ILLINOIS POLLUTION CONTROL BOARD
December 19, 1991

NORTH SUBURBAN DEVELOPMENT CORPORATION,	)	
Petitioner,	)	
v.	)	PCB 91-109 (UST Reimbursement)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

RICHARD G. BERNET APPEARED ON BEHALF OF THE PETITIONER, AND

TODD F. RETTIG AND RONALD L. SCHALLAWITZ APPEARED ON BEHALF OF RESPONDENT.

OPINION OF THE BOARD (by B. Forcade):

This Opinion supports the Order of the Board of December 6, 1991. The Illinois Supreme Court has specifically authorized Pollution Control Board Opinions filed after the timely final action of a Board Order. Waste Management of Illinois v. Pollution Control Board, Docket Nos. 71001, 71003, 1991 WL 242476 (November 21, 1991).

This matter is before the Board on the June 24, 1991 filing of a petition for review by North Suburban Development Corporation ("North Suburban"). North Suburban seeks review of the Illinois Environmental Protection Agency's ("Agency") determination of corrective action costs which are subject to reimbursement from the Illinois Underground Storage Tank Fund ("UST Fund"). The Agency filed its record in this matter on July 19, 1991. On September 9, 1991, the Agency filed a stipulation of uncontested facts between North Suburban and itself. The only issue in this case is whether the Agency should have reimbursed North Suburban for the remediation costs that it incurred prior to its notification of the Illinois Emergency Services and Disaster Agency ("ESDA").

BACKGROUND

On July 7, 1989, North Suburban purchased property at 3250 West Touhy Avenue, Skokie, Illinois. (Pet. pp. 1-2). Prior to acquisition, North Suburban discovered that there were three underground storage tanks ("USTs") on the property, a 5,200 gallon gasoline UST which was registered on June 30, 1988 and two 5,000 gallon heating oil tanks which were registered on August

24, 1990. (Pet. p. 2; Stip of Facts pars. 1, 2; Agency Rec. pp. 114, 115-116; Joint Ex. 2 pars. 1, 2).

Within one month of purchase, North Suburban hired American Waste Haulers, Inc. ("American Waste") to remove the USTs. (Pet. p. 2). On August 2, 1989, North Suburban filed with the Office of the State Fire Marshal ("Fire Marshal") its Application for Permit to remove the USTs. (Pet. p. 2). North Suburban also notified the Skokie Fire Marshal of its intent to remove the USTs. (Pet. p. 2). At the direction of the Skokie Fire Marshal and prior to its removal of the USTs, American Waste obtained a permit from the Agency for disposal of any contaminated soil. (Pet. p. 2). On November 10, 1989, American Waste removed the USTs in the presence of the Skokie Fire Marshal, who advised North Suburban that he was also representing the Illinois State Fire Marshal. (Pet. p. 2; Stip of Facts pars. 3, 6; Agency Rec. pp. 1, 114-116; Joint Ex. 2 pars. 3, 6).

Upon removal of the USTs, North Suburban manifested and disposed of the tank contents and all visibly contaminated soil. (Pet. p. 2). North Suburban also collected representative soil samples from the excavations. (Pet. pp. 2-3). On November 20, 1989, Environmental Monitoring and Technologies, Inc. sent North Suburban its analysis of the soil samples. (Pet. p. 3; Stip of Facts pars. 7-20; Agency Rec. pp. 105-112; Joint Ex. 2 pars. 7-20). Such test results exceeded Agency cleanup objectives.[1] (Pet. p. 3).

On November 28, 1989, North Suburban telephoned ESDA of the release from its tanks. (Pet. p. 3; Stip of Facts pars. 21, 22; Agency Rec. p. 1; Joint Ex. 2 pars. 21, 22). The Agency sent North Suburban a Notice of Release letter, dated December 8, 1989. (Pet. p. 3; Stip of Facts par. 26; Agency Rec. p. 92; Joint Ex. 2 par. 26). North Suburban, via a letter dated December 22, 1989, provided the Agency with its initial soil sample analysis and its contingency plan. (Pet. p. 3, Ex. B; Stip. of Facts pars. 27-31, Ex. B; Joint Ex. 2 pars. 27-31, Ex. B).

