BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

VOGUE TYRE & RUBBER COMPANY, Petitioner,	)	
v.	)	PCB No. 96-10
	)	(UST Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

NOTICE OF FILING

TO: Illinois Pollution Control Board
Attn: Ms. Dorothy Gunn, Clerk of the Board
Attn: Ms. Adaleen Hogan, Assistant Clerk of the Board
State of Illinois Building
100 West Randolph Street - Suite 11-500
Chicago, Illinois 60601

Illinois Pollution Control Board
Attn: Bradley Halloran
Hearing Officer
State of Illinois Building
100 West Randolph Street – Suite 11-500
Chicago, Illinois 60601

Illinois Environmental Protection Agency
Division of Legal Counsel
Attn: John J. Kim, Esq., Special Assistant Attorney General
2200 Churchill Road
Post Office Box 19276
Springfield, Illinois 62794

PLEASE TAKE NOTICE that on ~~August 30, 2004~~ SEPTEMBER 1, 2004, we filed with the Clerk of the Illinois Pollution Control Board, Vogue Tyre & Rubber Company's **Motion for Leave to File Vogue's Reply Brief Instanter** and **Petitioner's Reply Brief**, a copy of which is attached hereto and hereby served upon you. Pursuant to 35 Ill. Admin. Code § 101.103(d), these filings are submitted on recycled paper.

VOGUE TYRE & RUBBER COMPANY

By: _____
One of its Attorneys

David M. Allen
Jeffrey E. Schiller
Schuyler, Roche & Zwirner, P.C.
One Prudential Plaza, Suite 3800
130 East Randolph Street, Chicago, Illinois 60601
(312) 565-2400

CERTIFICATE OF SERVICE

I, Sety Sadri, a non-attorney, certify that I caused copies of the foregoing **Notice of Filing** and **Petitioner's Reply Brief** to be served to:

Illinois Pollution Control Board
Attn: Ms. Dorothy Gunn, Clerk of the Board
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Springfield, Illinois 62794

by depositing same in the United States Mail, first class postage prepaid, at One Prudential Plaza, 130 East Randolph Street, Chicago, on this ~~30th day of August, 2004~~ SEPTEMBER 1, 2004.

Sety Sadri

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

VOGUE TYRE & RUBBER COMPANY, Petitioner, v. ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)))))))	PCB No. 96-10 (UST Appeal)

MOTION FOR LEAVE TO FILE VOGUE'S REPLY BRIEF INSTANTER

NOW COMES, Petitioner, Vogue Tyre and Rubber Company, ("Vogue"), by its attorneys, and hereby moves this Honorable Board for leave to file its Reply Brief Instanter. In support of its Motion, Vogue states:

1. Vogue's reply was originally scheduled to be filed on August 19, 2004.

2. The time for filing Vogue's Reply Brief was predicated upon the IEPA's filing of its Response Brief on or before July 29, 2004.

3. The IEPA filed its Response Brief, together with a Motion for Leave to File Leave Instanter, on August 2, 2003. Vogue did not object to the IEPA's Motion which was granted by this board.

4. The board set August 23, 2004 as the filing date for Vogue's reply.

5. On August 23, 2004, Vogue's counsel called counsel for the IEPA to request additional time to file its Reply Brief. The IEPA's counsel stated that he had no objections to any additional time needed.

6. The reason that Vogue requested additional time was to ensure that the client and the billing attorney at Vogue's law firm would have an adequate opportunity to review and comment upon the Brief.

7. Vogue communicated its request and the IEPA's position to Hearing Officer.

Bradley Halloran, on August 23, 2004.

8. Vogue is now prepared to file its Reply Brief.

9. Vogue's Motion is not interposed for purposes of delay but rather to ensure that the interest of justice is served. Since this is the last scheduled brief in this matter, allowing Vogue to file Instanter will not impact any further scheduling.

WHEREFORE, Vogue respectfully requests this Board to grant it leave to file the attached Reply Brief Instanter.

Respectfully submitted,

VOGUE TYRE & RUBBER COMPANY

By: _____
One of its Attorneys

David M. Allen
Jeffrey E. Schiller
Dolores Ayala
Schuyler, Roche & Zwirner, P.C.
One Prudential Plaza
Suite 3800
130 East Randolph Street
Chicago, Illinois 60601
(312) 565-2400
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

VOGUE TYRE & RUBBER COMPANY, Petitioner, v. ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	PCB No. 96-10 (UST Appeal)

PETITIONER'S REPLY BRIEF

Petitioner, Vogue Tyre & Rubber Company ("Vogue"), by and through its attorneys, hereby submits its Reply Brief in the above-captioned matter.

