ILLINOIS POLLUTION CONTROL BOARD
July 20, 1995

STROH OIL COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 94-215
	)	(UST Fund)
OFFICE OF THE STATE FIRE MARSHAL,	)	
	)	
	)	
Respondent.	)	

STEPHEN F. HEDINGER AND BECKY S. MCCRAY, MOHAN, ALEWELT, PRILLAMAN & ADAMI, APPEARED ON BEHALF OF PETITIONER;

JOHN KNITTLE, ASSISTANT ATTORNEY GENERAL, APPEARED ON BEHALF OF RESPONDENT.

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

This matter is before the Board on an August 8, 1994 petition for review filed by Stroh Oil Company (Stroh), seeking review of a June 30, 1994 final eligibility/deductibility determination issued by the Office of the State Fire Marshal (OSFM). Stroh seeks the reversal of OSFM's imposition of a $100,000 deductible, and seeks to have a $10,000 deductible, or alternatively, a $15,000 deductible, applied to the site. On December 21, 1994, Stroh filed an amended petition which added additional arguments concerning the Forms Management Program Act (FMPA), and the installation of a UST at the site on April 19, 1988. The Board accepted the amended petition by order dated January 11, 1995, and directed the parties to address the FMPA at hearing and in post-hearing briefs. On February 11, 1995, respondent filed a motion to strike the arguments raised in petitioner's amended petition concerning the FMPA.

A hearing was held in this matter on March 3, 1995, in Springfield, Illinois before hearing officer Deborah L. Frank. At hearing, respondent made a motion to strike which respondent, at the direction of the hearing officer, renewed in a post-hearing motion filed on March 14, 1995. On April 4, 1995 petitioner filed its post-hearing brief, and a response to petitioner's post-hearing motion, accompanied by a motion to respond instanter. Respondent OSFM filed its post-hearing brief on April 18, 1995, and petitioner filed its reply brief on April 24, 1995.

BACKGROUND

Stroh Oil Company was a petroleum jobber from 1936 until 1990. Stroh also acted as a petroleum retailer and operated a bulk storage plant at its facility in Oakford, Menard County,

Illinois (the site). The site contained three underground storage tanks (USTs).

Stroh decided in April 1988 to install a new UST at the site to replace an existing 560 gallon UST. Stroh contracted W.J. Scott Company, a licensed contractor, to perform the installation. The OSFM approved the installation plan and issued a permit for the installation of the 1,000 gallon UST. In preparation for installation of the new UST, the existing 560 gallon UST was removed. OSFM inspector Judith Wallace was present during the installation and conducted an investigation.

During an inspection on October 26, 1989, Tom Spradlin, an inspector with the OSFM, inquired about the registration status of USTs at the site. Prompted by that inquiry, Stroh discovered that its USTs were not registered, and submitted registration forms to OSFM and paid all registration fees in accordance with the terms of the Gasoline Storage Act (GSA) (430 ILCS 15/0.01 *et seq.*) on or about October 28, 1989. Stroh subsequently ceased operations and closed in 1991. In May 1991, Stroh obtained a permit to remove all USTs from the site. The tanks were removed from the site on September 16, 1991. During the removal process, a petroleum release was discovered. Petitioner notified the Emergency Services and Disaster Agency (ESDA) (now known as Illinois Emergency Management Agency (IEMA)) of the release that same day, and the ESDA assigned the facility incident number 91-2621.

On April 19, 1994, Stroh submitted an eligibility/deductibility application to the OSFM, seeking to access the Underground Storage Tank Fund (UST Fund) in order to obtain reimbursement of its corrective action costs incurred in remediating the petroleum release. The application was received by the OSFM on April 27, 1994. The cover letter accompanying the eligibility/deductibility application indicated Stroh's belief that at least one of the tanks had been registered on or before July 28, 1989. OSFM found the application incomplete, and Stroh resubmitted the application with supplemental information on June 3, 1994.

On June 30, 1994, the OSFM issued its final eligibility/deductibility determination, determining that petitioner was eligible to access the UST Fund with a $100,000 deductible. OSFM applied this deductible based on its determination, pursuant to Section 57.9 of the Act, that no UST at the site was registered prior to July 28, 1989.

