ILLINOIS POLLUTION CONTROL BOARD
February 27, 1992

FIRST BUSEY TRUST & INVESTMENT CO., as Trustee of the ANNE LAYCOCK TRUST,	)	
Petitioner,	)	
v.	)	PCB 91-213 (Underground Storage Tank Reimbursement)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

E. PHILLIPS KNOX AND DARIUS PHEBUS, PHEBUS, TUMMELSON, BRYAN & KNOX APPEARED ON BEHALF OF PETITIONER

RONALD SCHALLAWITZ APPEARED ON BEHALF OF RESPONDENT

OPINION AND ORDER OF THE BOARD (by B. Forcade):

This matter is before the Board on a petition for review filed November 7, 1991, by petitioner First Busey Trust & Investment Co. (First Busey), as Trustee of the Anne Laycock Trust, pursuant to Ill.Rev.Stat. 1991, ch. 111 1/2, par. 1022.18b(g) and 1040. First Busey challenges the Environmental Protection Agency's (Agency) determination that a $100,000 deductible applies to First Busey's application for reimbursement from the Underground Storage Tank (UST) Fund for corrective actions. A hearing was held on January 15, 1992 in Urbana, Illinois. The Petitioner filed its closing argument and brief on January 28, 1992. The Agency filed its post hearing brief on February 3, 1992.

FACTS

First Busey as Trustee for the Anne Laycock Trust was the owner of a commercial site at 1209 E. University Ave. in Urbana, Illinois. (Pet. p. 1). The property contains two underground storage tanks. The 600 gallon tank (T-1) was originally used to store tractor fuel and then to store waste oil from farm equipment for pump out disposal. The 1,700 gallon tank (T-2) was originally used for heating oil and then converted to the storage of waste oil from farm equipment for pump-out disposal. The tanks have not been used since prior to April, 1987. (Tr. 12).

The property was leased to Massey-Ferguson, Inc. for operation of a farm implement dealership from May of 1966 to April 1, 1987 from First Busey's predecessor. On April 1, 1987 Heartland Power Co. (Heartland) became the lessee and operator of

the property. Heartland employed aboveground storage tanks for waste oil disposal and did not use the underground storage tanks. (Tr. 12). In fall of 1989, Heartland and First Busey began negotiations for the sale of the property to Heartland. (Tr. 24)

As part of the sale of the property, First Busey and Heartland agreed that First Busey would remove T-1 and T-2 since the tanks had not been used since April 1, 1987. The tanks were pulled on March 14 and 15, 1990 at which time a release of petroleum was discovered. ESDA was notified of the release on March 15, 1990. (Ag. Rec. p.23). The tanks were registered with the Office of the State Fire Marshal (OSFM) on March 5 and April 5, 1990. (Ag. Rec. pp. 24 & 25).

On May 3, 1991 First Busey submitted an Application for Reimbursement from the Illinois Underground Storage Tank Fund. (Pet. Ex. 1, Ag. Rec. pp. 21-27). The Agency received this application on May 9, 1991. (Pet.Ex. 3). The Agency did an initial review of the application on June 20, 1991. As a result of this review the Agency sought confirmation of the tank registration from the OSFM. The necessary information was received from the OSFM on July 26, 1991. (Tr. 73). After further review of the application, the Agency, on August 14, sent First Busey a letter requesting documentation that there was no prior knowledge of the petroleum release that was discovered on March 14, 1990. (Ag. Rec. p.44). On September 12, 1990, the Agency received letters from Mike Murphy, trust officer at First Busey, and James Strong of Strong Associates Ltd. stating there was no knowledge of the release of petroleum prior to July 28, 1989. (Ag. Rec. pp. 35-37). Mr. Strong was hired by First Busey to assist in the sale of the property and the removal of the tanks. The Agency on October 4, 1991 informed First Busey that a $100,000 deductible would apply to First Busey's application for reimbursement. (Ag. Rec. pp. 48, 49). First Busey is appealing the Agency's determination that a $100,000 deductible applies.

