ILLINOIS POLLUTION CONTROL BOARD
December 6, 1991

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

DISSENTING OPINION (by J. Anderson and M. Nardulli):

We respectfully dissent from today's action. We believe that the majority's conclusion that it is bound by a generally worded state statute whose meaning can be gleaned by looking only at a federally derived regulation is misplaced. We do not believe the Board was so bound and we would have found for North Suburban on the basis that the Agency had contradicted itself through its communications with North Suburban and had bound itself by its first determination. Any reasonable person would have relied on the Agency's first determination and, as a result, the Agency should not be allowed to contradict it.

On October 25, 1990, the Agency told North Suburban that it was eligible for reimbursement from the Fund for its remediation costs. It also delineated some parameters relating to the issue of which costs were reimbursable (such as the deductible amount). Nearly seven months after it made its initial determination of eligibility and reimbursability (and eleven months after North Suburban submitted its application for reimbursement), the Agency sought to further limit North Suburban's access to the Fund. The question that the Board must answer is whether a reasonable person would have relied on the Agency's initial determination and whether that initial determination can be further limited in scope.

The Act clearly contemplates that an applicant must satisfy certain requirements before he can be eligible for access to the Fund. Section 22.18b(a) of the Act sets forth those requirements. In addition, Section 22.18b(d) of the Act sets froth certain requirements that must be met before costs can be considered reimbursable. Many of the requirements in the two sections are quite specific. For example, Section 22.18b(a)(4) requires an owner to register the tanks with the Office of State Fire Marshal in accordance with the requirements delineated in Sections 4 and 5 of the Gasoline Storage Act, Ill. Rev. Stat.

1989, ch. 127½, pars. 156 and 157, and Section 22.18b(d)(3) sets forth in detail how the applicable deductible is to be determined. Unlike the above provisions, however, the "ESDA" notification requirement of Section 22.18b(d)(4)(D) applicable to this case was general in nature. Section 22.18b(d)(4)(D) states, in pertinent part, as follows:

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

It is clear from the language of Section 22.18b(d)(4)(D) itself that an applicant must give notification of a release in accordance with applicable requirements in order to receive its reimbursement. In fact, in Pulitzer Community Newspapers, Inc. v. IEPA, PCB 90-142, (December 20, 1990), the Board itself recognized that Section 22.18b(d)(4)(D) was one of the requirements that had to be met before an applicant could receive a reimbursement.[1] (Id. p. 6).

Section 22.18b(d)(4)(D), however, does not provide any specific information regarding who needs to be notified and when notification must be given. Moreover, although the section refers to "applicable requirements" and is capable of interpretation, no citation is made to any specific requirements (unlike the tank registration requirement of Section 22.18b(a)(4)). Recognizing this lack of specificity, the Board itself has recognized the linkage between Section 22.18b(d)(4) and the 24 hour ESDA notification requirement set forth 35 Ill. Adm. Code 731.150(a), a regulation that was derived from RCRA's financial assurance requirements via the Board's identical-in-substance rulemaking in R88-27, and that was effective on June 12, 1989. Pulitzer at 4. In addition, the legislature has amended Section 22.18b to specifically exclude remediation costs

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[1]It is important to note that the Board in Pulitzer never reached the general issue as to [1] whether pre-ESDA notification costs are reimbursable.

incurred prior to ESDA notification.[2] (HB-1741) Specifically, the legislature added the following language to the section:

> ...Costs of corrective action or indemnification incurred before providing that notification shall not be eligible for payment.

(See Rockford Drop Forge Co. v IEPA, No. 2-91-0342 slip op. at 12 (2d Dist 1991) citing State of Illinois v. Mikusch, 138 Ill. 2d 242, 252 (1990)).

It is evident from the record (i.e., North Suburban's application for reimbursement) that the Agency had all of the facts regarding North Suburban's ESDA notification at the outset of its review process. The Agency expressly determined that North Suburban was eligible for access to the Fund, as well as the various limitations on its eligibility and the reimbursability of costs, and communicated this information to North Suburban on October 25, 1990. In fact, the Agency's account technician, who discovered the ESDA notification issue, testified at hearing as follows:

> Q. Now, just turning back to what your present position is, you said is an account technician, what generally are the duties of an account technician?
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> A. In this particular case I reviewed billings and invoices in regards to leaking underground storage tank claims for reimbursement.
>
> Q. Okay. And is that the sole responsibility that you have?
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> A. Yes.
>
> * * *
>
> Q. Okay. How did you become aware of the application filed by North Suburban Development Corporation?
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> A. It came across my desk after the

[2]Subsequent to the hearing in this case, the Agency also amended its Fall 1991 LUST guidance manual to reflect the fact that pre-ESDA notification costs are not reimbursable. (Tr. 32-33; Reply Br. Ex. B - p. 21).

deductible amount and eligibility was determined.

