

ILLINOIS POLLUTION CONTROL BOARD
February 4, 1993

CHEMREX, INCORPORATED,)	
)	
Petitioner,)	
)	
v.)	PCB 92-123
)	(Underground Storage Tank
ILLINOIS ENVIRONMENTAL)	Fund Determination)
PROTECTION AGENCY,)	
)	
Respondent.)	

TODD R. WIENER APPEARED ON BEHALF OF PETITIONER, AND
JAMES G. RICHARDSON APPEARED ON BEHALF OF RESPONDENT.

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

This matter is before the Board on a petition for review filed by Chemrex Incorporated (Chemrex) on August 31, 1992. Chemrex requests that the Board review the Illinois Environmental Protection Agency's (Agency) July 27, 1992 underground storage tank (UST) reimbursement determination. The Agency determined that five out of six of Chemrex's USTs were ineligible to access the State Fund (Fund) because they "...contained fuels that are exempt from Section 2a of the Motor Fuel Tax Law, according to Section 22.18b(a)(2), and 22.18b(a)(5) of the Illinois Environmental Protection Act." The Agency also determined that a \$100,000 rather than a \$15,000 deductible applied to the remaining UST because the UST was not registered with the State Fire Marshal prior to July 28, 1989.

On September 3, 1992, the Board determined that the Agency's decision was final as to the USTs deemed ineligible for the Fund and that Chemrex had properly filed a timely appeal of the Agency's denial of eligibility as to those USTs. The Board also determined that the deductible amount applied to the remaining UST, and appealed by Chemrex in its petition for review, was not ripe for review. Reichhold Chemical v. IEPA (July 9, 1992), PCB 92-98; Village of Lincolnwood v. IEPA (June 4, 1992), PCB 91-83, 133 PCB 33; Ideal Heating Co. v. IEPA (January 23, 1992), PCB 91-253. Accordingly, that issue is not before us at this time.

On October 26, 1992, hearing was held in this matter in Chicago, Cook County, Illinois. No members of the public were present at hearing. Chemrex and the Agency filed their post-hearing briefs on December 31, 1992.

The Board affirms the Agency's July 27, 1992 eligibility determination regarding Chemrex's five USTs.

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BACKGROUND

At hearing the parties entered into a joint stipulation of facts. (Tr. 5-8; Joint Ex. 1.)

Chemrex owns property at 415 East 16th Street, Chicago Heights, Illinois. (Joint Ex. 1 par. 1; Pet. Br. Ex. A par. 1.) Chemrex had eight USTs on the property, all of which were registered with the State Fire Marshal. (Joint Ex. 1 par. 1; Pet. Br. Ex. A par. 1; Pet. Ex. B.) The eight USTs consisted of one gasoline UST, five unused, nonhazardous solvent USTs (i.e., three USTs containing virgin mineral spirits and two USTs containing virgin solvent naphtha [petroleum] light aromatic), and two xylene USTs. (Joint Ex. 1 par. 2; Pet. Br. Ex. A par. 2.)

On March 15, April 2, and April 3, 1991, Chemrex discovered and reported releases from the USTs to the Illinois Emergency Services and Disaster Agency (ESDA).¹ (Joint Ex. 1 par. 1; Pet. Br. Ex. A par. 1.) During the spring and summer of 1991, Chemrex performed remediation work at the site. In compliance with the Agency's Guidance Manual, Chemrex submitted a "22-Day Report", a "45-Day Product Action Report", and "Leaking Underground Storage Tank Investigation Plan and Health and Safety Plan" (Work Plan) to the Agency on April 22, 1991, May 16, 1991, and on June 21, 1992, respectively. (Joint Ex. 1 pars. 5, 6, 7 - Exs. B, C, D; Pet. Br. Ex. A pars. 5, 6, 7 - Exs. B, C, D.)

On October 4, 1991, Chemrex filed its application for reimbursement for remediation costs for the six USTs containing gasoline and unused solvents. (Joint Ex. 1 par. 8; Pet. Br. Ex. A par. 8; Agency Rec. 1-5.) On October 28, 1991, the Agency returned Chemrex's reimbursement application for incompleteness. (Pet. Ex. D; Agency Rec. 7-8.) Chemrex resubmitted its application on March 11, 1992. (Agency Rec. 9-10, 11-125.) On July 27, 1992, the Agency determined that only the one gasoline UST was eligible to access the Fund.² (Agency Rec. 139-140; Pet. Ex. A.)