As a result of its initial soil sample analysis, North Suburban continued to excavate contaminated soil from the site until November 29, 1989. (Pet. p. 3). At that time, North Suburban obtained a second set of soil samples which indicated

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[1]The Board notes that ESDA's incident ID form indicates that North Suburban discovered the release on November 24, 1989. (Agency Rec. p. 1). However, North Suburban's application for reimbursement and the stipulation of uncontested facts indicate that North Suburban discovered the release on November 20, 1989. (Agency Rec. pp. 113-115; Stip of Facts par. 20; Joint Ex. 2 par. 20)

that its site had been successfully remediated. (Pet. p. 3; St of Facts par. 24; Agency Rec. pp. 99-104; Joint Ex. 2 par. 24). On February 22, 1990, North Suburban submitted the analyses to the Agency and, on March 30, 1990, the Agency issued North Suburban a "clean closure" letter confirming that further remediation was not necessary. (Pet. p. 3, Exs. C, D; Stip of Facts pars. 25, 32, 34, 35, Ex. F of attached Ex. A; Agency Rec pp. 99-111; Joint Ex. 2 pars. 25, 32, 34, 35, Ex F of attached Ex. A).

On June 7, 1990, North Suburban submitted an application f reimbursement of corrective action costs from the Leaking Underground Storage Tank Fund ("Fund") to the Agency. (Pet. pp 3-4, Ex. E; Stip. of Facts pars. 36, 38, 39, Exs. A, C; Joint F 2 pars. 36, 38, 39, Exs. A, C). On July 11, 1990, North Suburb submitted a second application form to the Agency after a new application form became available. (Pet. p. 4, Ex. F; Stip. of Facts pars. 40, 42, Exs. D, E; Joint Ex. 2 pars. 40, 42, Exs. D E). On September 25, 1990, at the Agency's request, North Suburban submitted additional documentation, including another copy of its completed application form, to the Agency. (Pet. p 4; Stip. of Facts pars. 43, 45, Exs. F, G; Joint Ex. 2 pars. 43 45, Exs. F, G).

By letter dated October 25, 1990, the Agency made the eligibility determination regarding North Suburban's Applicatic for Reimbursement. (Pet. p. 4, Ex. G; Stip of Facts par. 46; Agency Rec. pp. 120-121; Joint Ex. 2 par. 46). In the letter, the Agency stated that North Suburban was subject to a $15,000. deductible, that the costs associated with the cleanup of the t heating oil tanks as well as any costs incurred prior to July 2 1989, were ineligible, and that it would deduct $500.00 from th amount as a late UST registration fee. (Pet. p. 4, Ex. G; Ager Rec. pp. 120-121). Specifically, the letter stated, in part, a follows:

> ...The Agency has reviewed the application and determined you to be eligible to seek reimbursement from the Fund for corrective action costs, accrued on or after July 28, 1989, in excess of $15,000.00. In addition, $500.00 for the late registration of the underground storage tank(s) at the above location will be deducted from the amount reimbursed in response to this claim....
>
> ...The review of your Application indicated that the $100.00 tank registration fee was paid after July 28, 1989 which resulted in the application of the above deductible amount for this claim....

> Please note, only the corrective action costs associated with the 5,200 gallon gasoline tank are eligible for reimbursement. The costs associated with the two 5,000 gallon heating oil tanks are ineligible for reimbursement as these tanks are not defined as underground storage tanks....

By letter dated November 30, 1990, North Suburban requested the Agency to reconsider its imposition of the late fee. (Pet. p. 5, Ex. H; Stip of Facts. par. 47; Agency Rec. pp. 117-118). The Agency responded by letter dated December 13, 1990. (Pet. p. 5, Ex. I; Stip of Facts par. 49; Agency Rec. p. 122; Joint Ex. 2 par. 49). In that letter, the Agency again determined that North Suburban had to pay the $500.00 late fee as a condition to reimbursement. (Pet. p. 5, Ex. I; Agency Rec. p. 122). Subsequent to such time, North Suburban, on February 15, 1991, April 5, 1991, and May 10, 1991, submitted additional documentation of remediation costs that it incurred. (Stip. of Facts pars. 50, 52, 54, Exs. H, I, J; Joint Ex. 2 pars. 50, 52, 54, Exs. H, I, J).

