ILLINOIS POLLUTION CONTROL BOARD
October 21, 2004

VOGUE TYRE & RUBBER COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 96-10
	)	(UST Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

JEFFREY E. SCHILLER OF SCHULYER, ROCHE & ZWIRNER APPEARED ON BEHALF OF PETITIONER; and

JOHN J. KIM OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by G.T. Girard):

Vogue Tyre & Rubber Company (Vogue Tyre) is seeking review of a June 15, 1995 determination by the Illinois Environmental Protection Agency (Agency) that the remediation at the site located at 1401 Golf Road, Skokie, Cook County was not subject to Title XVI of the Environmental Protection Act (Act) (415 ILCS 5/Title XVI (2002)) and the Board's rules at 35 Ill. Adm. Code 731 and 732. For the reasons discussed more fully below, the Board affirms the decision of the Agency. The Board finds that Title XVI of the Act (415 ILCS 5/Title XVI (2002)) and the Board's rules at 35 Ill. Adm. Code 731 and 732 are not applicable to Vogue Tyre's remediation of leaking underground storage tanks removed prior to the effective date of Title XVI.

The Board's opinion will summarize the procedural background of the case and then delineate the facts relevant to the Board's decision. The Board will then summarize the arguments of the parties. Finally, we will articulate the Board's findings and the reasons for the findings.

PROCEDURAL BACKGROUND

On July 18, 1995, Vogue Tyre filed an appeal of a June 15, 1995 Agency decision denying acceptance of reports submitted concerning remediation of the site. The Board accepted this matter for hearing on July 20, 1995. On May 10, 2004, the Agency filed the administrative record in this proceeding (R.) and on May 20, 2004, hearing was held before Board Hearing Officer Bradley Halloran (Tr.). Vogue Tyre filed a brief (Br.) on June 25, 2004, and the Agency filed a brief on August 2, 2004 (Ag.Br.). On September 1, 2004, Vogue Tyre filed a reply brief (Reply) along with a motion to file *instanter*. The Board grants the motion to file *instanter*.

FACTS

From January 1966 until July 7, 1995, Vogue Tyre owned a facility at 4801 Golf Road in Skokie, Cook County. R. at 73. Two 10,000-gallon gasoline tanks, known as Tanks 1 and 2, were owned and operated by Vogue Tyre at the site. R. at 107. Those tanks were removed in May, 1986. R. at 108.

On December 7, 1994, Vogue Tyre notified the Illinois Emergency Management Agency (IEMA) that a release had occurred from Tanks 1 and 2. R. at 74, 107. Between the removal of the tanks in 1986 and the reporting of the release in 1994, Vogue Tyre believed that a "large quantity of gasoline disappeared" from the site for reasons other than a leaking underground storage tank. Tr. at 5. Vogue Tyre formed this belief due to a report issued by a company hired to investigate the disappearance of gasoline. Tr. at 6. Vogue Tyre later discovered that the gasoline was not stolen, but did not convey the mistaken belief to the Agency. *Id.*

Vogue Tyre began remediation at the site in December, 1994 (R. at 73-74). On March 27, 1995, Vogue Tyre submitted a 20-day report, a 45-day report, a site classification report and remediation plan to the Agency. R. at 97-224. Also on May 16, 1995, Vogue Tyre submitted a site classification work plan and budget. R. at 95.

On June 15, 1995, the Agency sent a letter indicating that the incident was not subject to the Board's rules and denied the reports. R. at 95. Vogue Tyre filed an appeal of the Agency's decision on July 19, 1995.

Vogue Tyre I

In a prior proceeding before the Board, the Board affirmed the Office of State Fire Marshal's (OSFM) decision denying access to the underground storage tank fund by Vogue Tyre. Vogue Tyre & Rubber Company v. Office of State Fire Marshal, PCB 95-78 (Dec. 5, 2002) (Vogue Tyre I). The tanks and site at issue in that case are the same as in this proceeding. The site contained four underground storage tanks that were registered with OSFM on May 6, 1986. Tanks 3 and 4 were removed in 1993 and a release was reported to Illinois Emergency Management Agency (IEMA); those two tanks were not at issue in Vogue Tyre I or in this proceeding. Vogue Tyre I, PCB 95-78, slip. op. at 1.