APPLICABLE LAW

Statutory History

P.A. 86-125, effective on July 28, 1989, amended the Environmental Protection Act by establishing new criteria for UST owners and operators to access the Fund. Pursuant to these provisions, owners and operators of USTs were subject to a $10,000 annual deductible when accessing the Fund, or alternatively, if the owner or operator failed to register its USTs in accordance with the requirements of the GSA prior to July 28, 1989, the owner or operator would be subject to a $15,000 deductible. The UST provisions of the GSA pre-dated the enactment of P.A. 86-125, and required tank owners to register their tanks with the OSFM.

P.A. 86-958, effective December 5, 1989, amended those deductibility provisions of the Act. Pursuant to these amendments, a $10,000 deductible still applied for owners and operators who properly registered their tanks prior to July 28, 1989. However, additional deductible levels were established for tank owners who did not register their tanks prior July 28, 1989. These levels included a $100,000 deductible for owners and operators who failed to register any of the tanks at the site prior to July 28, 1989, and a $15,000 deductible if one or more, but not all, of the tanks at the site were registered prior to July 28, 1989.

P.A. 88-496, also known as H.B. 300, effective September 13, 1993, moved the UST provisions of the Act to a new Title XVI. The sections pertaining to deductible amounts were moved to Section 57.9. This amendatory act also gave the OSFM authority to determine whether an owner or operator of a UST site is eligible to seek reimbursement for corrective action costs from the UST Fund, and to determine the appropriate deductible to be applied to reimbursement applications. These determinations are appealable to the Board. Pursuant to Section 107.340 of the Board's procedural rules governing appeals from OSFM determinations, adopted on October 20, 1994 in docket R94-11, the standard of review the Board will apply in these cases is "whether the application, as submitted to OSFM, demonstrates compliance with the Act and Board regulations."

Accessing the Fund

Pursuant to Section 57.9 of the Act, effective since December 5, 1989, the UST Fund shall be accessible by owners and operators who have a confirmed release from a UST if certain additional requirements are satisfied. These additional requirements include: (1) the UST contained an eligible substance; (2) the owner or operator registered the tank and paid all fees in accordance with the requirements of the GSA and

related regulations; (3) the owner or operator notified the IEMA of a confirmed release; (4) the costs were incurred after notification; and (4) the costs were incurred as a result of the release.

The GSA requires the owner of a UST which at any time between January 1, 1974, and September 24, 1987 contained petroleum or petroleum products, or certain hazardous substances to register the UST with the OSFM. Pursuant to Section 4(b)(3) of the GSA, each person required to register a UST is required to pay a registration fee of $500 for each tank registered. Section 4(b)(6) of the GSA requires the owner of a tank which is installed or replaced after September 24, 1987 to register the tank prior to installation. The GSA imposes penalties of not more than $10,000 per day for those who fail to satisfy these registration requirements.

Pursuant to Section 57.9(b) of the Act, an eligible owner or operator is entitled to access the UST Fund with a $10,000 deductible, unless one of the enumerated exceptions apply, which include the following:

> 1) A deductible of $100,000 shall apply when none of the underground storage tanks were registered prior to July 28, 1989 . . .;
>
> * * * *
>
> 3) A deductible of $15,000 shall apply when one or more, but not all, of the underground storage tanks were registered prior to July 28, 1989, and the state received notice of the confirmed release on or after July 28, 1989.

The OSFM applied a $100,000 deductible to the Stroh site pursuant to Section 57.9(b)(1), finding that none of the tanks at the site were registered prior to July 28, 1989. Stroh seeks the imposition of a $15,000 deductible pursuant to Section 57.9(b)(3). Alternatively, Stroh seeks the imposition of a $10,000 deductible, claiming that its tanks were automatically registered under the Forms Management Program Act due to the OSFM's failure to properly promulgate its registration form.

ARGUMENTS OF THE PARTIES

Stroh makes several arguments in support of its assertion that a $15,000 deductible should apply to the site.

April 19, 1988 Installation of a UST at the Site

First, Stroh asserts that when it installed a new UST at the site on April 19, 1988, an OSFM employee inspected the completed

installation and recorded all the information which would otherwise be included in a registration form. (Resp. Br. at 2.) Stroh asserts that this inspection satisfied the registration requirements of the GSA. Additionally, Stroh asserts that regulations in effect at the time the new UST was installed required that tanks be registered prior to installation, and that therefore the tank must have been registered at the time it was installed.

In response, OSFM states that USTs must be registered by submitting a registration form provided by the OSFM, and that this is the only registration method accepted by the OSFM. OSFM asserts that the GSA requires that tank owners register their USTs "on forms provided by the Office of the State Fire Marshal." (Ill Rev. Stat. 1991, ch. 127 1/2, par. 156 (b)(7).) OSFM asserts that at the time Stroh registered its tanks, the OSFM was using forms provided by the federal government, and that these forms were being promulgated by the OSFM.

