BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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

NOTICE

Dorothy M. Gunn, Clerk
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PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board a MOTION FOR SUMMARY JUDGMENT, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

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Dated: June 10, 2003

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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

MOTION FOR SUMMARY JUDGMENT

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, John J. Kim, Assistant Counsel and Special Assistant Attorney General, and, pursuant to 35 Ill. Adm. Code 101.500, 101.508 and 101.516, hereby respectfully moves the Illinois Pollution Control Board ("Board") to enter summary judgment in favor of the Illinois EPA and against the Petitioner, Vogue Tyre and Rubber Company ("Vogue Tyre"), in that there exist herein no genuine issues of material fact, and that the Illinois EPA is entitled to judgment as a matter of law with respect to the following grounds. In support of said motion, the Illinois EPA states as follows:

I. STANDARD FOR ISSUANCE AND REVIEW

A motion for summary judgment should be granted where the pleadings, depositions, admissions on file, and affidavits disclose no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill.2d 460, 483, 693 N.E.2d 358, 370 (1998); Ozinga Transportation Services v. Illinois Environmental Protection Agency, PCB 00-188 (December 20, 2001), p. 2.

The Board's authority to review a determination by the Illinois EPA that plans submitted to it are not subject to regulation pursuant to the Leaking Underground Storage Tank ("LUST") Program arises from Section 57.7(c)(4)(D) of the Illinois Environmental Protection Act ("Act") (415 ILCS 5/57.7(c)(4)(D)). Section 57.7(c)(4)(D) provides that such an action is subject to appeal to the Board in accordance with the procedures of Section 40 of the Act (415 ILCS 5/40).

II. THE ILLINOIS EPA IS ENTITLED TO SUMMARY JUDGMENT BASED ON THE FACTS AND LAW

A. Relevant Facts

Vogue Tyre owned a facility at 4801 Golf Road in Skokie, Cook County, Illinois until July 7, 1995. Vogue Tyre kept two 10,000-gallon gasoline underground storage tanks ("USTs") on this facility. The Office of the State Fire Marshal assigned number 2-021982 to the facility. These USTs were removed in 1986. Vogue Tyre's Petition for Review of IEPA Final Decision, pp. 1-4.

On December 7, 1994, Vogue Tyre reported releases of gasoline from the 10,000 gallon USTs to the Illinois Emergency Management Agency ("IEMA"). IEMA assigned the releases Incident Number 94-2751. Vogue Tyre began corrective action and, in December 1994, submitted to the OSFM an Eligibility and Deductibility Application. On February 1, 1995, the OSFM declared that since the two 10,000 gallon USTs were removed prior to September 24, 1987, they were ineligible for reimbursement pursuant to 415 ILCS 5/57.9 and 430 ILCS 15/4. Vogue Tyre appealed the OSFM's decision to the Board on March 6, 1995. On December 5, 2002, the Board found in favor of the OSFM. On February 26, 2003, Vogue Tyre appealed that decision to the Illinois Appellate Court

for the First District (Vogue Tyre & Rubber Company v. Office of the State Fire Marshal, Appellate Court No. 03-0521). That case is still pending. Vogue Tyre's Petition, pp. 2-4.

Vogue Tyre also submitted numerous reports to the Leaking Underground Storage Tank section of the Illinois EPA for review. The Illinois EPA received Vogue Tyre's 20-Day Report, 45-Day Report, Site Classification Completion Report, and Corrective Action Plan on April 3, 1995, Vogue Tyre's Corrective Action Completion Report on May 2, 1995, and Vogue Tyre's Site Classification Work Plan and Budget on May 19, 1995. Vogue Tyre's Petition, p. 3.

On June 15, 1995, the Illinois EPA issued a letter denying Vogue Tyre's reports, stating that because the tanks at issue were removed in the mid-1980s, they were not subject to regulation and remediation by the Illinois EPA. The Illinois EPA declared this decision final, and Vogue Tyre has appealed to the Board. Vogue Tyre's Petition, p. 3.

B. No Genuine Issues Of Material Fact Exist

The reports denied by the Illinois EPA were related to the two 10,000 gallon USTs assigned Incident No. 94-2751. This is the only incident number, and therefore the only tanks, the Illinois EPA addresses in its denial letter. Consequently, no issue of material fact exists regarding which tanks are the subject of this case. Furthermore, neither party contests that these two tanks were removed in 1986, the sole fact upon which the Illinois EPA based its denial of Vogue Tyre's reports. No genuine issues of material fact thus exist.