Tanks 1 and 2 were deregistered by an administrative order issued by OSFM on February 17, 1993. Vogue Tyre I PCB 95-78, slip. op. 1. The tanks could no longer be registered because the tanks were removed prior to September 27, 1987. *Id.* Therefore, OSFM denied Vogue Tyre access to the underground storage tank fund and the Board affirmed that decision. *Id.*

Vogue Tyre appealed the Board's decision to the Appellate Court of Illinois First District. On September 28, 2004, the court entered a decision dismissing the appeal because Vogue Tyre failed to name the Board as a party to the appeal. No. 1-03-0521, (1st Dist. Sept. 28, 2004).

STANDARD OF REVIEW

Pursuant to Sections 57.7(c) and 57.8(i) of the Act (415 ILCS 5/57.7(c) and 57.8(i) (2002)), an applicant may appeal an Agency determination to "disapprove or modify a plan or report" to the Board under the provisions of Section 40 of the Act (415 ILCS 5/40 (2002)). Under Section 40 of the Act (415 ILCS 5/40 (2002)), the Board's standard of review is whether the application as submitted to the Agency would not violate the Act and Board regulations. Browning Ferris Industries of Illinois v. PCB, 179 Ill. App. 3d 598, 534 N.E.2d 616 (2nd Dist. 1989). Therefore, the Board must decide whether or not the application as submitted to the Agency, demonstrates compliance with the Act and Board regulations. Kathe's Auto Service Center v. IEPA, PCB 96-102 (Aug. 1, 1996). Further, the Agency's denial letter frames the issue on appeal. *Id.* . Finally, the burden of proof is on the owner or operator. Platolene 500, Inc. v. IEPA, PCB 92-9 (May 7, 1992); Ted Harrison v. IEPA, PCB 99-127 (July 24, 2003).

STATUTORY AND REGULATORY BACKGROUND

Section 57.5(a) of the Act states that:

> Notwithstanding the eligibility or the level of deductibility of an owner or operator under the Underground Storage Tank Fund, any owner or operator of an Underground Storage Tank may seek to remove or abandon such tank under the provisions of this Title. 415 ILCS 5/57.5(a) (2002)

Section 57.5(e) of the Act further provides that:

> In the event that an Underground Storage Tank is found to be ineligible for payment from the Underground Storage Tank Fund, the owner or operator shall proceed under Sections 57.6 and 57.7. 415 ILCS 5/57.5(e) (2002)

Section 57.9 of the Act (415 ILCS 5/57.9(a) (2002)) sets forth the criteria for eligibility to access the Underground Storage Tank Fund. The Underground Storage Tank Fund is accessible by eligible owners and operators to provide funds to remediate a confirmed release of specified substances from a leaking underground storage tank. Specifically, Section 57.9(a) provides:

> The Underground Storage Tank Fund shall be accessible by owners and operators who have a confirmed release from an underground storage tank or related tank system of a substance listed in this Section. The owner or operator is eligible to access the Underground Storage Tank Fund if the eligibility requirements of this Title are satisfied and:
>
> (1) Neither the owner nor the operator is the United States Government.
>
> (2) The tank does not contain fuel which is exempt from the Motor Fuel Tax Law.

(3) The costs were incurred as a result of a confirmed release of any of the following substances.

(A) Fuel, as defined in Section 1.19 of the Motor Fuel Tax Law.

(B) Aviation fuel.

(C) Heating Oil.

(D) Kerosene.

(E) Used oil which has been refined from crude oil used in a motor vehicle, as Defined in Section 1.3 of the Motor Fuel Tax Law.

(4) The owner or operator registered the tank and paid all fees in accordance with the statutory and regulatory requirements of the Gasoline Storage Act.

(5) The owner or operator notified the Illinois Emergency Management Agency of a confirmed release, the costs were incurred after the notification and the costs were a result of a release of a substance listed in this Section. Cost of corrective action or indemnification incurred before providing that notification shall not be eligible for payment.

(6) The costs have not already been paid to the owner or operator under a Private insurance policy, other written agreement, or court order.