Whether the $100,000 deductible applies depends on which law is applied to the application. The relevant dates in determining which law is to be applied in reviewing First Busey's application for reimbursement are:

May 9, 1991	-application received by the Agency,
July 26, 1991	-information received from the OSFM,
September 6, 1991	-effective date of new legislation
September 12, 1991	-Agency received letter from petitioner concerning knowledge of release.

The status of Petitioner's application on these dates will determine which law is to be applied.

The issues in this case involve the applicable law to be applied when reviewing an application for reimbursement, the

interpretation of the phrase "in use on that date at that site" in Section 22.18b(d)(3)(B)(i) of the Environmental Protection Act (Act) and when an application is considered filed.

ARGUMENT

The Agency concluded that the $100,000 deductible applied to First Busey's reimbursement application under Section 22.18b(d)(3)(B)(i) of the Environmental Protection Act (Act) as amended on September 6, 1991. The amended statute reads in part:

> If prior to July 28, 1989 the owner or operator had registered none of the underground storage tanks at the site on that date, the deductible amount under subparagraph (A) of paragraph (3) of this subsection(d) shall be $100,000 rather than $10,000. (PA 87-323, HB 1741, effective September 6, 1991)

The Agency states that it applied this section to the Petitioner's application because it was the applicable provision of the Act in effect at the time that a complete application was received from the Petitioner. The Agency considered First Busey's application to be complete on September 12, 1991 when the Agency received the letter from First Busey documenting there was no knowledge of the release prior to July 28, 1989. The Agency determined that the $100,000 deductible applied because the tanks were not registered prior to July 28, 1989.

The petitioner argues that the provision to be applied to their application should be the statute in effect at the time their original application was filed on May 9, 1991. The applicable provision of the Act (Section 22.18b(d)(3)(B)(i)) effective on this date reads in part:

> If prior to July 28, 1989 the owner or operator had registered none of the underground storage tanks <u>in use</u> on that date at the site, the deductible amount under subparagraph (A) of paragraph (3) of this subsection(d) shall be $100,000 rather than $10,000. (PA 86-958, effective December 5, 1989)(Emphasis added)

Petitioner further argues that the application was complete upon receipt of the information from the OSFM. The petitioner argues that the application satisfied the reimbursement checklist prepared by the Agency and therefore should be considered complete. The Petitioner concludes that if the application was complete on July 26, 1991, the application should be reviewed

under the statute as it read prior to it being amended on September 6, 1991.

The amendment to the statute changed the phrase "in use on that date at the site" to "on that date at the site." In A.K.A. Land Inc. v. EPA, PCB 90-188 (March 14, 1991) the Board construed "in use" as meaning that the USTs are utilized in the active sense. If this provision is applied to First Busey's application, the $100,000 deductible would not apply since the tanks were not being actively used on July 28, 1989. The tanks have not been used since prior to April 1, 1987 when Heartland began to lease the property.

To determine which deductible applies to First Busey's application we must determine what is the applicable law and when an application is "filed."

APPLICABLE LAW

The Board has held that the applicable law to be applied is that which is in effect upon the date of the filing of the application for reimbursement. Pulitzer Community Newspaper, Inc. v.IEPA, PCB 90-142 (December 5, 1989), Marjorie B. Campbell v. IEPA, PCB 91-5 (June 6, 1991).

In Pulitzer, the Agency denied the applicant access to the fund because at the time of the release, ESDA was not notified. The statute requiring notification of ESDA became effective one month after the release was discovered. The Board held that "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." Pulitzer, PCB 90-142, p.4.

The Agency argues that the law that should be applied when reviewing an application for reimbursement is the law that exists when the decision is made. The Agency further argues that Gallatin National Co. v. IEPA, PCB 90-183 (January 18, 1991) supports this argument. The Board notes that there are distinct factual differences between Gallatin and this case. Gallatin involved applying current law to the issuance of a permit for a landfill operation. The most important distinction to be made between the issuance of permits and underground storage tank determinations is that permits govern actions that will occur in the future while in UST cases the clean up of the site has already taken place and the only future action involves accessibility to the fund. The corrective actions at an underground storage site are often performed with reimbursement from the fund in mind. The regulations require that permit decisions be made within a specified time period after an application is filed, there is no similar time requirement for reimbursement decisions. Due to the difference between permits

and underground storage tank reimbursements Gallatin is not applicable to the present case.

