ILLINOIS POLLUTION CONTROL BOARD
February 25, 1993

RUSSELL L. BACON,	)	
	)	
Petitioner	)	
	)	
v.	)	PCB 92-111
	)	(UST Fund)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by J. Anderson):

On January 22, 1993, the Illinois Environmental Protection Agency (Agency) filed a Motion for Reconsideration of one aspect of the Board's opinion and order of December 17, 1992. On February 3, 1993, Russell L. Bacon (Bacon) filed a response in opposition.

The Board grants the motion for reconsideration and affirms its December 17 Opinion and Order.

The Agency requests the Board to reconsider its decision "that the Agency has no authority to require a Professional Engineers Certification Form in making its LUST Fund reimbursement determinations and affirm the Agency's authority to require a Professional Engineers Certification Form."[1] (Agency motion at 7.)

The Agency attached to its motion a copy of its form titled: "LUST REIMBURSEMENT FUND", and subtitled: "PROFESSIONAL ENGINEER CERTIFICATION FORM 11 (USE FOR <$150,000 CORRECTIVE ACTIONS WHERE NO APPROVED IEPA WORK PLAN)". (Agency motion, Exh. A.) As this form has not before been placed in the record, the Board will not consider it as evidence now.[2]

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[1] The Agency does not request reconsideration of the Board's reversal of the two other Agency determinations regarding the "constructive knowledge" deductibility issue and the related issue of "proof of payment".

[2] We note, however, that the certification form's limited applicability, as stated in the form's subtitle, does not serve to support the Agency's blanket assertions. We also note that the Agency's application for reimbursement, which is part of the record, raises a further question regarding the use of the certification form: applicants whose costs, like Bacon's, are not greater than $50,000, are not to answer the question in the application regarding whether they developed a corrective action

In its motion, the Agency does not cite to any case law, nor does it challenge any of the facts in the record or specific aspects of the Board's reasoning contained in its December 17, 1992 opinion. Nor does the Agency refer to its prior citations in its response brief to the Environmental Protection Act (Act) or Board regulations. (Agency Resp. Br., November 16, 1992.) Instead the Agency essentially presents another entirely new argument and generally attempts to buttress that argument with assertions of necessary reliance and the common good.

The Agency recognizes that the Act (Act) does not contain language specifically allowing the Agency to require a professional engineers certification form. The Agency argues, however, that a reasonable interpretation of the Act and relevant regulations in conjunction with the engineers' seal requirements in the Professional Engineering Practice Act of 1989 (Ill. Rev. Stat., 1991, ch. 111, par. 5201 et seq.) provides the statutory authority to require the certification form. In support, the Agency states:

> If professional engineers are required, through the inclusion of their seal on technical submissions, to prepare documents with a reasonable amount of professional skill and judgment, the Agency should have the authority to request this type of information when a professional engineer submits a technical submission. (Agency motion at 4.)

The Agency argues that it performs a vital function in administering the LUST cleanups in terms of use of public funds and protection of the "health and welfare of the people of the State of Illinois and the environment". (Agency motion at 4.) The Agency then argues that the payments from "Illinois Taxpayers" into the Fund are far less than the amounts of reimbursement requested, so it must insure that the amounts are wisely and efficiently used. The Agency then claims that it does not factor the amount of money available in its reimbursement decisions, but does factor in the activities for which the money is used. (Agency motion at 4, 5.)

Thus, the Agency argues, it must get all the information it can get; however, in that it does not have the technical oversight resources, it must rely on the professional expertise of others, particularly professional engineers hired by the owners/operators, for such oversight. The Agency then asserts:

> Therefore, the Agency requires that SKS [Bacon's professional engineering firm] certify to the Agency that

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plan or whether the Agency approved it. (R. 65.) We also again note that the application for reimbursement nowhere mentions the engineer's certification form at issue here.

