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NO.
STATE OF NEBRASKA
OFFICIAL
OCT 27 1995
DEPT. OF JUSTICE

DATE: October 25, 1995

SUBJECT: Reimbursement Payments Under the Petroleum Release Remedial Action Act, Neb. Rev. Stat. §§ 66-1501 to 66-1530

REQUESTED BY: Senator Curt Bromm
Nebraska State Legislature

WRITTEN BY: Don Stenberg, Attorney General
Timothy J. Texel, Assistant Attorney General

You have requested the opinion of this office on a number of questions which relate to reimbursement payments pursuant to the Petroleum Remedial Action Act ("the Act"), set out in Neb. Rev. Stat. §§ 66-1501 to 66-1530.

Nebraska Rev. Stat. § 66-1519 (Cum. Supp. 1994) created the Petroleum Release Remedial Action Cash Fund ("the Fund"). The Fund's purpose is to create a cash reserve from which those parties responsible for undertaking actions to remedy petroleum released from storage tanks into the environment can be reimbursed for some of their costs. Under the Act, the Nebraska Department of Revenue is responsible for collecting the fees imposed on sales of motor vehicle fuels and other petroleum. Pursuant to Neb. Rev. Stat. § 66-1519, the Department of Environmental Quality ("the Department") is charged with administering the provisions of the Act. Title 200 NAC 1-7, entitled "Rules and Regulations for Petroleum Release Remedial Action Reimbursement Fund," sets out the Department's rules for implementation of the program. They are promulgated by the Nebraska Environmental Quality Council pursuant to Neb. Rev. Stat. § 66-1518 (Cum. Supp. 1994).

The following headings set out the questions posed in opinion request.

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1) What is the liability or responsibility of the State of Nebraska if approved work has been completed, an application has been submitted for payment, and there is not sufficient monies in the Petroleum Release Remedial Action Cash Fund to effect reimbursement?

When addressing liability or responsibility, we assume the question relates to any obligations the State may incur with regard to parties responsible for conducting remedial actions. Two statutory sections within the Act specifically address the issue presented above. Nebraska Rev. Stat. § 66-1523(4) (Cum. Supp. 1994) states:

> (4) If the fund is insufficient for any reason to reimburse the amount set forth in this section, the maximum amount that the fund shall be required to reimburse is the amount in the fund. If reimbursements approved by the department exceed the amount in the fund, reimbursements shall be made in the order in which the applications for them were received by the department.

Nebraska Rev. Stat. § 66-1524 (1990) states:

> The State of Nebraska shall not be liable for any reimbursement under the Petroleum Release Remedial Action Act in the event that the fund is insufficient to reimburse the amount set forth in section 66-1523.3)

These two statutory provisions show that it is the Fund itself which incurs an obligation to pay approved reimbursement requests, not the State of Nebraska. Based on the language in these statutes, it is our opinion that the State of Nebraska does not incur any financial liability to pay reimbursement funds to owners of petroleum storage tanks who have completed approved remedial projects, have submitted an application for payment, but are not immediately paid due to insufficient money being present in the Fund.

2) Under the [facts presented in question 1], what is the responsibility of the State with respect to interest on the unpaid monies? Are the persons requesting reimbursement entitled to interest, and if so, from what date and at what rate?

Addressing the above questions in reverse order, we do not find sufficient evidence to indicate applicants for reimbursement would be entitled to interest payments when the Fund does not have a sufficient balance to pay requested reimbursements.

The Department has taken the position that interest is owed to those responsible parties who submitted applications for reimbursement prior to August 14, 1995, but have not yet been

reimbursed. August 14, 1995, is the date the Fund's balance became insufficient to pay the applications for reimbursement. The Department has paid interest on those claims filed prior to August 14 based on the Nebraska Prompt Payment Act, Neb. Rev. Stat. §§ 81-2401 to 81-2408. The Prompt Payment Act requires state agencies to provide payment in full on or before the forty-fifth day after submitting a bill for goods or services, or sixty days after submitting a bill for goods or services provided for third parties. After not receiving payment within the required time, creditors are allowed to charge interest on the unpaid principal balance beginning on the thirty-first day after the agency receives the bill or the goods, whichever is later. The Department believes remedial work to correct petroleum releases constitutes services for a third party, which require payment within sixty days under the Prompt Payment Act.

