ILLINOIS POLLUTION CONTROL BOARD
August 13, 1992

GALESBURG COTTAGE HOSPITAL,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 92-62
	)	(Underground Storage
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	Tank Fund)
	)	
	)	
Respondent.	)	

STEPHEN F. HEDINGER of MOHAN, ALEWET, PRILLAMAN & ADAMI APPEARED ON BEHALF OF PETITIONER.

OPINION AND ORDER OF THE BOARD (by J. Theodore Meyer):

This matter is before the Board on a petition for review filed April 27, 1992 by petitioner Galesburg Cottage Hospital (Cottage Hospital) pursuant to Section 22.18b(g) of the Environmental Protection Act (Act). (Ill.Rev.Stat.1991, ch. 111½, par. 1022.18b(g).) Cottage Hospital seeks review of the Illinois Environmental Protection Agency's (Agency) March 23, 1992 partial denial of reimbursement from the Underground Storage Tank (UST) Fund. A hearing was held on June 29, 1992 in Galesburg, Illinois. No members of the public attended.

The only issue in this case is whether costs incurred in association with a planned removal of USTs are "corrective action" costs and thus reimbursable by the Fund.

BACKGROUND

This case involves the removal of USTs at a service station located at Losey and Seminary Streets, Galesburg, Illinois. (R. at 35.)[1] Cottage Hospital purchased the site in 1979. From 1979 until September 1990, the site was operated as a gasoline dispensing service station by Cottage Hospital's tenant, Mr. Dale Bolin. (R. at 31.) On April 27, 1990, and again on May 14, 1990, Cottage Hospital's contractor, Illinois Oil Marketing Equipment, Inc., tested the gasoline lines at the facility. The line dispensing premium gasoline would not hold pressure, and thus failed the tightness test. (R. at 75, 81.) The operator of

[1] "R." denotes citation to the Agency record, and "Stip." indicates citation to a stipulation entered by the parties at hearing.

the station, Mr. Bolin, was directed to immediately stop dispensing premium fuel. The trustees of Cottage Hospital subsequently decided to cease leasing the property as a service station and have the tanks removed. Mr. Bolin was notified of this decision on June 1, 1990. (R. at 31.)

On August 8, 1990, the Office of the State Fire Marshal (OSFM) received Cottage Hospital's application for a permit to remove the three tanks at the facility. (R. at 1.) OSFM issued that permit for removal of the USTs on August 20, 1990. (R. at 3.) The tanks were removed in September 1990.[2] During the course of the removal, it was discovered that there had been a release of petroleum. (Stip. at 5.) Cottage Hospital notified the Illinois Emergency Services and Disaster Agency (ESDA) of the release on September 20, 1990. (R. at 4-5.) Cottage Hospital subsequently performed remedial activities at the site. On July 31, 1991, the Agency notified Cottage Hospital that no further remediation was necessary. (R. at 30.)

Cottage Hospital filed its application for reimbursement with the Agency on September 30, 1991. (R. at 31-56.) The invoices submitted in support of the application covered the period from April 26, 1990 to April 4, 1991, and the total amount requested was $36,779.07. (R. at 146.) On March 23, 1992, the Agency issued its decision, finding that, after deducting the applicable $15,000 deductible, $10,539.52 was reimbursable. The Agency listed three separate amounts for which reimbursement was denied. (R. at 146-148.) Cottage Hospital filed its petition for review with the Board on April 27, 1992.

DISCUSSION

In its petition for review, Cottage Hospital challenged all three items for which the Agency denied reimbursement: $3,069.98 for charges incurred prior to notification of ESDA (item 1); $6,452.20 for tank removal costs (item 2); and $1,717.37 for an adjustment in handling charges (item 3). (R. at 148.) However, the stipulation entered by the parties at hearing states that the parties have resolved the disputes as to items 1 and 3. (Stip. at 1-2.) Therefore, the only issue remaining is the disputed tank removal costs in item 2.

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[2] There is conflicting evidence as to the actual date of the removal of the tanks. The corrective action report states that the tanks were removed on September 11, 1990 (R. at 6), the stipulation states that Cottage Hospital's witness would have testified that the tanks were removed on September 20, 1990 (Stip. at 5), and the application for reimbursement states that the tanks were removed on September 21 and 24, 1990. (R. at 37, 43, and 49.)

The Agency denied reimbursement of $6,452.20 in tank removal costs, stating that the tanks were not removed in response to a release, and that therefore the associated costs are not corrective action costs. (R. at 148.) The Agency pointed to Section 22.18(e)(1)(C) of the Act, which states in part:

> Corrective action does not include removal of an underground storage tank if the tank was removed or permitted for removal by the Office of the State Fire Marshal prior to the owner or operator providing notice of a release of petroleum in accordance with applicable notice requirements. (Ill.Rev.Stat. 1991, ch. 111½, par. 1022.18(e)(1)(C).)