The Agency stipulates that its eligibility determination as to the five USTs that contained unused, nonhazardous petroleum solvents was based on a September 6, 1991 amendment to the Environmental Protection Act, 415 ILCS 5/1 et seq. (1992 State Bar Edition). This amendment occurred after Chemrex notified the

¹ESDA has been renamed the Emergency Management Agency.

²In its July 27, 1992 determination letter, the Agency incorrectly referred to this UST as a "1,000 gallon diesel tank". The UST is correctly referred to as a 1,000 gallon gasoline tank in Chemrex's reimbursement application and its petition for review.

Agency of the releases and after Chemrex submitted its Work Plan to the Agency.

APPLICABLE REGULATIONS

From the date Chemrex first discovered the releases to the date Chemrex submitted its Work Plan, Section 22.18b(a) of the Act, 415 ILCS 5/22.18b(a) (1992 State Bar Edition), provided that releases of non-hazardous petroleum products were eligible for reimbursement from the Fund. That section states, in part, as follows:

- a. [a]n owner or operator is eligible to receive money from the Underground Storage Tank fund for costs of corrective action or indemnification only if all the following requirements are satisfied:

* * * *

- (2) the underground storage tank does not contain fuel which is exempt from the provisions of Section 2a of The Motor Fuel Tax Law;
- (3) the costs of corrective action...were incurred by an owner or operator as a result of a release of petroleum, but not including any hazardous substance from an underground storage tank;

Effective September 6, 1991, Public Act 87-323 amended Section 22.18b(a) of the Act, making owners or operators eligible to receive money from the Fund for costs of corrective action if their USTs contain certain specific substances other than petroleum solvents. 1991 Ill. Legis. Serv. 1822, 1826. Section 22b(a)(5) of the Act, 415 ILCS 5/22.18b(a)(5) (1992 State Bar Edition), specifically provides, in part, as follows:

- a. an owner or operator is eligible to receive money from the Underground Storage Tank fund for costs of corrective action or indemnification only if all the following requirements are satisfied:

* * * *

- (5) The released petroleum is within one or more of the following categories:
- (A) Fuel, as that term is defined in Section 1.19 of the Motor fuel Tax Law.
- (B) Aviation fuels, heating oil, or kerosene.

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- (C) Used oil. For purposes of this Section, "used oil" means any oil that has been refined from crude oil used in a motor vehicle, as that term is defined in Section 1.3 of the Motor Fuel Tax Law, and that, as a result of that use, is contaminated by physical or chemical impurities.

The amendment at issue in this case thus excludes formerly eligible USTs containing petroleum solvents.

ARGUMENT

Chemrex argues that the applicable law in this case is the law in effect on the date that Chemrex notified ESDA of the release (i.e., March 15, April 2, and April 3, 1991). In support of this argument, Chemrex notes that such reports put the Agency on notice that there were releases. Chemrex adds that it provided the State with documentation showing registration. Accordingly, Chemrex asserts that the Agency was on notice of a reimbursable event in April 1991. Chemrex adds that all subsequent relevant events (i.e., the filing of the "20-day Report", "45-Day and Free Product Action Report", and the Work Plan) also occurred prior to the September 1991 amendment. Chemrex concludes that the Board has held that, where a statutory amendment involves prior activity or a certain course of conduct, the applicable law is that which is in effect at the time that the course of conduct occurred. Lynch v. IEPA (November 19, 1992), PCB 92-81 at 2-3.

Chemrex next argues that the application of Public Act 87-323 would be an unauthorized and impermissible retroactive application of the law. Specifically, Chemrex asserts that nothing in the September 1991 amendment, or its legislative history, indicates that it should be applied retroactively to releases occurring before the amendment. In fact, Chemrex points out that the Board has declined to apply regulations retroactively. Mandel v. Kulpaka (July 30, 1992), PCB 92-33.

Chemrex adds that the provision of the Act relating to deductible determinations demonstrates that the legislature knows how to make the date of application submittal a controlling date with respect to determining applicable deductibles. Section 1022.18b(d)(3)(G) of the Act, 415 ILCS 5/22.18b(d)(3)(G) (1992 State Bar Edition), specifically provides, "[t]he Agency shall determine the applicable deductible...based on the date that a complete application for eligibility determination...is received by the Agency." Chemrex notes that the Act does not have a comparable provision with respect to the issue of eligibility.

