ILLINOIS POLLUTION CONTROL BOARD
May 3, 2001

RIVERVIEW FS, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 97-226
	)	(UST– FRD)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
	)	
Respondent.		

BRYAN G. SELANDER APPEARED ON BEHALF OF PETITIONER, and

DANIEL P. MERRIMAN APPEARED ON BEHALF OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY.

OPINION AND ORDER OF THE BOARD (by M. McFawn):

On September 9, 1997, Riverview FS (Riverview or petitioner) filed a petition seeking review of an underground storage tank reimbursement determination issued by the Illinois Environmental Protection Agency (Agency). Petitioner seeks review of the Agency's partial denial of reimbursement from the Leaking Underground Storage Tank (LUST) Fund.

The Agency filed its administrative record, including its fiscal file on April 23, 1998. A hearing was held in South Beloit, Illinois on December 5, 2000. Petitioner presented one witness, Mr. Stan Tobias, the current general manager of Riverview. The Agency presented three witnesses: the manager of the LUST Claims Unit, a former claims reviewer who reviewed Riverview's petition, and the field inspector familiar with the Riverview FS LUST removal. Petitioner filed a posthearing brief on January 12, 2001. The Agency did not file a posthearing brief. After reviewing the record and petitioner's brief, the Board finds that Riverview's legal arguments are not persuasive, and affirms the Agency's partial denial of Riverview's LUST Fund reimbursement application.

FACTS

The facts of this case are simple, and not in dispute. In 1992, petitioner removed two underground storage tanks (USTs) from its site on Meridian Road in Rockford, Winnebago County, Illinois. Riverview retained Mankoff Equipment to remove the USTs, and Terra Nova Research to provide technical oversight. Riverview and its contractors completed all work related to this project by July 31, 1994. R.F. at 82, 85.[1]

[1] The administrative record, fiscal file, will be referred to as "R.F. at __."

On January 30, 1996, Riverview submitted an application for reimbursement from the LUST Fund. The application sought reimbursement of $159,577.18 in costs incurred by petitioner in remediation activities. R.F. at 11-20. The Agency issued its final determination of the application in a letter dated May 12, 1997. R.F. at 91-92. In that letter, the Agency stated that $89,344.58 of the costs submitted for reimbursement were eligible for reimbursement, and that $60,232.60 were not eligible.[2] The Agency provided the following three part justification for denying the $60,232.60:

> 1) A deduction of $954 from the amount paid to Mankoff Equipment for BETX samples. The Agency stated that this deduction was made because petitioner failed to demonstrate that these costs were reasonable, citing Section 22.18b(d) 4(C) of the Act. 415 ILCS 5/22.18(b) (1992)
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> 2) A deduction of $58,679.10 from the total amount paid to Mankoff Equipment for soil excavation and removal of contaminated soils, and additional BETX samples. The Agency stated that this deduction was made because petitioner did not provide supporting documentation, and failed to demonstrate that these costs were reasonable, citing again Section 22.18b(d)4(C) of the Act. 415 ILCS 5/22.18(b) (1992)
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> 3) A deduction of $599.50 from the total amount paid to Terra Nova Research for costs associated with seeking reimbursement from the UST Fund, citing Section 22.18(b)(d)4(C) of the Act. 415 ILCS 5/22.18(b) (1992).

Essentially, Riverview only contests the deductions made by the Agency identified in items 1 and 2 above. Those deductions involve the reimbursement Riverview sought for the BETX sampling and the excavation and removal of contaminated soil. The Agency did partially reimburse petitioner the portion of those costs it found to be reasonable. Riverview did not address the deduction listed in item (3) at hearing, or in its posthearing brief.

At hearing, Mr. Tobias testified that Mankoff Equipment was no longer in business. Tr. at 15.[3] Mr. Tobias also testified that he was "at" Riverview only after January 26, 1996, and that he was not aware of any contact from the Agency until he received that Agency's letter of May 12, 1997. See R.F. at 91-92; Tr. at 16-17. Mr. Tobias also testified that Terra Nova was hired by Riverview to oversee the UST removal project. Tr. at 19.