In a letter dated May 20, 1991, the Agency completed the second part of its two-part review of North Suburban's application and denied North Suburban any reimbursement for $39,711.37 of expenses incurred prior to ESDA notification. (Pet. pp. 6-7, Ex. A; Stip of Facts par. 57; Agency Rec. pp. 124-125; Joint Ex. 2 par. 57). This is the amount in conflict.

DISCUSSION

As previously stated, the sole issue presented is whether remediation costs incurred by North Suburban prior to notification to ESDA are reimbursable from the Fund.

I. North Suburban's Position

In the instant case, North Suburban argues that there is no support for the Agency's decision in the Act, regulations, or the Agency's two guidance documents and that, as a result, the Agency has contravened its statutory charge to "adopt reasonable and necessary rules" pursuant to Section 22.18(f) of the Act. (Pet. Br. 4). North Suburban also argues that the Agency's decision conflicts with the Section 22.18(e)(1)(C) of the Act which defines corrective action as:

> ...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, solid remediation....

(Pet. Br. pp. 4-5).

Specifically, North Suburban argues that the Agency is attempting to limit the definition by excluding pre-ESDA notification costs even though the definition contains no timing requirement and North Suburban's costs fall within the definition. (Reply Br. p. 2). In support of its argument, North Suburban notes that the Act's only timing restriction on otherwise reimbursable costs are those incurred before the effective date of the Act (i.e. July 28, 1989) and that had the legislature intended to further limit access to the Fund based upon the date corrective action costs were incurred, it would have done so in the text of the statute. (Pet. Br. p. 5; Reply Br. p. 2).

North Suburban argues that the legislature recently amended the Act to exclude corrective action costs incurred prior to ESDA notification and that the amendment contains no retroactive clause that would make the amendment applicable to North Suburban's application for reimbursement. (Reply Br. p. 2). North Suburban also argues that the legislature's action indicates that a formal revision, through amendment or promulgation of new regulations, rather than informal Agency interpretation, is necessary to further limit access to the Fund. (Id.).

Finally, North Suburban argues that the Agency should be estopped from denying reimbursement because it failed to give North Suburban any notice of its position on the reimbursability of pre-ESDA costs until 10 months after North Suburban first submitted its application and 7 months after the Agency approved North Suburban's access to the Fund. (Pet. Br. pp. 5-6; Reply Br. pp. 3, 4-5). Over the course of the eleven month period between North Suburban's submission of its application (June 7, 1990) and its receipt of the Agency's May 20, 1991 letter, North Suburban had numerous telephone conversations, as well as an April 1, 1991 meeting, with the Agency regarding its application for reimbursement. (Pet. pp. 5-6, Ex. K; Stip of Facts par. 56, Ex. K - par. 10; Joint Ex. 2 par. 56, Ex. K - par. 10). During that span of time, the Agency did not inform North Suburban that it considered North Suburban's ESDA notification untimely or of the Agency's policy regarding the non-reimbursability of costs incurred prior to notification of ESDA. (Pet. p. 5-6; Stip of Facts par. 58, Ex. K - par. 12; Joint Ex. 2 par. 58, Ex. K - par. 12).

II. The Agency's Position

The Agency, on the other hand, cites to Section 22.18b(d)(4)(D) of the Act and 35 Ill. Adm. Code 731.150 as support for its determination that pre-ESDA notification costs

are non-reimbursable. (Agency Br. p. 2). Section 22.18(b)(d)(4)(D) states:

> Requests for partial or final payment for claims under this section shall be sent to the Agency and shall satisfy all of the following:
>
> * * *
>
> D. The owner or operator notified the State of the release of petroleum in accordance with applicable requirements;
>
> * * *

Additionally, the Board's RCRA regulations, at 35 Ill. Adm. Code 731.150, state:

> Owners and operators of UST systems shall report to the ESDA within 24 hours and follow the procedures in Section 731.152 for any of the following conditions:
>
> a) The discovery by owners and operators or others of released regulated substances at the UST site or in the surrounding area....