Cottage Hospital argues that the Agency erred in applying this limitation on "corrective action" to this case. Cottage Hospital notes that this limitation, excluding tank removals where permitted prior to notification of a release, was added by P.A. 87-323, effective September 6, 1991. Cottage Hospital states that the tank removal in this case occurred on September 20, 1990, almost a full year before the effective date of the change in the definition of "corrective action." Thus, Cottage Hospital contends that the amendment cannot be used to defeat reimbursement for the tank removal costs.

Cottage Hospital recognizes that in determining reimbursibility, the law to be applied is the law in effect on the date of the filing of the application for reimbursement. (First Busey Trust & Investment Co. v. Illinois Environmental Protection Agency (February 27, 1992), PCB 91-213; Pulitzer Community Newspapers v. Illinois Environmental Protection Agency (December 20, 1990), PCB 90-142.) Cottage Hospital does not dispute that only corrective action costs can be reimbursed, but contends that the Agency has erroneously applied a definition of "corrective action" which was not in effect until well after all corrective actions in this case were completed. Cottage Hospital maintains that this situation is like the situation in Pulitzer Community Newspapers, where the Agency similarly denied reimbursement on the basis of statutes and regulations which did not exist at the time the corrective action was undertaken. Cottage Hospital states that the Board explained in Pulitzer Community Newspapers that the statute in effect at the time of filing the application is applicable, but in determining whether those provisions were complied with, the statute in effect at the time the actions were undertaken is applicable. (Pulitzer Community Newspapers (February 28, 1991), PCB 90-142.) Therefore, Cottage Hospital argues that only the costs of corrective action are reimbursable, and that in determining whether the actions undertaken in this case are corrective action, the law in effect at the time the actions were undertaken is determinative.

The Agency argues that there are two reasons that the tank

removal costs incurred by Cottage Hospital are not corrective action costs, and thus not reimbursable. First, the Agency contends that because Cottage Hospital made a business decision to remove the tanks, the tanks apparently would have been removed whether or not a release was subsequently discovered. Thus, the Agency asserts that the removal of the tanks was not "an action to stop, minimize, eliminate, or clean up a release of petroleum or its effects.." (Section 22.18(e)(1(C) of the Act), and was not therefore corrective action.

Second, the Agency points to the amendment of the definition of "corrective action" in P.A. 87-323, effective September 6, 1991, excluding tank removals if removed or permitted for removal by OSFM prior to notification of a release. The Agency argues that if this amendment applies to Cottage Hospital's application for reimbursement, it is clear that the tank removal costs are not corrective action, since Cottage Hospital obtained its removal permit one month before any notification to ESDA of a release. The Agency cites this Board's decision in First Busey Trust & Investment Co. v. Illinois Environmental Protection Agency (February 27, 1992), PCB 91-213, for the proposition that the law to be applied is that which was in effect at the time the Agency received the applicant's completed application. Thus, the Agency maintains that the tank removal costs are not corrective action, and therefore are not reimbursable.

After a review of the record and the arguments of the parties, the Board reverses the Agency's determination that $6,452.20 in tank removal costs are not reimbursable. Initially, the Board again rejects the Agency's argument that the removal costs are not reimbursable because the tanks were removed as the result of a business decision, and thus are not corrective action costs. The Board has twice held that the fact that a petitioner had planned to remove tanks does not bar tank removal costs from being reimbursed as corrective action costs when those activities meet the statutory definition. (Miller v. Illinois Environmental Protection Agency (July 9, 1992), PCB 92-49; Enterprise Leasing Co. v. Illinois Environmental Protection Agency (April 9, 1992 and June 4, 1992), PCB 91-174.) The proper inquiry in this case is whether the tank removal costs meet the definition of "corrective action." Thus, the Board must determine whether P.A. 87-323 applies to this case.

The Board finds that the Agency's reliance on First Busey to apply the P.A. 87-323 amendment to this case is misplaced. First Busey involved a change in eligibility requirements (a change in deductibles), not a statutory change which concerned prior activity. It is true that when determining eligibility for reimbursement, the applicable law to be applied is that which is in effect on the date of the filing of the application for reimbursement. (Cite First Busey, Campbell, Rockford Drop Forge, and change in definition of petroleum case(?)) However, where a

statutory amendment involves prior activity or a certain course of conduct, the law to be applied is the provisions in effect at the time that the course of conduct occurred. That is exactly what this Board did in Pulitzer Community Newspapers, Inc. v. Illinois Environmental Protection Agency (December 20, 1990 and February 28, 1991), PCB 90-142.