> the work completed and the resulting costs for which reimbursement is requested be an appropriate use of the Fund, and a wise use of taxpayer dollars. The form that this final certification takes is a Professional Engineers Certification Form.[3] (Agency motion at 6.) Emphasis added.

The Agency acknowledges that Mr. Winkel of SKS, not being a registered professional engineer, did not place a seal on the documents he signed and submitted to the Agency. The Agency asserts, though, that it relied on SKS, and therefore it was SKS that was required to certify. (Agency motion at 6.) The Agency concluded:

> The exercise of the authority to require a professional engineers certification form is for the common good of all citizens of Illinois, not only the taxpayers but every citizen who benefit (sic) from a (sic) the wise use of taxpayer dollars to protect human health and welfare and the environment. (Agency motion at 6.)

At the outset, the Board rejects the Agency's bald "piggyback" assertion that the "seal" requirements in the Professional Engineering Practice Act somehow devolves upon the Agency the authority under the Environmental Protection Act to deny reimbursement for failure to submit the Agency's certification form. Rather than pointing to any statutory language in either Act (or anywhere else for that matter) to support its asserted connection, the Agency argues that it should have such authority because such reliance is necessary and is for the common good.

The Agency's arguments simply gloss over what is in the record in this case. This record gives little support for the level or nature of reliance upon the engineer's certification form that the Agency claims. The record suggests an "after the fact" requirement by the Agency. There was certainly no Agency reliance as regards its eligibility determination. The record is silent or at best unclear as to the circumstances that require the use of the certification form and as to what the person's certification means. The Agency now weaves a new argument that further confuses the issue. The Agency now expects the engineer to certify that the work performed and costs incurred are an "appropriate use of the Fund" and "wise use of taxpayer dollars", and gives the following rationalization.

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[3] The Board notes that the form contains no such language. We also note that the form relies on hearsay information from other persons not even required to be under the engineer's supervision or control.

The Agency first uses a "common good" claim that, because the Fund is underfunded, this factor enhances its duty to insure wise and efficient use of the Fund. The Agency then argues in sequence that its enhanced duty: 1) affects the Agency's reimbursement decisions regarding the activities for which the money is being used; 2) leads to a special need for more information about those activities than its technical resources can gather; then 3) leads to its need to rely on outside engineers, and thence to reliance upon the engineer's certification form to assure appropriate and wise use of the taxpayer's dollars.

At its inception, the Agency's argument is without foundation. The Act gives the Agency no authority to allow any aspect of its review of eligibility or cost reimbursement determinations to be influenced by the underfunded status of the Fund. The Board has already held that the express provisions in the Act concerning how to handle insufficient funds do not provide for Agency withholding of approval of the claim for this reason. City of Roodhouse v. IEPA (September 17, 1992), PCB 92-31. The Agency is attempting to accomplish, by indirection here, the same thing, but now "for the common good"---the statute notwithstanding.

The Board rejects as unacceptable the Agency's arguments that, no matter how couched, boil down to an assertion that the level of the Agency's duty to ensure wise and efficient use of the Fund for the common good rises and falls in inverse relation to whether there is a deficit or surplus in the Fund.

Basically, the issue before the Board is not on the merits of whether the Agency should require the applicant to submit a certification form. The issue before the Board is whether there is authority in the Act or Board rules for the Agency's denial of reimbursement because of Mr. Bacon's failure to have completed an IEPA Professional Engineer Certification Form. (Board opinion, December 17, 1992 at 18.) After having carefully reviewed the issue, including the listings in the Act regarding the showings the owner/operator must make---first for eligibility and then for payment of claims---as well the federally-derived Board regulations, and the testimony and evidence in the record, the Board found that the Agency did not have authority to deny reimbursent to Mr. Bacon. The Agency's arguments fail to refute the Board's reasoning, which we will not repeat here.

Upon reconsideration, the Board affirms its December 17, 1992 opinion and order.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 25th day of February, 1993, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board