Furthermore, OSFM asserts that Board regulations at 35 Ill. Adm. Code 731.103, which were in effect at that time, defined what constituted proper registration. The United States Environmental Protection Agency's Notification form was attached as an appendix to these regulations. Stroh did ultimately submit this form to OSFM, but not until October 26, 1989.

Finally, OSFM asserts that, despite the regulation requiring that a UST be registered prior to installation, the 1,000 gallon tank was not so registered. OSFM asserts that this is another regulatory requirement with which Stroh failed to comply.

Amendments to Deductibility Provisions of the Act

Stroh next asserts that it submitted registration forms for all the USTs at the site on October 26, 1989, and that the law in effect at that time concerning eligibility/deductibility determinations was P.A. 86-125, adopted on July 28, 1989. P.A. 86-125 provided, in relevant part:

> If prior to the effective date of this amendatory Act of 1989 the owner or operator has not registered the underground storage tanks in use on that date at the site and paid all required fees . . . the deductible amount . . . for the first year in which a claim is submitted shall be $15,000 rather than $10,000.

Stroh asserts that, pursuant to this provision, its right to a $15,000 deductible vested when it registered its tanks on October 26, 1989. Stroh further asserts that this deductible level was not modified until the December 5, 1989 effective date of P.A. 86-958. Accordingly, Stroh asserts that it is entitled to the $15,000 deductible provided pursuant to P.A. 86-125, which was

in effect at the time its tanks were registered. Stroh asserts that any contrary decision would deprive Stroh of its property without due process and would violate Stroh's right to equal protection of the laws.

In response, OSFM asserts that Stroh is raising this argument for the first time in its post-hearing brief, and that OSFM had no opportunity to present testimony or question witnesses concerning this argument. OSFM therefore asserts that the Board should not allow this argument to be heard. Addressing the merits of the arguments, OSFM asserts that the date the deductibility application is received determines the law to be used in making the deductibility decision. OSFM asserts that a deductibility determination cannot be made until an application is received, since the deductible is based on information contained in the application. OSFM therefore asserts that Stroh could not have a right to any deductible until its application was received by OSFM.

The Forms Management Program Act

Finally, Stroh asserts that OSFM's failure to comply with the Forms Management Program Act (FMPA) in promulgating its registration form relieved Stroh of its obligation to submit the form, and made registration with the GSA unnecessary. Stroh therefore asserts that it is entitled to a $10,000 deductible.

The OSFM raises several arguments in response to Stroh's assertions concerning the FMPA. First, OSFM asserts its position that the Board should refuse to hear this argument since it was not raised before OSFM. Second, the OSFM asserts that the Act does not give the Board authority to decide issues involving the FMPA. Third, OSFM asserts that the Board is not the proper agency to enforce the FMPA, since the rules implementing the FMPA state that it is the responsibility of Central Management Services (CMS) to enforce the FMPA. Finally, OSFM asserts that even if the FMPA does apply, its form complied with the terms of the FMPA.

Arguments Not Raised Before the OSFM

The OSFM asserts that Stroh raises several arguments before the Board which were not raised before the OSFM. The OSFM asserts that these arguments should not be heard by the Board since the standard of review in the Board's procedural rules for eligibility/deductibility determination appeals is limited to consideration of "whether the application, as submitted to OSFM, demonstrates compliance with the Act and Board regulations."

In response, Stroh asserts that there was no hearing before the OSFM, and that Stroh had no opportunity to identify the reason for the OSFM's decision or to challenge that decision.

Stroh asserts that accepting OSFM's argument would deprive it of its right to be heard on these issues.

DISCUSSION AND DECISION

Arguments Not Raised Before the OSFM

As an initial matter, we reject the OSFM's assertion that Stroh cannot raise legal theories in support of a lower deductible which were not raised before the OSFM. The standard of review articulated in Section 107.340 of the Board's OSFM procedural rules is intended to define the scope of information which will be reviewed in determining whether the record supports eligibility and imposition of the applied deductible. It is not intended to restrict the scope of the legal arguments which an applicant can raise to support the applicant's assertion that the record demonstrates a lower deductible is appropriate. We therefore deny OSFM's motion to strike these arguments, and will consider legal arguments made by Stroh which were not made before the OSFM.