Pulitzer Community Newspapers involved an Agency denial of reimbursement because the costs were incurred prior to notification of ESDA that a release had occurred. The Board reversed the Agency's decision, because neither the statute nor the regulation requiring notification of ESDA within 24 hours after the discovery of a release were in effect at the time the release was discovered. The Board concluded that it would have been impossible for Pulitzer to give notice to ESDA in accordance with the statute and the regulation, since those provisions did not become effective until approximately three months after the release. (Pulitzer Community Newspapers (December 20, 1990), PCB 90-142, slip op. at 4-5; Pulitzer Community Newspapers (February 28, 1991), PCB 90-142, slip op. at 2.) The Board stated:

> The applicable criteria for determining Pulitzer's eligibility for reimbursement are those criteria set forth at Section 22.18b(d)(4)(D), which became effective July 28, 1989 with the enactment of P.A. 86-125, because these provisions were in effect at the time Pulitzer filed its application for reimbursement on November 21, 1989. P.A. 86-125 requires that an applicant satisfy certain criteria to be eligible for reimbursement. One of those criteria is that "[t]he owner or operator notified the State of the release of petroleum in accordance with applicable requirements." The Board focused on the date of discovery of the release for purposes of determining what notification duties applied to Pulitzer. (Pulitzer Community Newspapers (February 28, 1991), PCB 90-142, slip op. at 2.)

The facts of this case are directly analogous to the situation presented in Pulitzer Community Newspapers. Cottage Hospital obtained its permit to remove the tanks in August 1990, and actually removed those tanks in September 1990. ESDA was notified of the release on September 20, 1990. All of these dates were long before the September 6, 1991 effective date of P.A. 87-323, which added the provision that tank removal costs are not corrective action costs if the tank was removed or permitted for removal by OSFM prior to notification of the release. There was no way for Cottage Hospital to know that it must provide proper notification (to ESDA) before obtaining the OSFM permit. Applying P.A. 87-323 to Cottage Hospital's application for reimbursement would illogically require Cottage Hospital to conform its conduct to requirements which were not effective until almost a year after the conduct was done. Thus, in order to determine whether the tank removal costs are

reimbursable as corrective action costs, the Board must apply the definition of "corrective action" as it existed when the costs were incurred, i.e. in September 1990.[3]

That definition of "corrective action" stated:

> "Corrective action" means an action to stop, minimize, eliminate, or clean up a release of petroleum or its effects as may be necessary or appropriate to protect human health and the environment. This includes, but is not limited to, release investigation, mitigation of fire and safety hazards, tank removal, soil remediation, hydrogeological investigations, free product removal, ground water remediation and monitoring, exposure assessments, the temporary or permanent relocation of residents and the provision of alternate water supplies. (Ill.Rev.Stat. 1989, ch. 111½, par. 1022.18(e)(1)(C).)

As the Board noted in Enterprise Leasing and in Miller, this definition presents a two-part test: Whether the costs are incurred as a result of action "to stop, minimize, eliminate, or clean up a release of petroleum", and whether the costs are the result of activities such as tank removal. The Board finds that the tank removal costs incurred by Cottage Hospital meet both parts of the definition. Therefore, the $6,452.20 in tank removal costs are reimbursable as corrective action costs.

Finally, the Board notes that the Agency argues in its brief that the tank removal costs are not reimbursable because, assuming that the release was discovered at the time of the tank tightness tests, Cottage Hospital failed to notify ESDA within 24 hours of the discovery of the release. However, this reason for denying reimbursement was not included in the Agency's final decision. (R. at 146-148.) As the Board has previously held, the Agency is bound on review by the reasons given in its letter communicating its decision. The Agency cannot, at the Board level, raise new reasons for denying reimbursement. (Clinton County Oil Co. v. Illinois Environmental Protection Agency (March 26, 1992), PCB 91-163, slip op. at 3; see also Pultizer Community Newspapers (December 20, 1990), PCB 90-142.) Therefore, the

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[3] The Board recognizes that in Miller v. Illinois Environmental Protection Agency (July 9, 1992), PCB 92-49, it stated that the proper inquiry was whether the tank removal costs met the definition of "corrective action" as that definition existed when Miller's application for reimbursement was filed. However, that case involved an Agency denial for reimbursement of costs because the tank removal was "planned", not the application of the language of P.A. 87-323, since Miller's application was filed before the effective date of P.A. 87-323.

Board will not consider this argument.

CONCLUSION

In sum, the Board finds that $6,452.20 in tank removal costs are corrective action costs and are therefore reimbursable. In determining eligibility for reimbursement, the applicable law is that which is in effect on the date of the filing of the application for reimbursement. However, where a statutory amendment involves prior activity or a certain course of conduct, the law to be applied are the provisions in effect at the time that the course of conduct occurred. The Agency's determination that the tank removal costs are not reimbursable is reversed.

This opinion constitutes the Board's findings of fact and conclusions of law.

ORDER

The Board hereby reverses the Agency's March 23, 1992 determination that $6,452.20 in tank removal costs is not reimbursable. This case is remanded to the Agency for disbursement of the $6,452.20 amount, consistent with this opinion and order. This docket is closed.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (Ill.Rev.Stat. 1991, ch. 111½, par. 1041) provides for the appeal of final Board orders. The Rules of the Supreme Court of Illinois establish filing requirements. (But see also 35 Ill.Adm.Code 101.246 "Motions for Reconsideration", and Castenada v. Illinois Human Rights Commission (1989), 132 Ill.2d 304, 547 N.E.2d 437.)

R. Flemal and B. Forcade concurred, and J. C. Marlin dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 13th day of August, 1992, by a vote of 6-1.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board