Chemrex further argues that the Agency's determination is an arbitrary and insupportable violation of its past practices and

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procedures. Specifically, Chemrex notes that the Agency has admitted in this case that it approved a reimbursement applications that were submitted to the Agency on or after September 6, 1991, for USTs containing unused solvents or other non-fuel substances. (Agency admission in response to Chemrex's Request to Admit No. 4.) Specifically, Chemrex points to the MacLean-Fogg case involving releases from solvent (non-fuel) USTs. MacLean-Fogg v. IEPA PCB 92-11. In that case, the Agency initially denied MacLean-Fogg's reimbursement application because MacLean-Fogg did not submit its reimbursement application until September 6, 1991. MacLean-Fogg filed a petition before the Board to review the matter. Chemrex asserts that, before the Board could rule on the matter, the Agency determined that MacLean-Fogg's USTs were eligible for reimbursement from the Fund. Upon the Agency's revised determination and MacLean-Fogg's motion, the Board dismissed the matter. MacLean-Fogg (March 26, 1992), PCB 92-11.

Finally, Chemrex asserts that the Agency's eligibility determination deprives it of a right to reimbursement that it paid for (i.e., by registering and paying all fees) and relied on. 40 C.F.R. 280.90 et seq. requires owners and operators of USTs to meet certain financial responsibility requirements, such as the purchasing of adequate insurance. 40 C.F.R. 280.101 provides that an owner or operator may satisfy such requirements through its eligibility for reimbursement from state administered funds. Chemrex asserts that it did not secure private insurance for its USTs and that it relied on the Fund because the law clearly indicated that any UST release would be insured by the Fund.

Chemrex adds that the Agency's unauthorized retroactive application of the September 1991 amendment violates 40 CFR 280.101, which requires Illinois to submit to USEPA a description of the State Fund "along with a list of the classes of [USTs] to which the Fund may be applied." Chemrex notes that the Agency's Guidance Manual indicates that the USTs at issue were eligible for reimbursement and that Illinois submitted the Guidance Manual to USEPA in seeking approval of the Fund. Accordingly, Chemrex argues that the Agency cannot now retroactively narrow the categories of eligible USTs, effectively invalidating USEPA's approval of the Fund and leaving Chemrex and other UST owners without federally required insurance.

DISCUSSION

The only issue to be reviewed in this case is the Agency's eligibility determination for the five USTs. The resolution of this issue turns on the issue of whether Public Act 87-323 (effective September 6, 1991) is applicable to Chemrex. The Board finds that the Agency's eligibility determination was correct and that Public Act 87-323 applies to Chemrex's

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application for reimbursement.

The Board has held that when determining whether UST removal costs are reimbursable as corrective action costs, the law to be applied is the definition of "corrective action" as it existed when the costs were incurred. Lynch v. IEPA (November 19, 1992), PCB 92-81 at 2-3; Galesburg Cottage Hospital v. IEPA (August 13, 1992), PCB 92-62 at 3-6; Pulitzer Community Newspapers, Inc. v. IEPA (December 20, 1990), PCB 90-142 at 4-5, 117 PCB 102-103, and (February 28, 1991) at 2, 119 PCB 31, 32. In other words, where a statutory amendment involves a prior activity or a certain course of conduct, the law to be applied is the provision in effect at the time that the course of conduct occurred. Lynch v. IEPA (November 19, 1992), PCB 92-81 at 2-3; Galesburg Cottage Hospital v. IEPA (August 13, 1992), PCB 92-62 at 3-6; Pulitzer Community Newspapers, Inc. v. IEPA (December 20, 1990), PCB 90-142 at 4-5, 117 PCB 102-103, and (February 28, 1991) at 2, 119 PCB 31, 32.

The statutory amendment at issue in this case, however, does not involve a particular activity or course of conduct. Rather, the amendment narrows the classes of USTs that are eligible to access the Fund.

The Board has held that when determining eligibility for reimbursement, as opposed to the issue of when corrective actions were taken, the applicable law is that which is in effect on the date of the filing of the application. Pulitzer Community Newspapers, Inc. v. IEPA (December 20, 1990), PCB 90-142 at 4-5, 117 PCB 102-103, and (February 28, 1991) at 2, 119 PCB 31, 32. (see also Miller v. IEPA (July 9, 1992), PCB 92-49 at 4; First Busey Trust and Investment Company v. IEPA (February 27, 1992), PCB 91-213 at 4-5, 130 PCB 287, 290-91; Marjorie B. Campbell v. IEPA (June 6, 1991), PCB 91-5 at 2, 123 PCB 25, 26, citing to Pulitzer.)