(7) The costs were associated with "corrective action" of this Act. If the underground storage tank which experienced a release of substance listed in this Section was installed after July 28, 1989, the owner or operator is eligible to access the Underground Storage Tank Fund if it is demonstrated to the Office of the State Fire Marshall the tank was installed and operated in accordance with the Office of the State Fire Marshall regulatory requirements. Office of the State Fire Marshall certification is prima facie evidence the tank was installed pursuant to the Office of the State Fire Marshall regulatory requirements. 415 ILCS 5/57.9(a) (2002)

ARGUMENTS

The issue in this proceeding centers around the applicability of the leaking underground storage tank program. Vogue Tyre asserts that the provisions of the leaking underground storage

tank program are triggered upon the notification of a release. The Agency disagrees. The following paragraphs will summarize the arguments put forth by Vogue Tyre and the Agency in this proceeding.

Vogue Tyre's Arguments

Vogue Tyre argues that Vogue Tyre has complied with the eligibility requirements of Section 57.9 of the Act (415 ILCS 5/57.9 (2002)) and is therefore eligible to receive $264,000, plus attorney fees from the leaking underground storage tank fund. Br. at 3, 4. Vogue Tyre concedes that OSFM deregistered the tanks and that the Board declined to review the OSFM's decision. Br. at 3. However, Vogue Tyre argues that whether the tanks are registered is a subject "currently being resolved in the Appellate Court." Br. at 5. Vogue Tyre asserts that there is no dispute that Vogue Tyre complied with the remaining portions of Section 57.9 of the Act (415 ILCS 5/57.9 (2002)). Br. at 5.

Vogue Tyre maintains that Title XVI of the Act (415 ILCS 5/Title XVI (2002)) does not state that the provisions apply only to release occurring after the enactment of the Title in 1986. Br. at 5. Vogue Tyre states that the Title XVI speaks of costs incurred after notification of a confirmed release and Vogue Tyre did not discover the release until 1994. *Id*. Upon discovery of the release, Vogue Tyre asserts that steps were immediately undertaken to remediate the site in compliance with Title XVI, and the state regulations adopted thereunder. *Id*.

Vogue Tyre opines that the established principles of statutory construction support Vogue Tyre's contention that Section 57.9 of the Act (415 ILCS 5/57.9 (2002)) applies here. Br. at 6. Vogue Tyre argues that in construing a statute, courts must give effect to the intent of the legislature. Br. at 6, citing Antunes v. Sookhakitch, 146 Ill. 2d 477, 588 N.E.2d 1111, 1114 (1992); People v. Steppan, 105 Ill. 2d 310, 473 N.E.2d 1300, 1303 (1985). Vogue Tyre maintains that a court should consider not only the language of the statute, but also the reason and necessity of the law, the evils to be remedied, and the object and purposes to be obtained. *Id*. In this case, Vogue Tyre asserts the mandates of the leaking underground storage tank program were complied with by Vogue Tyre immediately notifying IEMA and initiating remediation. Br. at 7.

To further bolster the argument, Vogue Tyre relies on ChemRex v. IPCB, 257 Ill. App. 3d 274, 628 N.E.2d 863 (1st Dist. 1993). Vogue Tyre asserts that the court explained the purpose of the leaking underground storage tank program "in words directly applicable to this case." Br. at 8. Vogue Tyre states that the court found the purpose of the Act to be "to afford financial assistance in preventing environmental damage" and to "increase public participation in the task of protection of the environment." Br. at 8, quoting ChemRex, 628 N.E.2d 966. Vogue Tyre further quotes ChemRex as follows:

> ChemRex, having performed every task required by the statute and rules to prevent environmental damage in anticipation of financial assistance, should have been granted reimbursement. To deny it such assistance would defeat the very spirit and purpose of this enactment. Therefore, in order to effectuate the purpose of the Environmental Protection Act as well as to avoid an unjust consequence,

> we find that a reasonable time frame for reimbursement will be read into the statute. Accordingly, we hold that eligibility for Fund reimbursement in this case should have been determined a the time when the underground storage tank owners and operators notified the state agencies of the underground storage tank leaks. ChemRex, 628 N.E.2d 966; Br. at 8.