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[2] The remaining $10,000 of the costs for which petitioner applied for reimbursement were deducted by the Agency pursuant to Section 22.18b(d)(3)(A) of the Act (415 ILCS 5/22.18b(d)(3)(A) (1992)).

[3] The transcript for the December 5, 2000 hearing will be referred to as "Tr. at __."

STATUTORY BACKGROUND

Prior to 1993, Section 22.18b of the Act governed eligibility for reimbursement from the LUST Fund. 415 ILCS 5/22.18b (1993). Section 22.18b(d)(4)(C) required, in pertinent part, an owner or operator seeking reimbursement to provide an accounting of all costs, demonstrate that the costs incurred were reasonable, and that the "accounting of those costs shall be provided to the Agency on a time and materials cost basis (or other Agency approved accounting methods) . . . ." 415 ILCS 5/22.18b(d)(4)(C) (1993). No time limit was placed on the Agency's review of petitions received under this section.

In 1993, the General Assembly amended the Act regarding LUST Fund reimbursement applications and determinations. The amendments repealed Section 22.18b, and enacted new Title XVI, including Sections 57.8 and 57.13. Notable among the new requirements is a 120-day determination period imposed on the Agency by Section 57.8(a)(1). 415 ILCS 5/57.8(a)(1) (1998).

However, the General Assembly also provided specific instruction as to how removals that bridged the transition from old Section 22.18b to new Section 57.8 were to proceed. Section 57.13 states that releases reported to the State after the effective date, which was September 13, 1993, of the amendments would proceed under the new Title XVI. 415 ILCS 5/57.13(a) (1998). Releases reported prior to that effective date could elect to proceed under the requirements of new Title XVI by submitting a written statement of such election to the Agency. 415 ILCS 5.57.13(b) (1998). Absent a written statement of election, however, removals and subsequent reimbursements would continue to proceed under the requirements of Section 22.18b.

CONTESTED ISSUES

The facts are not at issue, and petitioner does not argue that the Agency's determination was unreasonable. Rather, in its brief, petitioner frames the issue as: "Can the IEPA reduce a reimbursement request based on a lack of supporting documentation or failure of the owner to demonstrate cost reasonableness when the Agency failed to address the claim for one year and four months?" Br. at 2.[4] Petitioner then articulates in its brief the two legal challenges it is making concerning the Agency's determination. First, petitioner argues that the Agency was required to comply with the 120 day review limit contained in Section 57.8(a)(1) of the Act (415 ILCS 5/57.8(a)(1)(1998)). Second, petitioner argues that, if the 120-day review period is not applicable, the Agency should be barred from reducing the reimbursement based on the Agency's delay in processing the application, on the grounds that the equitable doctrine of *laches* is applicable.

[4] Petitioner's posthearing brief, filed with the Board on January 12, 2001, will be referred to as "Br. at __." The Agency did not file a posthearing brief.

The Agency did not file a posthearing brief or reply. Counsel for the Agency did address at hearing its legal arguments. First, the Agency argued that the 120-day review period for Title XVI claims is not applicable, and that Section 22.18b(d)(4)(C) is applicable. Tr. at 9. Second, the Agency argued that the standard for reimbursement in this case is that set out at former Section 22.18b(d)4(C) of the Act. That is, that the Agency could only reimburse reasonable costs for corrective action provided they are adequately documented, and that adequate documentation under that former provision of the Act is a breakdown for costs on a time and material basis or some other documentation that the Agency was aware of. Tr. at 9-11. In its closing argument, the Agency's counsel also argued that the because of the substantial period of time between the completion of the work in June or July of 1994 and the claim being submitted in January 1996, it is difficult to determine why Riverview could not come up with the necessary documentation from its contractor. Tr. at 102.