The Board finds no reason to go against the holding in Pulitzer and Campbell. The Board also sees potential problems in applying the law in effect when the decision is made to UST reimbursement determinations. The applicant who submits an application prior to a change in the statute would not know when the decision is being made and therefore would not know which statute was applied until after the determination was made. Since the Agency has complete control over when a determination is made it could effectively control which law is to be applied to an application. The Agency makes a determination pertaining to access to the fund, applicable deductible and eligibility of costs. These determinations can be made at different times by the Agency. If the law in effect at the time the decision is made is applied, it is conceivable that determinations on accessibility and cost recovery would be made under two different statutes.

FILING OF A COMPLETE APPLICATION

The Agency argues that an application is not necessarily filed when it is received by the Agency or date-stamped. The Agency contends that the application is not filed until all documentation needed to review the application has been received by the Agency. The Board agrees with the Agency that an application cannot be considered filed unless it is complete. The Agency cannot proceed in making its determination if the information required is not included in the application. When the Agency finds an application incomplete the applicant should be notified in order to remedy the deficiencies. An incomplete application should either be rejected or the applicant given a specified time period to supply the required information. However, the question remains as to when an application can be considered complete.

The determination of when an application can be considered complete and therefore filed is a factual determination. Therefore, we look at the handling of First Busey's application to make this determination.

Petitioner's application contains forms entitled Notification for Underground Storage Tanks addressed to the OSFM along with copies of cancelled checks payable to OSFM. (Pet.Ex. 1, Ag. Rec. pp. 1-5, pp. 13-15). Attached to the form included under Tab A1 Registration in the application (Ag. Rec. p.1) is a note stating:

> Our request to the OSFM for Registration Date and certification has been awaiting action for more than ten months. These documents are submitted 'in lieu of'

per the instructions of Mr. Kyle Rominger, IEPA.

Mr. Strong, who was primarily responsible for preparing the application, testified concerning these forms and the note.

> I put this on the sticker because I had not been able to get the document which was referred to in the administrative instructions for this form from the office of the state fire marshal and having worried about it--by worried I mean phoning the fire marshal and' others to get a complete file. I called the Agency to an action person who turns out from this notice to be Mr. Kyle Rominger and I said we're ready to submit except that we're gonna have to submit. . . .It's interesting that just before I talked to Mr. Rominger I talked to the fire marshal action person for providing the document to me and I thought it had been lost. Ten months is a long time and they said no, it's right here. It's coming up. It'll come up. And of course it hasn't come up yet. We still do not have that document. So it's lucky I did work out with Mr. Rominger a substitute procedure.
>
> (Tr. 61, 62)

Karl Kaiser, project manager with the Agency performed an initial review of the petitioner's application on June 20, 1991. At hearing, Mr Kaiser testified as to his findings and subsequent actions regarding his initial review of this application:

> Q. What was your conclusion in June of 1991 as to this application?
>
> A. At that particular time I considered this application incomplete.
>
> Q. Why was that?
>
> A. It needed verification of proof of registration and fee payment and it had some inconsistencies in the tank information.
>
> Q. How did you attempt to clarify these questions that you had in your mind?
>
> A. I requested the information that I would need to clarify these items from the office of the state fire marshal.
>
> (Tr. 73)

The Agency received the requested information from the OSFM on July 26, 1991. (Ag. Rec. 38 & 39).

First Busey's application was incomplete because it did not contain the required information concerning the tank registration. Mr. Strong was unable to obtain the required information from the OSFM to complete the application, therefore he contacted the Agency who provided an alternate means of filing the application. It is undisputed that Mr. Rominger, of the Agency, provided Mr. Strong with a substitute procedure to submit the application without the required information from the OSFM. Mr. Rominger's instructions to submit the forms "in lieu" of the required documents represents the Agency's acceptance of the application as submitted. The receipt of the information from the OSFM cured the deficiencies in the application discovered by the Agency in their initial review.