Vogue Tyre argues that Section 57.9 of the Act (415 ILCS 5/57.9 (2002)) clearly applies to notification of release and Vogue Tyre's eligibility should be determined as of 1994, the year that Vogue Tyre notified IEMA of a release. Br. at 8. Vogue Tyre acted promptly and in the public interest upon discovery of the release, according to Vogue Tyre. *Id*. Thus, Vogue Tyre asserts that the statutes' purpose can only be served by permitting Vogue Tyre to recover from the underground storage tank fund.

In the reply, Vogue Tyre argues that the Board has set the standard for statutory applicability of the leaking underground storage tank program and cites Pulitzer Community Newspapers v. IEPA, PCB 90-142 (Dec. 20, 1990) in support. Reply at 2. Vogue Tyre points out that in Pulitzer, the Board established that to determine eligibility for access to the underground storage tank fund, the provisions of the Act in place at the time the application for reimbursement apply. Reply at 2. Vogue Tyre goes on to state that in Pulitzer, the Board noted that the date of discovery of the release is the other important date. *Id*.

Vogue Tyre asserts that the court adopted the view expressed by the Board in Pulitzer in ChemRex and restates the argument made in the brief. Reply at 2-3. Vogue Tyre also asserts that, as in ChemRex, Vogue Tyre was subject to the leaking underground storage tank program and ChemRex is controlling. Reply at 4.

Vogue Tyre takes issue with the Agency's reliance on Chuck and Dan's Auto Service v. IEPA, PCB 92-203 (Aug. 26, 1993). Reply at 3. Vogue Tyre opines that the Agency incorrectly relies on language in that opinion which states that "when a statute involves 'prior activity or a certain course of conduct'" the law in effect at the time the tanks are removed applies. *Id*. Vogue Tyre asserts that, in addition to the language quoted by the Agency, Chuck and Dan's Auto Service actually states that the applicable law is the law in effect on the day that the application for reimbursement is filed. *Id*. Vogue Tyre argues that removal of the tanks does not meet the definition of "prior activity or a certain course of conduct" as that phrase is used in Chuck and Dan's Auto Service. *Id*.

Vogue Tyre maintains that Chuck and Dan's Auto Service stands for the proposition that the Agency cannot prevent a responsible party from recovery by changing the rules after remediation has begun. Reply at 3. Vogue Tyre opines that Chuck and Dan's Auto Service does not hold that remediation performed after the change in rules, when discovery and claim submission were also after the change, are not eligible for reimbursement, pursuant to that change in rules. Reply at 3-4.

Agency Arguments

The Agency agrees that the issue of whether the tanks are registered is not decisive in this proceeding. Ag. Br. at 4. The Agency points to Section 57.5(e) of the Act (415 ILCS 5/57.5(e) (2002)) and argues that the Act contemplates a dichotomy of duties between the Agency and OSFM. Ag. Br. at 5. The Agency asserts that under the Act an owner or operator might be ineligible to access the underground storage tank fund, but be obligated to perform remediation under the Act. *Id*. In any event, the Agency maintains that Vogue Tyre is not subject to the leaking underground storage tank program. *Id*.

The Agency asserts that because Vogue Tyre's tanks were removed prior to the adoption of the amendments to the Act, which initiated the leaking underground storage tank program, the Agency lacks regulatory authority over the tanks. Ag. Br. at 5. The Agency cites to Chuck and Dan's Auto Service for the proposition that the only relevant law is the one in place at the time the conduct actually occurred. Ag. Br. at 6. The Agency maintains that since the tanks were removed in May, 1986, several months before the effective date of the earliest leaking underground storage tank amendments, the leaking underground storage tank program cannot be applied to Vogue Tyre. *Id*.

The Agency also relies on a recent decision by the Illinois Supreme Court. Ag. Br. at 7, citing Caveney v. Bower, 207 Ill. 2d 82, 797 N.E.2d 596 (2003). The Agency points out that the court found that amendment or repeals that are procedural in nature may be applied retroactively, while those that are substantive may not. Ag. Br. at 7-8, citing Caveney 207 Ill. 2d at 92. The Agency further notes that the court went on to indicate that absent an "unequivocal expression of legislative intent" authorizing retroactive application of the statute, retroactive application of substantive statutory changes is forbidden. Ag. Br. at 8, citing Caveney 207 Ill. 2d at 94-95.

