with Section 39(a) of the Act which sets forth the section of the Act and regulations that may be violated, the type of information which the Agency deems the applicant failed to provide and a statement of the specific reasons why the Act and regulations might not be met if the permit were granted. (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1039(a).)

It is well established that the information in the denial statement frames the issues on review. (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1039(a); Centralia Environmental Services, Inc. v. IEPA, PCB 89-170 at 6 (May 10, 1990); City of Metropolis v. IEPA, PCB 90-8 (February 22, 1990).) Such information is necessary to satisfy principles of fundamental fairness because it is the applicant who has the burden of proof before the Board to demonstrate that the reasons and regulatory and statutory bases for denial are inadequate to support permit denial. (Technical Services Co. v. IEPA, PCB 81-105 at 2 (November 5, 1981).) The same rationale applies to the Agency's denial of applications for reimbursement because Section 22.18b(d)(4) imposes a burden on the applicant to "satisfy" six criteria in order to receive reimbursement. (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1022.18b(d)(4).) It is the applicant seeking reimbursement who has the burden of proof before the Board to demonstrate that it is in compliance with the Act and regulations and is eligible for reimbursement from the Fund. Consequently, an applicant seeking reimbursement from the Fund is entitled to a statement detailing the reasons for denial and the statutory and regulatory support for such denial.

Additionally, the Agency has taken the position that it must adhere to the requirements of Section 39(a). Bur Filson, manager of the LUST clean-ups in the Marion region, testified at hearing that applications for reimbursement under the Fund "would be considered for appeal purposes, a permit. And when denying a permit, you give the reasons, the sections that would be violated had the permit been issued and so forth." (Tr. 135.) Filson also stated that "the permit denial lists or states that the [A]gency has to give the portion of the Act or regulations adopted under the Act or something to that effect." (Tr. 139.)

Here, there is no question that the Agency's denial statement complied with Section 39(a) of the Act and properly framed the

issues on review.[3] Pursuant to Section 39(a) of the Act, where the Agency has determined that permit denial is warranted, the denial statement constitutes the Agency's "final action". Principles of fundamental fairness require that an applicant be given notice of the statutory and regulatory bases for denial of an application for reimbursement and that the Agency be bound on review by those cited bases for denial given in its denial statement. Fundamental fairness would be violated if the Agency were free to cite additional statutory and regulatory reasons for denial for the first time at the Board hearing. The Board concludes that the Agency cannot rely upon those regulations not previously cited in the denial letter as support for its denial of Pulitzer's application for reimbursement.

The Board is not required to consider the Agency's reliance upon the OSFM and ESDA regulations in reviewing this matter in light of its determination that the Agency cannot raise new reasons for denial at the Board level. However, because this case is one of first impression, the Agency's attempted reliance upon these regulations warrants some discussion. It is well established that administrative agencies are creatures of statute having no greater powers than those conferred on them by legislative enactment. (Village of Lombard v. PCB, 363 N.E.2d 814 (1977); Rossler v. Morton Grove police Pension Board, 533 N.E.2d 927 (1st. Dist. 1989).) P.A. 85-861 gave the Agency and the Fire Marshal authority to implement the UST program. The Board has determined that, while no explicit division of authority is given, the provision that the OSFM "shall not adopt regulations relating to corrective action at" USTs implies such a division. (Ill. Rev. Stat. 1989, ch. 127 1/2, par. 154(3)(b)(ii); In The Matter of: UST Update, USEPA Regulations (September 23, 1988), R88-27 at 3 (April 27, 1989).) Additional requirements relating to corrective action must be adopted by the Board pursuant to Section 27 of the Act, which would be implemented by the Agency. (Id.) According to a "Memorandum of Understanding" entered into by the Agency, OSFM and ESDA, ESDA "is the responsible Agency for primary coordination of the State's response to this type of emergency." (Resp. Ex 14.)

In the absence of a statutory provision making notification

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[3] This case is distinguishable from Centralia Environmental Services Inc.v. IEPA, PCB 89-170 where the Board directed the Agency to issue an amended denial statement. In Centralia, the Agency's 39(a) letter did not contain citations to the Act or regulations and, therefore, the Agency failed to frame the regulatory and statutory issues on review. In light of that deficiency, the Board found that the proper remedy was to remand the matter to the Agency to cure the defect and allow the applicant the opportunity to respond to the amended denial statement. Here, however, the Agency issued a 39(a) letter which framed the issues on review, but attempted to subsequently modify those issues.

a prerequisite to reimbursement, the OSFM and ESDA regulations are not sufficiently linked to the right to reimbursement from the Fund to be a basis for Agency denial of an application for reimbursement. Moreover, the Agency admitted at hearing that it has no authority to "enforce" OSFM regulations. (Tr. 147-150.) Nor do we believe the Agency may rely on ESDA "notice regulations", absent a statutory provision requiring notice, to deny reimbursement. In In the Matter of: UST State Fund, R89-19 (April 26, 1990), the Board stated that the OFSM and the Agency cannot create authority, beyond the scope of that conferred by statute, by mutual agreement (i.e., Memorandum of Understanding Resp. Ex. # 14). The Board concludes 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 requiring notice.

The Board notes that the circumstances presented here are unusual in that, because of the time frames involved, many of the regulations pertaining to USTs, as well as the Agency's guidance manual (Resp. Ex. 19), were not yet enacted. Additionally, the UST provisions of the Act appear to be in a constant state of flux due in part, perhaps, to the dual implementation of the system. Therefore, much of the above discussion is pertinent only to those reimbursement cases which fall into this "gap" period where procedures were not soundly in place. The Board also notes that, while it has concluded that there was no statutory or regulatory notification requirement applicable to Pulitzer, the record establishes that Pulitzer notified the Agency of the release immediately. (Tr. 21-24; Pet. Ex. 8.) The record also establishes that Pulitzer and the Agency were in frequent contact both before and during the remediation of the site and that the Agency had ample opportunity to instruct Pulitzer to notify ESDA.

In summary, the Board finds that no statutory provision requiring notice of a release was in effect at the time the instant release was discovered, nor was any such Board regulation effective at the time of Pulitzer's release. Additionally, the Agency may not deny reimbursement for failure to timely notify ESDA based upon OSFM and ESDA notice requirements where no statute existed at the time the release was discovered conditioning reimbursement on such notification. Therefore, the Board concludes that, under the facts presented here, Pulitzer was not required to notify ESDA of the release. Therefore, the Agency improperly denied reimbursement on the basis that Pulitzer is ineligible for reimbursement for failure to notify ESDA. However, because the Agency made no determination as to the reasonableness of the corrective action costs incurred by Pulitzer, the Board remands this matter to the Agency for such a determination in accordance with Section 22.18b(d)(4)(C). This docket is closed. Petitioner is free to seek Board review of the Agency's final determination of the reasonableness of costs under a separate docket.

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

ORDER

The Agency's determination that Pulitzer is not eligible for reimbursement from the Fund is reversed. This matter is remanded to the Agency for a determination of the reasonableness of the corrective action costs incurred by Pulitzer. This docket is closed; however, petitioner is free to seek Board review upon the Agency's final determination of the reasonableness of costs.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 20th day of December, 1990 by a vote of 7-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board