PETITIONER'S ARGUMENTS & BOARD ANALYSIS

120-Day Review Period

Petitioner's first argument is that the Agency exceeded the statutory review period of 120 days found in Section 57.8(a)(1) of the Act (415 ILCS 5/57.8(a)(1)(1998)). The Board disagrees. The 120-day time restriction was added to the Act in 1993 when Title XVI was adopted. Adopted at the same time was Section 57.13, a provision which governs releases from leaking USTs which predate these amendments. Section 57.13 is intended to allow those UST incidents to bridge the effective date of the amendments. The effective date of these amendments was September 13, 1993.

The release and removal of the two underground tanks from the Riverview site occurred in 1992. Absent a written statement from petitioner electing to proceed under Section 57.13(b), petitioner's reimbursement application is by law subject to the former provisions of the Act pertaining to LUST, *i.e.*, Section 22.18b. Petitioner does not claim that it submitted any request to the Agency to proceed under the new Title XVI, and the record does not contain any such request. Therefore, the Agency was under no statutorily authority to proceed under Title XVI of the Act when reviewing this reimbursement application. Therefore, the 120-day review period applicable to Title XVI applications does not apply to Riverview's application. Instead, the provisions at Section 22.18b of the Act govern the Agency's review of this application. See 415 ILCS 5/22.18b (1992)

Laches

Petitioner also argues that the equitable doctrine of *laches* precludes the Agency from reaching its determination on the basis of inadequate information. Specifically, petitioner states that the Agency's delay in processing the application "significantly harmed Riverview's ability to document or further justify the costs it incurred in remediation." Br. at 4.

"*Laches* is an equitable doctrine which precludes the assertion of a claim by a litigant whose unreasonable delay in raising that claim has prejudiced the opposing party." Tully v.

Illinois, 143 Ill. 2d 425, 432, 574 N.E. 2d 659, 662 (1991); see also City of Rochelle v. Suski, 206 Ill. App. 3d 497, 501, 564 N.E. 2d 933, 936 (2d Dist. 1990). *Laches* is based on the notion that courts will not readily come to the aid of a party who has "slept on his rights to the detriment of the opposing party." Tully, 143 Ill. 2d at 432, 574 N.E. 2d at 662.

The application of *laches* to government is generally disfavored. The Illinois Supreme Court has held that *laches* will not be applied to the State "in its governmental, public, or sovereign capacity," and that it can not be applied to the State in "the exercise of its police powers or in its power of taxation or the collection of revenue." Hickey v. Illinois Central Railroad Co., 35 Ill. 2d 427, 448, 220 N.E. 2d 415, 426 (1966) (citations omitted). However, the State does not have "absolute immunity" from *laches*. *Id*. The doctrine may be applied when the State is "acting in a proprietary, as distinguished from its sovereign or governmental capacity . . . and even, under more compelling circumstances, when acting in its governmental capacity." *Id*. (citations omitted). Additionally, the Court stated that "mere nonaction of governmental officers is not sufficient to work an estoppel . . . there must have been some positive acts by the officials which may have induced the action of the adverse party . . . ." *Id*. See also Van Milligan v. Board of Fire and Police Commissioners, 158 Ill. 2d 85, 630 N.E. 2d 830 (1994); People v. ESG Watts (February 5, 1998), PCB 96-107, slip. op at 7; People v. Bigelow Group, Inc. (January 8, 1998), PCB 97-217, slip op. at 2.

To successfully allege *laches*, Riverview must show (1) that the Agency exhibited a lack of due diligence and (2) that it was prejudiced as a result of the delay. Tully, 143 Ill. 2d at 432, 574 N.E. 2d at 662; Van Milligan, 158 Ill. 2d at 89, 630 N.E. 2d at 833.

Petitioner argues that *laches* applies because the Agency took a year and four months to respond to the application. Riverview claims that it was prejudiced by this delay in that its contractor, Mankoff Equipment, went out of business, thus preventing Riverview from accessing the information it would need to respond to the Agency's determination.