The Agency argues that there is absolutely no indication that the legislature intended Section 57 of the Act (415 ILCS 5/57 (2002)) or the predecessor section 22.12 (Ill. Rev. Stat. 1987, ch. 111 1/2, par. 1022.12) to be applied retroactively. Ag. Br. at 8. Therefore under Caveney, Title XVI of the Act cannot be applied retroactively.

The Agency notes that a similar situation was encountered in OK Trucking Company v. Armstead, 274 Ill. App. 3d 376, 653 N.E.2d 863 (1st Dist. 1995). Ag. Br. at 8. The facts of that case involved an attempt to register tanks which had been removed prior to the attempted registration. Ag. Br. at 9, citing OK Trucking 274 Ill. App. 3d at 380. The court held that no registration was possible since the tanks in question did not meet the definition of underground storage tanks, because the tanks did not exist. *Id*. The Agency asserts that the definitions relied upon by the court in OK Trucking are the same definitions as in Section 57.2 of the Act (415 ILCS 5/57.2 (2002)). Ag. Br. at 9.

The Agency disagrees that ChemRex supports Vogue Tyre's reading of the Act and asserts that ChemRex bolsters the Agency's position. Ag. Br. at 10. The Agency argues that in ChemRex, the court found that a retroactive application of the statutory amendment was an abuse of discretion. Ag. Br. at 10, citing ChemRex 257 Ill. App. 3d at 280. The Agency asserts that the facts of ChemRex are distinguishable; however, the rules of law are relevant. Ag. Br. at 11. The Agency opines that, in ChemRex, the court properly cited to general principles regarding prospective application of amendments and the court found no legislative intent in the

statutory provisions that the leaking underground storage tank program should be applied retroactively. Ag. Br. at 11.

The Agency further argues that the final decision of the Agency should be affirmed as the decision is consistent with public policy. Ag. Br. at 12. The Agency notes that had Vogue Tyre discovered the leak when the tanks were removed there would have been no leaking underground storage tank program. Ag. Br. at 12. The Agency further argues that if the Board accepts Vogue Tyre's arguments any owner or operator would be subject to the remediation provisions of Title XVI of the Act (415 ILCS 5/Title XVI (2002)) and although Vogue Tyre is willing to perform such activities, other owners or operators may not be. *Id*.

DISCUSSION

The first issue to be decided is whether or not Vogue Tyre can receive reimbursement from the underground storage tank fund pursuant to Title XVI of the Act (415 ILCS 5/Title XVI (2002)) for remediation of a petroleum leak from two tanks at Vogue Tyre's Golf Road site. The next issue the Board will discuss is the applicability of Title XVI of the Act to the two tanks at the Vogue Tyre's Golf Road site. The following discussion will address each issue in turn.

Reimbursement for Vogue Tyre

Vogue Tyre asserts that the issue of tank registration is currently being resolved in the appellate court. Br. at 5. The Agency argues that the issues in the OSFM appeal are separate from this proceeding, but argues that a finding of ineligibility "is not tantamount to a finding of no liability pursuant to other sections of Title XVI." Ag. Br. at 5. In Vogue Tyre I, the Board found that Vogue Tyre is ineligible for reimbursement from the underground storage tank fund because the tanks were not registered. The appellate court recently dismissed Vogue Tyre's appeal of the Board's decision. Therefore, the tanks are not registered and a prerequisite to reimbursement is that the tanks be registered (*see* 415 ILCS 5/57.9(a)(4) (2002)). Thus, the specific relief sought by Vogue Tyre in this appeal, *i.e.* $264,000, plus attorney fees (Br. at 3, 4), cannot be granted to Vogue Tyre.

The Agency correctly points out that ineligibility to access the underground storage tank fund is not equivalent to no applicability of the remaining provisions of Title XVI of the Act (415 ILCS 5/Title XVI (2002)). Specifically, Section 57.5 of the Act (415 ILCS 5/57.5 (2002)) allows for proceeding to remove underground storage tanks under the provisions of Title XVI of the Act (415 ILCS 5/Title XVI (2002)). Therefore, even though Vogue Tyre cannot access the underground storage tank fund, the Board will examine the applicability of Title XVI to Vogue Tyre.