Amendments to Deductibility Provisions of the Act

Stroh's arguments concerning the changes to the deductibility portions of the Act raise the issue of which law should be applied upon application for eligibility to access the Fund. The OSFM has traditionally applied the law in effect at the time the application is submitted, and argues that that practice should be followed in this case. Stroh argues that P.A. 86-125 should be applied to its eligibility/deductibility application since it was the law in effect at the time Stroh registered its tanks. Stroh asserts that pursuant to P.A. 86-125, it was entitled to a $15,000 deductible, and that this right vested upon registration. Stroh asserts that the application of a $100,000 deductible based upon the subsequent amendments in P.A. 86-958, effective December 5, 1989, would constitute an unconstitutional retroactive deprivation of its rights.

Thus, the true question underlying which version of the deductibility provisions of the Act is applicable is: when does the right to a particular deductible vest? We find that such right vests when an applicant's right to access the Fund vests, and therefore, the law in effect at that time will govern the correct deductible. In this case, we find that Stroh's right to access the Fund vested no sooner than September 16, 1991.

The Illinois Supreme Court has held that there is no vested right in the continuance of a law. The legislature has an ongoing right to amend a statute (Envirite Corporation v. The Illinois Environmental Protection Agency, 198 Ill. Dec. 424, 426, 632 N.E. 2d 1035 (Ill. 1994), *citing* People ex rel. Eitel v. Lindheimer (1930), 371 Ill. 367, 373, 21 N.E.2d 318.)

Furthermore, the Appellate Court has addressed the issues of vesting of rights and retroactive deprivation of rights in ChemRex, Inc. v. Pollution Control Board, 195 Ill. Dec. 499, 628 N.E. 2d 963 (1st Dist. 1993.) In that case, the Illinois Environmental Protection Agency (Agency) denied eligibility for ChemRex to access the UST Fund based on a change in the eligibility criteria that occurred after a release from ChemRex's tanks had occurred, but before ChemRex applied for reimbursement. The Board upheld the Agency's denial of eligibility, on the grounds that the law in effect at the time the reimbursement application was submitted controlled the eligibility determination. The appellate court reversed, finding that the application of the law to ChemRex constituted a retrospective law. The court, citing the Illinois Supreme Court opinion in United States Steel Credit Union v. Knight 32 Ill.2d 138, 142, 204 N.E.2d 4, 6 (1965), stated:

> The Illinois Supreme Court has defined a retrospective law as 'one that takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past.'

(Citation omitted.)

Applying this test in ChemRex, the Appellate Court found that applying the amendment to ChemRex so as to deprive ChemRex of the right to access the Fund constituted a retrospective application of the law, in that it attached "a new disability in respect of transactions or considerations already past." The court emphasized that ChemRex had discovered, reported, and set about repairing the releases immediately after the leaks occurred, prior to the date of the statutory amendment. The court found that nothing in the record revealed an omission or want of diligence on the part of ChemRex. Under these circumstances, the court found that ChemRex had a reasonable expectation of reimbursement from the Fund, and that eligibility for Fund reimbursement should have been determined at the time the tank owner or operator reported the release and embarked upon remediation.

Applying this test to Stroh, we find that application of the law in effect at the time of Stroh's eligibility/deductibility application does not constitute retrospective application of a law. The law has not changed since Stroh reported its release and began its remedial efforts. Stroh had no reasonable expectation of accessing the Fund with a $15,000 deductible, since the law imposing a $100,000 deductible was in effect for over eight months prior to the time when Stroh reported a release. Furthermore, Stroh did not have a right to access the Fund until the release was reported on September 16, 1991, and it

could therefore claim no vested interest in or reasonable expectation of the application of a particular deductible effective prior to that date. Stroh's registration of its tanks was not a voluntary action undertaken in anticipation of obtaining a particular deductible; Stroh was required to register its tanks by July of 1989 in order to comply with the GSA, and in order to comply with the requirements of federal law.

The Board finds that the effect of P.A. 86-958 was prospective only, and that it did not take away any of Stroh's vested rights or impose any disability upon Stroh in respect to transactions already past. We therefore find that the OSFM applied the correct law to petitioners. Having determined which law should apply to petitioner, we next examine what deductible should apply to petitioners under that law.