In this case, Chemrex initially filed its reimbursement application on October 4, 1991. Pursuant to the Agency's October 28, 1991 request for supplemental information, Chemrex sent an amended application to the Agency on March 11, 1992. Even if Chemrex's reimbursement application were considered complete on October 4, 1991, that date is past September 6, 1991. Accordingly, because Public Act 87-213 was in effect at the time that Chemrex filed its reimbursement application, Public Act 87-213 is not being applied retroactively as Chemrex argues. We also note that the legislature failed to include a provision in the Act that would "grandfather" Public Act 87-323 with respect to companies that notified ESDA and took remedial action prior to the amendment, but filed their reimbursement application after the amendment.

As for Chemrex's argument regarding the Agency's past

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practices, we note that Chemrex has not alleged that it relied on the Agency's past practices or that it would have acted differently if the Agency had never previously approved reimbursement applications that were submitted to the Agency after September 6, 1991, for unused solvent or non-fuel USTs. Moreover, in response to Chemrex's request to admit, the Agency admitted that it only approved one reimbursement application (i.e., MacLean-Fogg) that was submitted on September 6, 1991.

In any event, even if Chemrex had alleged reliance, the Board agrees with the Agency's argument that "two wrongs do not make a right". In other words, the Board believes that the Agency is entitled to change its position, rather than maintain consistency with an incorrect eligibility determination, in light of the fact that there is no statutory provision, regulation, or case law that addresses the issue at hand.

The Board is not unsympathetic to Chemrex's argument regarding its loss of access to private insurance. We note, however, that Chemrex was placed on notice of the statutory amendment when it was first introduced before the legislature. More important, however, is the fact that the Act has been amended so as to remove the Board's authority to regulate financial assurance matters. As a result, the Board's scope of review with regard to financial assurance matter has been limited. Specifically, Public Act 86-1050 modified Section 22.4(d) of the Act, 415 ILCS 5/22.4(d) (1992 State Bar Edition), to limit the Board's authority to adopting only "regulations relating to corrective action". 1990 Ill. Legis. Serv. 211, 223. (see also Public Act 86-958, 1989 Ill. Legis. Serv. 5219; Public Act 86-1484, 1991 Ill. Legis. Serv. 3028; and Public Act 87-323, 1991 Ill. Legis. Serv. 1822.) The Board, in response, has amended its regulations to delete its prior regulations in the financial assurance area. In the Matter of: UST Update USEPA Regulations (1/1/91 - 6/30/91) (April 9, 1992) R91-14, 132 PCB 681.

With regard to Chemrex's assertion regarding the submission of the Agency's Guidance Manual to USEPA when seeking approval of the Fund, we note that the Agency's Guidance Manual has not been promulgated as a rule pursuant to the Illinois administrative Procedure Act. As a result, the Guidance Manual has no legal or regulatory effect in proceedings before the Board and the Board cannot enforce its provisions. Miller v. IEPA (July 9, 1992), PCB 92-49 at 5-6; Warren's Service v. IEPA (June 4, 1992), PCB 92-22 at 3, 134 PCB 41, 43; Strube v. IEPA (May 21, 1992), PCB 91-205 at 3, 133 PCB 477, 479; Platolene 500, Inc. v. IEPA (May 7, 1992), PCB 92-9 at 4-5, 133 PCB 234, 237-238. More importantly, the Board notes that the assertion also relates to the Board's lack of authorization with financial assurance matters and thus, is not directly relevant here.

Accordingly, the Board finds that the Agency's eligibility determination for Chemrex' five petroleum solvent USTs was proper.

This opinion constitutes the Board's findings of fact and conclusions of law in this matter

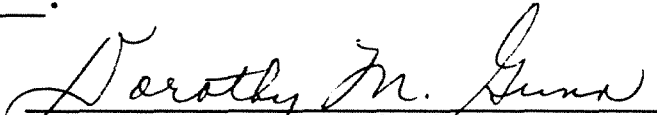
ORDER

For the reasons expressed in the accompanying opinion, the Board hereby affirms the Agency's July 27, 1992 determination regarding the non-reimbursability of remediation costs incurred by Chemrex for its five petroleum solvent underground storage tanks.

Section 41 of the Environmental Protection Act, 415 ILCS 5/41 (1992 State Bar Edition), provides for appeal of final Orders of the Board within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements. (But see also Castenada v. Illinois Human Rights Commission (1989), 132 Ill.2d 304, 547 N.E.2d 437).

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that on the 4th day of February, 1993, the above opinion and order was adopted by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board