

ILLINOIS POLLUTION CONTROL BOARD  
July 9, 1992

A.B. DICK COMPANY, )  
 )  
Petitioner, )  
 )  
v. ) PCB 92-99  
 ) (Underground Storage Tank Fund  
 ) (Reimbursement Determination)  
 )  
ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY, )  
 )  
Respondent. )

ORDER OF THE BOARD (by J. Anderson):

On July 2, 1992, A.B. Dick Co. filed a petition for review of the Agency's denial of reimbursement for costs from the Underground Storage Tank Fund (Fund). This petition concerns A.B. Dick's facility at 5700 W. Touhy, Chicago, Cook County. In its June 1, 1992 letter, the Agency determined that costs associated with underground storage tanks (USTs) 31 and 32 were eligible for reimbursement with a \$10,000 deductible, that costs associated with tank 16 were ineligible because this was an above-ground tank, and that costs associated with tanks 1-15 and 17-30 were ineligible because these USTs stored substances which were either hazardous substances or which were not petroleum. The letter went on to state that:

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.

The determination as to tanks 16, 31 and 32 are not at issue. As to the remaining USTs, petitioner states that:

Given the contradictory and ambiguous nature of the IEPA's notice of decision sent to A.B. Dick on June 1, 1992, A.B. Dick is uncertain whether the IEPA has taken its final action with respect to this request for reimbursement from the Fund. In order to protect its right to appeal, A.B. Dick is filing this petition for review of the IEPA's decision. If the Board determines that the IEPA's action is not final, it should dismiss this petition without prejudice to A.B. Dick's right to file a timely appeal once the IEPA takes its final

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action. If the Board determines that the IEPA's letter of June 1, 1992 does constitute its final action, then A.B. Dick respectfully requests that the Board accept this matter for hearing and review the IEPA's decision denying A.B. Dick reimbursement from the Fund.

The Board finds that the Agency's decision must be deemed final as to tanks 1-15 and 16-30. The Agency has attempted to reserve a right to "reconsider" its decision. In a permit appeal case, Reichhold Chemicals, Inc. v. IPCB (1990), 204 Ill. App. 3d 674,561 N.E. 2d 1343, the appellate court stated that the Act does not grant the Agency any authority to modify or reconsider its decisions. Section 22.18b does not, by its terms, allow for Agency reconsideration any more than does Section 39. The Board accordingly finds that A.B. Dick has properly filed a timely appeal of the Agency's final action of June 1, 1992.<sup>1</sup> This case is accordingly ripe for review. Village of Lincolnwood (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,

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<sup>1</sup>A.B. Dick 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.

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 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 dissented.

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

  
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 Dorothy M. Gunn, Clerk  
 Illinois Pollution Control Board

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