C. The Illinois EPA Is Entitled To Judgment As A Matter Of Law

There are several bases the Board could and should rely on in recognizing that the Illinois EPA's decision to deny the reports in question was appropriate given the circumstances and underlying law.

1. The Illinois EPA's denial of Vogue Tyre's reports should be upheld because the tanks at issue were removed prior to the date the LUST program became effective

The Illinois EPA lacks regulatory authority over Vogue Tyre's 10,000-gallon tanks because the tanks were removed prior to the effective date of the LUST program. When a statute involves "prior activity or a certain course of conduct...the applicable law is the statute in place at the time of tank removal." Chuck and Dan's Auto Service v. Illinois Environmental Protection Agency, PCB 92-203 (August 26, 1993). The only relevant law is the one in place at the time the conduct actually occurred, regardless of whether or not the course of conduct was discovered or reported after the statute or amendment became effective. Id.

In Chuck and Dan's, the Illinois EPA denied the Petitioner's reimbursement application for certain costs associated with tank removal. Chuck and Dan's at 2. The basis of this denial was that the tanks were not removed in response to a release, as was required through the adoption of P.A. 87-323, an amendment to Section 22.18(e)(1)(C) of the LUST program. Id. at 7. On appeal to the Board by Petitioner, the Illinois EPA's denial was overturned. Id. The Board stated that since the amendment did not become effective until September 6, 1991, and Petitioner's tanks were removed on May 14, 1990, the amendment did not apply to or govern reimbursement for the previous tank removal; the applicable law was instead the one in place in 1990. Id. Also, since Petitioner was

seeking reimbursement for a prior course of conduct, the Board deemed it irrelevant that Petitioner submitted the reimbursement application to the Illinois EPA on February 4, 1994, after the amendment became effective; this amendment was still inapplicable to Petitioner's activity. Id.

This same concept applies to the Illinois EPA's denial of Vogue Tyre's reports. Here, Vogue Tyre removed the 10,000-gallon tanks in 1986. Following the Board's decision in Chuck and Dan's, the law governing this removal is the statute that was in place at the time of removal in that same year. The earliest version of Illinois's LUST program, though, did not become effective until approximately three years later, on July 28, 1989 through the adoption of P.A. 86-125 § 1. As a result, the LUST law did not apply at the time of removal and accordingly did not apply at the time of the Illinois EPA's decision to reject Vogue Tyre's reports.

Also similar to Chuck and Dan's, it is irrelevant that Vogue Tyre reported the release to the Illinois EPA in 1994, after the LUST program became effective, for Vogue Tyre's reports were in regard to a prior course of conduct, i.e. tank removal and releases that occurred before July 28, 1989. The LUST program therefore cannot be applied to Vogue Tyre's tank removal, meaning the Illinois EPA has no regulatory authority to require remediation of releases from such tanks or review related reports. Lacking such authority, the Illinois EPA's denial of Vogue Tyre's reports was valid.

2. The Illinois EPA's denial of Vogue Tyre's reports should be upheld because tanks removed prior to the effective date of the LUST program should not be subject to its regulations as a matter of public policy

The LUST program should not be applied to the tanks removed in 1986 as a matter of public policy. The tanks were not subject to regulation under the LUST

program when they leaked or when they were removed. They should not be subject to regulation now. In other words, if Vogue Tyre had discovered the releases when they occurred, or even up to three years after they occurred, the LUST program would not have applied. It should not apply now simply because Vogue Tyre happened to find the releases after the LUST program took effect. Public policy thus favors the Illinois EPA's denial of Vogue Tyre's reports.

Further, to allow for the submission of these reports by Vogue Tyre would effectively reward them for belated conduct and activity in that they would potentially be able to seek reimbursement from the Underground Storage Tank Fund.[1] To allow an owner or operator that would not have qualified for eligibility under the LUST program due to removal of tanks prior to the effective date of the LUST program itself to nonetheless "backdoor" themselves into eligibility by reporting a suspected release after the effective date of the program simply allows the owner or operator a benefit (i.e., reimbursement of costs) to which they were never entitled. The Illinois EPA has recognized that its authority has limitations that must be respected, and similarly the Board should make clear to the Petitioner that an owner or operator of an UST also has certain limitations that cannot be circumvented.