Under the Department's analysis, the request for reimbursement constitutes a "bill," which the Fund is obligated to pay. The Department believes that since the Fund had a sufficient balance prior to August 14, 1995, with which to pay claims, the Fund was obligated to pay reimbursement "bills" prior to that date. The "service" rendered is the work remedying the petroleum release, performed by either the responsible party or the contractor actually performing the work. Therefore, the Department has paid interest on unpaid applications submitted prior to August 14, 1995. The Department believes that no interest is due for unpaid reimbursements submitted after August 14, as the Fund's liability is limited to the amount in the Fund. Since there is no liability for the principal once the Fund becomes insufficient, there is no liability to pay interest on the principal. Applications for reimbursement which are being paid now were submitted approximately six months ago. The Department anticipates the wait period for reimbursement to continue to increase.

Although the Prompt Payment Act requires timely payments, and in the alternative allows creditors to charge interest, we do not believe applicants for reimbursement payments under the Petroleum Remedial Action Act meet the criteria set out in the Prompt Payment Act.

To be a "creditor" under the Prompt Payment Act, one must provide goods or services to an agency. Applicants for reimbursement do not provide the Department of Environmental Quality or any other state agency with goods or services. The reimbursement is for money applicants expend on repairs and clean up of petroleum contamination on their own property. The language of the Prompt Payment Act deals exclusively with goods or services provided to agencies. There are no provisions for situations such as are presented with payments under the Petroleum Remedial Action Act.

Also, the Act contains no language indicating that interest is to be paid to applicants for reimbursement. If the Legislature had intended for interest to be paid as a separate amount, or as part of the reimbursement itself, language to that effect could have easily been included in the Act. The absence of such language provides evidence that interest payments were not a cost the Legislature intended the Fund to repay. Further support for this position can be drawn from the fact that reimbursement for actions taken which remedy environmental contamination is a debt created entirely by statute, and payment of interest was not included.

Prior to passage of the Act and creation of the Fund in 1989, owners or operators of leaking petroleum tanks could be and were made responsible for remedial actions without any reimbursement under the Nebraska Petroleum Products and Hazardous Substances Storage and Handling Act, set out at Neb. Rev. Stat. §§ 81-15,117 to 81-15,127. Nebraska Rev. Stat. § 81-15,124(3) (1987) stated, "The approved recovery plan shall then be carried out by the owner or operator of the tank causing the release. **All expenses incurred during the cleanup and recovery shall be paid by the owner or operator.**" (emphasis added). In 1989 the Legislature passed the Petroleum Release Remedial Action Act and created the Fund for the reasons stated in Neb. Rev. Stat. § 66-1502 (1990), including easing the financial burden on responsible parties in order to promote remedial actions. Section 81-15,124(3) was amended to reflect that owners or operators are responsible for remedial action costs, subject to reimbursement from the Fund.

The fact remains that the financial obligation for reimbursements was created by the Legislature and assumed by the Fund only through the charter created in the Act. Without being granted the specific authority to pay interest, the Fund may be incurring a debt without authorization from the Legislature. Under the Petroleum Remedial Action Act, the Department is merely charged with administration of the Fund. The Nebraska Supreme Court has held in numerous cases that administrative agencies cannot use their rule-making or interpretive power to modify, alter, or enlarge provisions of statutes which they are charged with administering. ***Clemens v. Harvey***, 247 Neb. 77, 525 N.W.2d 185 (1994); ***State ex rel. Spire v. Stodola***, 228 Neb. 107, 421 N.W.2d 436 (1988); ***Beatrice Manor, Inc. v. Dept. of Health***, 219 Neb. 141, 362 N.W.2d 45 (1985); ***Dodge County v. Dept. of Health***, 218 Neb. 346, 355 N.W.2d 775 (1984). We therefore do not believe applicants for reimbursement are entitled to interest on unpaid money.

Assuming a court did uphold the Department's position and held interest to be due, we will address from what date and at what rate interest would be due. First, if interest were to be held due, it appears clear that the Fund itself would be the debtor, not the State or the Department. Under the Prompt Payment Act, if the agency incurring a debt provides payment for the goods or services provided for third parties within sixty days of receipt of the

bill, no interest is due. *See* Neb. Rev. Stat. § 81-2403(2) (1994). If payment is not submitted within sixty calendar days of receiving the bill, the creditor is allowed to charge the agency interest on the unpaid principal balance at the rate specified in Neb. Rev. Stat. § 45-104.02 (1993). *See* Neb. Rev. Stat. § 81-2404 (1994). Interest begins accruing on the thirty-first calendar day after receipt of the bill, or presumably here, the complete application. *Id.*