Applicability of Title XVI

Vogue Tyre argues that the law in effect at the time Vogue Tyre notified IEMA of a release is the law that is applicable. Vogue Tyre maintains that Title XVI of the Act (415 ILCS 5/Title XVI (2002)) had been implemented when the release was reported in 1994 and should be applied by the Board to Vogue Tyre. The Agency disagrees and argues that since the leaking

underground storage tank program was not adopted until after removal of the tanks, Title XVI does not apply to Vogue Tyre. Thus, to apply the provisions of Title XVI to Vogue Tyre, the Board must find that there is a clear legislative directive in Title XVI to apply the provisions retroactively or the Board must find that the law in effect at the time of notification of the release applies. The Board can make neither finding.

Retroactive Application

Since the inception of the leaking underground storage tank program, there have been numerous changes to the provisions of the law. As a result, the Board and the courts have addressed the issue of what law applies when. *See* Chuck & Dan's Auto Service, ChemRex, and Pulitzer. Although each of these cases acts as guidance for the Board, none of the cases are directly on point. In Pulitzer, the Board found that the law in effect at the time the reimbursement application was submitted should apply, except that a provision requiring notification of an agency at the time of discovery of the release could not be applied retroactively. Pulitzer slip. op. at 9. In Chuck & Dan's Auto Service, the Board recognized that the law in effect at the time of the application for reimbursement would prohibit reimbursement for the planned removal of underground storage tanks. However, the law in effect at the time the tank removal was performed should apply to reimbursement for the actual removal of the tanks, because the amendment to the statute addressed a prior activity. Chuck & Dan's Auto Service slip. op at 20. Finally, in ChemRex, the court found that the law in effect at the time ChemRex notified the state agencies should apply, rather than the law in effect at the time reimbursement was sought. ChemRex 628 N.E.2d at 280. The court made this finding on very specific facts including that ChemRex "discovered, reported, and set about repairing the releases from the affected tanks immediately after the leaks occurred . . . ." *Id.*

Also of significance is the Caveney decision by the Supreme Court of Illinois. The court found that statutes which are silent on retroactive application are to be read using Section 4 of the Statutes on Statutes (5 ILCS 10/4 (2002)). The court found that Section 4 is a clear indication of the temporal reach of every statute and Section 4 forbids retroactive application of substantive changes to statutes. Caveney 797 N.E.2d at 601. The court stated that:

> Thus, Section 4 represents a clear legislative directive as to the temporal reach of statutory amendments and repeals: those that are procedural in nature may be applied retroactively, while those that are substantive may not. Caveney, 797 N.E.2d at 602.

The Board finds that the language of Title XVI is clear and Title XVI does not apply retroactively under the facts of this case.[1] There is no language in the current provisions of Title

[1] The Board notes that the Second District Appellate Court recently issued a decision in State Oil Company *et. al.* v. IPCB, *et. al.*, Nos. 2-03-0463, 2-03-0493 (2nd Dist. Sept. 30, 2004), (petitions for leave to appeal have been filed). The Appellate Court determined that "the legislature manifested an intent that the Act be generally given retroactive application." The appellate court also found that not applying the language of Section 57.12 of the Act (415 ILCS 5/57.12 (2002)) would lead to an absurd result, in that, allowing an owner or operator to sell property to escape

XVI, or in the predecessor provisions, which indicates an intent to apply the leaking underground storage tank program retroactively. Therefore, based on Caveney and the plain language of Title XVI of the Act (415 ILCS 5/Title XVI (2002)), the statutory provisions regarding the leaking underground storage tank program do not apply retroactively.

The Board further finds that this ruling is consistent with Pulitzer and ChemRex. In ChemRex, the court declined to apply amendments to the leaking underground storage tank program retroactively. ChemRex 628 N.E.2d at 280. In so doing, the court found that the law in effect at the time ChemRex notified the proper state agencies of a release was applicable. *Id*. In Pulitzer, the Board also declined to apply provisions of the leaking underground storage tank program retroactively when finding that the law in effect at the time the application was submitted applied to Pulitzer. Pulitzer, slip. op. at 9.

Notification of Release

The Board is not persuaded that the findings in ChemRex and Pulitzer support the position of Vogue Tyre that the law in effect at the time of notification of a release should apply. As discussed above, both cases support a decision not to apply a substantive amendment to a statute retroactively. Clearly, the provisions of the leaking underground storage tank program are substantive in nature and applying the provisions of Title XVI of the Act (415 ILCS 5/Title XVI (2002)) to owners or operators who removed tanks prior to the implementation of the program would substantively affect those owners or operators.

