

ILLINOIS POLLUTION CONTROL
July 9, 1992

REICHHOLD CHEMICALS, INC.,)
)
Petitioner,)
)
v.) PCB 92-98
) (Underground Storage Tank
ILLINOIS ENVIRONMENTAL) Fund Reimbursement)
PROTECTION AGENCY,)
)
Respondent.)

ORDER OF THE BOARD (by M. Nardulli):

On June 26, 1992, Reichhold Chemicals, Inc. (Reichhold) filed a petition for review of the Illinois Environmental Protection Agency's (Agency) decision denying Reichhold access to the Underground Storage Tank Fund (Fund). Reichhold sought reimbursement for costs associated with 28 USTs. In its May 26, 1992 letter, the Agency determined that costs associated with 22 tanks were ineligible for reimbursement because Reichhold failed to identify the contents of those tanks as petroleum fuel products. (Ill. Rev. Stat. 1991, ch. 111 1/2, par. 1022.18b(a)(5).) The letter also provides:

This decision does not constitute the Agency's final determination of eligibility. The Agency reserves the right to change this determination should additional information become available which would modify this decision. the final decision regarding eligibility and appropriate deductible amounts will be made as requests for reimbursement are reviewed by the Agency.

Reichhold's petition for review provides:

Reichhold has been diligently working with the Agency, and continues to work with the Agency to provide additional documentation and information in an effort to satisfy the Agency's request for this additional information to resolve this matter. Reichhold has obtained additional documentation that was not previously provided to the Agency and remains hopeful that the Agency will reach the proper determination that the 22 USTs were petroleum USTs eligible for reimbursement under the Act. However, Reichhold must file this appeal at this time to preserve its right to a full evidentiary hearing.

The Agency's letter is an attempt to reserve a right to "reconsider". However, in a permit appeal case, Reichhold Chemicals, Inc v. IPCB (1990), 204 Ill. App. 3d 674, 561 N.E.2d 1343, the appellate court held that the permit provisions of the Act do not grant the Agency the power to reconsider its

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decisions. Similarly, Section 22.18b does not allow for Agency reconsideration of its UST decisions. Therefore, the Board finds that the Agency's decision is final as to the 22 USTs deemed ineligible for the Fund and that Reichhold has properly filed a timely appeal of the Agency's denial of eligibility as to those tanks.¹ This case is ripe for review. (Village of Lincolnwood v. IEPA (June 4, 1992), PCB 91-83; Ideal Heating Co. v. IEPA (January 23, 1992), PCB 91-253.

This matter is accepted for hearing.

Hearing must be scheduled within 14 days of the date of this Order and completed within 60 days of the date of this Order. The hearing officer shall inform the Clerk of the Board of the time and location of the hearing at least 40 days in advance of hearing so that public notice of hearing may be published. After hearing, the hearing officer shall submit an exhibit list, and all actual exhibits to the Board within 5 days of the hearing. Any briefing schedule shall provide for final filings as expeditiously as possible and in no event later than 70 days from the date of this Order.

If after appropriate consultation with the parties, the parties fail to provide an acceptable hearing date or if after an attempt the hearing officer is unable to consult with the parties, the hearing officer shall unilaterally set a hearing date in conformance with the schedule above. This schedule will only provide the Board a very short time period to deliberate and reach a decision before the due date. The hearing officer and the parties are encouraged to expedite this proceeding as much as possible.

Within 10 days of accepting this case, the Hearing Officer shall enter a Hearing Officer Scheduling Order governing completion of the record. That Order shall set a date certain for each aspect of the case including: briefing schedule, hearing date(s), completion of discovery (if necessary) and pre-hearing conference (if necessary). The Hearing Officer Scheduling Order may be modified by entry of a complete new scheduling order conforming with the time requirements below.

The hearing officer may extend this schedule only on a waiver of the decision deadline by the petitioner and only for the equivalent or fewer number of days that the decision deadline is waived. Such waivers must be provided in writing to the Clerk

¹ Reichhold has the option, of course, of filing a new application for these tanks to allow the Agency to consider new information. Reichhold, 204 Ill. App. 3d at 679-80.

of the Board. Any waiver must be an "open waiver" or a waiver of decision until a date certain.

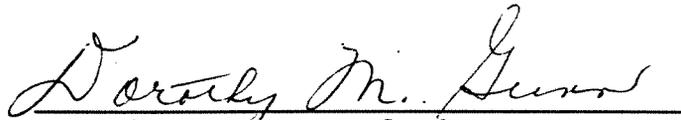
Because of requirements regarding the publication of notice of hearing, no scheduled hearing may be canceled unless the petitioner provides an open waiver or a waiver to a date at least 120 days beyond the date of the motion to cancel hearing. This should allow ample time for the Board to republish notice of hearing and receive transcripts from the hearing before the due date. Any order by the hearing officer granting cancellation of hearing shall include a complete new scheduling order with a new hearing date at least 40 days in the future and at least 30 days prior to the new due date and the Clerk of the Board shall be promptly informed of the new schedule.

Because this proceeding is the type for which the Illinois Environmental Protection Act sets a very short statutory deadline for making a decision, absent a waiver, the Board will grant extensions or modifications only in unusual circumstances. Any such motion must set forth an alternative schedule for notice, hearing, and final submissions, as well as the deadline for decision, including response time to such a motion. However, no such motion shall negate the obligation of the hearing officer to establish a Scheduling Order pursuant to the requirements of this Order, and to adhere to that Order until modified.

IT IS SO ORDERED.

B. Forcade dissents.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Order was adopted on the 9th day of July, 1992, by a vote of 5-1.


 Dorothy M. Gunn, Clerk
 Illinois Pollution Control Board