In response to North Suburban's estoppel argument, the Agency argues that it has uniformly interpreted the Act and regulations to require ESDA notification within 24 hours of the discovery of a release and that pre-ESDA notification costs are not reimbursable. (Id. p. 6). The Agency also argues that it would be unreasonable to require the Agency to inform an applicant that specific costs were not reimbursable prior to its complete review of all the information submitted by an applicant pursuant to Sections 22.18(b)(a), 22.18(b)(d)(3), and 22.18(b)(d)(4) of the Act. (Id. pp. 6-7). Specifically, the Agency notes that the Act envisions the following two-step review process: 1) a review of the application to determine whether the applicant is eligible to access the Fund and what the appropriate deductible is pursuant to Sections 22.18(b)(a) and 22.18(b)(d)(3) of the Act, and 2) a review of the costs pursuant to Section 22.18(b)(d)(4) of the Act. (Id.). Finally, the Agency argues that its two-step review process provided North Suburban with the opportunity to raise its concerns regarding individual cost determinations. (Id. p. 7).

CONCLUSIONS

The Board concludes that the Agency made the proper

decisions and made them in a proper manner. First, the Agenc required to make an initial decision on eligibility pursuant Section 22.18b(a) which states:

> a. An owner or operator is eligible to receive money f the Underground Storage Tank Fund for costs of corrective action or indemnification only if all of following requirements are satisfied:
>
> 1. Neither the owner nor operator of the undergro storage tank is the United States Government;
>
> 2. The underground storage tank does not contain which is exempt from the provisions of Section of The Motor Fuel Tax Law;
>
> 3. The costs of corrective action or indemnificat were incurred by an owner or operator as a res of a release of petroleum, but not including a hazardous substance, from an underground stora tank;
>
> 4. The owner or operator has registered the tank accordance with Section 4 of "An Act to regula the storage, transportation, sale and use of gasoline, volatile oils and other regulated substances", approved June 28, 1919, and paid the Underground Storage Tank Fund all fees required for the tank in accordance with Secti 4 and 5 of such Act and regulations adopted by Office of State Fire Marshal;
>
> 5. For costs of indemnification, in addition to i (1) through (4), the provisions of subsection have been met.
>
> * * *

The Agency made its eligibility decision in a timely manner a made it correctly. North Suburban met the eligibility requirements when the tank removal was done, met the requirem when the Agency decision was made, and meets the requirements today. Having met the eligibility requirements, the Agency c not legally deny eligibility because the costs were not reimbursable. Nothing in the Act allows the Agency to consid ESDA notification in making an eligibility decision; therefor the Agency's "failure" to cite ESDA notification issues in ma its eligibility determination is perfectly appropriate.

Later, the Act requires the Agency to make a reimbursabi decision under Section 22.18b(d)(4), which states (Emphasis Added):

4. Requests for partial or final payment for claims u this Section shall be sent to the Agency and shall satisfy all of the following:

   A. The owner and operator are eligible under subsections (a) and (c) of this Section;

   B. Approval of the payments requested will not resul in the limitations set forth in subsection (b) of this Section being exceeded;

   C. The owner or operator provided an accounting of all costs, demonstrated the costs to be reasonabl and provided either proof of payment of such cost or demonstrated the financial need for joint payment to the owner or operator and the owner's or operator's contractor in order to pay such costs;

   D. The owner or operator notified the State of the release of petroleum in accordance with applicabl requirements;

   E. The owner or operator notified the Agency of any initial corrective measures taken and demonstrate such measures to be consistent with the final corrective action approved by the Agency; and

   F. The owner or operator submitted plans for final corrective action to the Agency and performed the corrective action in accordance with the plans approved by the Agency.