Also, in both ChemRex and Pulitzer, the applicants were in the process of remediation, but had not yet applied for reimbursement, when the law was changed. The change in the law impacted the eligibility of both ChemRex and Pulitzer, resulting in both becoming ineligible for reimbursement. The tanks were eligible for the leaking underground storage tank program when the tanks were removed. Here, Vogue Tyre had removed the tanks prior to the implementation of the program and thus was not eligible for reimbursement at the time of removal. A release was discovered several years later, and Vogue Tyre notified the state agencies of a release. Thus, Vogue Tyre is seeking to apply provisions of a statute that were not even in place when the tanks were removed.

As the Agency correctly points out, a finding by the Board that Vogue Tyre is subject to the provisions of Title XVI of the Act (415 ILCS 5/Title XVI (2002)) could create difficulties for other tank owners and operators. Although Vogue Tyre seems willing to perform remediation as

---

liability would be absurd. Thus, the appellate court applied a provision of Title XVI of the Act (415 ILCS 5/Title XVI (2002) retroactively. However, as in Pulitzer and ChemRex, the facts of the State Oil case are substantially different than the facts of this case. The appellate court in State Oil was applying a provision of Title XVI dealing with enforcement liability, not specific requirements for remediation. In this case, Vogue Tyre is seeking reimbursement and application of statutory provisions dealing with remediation, including requirements for specific reporting to the Agency. Applying the statute retroactively, in this case, would lead to an absurd result, in that Vogue Tyre is seeking to apply provisions of a statute that were not even in place when the tanks were removed.

required by the provisions of Title XVI of the Act (415 ILCS 5/Title XVI (2002)), other owners or operators may not be willing to take on that responsibility. Furthermore, because the leaking underground storage tank program did not exist at the time of removal of the tanks, Vogue Tyre cannot follow the rules on tank removal adopted under Title XVI of the Act (415 ILCS 5/Title XVI (2002)). *See, e.g.*, 41 Ill. Adm. Code 170.541 (requiring a remover to be licensed and to obtain a permit prior to removal). This is an absurd result.

The Board finds that Title XVI of the Act (415 ILCS 5/Title XVI (2002)) does not apply to Vogue Tyre. The Board is convinced that to hold otherwise could create overwhelming difficulties for persons who removed tanks prior to the implementation of the leaking underground storage tank program. The Board understands that remediation of a site where a release occurred before the leaking underground storage tank program was adopted must still be undertaken, but the requirements of Title XVI of the Act (415 ILCS 5/Title XVI (2002)) do not apply.

CONCLUSION

Vogue Tyre submitted various reports to the Agency for review as a part of remediation for a site where leaking underground storage tanks had been removed. Vogue Tyre is seeking reimbursement of $264,000, plus attorney fees (Br. at 3, 4) for the remediation taken at Vogue Tyre's Gulf Road site. The Board finds that, because the tanks are not registered and a prerequisite to reimbursement is that the tanks be registered (*see* 415 ILCS 5/57.9(a)(4) (2002)), the specific relief sought by Vogue Tyre in this appeal cannot be granted to Vogue Tyre. The Board further finds that the language of Title XVI of the Act (415 ILCS 5/Title XVI (2002)) is clear and the statutory provisions regarding the leaking underground storage tank program do not apply retroactively. Finally, the Board finds that the provisions of Title XVI of the Act (415 ILCS 5/Title XVI (2002)) do not apply to Vogue Tyre.

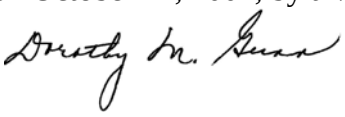
ORDER

The Board affirms the Illinois Environmental Protection Agency's (Agency) decision deeming that the Vogue Tyre & Rubber Company site at 1401 Golf Road, Skokie, Cook County is not subject to 35 Ill. Adm. Code 731 and 732. Further, the Board affirms the Agency's denial of a 20-day report, at 45-day report, a site classification report and corrective action plan submitted for the site.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/31(a) (2002)); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the Board adopted the above opinion and order on October 21, 2004, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board