

ILLINOIS POLLUTION CONTROL BOARD
December 19, 1991

PAUL ROSMAN,)
)
 Petitioner,)
) PCB 91-80
 v.) (UST Reimbursement
) Determination)
)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

CONCURRING OPINION (by B. Forcade):

I respectfully concur with today's action. I agree with the outcome and with all of the reasons, with one minor exception. I believe the decision made in this case regarding statutory definitions of corrective action must be more clearly linked with statutory decisions regarding reimbursement or eligibility.

Specifically, the Act envisions the following two-step review process: 1) first, a review of the application to determine whether the applicant is eligible to access the Fund and what the appropriate deductible is pursuant to Section 22.18(b)(a) of the Act, and 2) a review of the costs pursuant to Section 22.18(b)(d)(4) of the Act. These two decision making processes are the only two contemplated under Section 22.18b of the Act, each decision is a final Agency action appealable to this Board and each decision has its own time line and burden of proof. If an Agency decision regarding statutory provisions is going to be reviewed by this Board, it must be specifically squeezed into one of those two decision making processes.

The provisions regarding eligibility (the first Agency decision) are found at Section 22.18b(a) of the Act, and those regarding reimbursement (the second Agency decision) are found at Section 22.18b(d)(4)(D). If the Agency fails to make the eligibility decision properly, it cannot revisit that decision when it determines reimbursement. See Pulitzer v. IEPA, PCB 90-142 (December 20, 1990). The two decisions are totally separate.

Notwithstanding these two decision making processes, the Act includes many prohibitions or limitations that affect the amount of money that a person may retrieve from the state regarding clean up. For example, the requested costs may not fit the statutory definition of corrective action in Section 22.18(e)(1)(C), as it the case here. Additional examples include that the requested corrective action costs may exceed statutory maximums stated in Sections 22.18b(b) or 22.18c(a). These "other" statutory limitations are not specifically connected in

the Act to either the eligibility decision or to the decision regarding reimbursement. If this Board is to connect those "other" factors with the two statutory decision making processes, it must use some theory. Hopefully, that theory would guide the Agency and future petitioners before this Board in the proper implementation of the law.

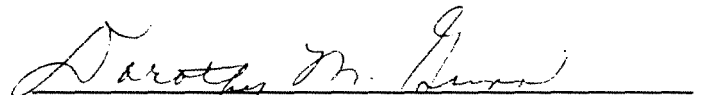
The only theory articulated by the majority for connecting the definition of "corrective action" with the reimbursement decision under Section 22.18b(d)(4)(D) is found on page 6 of that Opinion, "We find that a sufficient nexus exists between reasonable costs as articulated in Section 22.18b(d)(4)(C) and costs associated with corrective action." The majority does not explain what factors influence the sufficient nexus theory, nor do they explain how those factors favor connecting the definition of corrective action to the reimbursement determination rather than the determination on eligibility.

I believe the theory connecting these other statutory factors to either reimbursement decisions or eligibility decisions is the critical element of this case. Since I find the "sufficient nexus" theory inadequate to guide future developments in the law, I concur.



Bill S. Forcade
Board Member

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above Concurring Opinion was filed on the 23rd day of December, 1991.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board