INTRODUCTION

The Response to Petitioner's Post-Hearing Brief (the "Response") filed by Respondent Illinois Environmental Protection Agency (the "IEPA") is, in large part, a repetition of the arguments previously set forth by the IEPA in its rejected Motion for Summary Judgment. Simply put, the IEPA asserts that Vogue is not subject to the Lust Program because the Lust Program, which was in effect at the time Vogue discovered that a gasoline leakage had occurred at its 4801 Golf Road facility (the "Site"), and was in effect when Vogue remediated the contamination resulting from the leakage was not in effect when the UST's which leaked the gasoline were removed from the ground. Each of the IEPA's arguments is a variant on this theme; for example, the IEPA's arguments pertaining to retroactive application of the Lust Program are of no moment if the applicable statute is determined by the time of application for reimbursement since the program was in place when Vogue applied for reimbursement. Thus, should this Board determine that the statutory framework applicable to this case is the one in place on the date Vogue applied for reimbursement, Vogue is plainly entitled to the relief it

seeks. Accordingly, this Reply Brief will focus on that single question and will stand on its previous submissions with respect to any other matters.

ARGUMENT

This Board has set the standard for statutory applicability of the Lust Program on numerous past occasions. In Pulitzer Community Newspapers, Inc. v. IEPA, PCB 90-142, 117 PCB 99 (December 20, 1990), reconsideration denied 119 PCB 31 (February 28, 1991), the Board specifically stated that "the applicability for determining...eligibility for reimbursement are those ... provisions [which] were in effect at the time [Petitioner] its application for reimbursement..."(119 PCB at 32) To the extent that another date is important, the Board in Pulitzer explained that it was "the date of discovery of the release...given that discovery of the release triggers the duty to notify." (Id.) Similarly, in First Busy Trust & Investment Co v. IEPA, PCB 91-213, 130 PCB 287 (February 27, 1992), the Board again ruled that the applicable statute to be applied to Petitioner's request for reimbursement was the one in effect on the date Petitioner's application was completed. (130 PCB at 294)

The Illinois Appellate Court has adopted this view. In ChemRex v. Pollution Control Board, 628 N.E. 2d 863 (1st Dist. 1993), the Illinois Appellate Court explained the purpose of the LUST Program in words directly applicable to this case. Then, the Court found the purpose of the Illinois Environmental Protection Act to be "to afford financial assistance in preventing environmental damage ... [and to] increase public participation in the task of protection the environment ..." (628 N.E. 2d at 966). The Court then found that ChemRex had "completed with ... statutory and rules elections by immediately notifying the state of the leaks and initiating corrective action. (Id.) The Court concluded that::

> 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 at the time when underground storage tank owners and operators notified the state agencies of underground storage tank leaks.

In its Response, the IEPA cites only Chuck and Dan's Auto Service v. IEPA, PCB 92-203 (August 26, 1993) for the proposition that the applicable statutory framework was the one in place when Vogue removed the UST's, rather than the one in place when it discovered the leak and/or applied for reimbursement. (Response pp. 5-6) However, the Chuck and Dan's case simply does not stand for that proposition. Chuck and Dan's involved an attempt by the IEPA to utilize an amendment to a regulation enacted after remediation to preclude recovery of remediation costs. The Board rejected this attempt. Here, there was no new law enacted after remediation - - rather, remediation occurred after the law had been changed. Thus, Chuck and Dan's provides no support for the IEPA's position.

The IEPA quotes the Chuck and Dan's case to the effect that "when a statute involves 'prior activity or a certain course of conduct...the applicable law is the statue in place at the time of tank removal'". This quote, however, leaves out a critical previous sentence in the Opinion which states that "the applicable law is the statute in effect on the day of the filing of the application for reimbursement." (Chuck and Dan's, p.6, fn. 2 (emphasis added)) The key to reconciling these two quotes is to determine what constitutes "prior activity or a certain course of conduct" as defined by the Board. Here, removal of the USTs by Vogue does not fit this definition, as is made clear by the above-cited cases. What Chuck and Dan's holds is that the agency cannot prevent a responsible party from recovery by changing the rules after remediation. It does not hold that remediation

performed after the change (where discovery and submission of claim were also after the change) is not eligible for reimbursement.

The IEPA seeks to distinguish Chemrex on the grounds that the owner/operator of the UST in that case "was without question subject to the Lust Program." (Response p. 11) This, however, is no distinction, because Vogue too was subject to the program. The Chemrex Court's clear statement is that a company which has acted to present environmental damage resulting from a leaking UST "should [be] granted reimbursement", so long as it complies with the rules in effect on the date of application for reimbursement, and that any other ruling "would defeat the very spirit and purpose of [the Lust Program]." (628 N. E. 2d at 964) This is not, as the IEPA claims, a retroactive application of the Lust Program – this would only apply if the application was filed prior to the enactment of the Lust Program. That plainly did not occur here.

CONCLUSION

WHEREFORE, Petitioner Vogue Tyre & Rubber Company respectfully requests that the Pollution Control Board:

a. find that the IEPA's final decision of June 15, 1995 was erroneous and order the IEPA to approve the Reports submitted by Vogue to the IEPA; and

b. order the IEPA to:

   (i) acknowledge that all of Vogue's corrective actions are eligible for reimbursement from the UST Fund; and

(ii) begin processing Vogue's Reports so that Vogue can be reimbursed for the costs of its corrective action.

Respectfully submitted,

VOGUE TYRE & RUBBER COMPANY

By: _____
One of its Attorneys

David M. Allen
Jeffrey E. Schiller
Schuyler, Roche & Zwirner, P.C.
One Prudential Plaza, Suite 3800
130 East Randolph Street
Chicago, Illinois 60601
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