3. The Illinois EPA's denial of Vogue Tyre's reports should be upheld since applying the LUST program would constitute retroactive statutory application

The Illinois EPA cannot regulate Vogue Tyre's 10,000-gallon tanks because doing so would constitute retroactive statutory application. Unless the legislature

[1] As noted earlier, the Board's decision to uphold OSFM's determination that the two 10,000 gallon tanks were ineligible for reimbursement is currently under review by the Appellate Court. If the Appellate Court affirms the Board's decision, and if the Board in this case reverses the Illinois EPA and determines that the reports should have been accepted and that the Illinois EPA does have authority over the releases, then Vogue Tyre would be obligated to perform remediation without the possibility of reimbursement.

indicates what the temporal reach of a statute should be, it is up to the court to determine whether application of the statute would have a "retroactive impact, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." Commonwealth Edison Co. v. Will County Collector, 196 Ill.2d 27, 38, 749 N.E.2d 964, 971 (2001). The mere fact that a statute is applied to conduct predating the statute's enactment does not necessarily mean it has retroactive impact. Id. at 39, 971. "Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." Id. at 39, 972. If the court finds there would in fact be retroactive impact, the presumption is that the legislature did not intend the statute to be applied retroactively. Id. at 38, 971.

Here, application of the LUST law to Vogue Tyre's tank removal would have retroactive impact. If the LUST program were applied, it would increase Vogue Tyre's liability for past conduct, for Vogue Tyre would be required to comply with LUST standards regarding cleanup of the previously removed tanks and would be subject to penalty for failure to do so. Applying LUST requirements would also impose new duties on Vogue Tyre with respect to transactions already completed. The 10,000-gallon tanks were removed before the LUST program went into effect. The releases occurred prior to the LUST program as well, for they had to have happened prior to tank removal. The tank removal/release "transaction" had therefore been completed. Yet, as just mentioned, Vogue Tyre would now acquire new duties, namely the duty to remedy releases from those tanks in compliance with LUST standards. Finally, the LUST program attaches new legal consequences to events completed before its enactment. As just outlined, the

events at issue in the case (removal and release) had already been completed when the LUST program became effective. The LUST program would attach new legal consequences to these events in that Vogue Tyre would now be potentially subject to enforcement action if it failed to comply with all LUST program provisions regarding release remediation.

Application of the LUST program to Vogue Tyre's two 10,000-gallon tanks would therefore have a retroactive impact. As a result, the Board must presume the General Assembly did not intend the LUST law to be applied retroactively. Vogue Tyre's 10,000-gallon tanks are thereby not subject to regulation under the LUST program, and the Illinois EPA's denial of reports related to these tanks was legitimate.

III. CONCLUSION

Vogue Tyre's reports are not subject to review by the Illinois EPA under the LUST program. The removal of Vogue Tyre's 10,000-gallon tanks is subject to the law existing at the time the tanks were removed in 1986. The LUST program did not exist in 1986, but rather became effective three years afterwards. Consequently, the 10,000-gallon tanks, as well as any substances released from such tanks, are not subject to the LUST program or to Illinois EPA regulation in pursuance of the LUST program. Along with the legal guideline set forth by the Board in Chuck and Dan's, public policy favors such a conclusion as well. Furthermore, application of the LUST law would have a retroactive impact and would therefore constitute unenforceable retroactive application of the statute. The LUST program, then, cannot be applied to the tanks at issue, meaning the Illinois EPA's denial of Vogue Tyre's reports was appropriate.

For the reasons stated herein, the Illinois EPA respectfully requests that the Board affirm the Illinois EPA's decision to deny Vogue Tyre's reports.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent

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Dated: June 10, 2003

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on June 10, 2003, I served true and correct copies of a MOTION FOR SUMMARY JUDGMENT, by placing true and correct copies thereof in properly sealed and addressed envelopes and by depositing said sealed envelopes in a U.S. mail drop box located within Springfield, Illinois, with sufficient First Class postage affixed thereto, upon the following named persons:

Dorothy M. Gunn, Clerk
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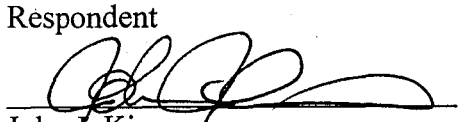
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



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