The petitioner's application was next reviewed by the Cost Authorization Decision Group of the Agency sometime between August 8 and August 14. Cindy Davis, Southern subunit manager with the Agency, testified as to the findings of this review:

> We decided that the application was not complete because it did not have a statement from the owner/operator stating that he did not have prior knowledge of the release. .....Our old application does not have that question asked and in a previous Pollution Control Board decision, which was Sparkling Springs Mineral Water, the Board suggested and strongly suggested that we ask the owner/operators to provide proof that they did not have any prior knowledge.
>
> (Tr. 101)

The Agency subsequently developed a new application form in July of 1991 that required the owner/operator to demonstrate the there was no actual or constructive knowledge of the release prior to July 28, 1989. (Tr. 102) (Res. Ex. 1). In reviewing old applications, the Agency notified the applicant and requested the applicant supplement the application by providing a statement concerning prior knowledge. (Tr. 103).

When the Petitioner originally filed its application, the Agency did not require documentation concerning prior knowledge. The new application requiring documentation was developed in July of 1991, more than two months after the original application was filed.

In Pulitzer the Board accepted the date that a letter requesting reimbursement was sent to the Agency as the date the application was filed because reimbursement forms had not yet been developed by the Agency. However, the Board cautioned that the circumstances in Pulitzer were unusual and therefore much of the discussion pertained only to those cases which fall into a "gap" period where procedures are not soundly in place. A "gap"

existed when First Busey's application was being reviewed by the Agency. The Agency developed a new reimbursement form in July of 1991, based on recommendations in Sparkling Spring Mineral Water v. IEPA, PCB 91-9 (May 9, 1991). For reimbursement applications received on old forms after July of 1991, the Agency requested the applicant to supplement the application with proof that there was no prior knowledge of the release. This transitional period of adopting the new form created a "gap" period. Upon developing the new form all the applications pending before the Agency, in which knowledge of the release was at issue, required additional information before a decision could be made. First Busey was unable to submit a complete application because the new forms requiring proof that no prior knowledge existed where not available at the time First Busey filed its application for reimbursement.

An applicant cannot be expected to comply with the requirements for an application that are not in effect at the time that the application is filed with the Agency. An application is considered complete if it meets the requirements in place at the time that the application is received by the Agency. First Busey's application was complete on July 26, 1991 when the Agency received the tank registration information from the OSFM because the application contained the information requested by the current reimbursement form. The new form requiring proof that there was no prior knowledge was not available at the time the application was submitted to the Agency.

CONCLUSION

The Board finds that the Petitioner's application should have been considered as filed complete on July 26, 1991 and the applicable provisions of the statute in effect on that date applied to determine the Petitioner's appropriate deductible. The applicable law to be applied to this application is PA 86-958, effective December 5, 1989. Since the tanks were not in use on July 28, 1989 or registered before that date the $100,000 deductible does not apply. This matter is remanded to the Agency to apply the appropriate deductible to First Busey's application and determine which costs are recoverable.

The Board also notes that it has decided to remand to the Agency those Agency determinations of eligibility which did not reach the issue of reimbursability of costs and deductibility. In Ideal Heating v. IEPA, PCB 91-523, (January 23, 1992) the Board held that such incomplete determinations are not appealable. The Board applies this principle only in cases where no hearing has been held. Because a hearing was held in this case, the Board, therefore, has decided this case on the merits.

The above Opinion constitutes the Board's finding of fact and conclusions of law in this matter.

ORDER

The October 4, 1991 Agency determination of a $100,000 deductible on Petitioner's application is hereby reversed and this matter is remanded to the Agency.

IT IS SO ORDERED.

J.C. Marlin abstained.

Section 41 of the Environmental Protection Act (Ill.Rev.Stat. 1991 ch. 111 1/2, par. 1041) provides for the appeal of final orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion and Order was adopted on the 27th day of February, 1992 by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board