April 19, 1988 Installation of a UST at the Site

The OSFM determined that petitioner was eligible to access the UST Fund with a $100,000 deductible pursuant to Section 57.9 of the Act, finding that no UST at the site was registered prior to July 28, 1989. Stroh argues that a $15,000 deductible should apply to its site, since a 1000 gallon tank, installed at the site in April 1988, should have been considered registered at the time it was installed. Stroh asserts that the tank should be considered registered since an OSFM inspector was on-site during the installation, and the inspector's report was included within the OSFM's files. Stroh argues that the inclusion of the inspection report in the OSFM's files should constitute registration within the meaning of the GSA, since the inspection report contains all the information which would have been contained in a registration form. We disagree.

Stroh cannot rely on an inspection report filed by an OSFM inspector to satisfy its obligation to register its tanks. A tank owner has a statutory obligation to register its tanks, which is independent of the owner's obligation to notify the OSFM of a tank installation. It is tank registration which is relevant for determining the appropriate deductible applicable to a UST site. Additionally, we agree with OSFM that it is not OSFM's responsibility to cull the information necessary for registration from an installation inspection report.

Furthermore, we disagree with Stroh's assertion that its tank must be considered registered at the time of installation since, pursuant to Section 4(b)(6) of the GSA, an owner of a UST which is installed or replaced after September 24, 1987 must register the tank prior to installation. It was Stroh's statutory obligation to register the tank prior to installation, and failure to do so is Stroh's failure to satisfy its statutory obligations.

The Forms Management Program Act

Alternatively, Stroh asserts that it is entitled to a $10,000 deductible, since the OSFM's failure to properly promulgate its form pursuant to the FMPA relieved Stroh of its obligation to submit a registration form.

The FMPA and regulations thereunder require state agencies to submit for approval all externally-used forms to the Department of Central Management Services (CMS), and require that an agency include certain notifications on the first page of each such form. Section 2 of the FMPA, entitled "Legislative findings and purpose", states that the FMPA was enacted in order to "simplify, consolidate, or eliminate when and where expedient the forms, surveys, and other documents used by State agencies," (20 ILCS 435/2), through the implementation of a "Statewide Form Management Program" (Id.). Pursuant to Section 5.1 of the FMPA (20 ILCS 435/5.1), failure of an agency to comply with the terms of the FMPA relieves businesses of the obligation to submit or file such forms with that agency. Furthermore, any business that fails to submit such a form shall not be subject to any penalty or fine.

The GSA imposes an obligation on the owner of USTs to register those USTs on forms provided by the OSFM, and to pay a registration fee for each tank. The owner's failure to do so subjects the owner to certain penalties. Section 57.9(b) of the Environmental Protection Act does not impose any new obligations on owners or operators, but instead defines their rights to access the Fund based on the date they complied with the pre-existing requirements of the GSA.

We find that the FMPA is not relevant to this case. Stroh first sought to register its tanks on October 26, 1989, and OSFM accepted the forms submitted by Stroh as valid registration. Stroh had not attempted to register its tanks prior to the July 28, 1989 cutoff date, or to register its tanks in some manner other than submittal of the form required by OSFM.

Even assuming that Stroh is correct that the OSFM failed to comply with the requirements of the FMPA, the FMPA would not require that a UST actually be considered registered for purposes of Section 57.9 of the Act. Instead, the FMPA would relieve Stroh of its obligation to submit the particular form required, and would shield Stroh from the imposition of penalties pursuant to the GSA. The statutory requirements of Section 57.9(b) are independent statutory criteria for determining the appropriate deductible when accessing the UST Fund. OSFM's failure to comply with the terms of the FMPA would therefore not affect the imposition of the appropriate deductible pursuant to Section 57.9 of the Act.

The Board hereby finds that, pursuant to Section 57.9 of the Act, October 26, 1989 is the appropriate registration date for Stroh's USTs. Having reviewed the legislative findings and purpose set forth at Section 2 of the FMPA, we do not believe that the legislature intended to require otherwise.

CONCLUSION

The Board finds that OSFM correctly applied a $100,000 deductible to Stroh's site. The decision of the OSFM is therefore affirmed.

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

ORDER

The June 30, 1994 decision of the Office of the State Fire Marshal, finding Stroh Oil Company eligible to access the Underground Storage Tank Fund with a $100,000 deductible for remediation associated with the September 16, 1991 release of petroleum at Stroh's facility in Oakford, Menard County, Illinois is hereby affirmed.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1992)) provides for the appeal of final Board orders within 35 days of the date of service of this order. The Rules of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill. Adm. Code 101.246. "Motions for Reconsideration".)

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 July 1995, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board