The Board disagrees for several reasons. First, the facts of this case do not demonstrate that the Agency's review exhibited a lack of due diligence. Under the applicable law, the Agency had no statutory time limit within which it was required to review the application. The Agency did acknowledge at hearing that, because of the added pressure placed on Agency resources to complete review of new applications under the 1993 Title XVI amendments, pending applications suffered "a bit in the time of their processing because of the legislative commitment." Tr. at 35. However, petitioner has not presented any evidence to suggest that the 16 month review period in this case was substantially longer than like cases.

In addition, the time taken by the Agency to respond to petitioner's application is comparable to the time Riverview took to submit its reimbursement application. The USTs were removed in 1992. All of the activities included in the application were completed no later than July 31, 1994. Yet, petitioner submitted its application on January 30, 1996, one year and six months after all the work was completed. Petitioner has presented no evidence as to why an amount of time comparable to that taken to submit the application is not a reasonable amount of time for the Agency to review that application.

Furthermore, petitioner has not presented a compelling case that it was prejudiced as a result of the time the Agency took in reviewing the application. Nothing in the record identifies when Mankoff Equipment ceased operations. The total time between completion of Riverview's activities was over three years, nearly equally attributable to both petitioner and the Agency. Even if petitioner had demonstrated that the Agency failed to exhibit due diligence in its review, petitioner has failed to demonstrate that any prejudice it may have suffered was due to delay solely attributable to the Agency. We note that at hearing, petitioner only presented testimony that it was unable to contact Mankoff Equipment. Tr. at 14-15. Petitioner did not present any evidence about its efforts to contact Terra Nova Research, its oversight contractor, about the necessary documentation..

Finally, the record contains no evidence that Riverview relied to its detriment upon some positive act of the Agency. The then applicable Section 22.18b of the Act required that requests for reimbursement from the LUST Fund include a demonstration "that the costs incurred to perform the corrective action were reasonable," and that such accounting "be provided on a time and materials cost basis . . . ." 415 ILCS 5/22.18b(d)(4)(C) (1992). Section 22.18b placed the burden upon petitioner to submit a complete application, and identified the format the information needed to be in for the Agency to render a determination on the application.

As the Board finds that Riverview has failed to establish the basic elements of *laches*, there is no need to examine whether the Agency was acting in a sovereign or governmental capacity, as opposed to a proprietary capacity. The Board will not address the question of whether the facts of this case would reach such compelling circumstances as would allow the doctrine of *laches* to apply to a government agency.

CONCLUSION

Riverview's application did not contain the documentation required for the Agency to determine that the $60,232.60 in dispute were reasonable costs. Furthermore, petitioner has not persuaded the Board that the Agency's determination violated any statutory requirement or equitable law. The Board finds that the 120-day review limit contained in Section 57.8(a)(1) of the Act is not applicable, and that Riverview failed to show that the equitable doctrine of *laches* is applicable in this case. Therefore, the Board finds in favor of the Agency's determination that $60,232.60 of Riverview's claimed costs were not eligible for reimbursement because Riverview failed to demonstrate with adequate documentation that those costs as reasonable with adequate documentation.

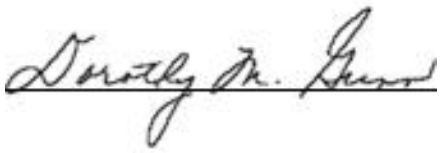
ORDER

As set forth above, the Board affirms the Agency's determination that $60,232.60 of Riverview's claimed costs were not eligible for reimbursement.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/24 (1998)) provides for the appeal of final Board orders to the Illinois Appellate Court within 35 days of service of this order. Illinois Supreme Court Rule 335 establishes such filing requirements. See 172 Ill. 3d R. 335; see also 35 Ill. Adm. Code 101.520, Motions for Reconsideration.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 3rd day of May 2001 by a vote of 7-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board