(Tr. pp. 22-23 - Emphasis added).

For the account technician, whose duty it was to review billings and invoices, to determine for the first time that another entire class of costs (i.e. pre-ESDA notification costs) was unacceptable because it contradicts the formal determination that the Agency previously made and communicated to North Suburban. In other words, the Agency cannot "limit" and, in effect void or repudiate, its reimbursement determination at the tail end of its review process once it has already communicated some of the parameters of that determination to an applicant.

As for the Agency's assertion that it has "uniformly interpreted the Act and the regulations to require notification of ESDA within 24 hours of the discovery of a release" (Id. p. 6), I note that the above statement conflicts with the Agency's assertion 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." (Id. pp. 6, 7-8). Moreover, if the Agency has always considered pre-ESDA notification costs non-reimbursable, there is no reason why the Agency could not have promulgated its own regulations on the subject or enunciated its position in its guidance documents in order to place applicants on notice of its position at the outset of its reimbursement determination process. In fact, Section 22.18b(f) of the Act explicitly authorizes the Agency to "adopt reasonable and necessary rules for the administration of [the Fund]." Moreover, Section 3.09 of the Administrative Procedure Act, Ill. Rev. Stat. 1989, ch. 127, par. 1003.09, defines a "rule" as follows:

> "Rule" means each agency statement of general applicability that implements, applies, interprets, or prescribes law or policy, but does not include (a) statements concerning only the internal management of an agency and not affecting private rights or procedures available to persons or entities outside the agency, (b) informal advisory rulings... (c) intra-agency memoranda or (d) the prescription of standardized forms.

Notwithstanding the above, the Agency, at the very least, should have notified North Suburban at the outset of the review process of its determination regarding pre-ESDA notification costs. It did not, however. Specifically, the Agency, in its October 25, 1990 letter to North Suburban, approved North Suburban's application for reimbursement with only three caveats,

a $15,000 deductible, the non-reimbursability of costs incurred prior to July 28, 1989, and the $500 deduction for North Suburban's late tank registration. I do not see any distinction between these three caveats and the caveat regarding ESDA notification. In other words, once the Agency informs the applicant of some of the limits on its eligibility and on the amount of the costs that can be reimbursed (such as the deductible amount), it must inform the applicant of all of the limits on eligibility and reimbursability. The failure of the Agency to include this fourth caveat during its determination is unfair to say the least.

We also wish to emphasize that we are disturbed by the fact that the Agency never informed North Suburban of its stance on the pre-ESDA notification issue during its eleven month review process although it had all of the pertinent information necessary to decide this issue at the outset of the process and although it had numerous contacts with North Suburban (in person and via the telephone) throughout the process. (Pet. pp. 5-6; Ex. K; Stip of Facts pars. 56, 58, Ex. K - pars. 10, 12; Joint Ex. 2 pars. 56, 58, Ex. K - pars. 10, 12). Moreover, the Agency cannot expect North Suburban to have raised its concerns regarding the issue when the Agency itself did not document its position in either its October 25, 1990 letter or its 1989 or 1990 guidance documents (Tr. pp. 40-41; Stip of Facts Exs. L - pp. 10.4-10.5, M - pp. 14-3-14-4) and when the Agency's and Board's position regarding the interrelationship of Section 22.18b(d)(4)(D) and 35 Ill. Adm. Code 731.150 had not been publicized (see Pulitzer, PCB 90-142 (December 20, 1990)).

Accordingly, for the foregoing reasons, we believe that the Board should have reversed the Agency's determination regarding the non-reimbursability of costs incurred prior to North Suburban's notification of ESDA.

Joan G. Anderson

Michael L. Nardulli

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Dissenting Opinion was filed on the 21st day of January, 1992.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board