* * * *

The Board's regulations, at 35 Ill. Adm. Code 731.150, state:

> Owners and operators of UST systems shall report to the ESDA within 24 hours and follow the procedures in Section 731.152 for any of the following conditions:
>
> a) The discovery by owners and operators or others of released regulated substances at the UST site or in the surrounding area....

Accordingly, at the time of leak detection in this proceeding, the regulatory requirements that existed required North Suburban to give notification to ESDA within 24 hours, and the statutory language required North Suburban to provide the Agency with proof of notification as a condition for payment of such claims. Again, the Agency made this reimbursement decision in a timely

manner and made it correctly. The costs incurred by North Suburban were not reimbursable when the tanks were removed, were not reimbursable when the Agency made its decision and are not reimbursable today. The Agency made the correct decision under this Section of the Act; it did not change its mind about the earlier decision under Section 22.18b(a) of the Act.

The North Suburban estoppel argument does not have merit. North Suburban incurred all of its removal costs six months prior to contacting the Agency in any manner. All costs were expended almost one year prior to the Agency determination on eligibility, and over eighteen months prior to the Agency decision on reimbursable costs. North Suburban could not have "relied" on the Agency decision in making its expenditures. Reasonable reliance is a necessary element of estoppel. North Suburban has not identified any remediation costs that it expended based upon the Agency position in this proceeding.

North Suburban has repeatedly characterized the controlling law in this proceeding as, the Agency's "secret position" (Brief p.5), the Agency's "undisclosed interpretation" (Reply Brief p.3), and similar statements. North Suburban repeatedly asserts that the Agency failed to inform them of this requirement.[2] This "secret position" or requirement is actually the Board regulation found at 35 Ill. Adm. Code 731.150. That regulation was in force and effective from June 12, 1989.[3] That regulation required notification of ESDA with 24 hours of leak detection.

North Suburban has never asserted that the regulation does not apply to it. North Suburban has never asserted that Section 731.150 is not a requirement regarding notice to the State. North Suburban has never asserted that it complied with Section 731.105. Failure to comply with Section 731.150 not only precludes the Agency from reimbursement of remediation costs, it subjects North Suburban to enforcement liability under the Act.

North Suburban also asserts that subsequent statutory amendments support its position. In fact, North Suburban argues that the legislature recently amended the Act to exclude corrective action costs incurred prior to ESDA notification and

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[2]The Agency states that its interpretation of the applicable law has never changed (Tr. 33-34), and that North Suburban never inquired about whether pre-notification costs were reimbursable (Tr. 36). North Suburban's counsel admitted he never inquired about the reimbursability of pre-notification costs (Tr. 19-20).

[3]In other words, that regulation was in place and effective prior to the time North Suburban purchased the property in question, prior to any leak detection, and prior to any Agency determinations in this proceeding.

that the amendment contains no retroactive clause that would make the amendment applicable to North Suburban's application for reimbursement. (Reply Br. p. 2). North Suburban also argues that the legislature's action indicates that a formal revision, through amendment or promulgation of new regulations, rather than informal Agency interpretation is necessary to further limit access to the Fund. (Id.). The old statutory language of Section 22.18b(d)(4)(D) including the amendments recently added by HB-1741 (as underlined) state:

> D. The owner or operator notified the State of the release of petroleum in accordance with applicable requirements. Costs of corrective action or indemnification incurred before providing that notification shall not be eligible for payment.

Contrary to North Suburban's assertions this does not reflect a new statutory initiative to exclude pre-notification expenses. The old language would have excluded all remediation costs when ESDA was not notified within 24 hours, even if ESDA was notified more than 24 hours later but before remediation costs were incurred. The new language makes it clear that costs incurred after notification can be compensated even if the 24 hour notification requirement is not met. Since pre-notification costs are excluded under both the old and the new statutory language, this argument is misplaced.

Accordingly, for the foregoing reasons, the Board hereby affirms the Agency's determination regarding the non-reimbursability of costs incurred prior to North Suburban's notification of ESDA.

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

IT IS SO ORDERED.

Board Members J. Anderson and M. Nardulli dissented

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Opinion was adopted on the 19th day of December, 1991, by a vote of 4-2.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board