Turning to the issue of the State's responsibility with respect to interest, the Petroleum Remedial Action Act does not specifically address the issue of the State's liability or lack thereof for interest on unpaid monies. However, §§ 66-1524 and 66-1523(4) could be read to mean that the State was intended to be completely insulated from incurring obligations related to reimbursements under the Act. The language in § 66-1524 appears to be couched in terms of a complete protection from liability on the part of the State of Nebraska. Obligations incurred as a result of a lack of funds are directly and closely related to the reimbursement funds themselves. As such, we believe that the language in §§ 66-1524 and 66-1523(4) written in broad terms, was intended to protect the State from liability should the Fund not have sufficient money to pay reimbursement claims. As such, if applicants for reimbursements were to be owed interest on unpaid sums, the Act contemplates that the Fund, not the State, would be obligated to pay any interest caused by late payments. As the State cannot be held responsible for payments of the principal in reimbursement payments, we find no evidence indicating the State would be liable for interest for late payments of that principal. Although not determinative, we note that the Department also takes the position that the Fund, not the State, would be obligated to pay any interest payments caused by late reimbursements.

3) Can the Department utilize funds from the Petroleum Release Cash Fund for reimbursement for work completed subsequent to the date upon which an unpaid application is received by the Department?[1]

After submitting an application for reimbursement, the only mechanism through which a party responsible for a leaking petroleum tank could perform further remedial action work and receive reimbursement would be to initiate an entirely new application for approval and reimbursement. The procedure for reimbursement under the Act is for work which has been completed. Therefore, any work performed subsequent to completion of a project and submission of an application for reimbursement would constitute a second project. The Act does not provide a process for reimbursing parties subsequent to completion of an approved remedial action. The

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[1] Paragraph three of the opinion request contains three questions, which we will address separately, in consecutive order.

Department would therefore not have the authority to reimburse parties for work performed after a remedial action is completed and the Department has received an application for reimbursement for the approved project. The party responsible for the tank would be required to go through an entirely new remedial action reimbursement process for the subsequent work.

The only means by which parties can be paid in a method other than the full reimbursement after the remedial actions are completed is through partial payments after completion of each different stage involved in the remedial action process. Partial reimbursement payments are allowed under Neb. Rev. Stat. §§ 66-1525(1) and 66-1523(3) (Cum. Supp. 1994) and 200 NAC 2, para. 005. The stages after which partial payments are allowed are set out in 200 NAC 2, para. 005.02. However, if the responsible person does not complete the entire remedial action project, he or she must reimburse the Fund for the total amount of partial reimbursements received. *See* Neb. Rev. Stat. § 66-1527 (1990) and 200 NAC 2, para. 005.01. The partial payments are essentially an advance on the final reimbursement. They are made prior to completion of the remedial action and application for reimbursement. We do not believe partial payments affects the conclusion that responsible parties must submit a new application for work after the initial remedial action is completed and the Department has received an application for reimbursement.

Does the requirement that "reimbursement shall be made in the order in which the applications for them were received" apply only if the reimbursements approved by the Department exceed the amount in the Fund?

We believe the priority system for reimbursements according to the order in which they were received does apply only when the reimbursements approved by the Department exceeds the money available in the Fund.

Pursuant to § 66-1523(4), the provision whereby reimbursements are prioritized according to the order in which applications are received comes into effect only when the approved reimbursements exceed the amount in the Fund. Section 66-1523(4), in pertinent part, states: "If reimbursements approved by the department exceed the amount in the fund, reimbursements shall be made in the order in which the applications for them were received by the department." Very similar language appears in the Department's rules and regulations. Title 200 NAC 2, para. 004.03 states: "If the Department approves reimbursements in excess of the amount in the fund, the department shall make reimbursements in the order in which the complete applications were stamped . . . ."

Title 200 NAC 2, para. 004, sets out the Department's procedures regarding acceptance and chronological ordering of applications. In order for an application to be considered

received by the Department, the application must contain all information required by the Department. If all necessary information has been provided with the application, it is date and time stamped upon receipt. If required information is missing, the applicant must resubmit the application. The application will be date and time stamped at the time of resubmission.

The language in both the statute and the regulations condition chronological prioritization of reimbursement payments upon the Fund having an insufficient amount to pay approved applications. It therefore appears clear that the Fund's having an insufficient balance and the applications involved are all approved applications are prerequisites to beginning the process of paying reimbursements according to their order of submission.

Does the Department have any flexibility, once reimbursements approved exceed the amount in the Fund, to utilize the Fund in any manner inconsistent with subsection (4) of 66-1523?

At the outset of the third section of your opinion, you cited to the second sentence in § 66-1523(4). As that is the part of the Act which requires that reimbursements be paid in the same order in which they are submitted, we understand your question to be primarily concerned with that requirement. The Department believes the Act provides it with the authority to pay reimbursements in a method different than the order of submission under certain circumstances. We agree with the Department's interpretation of the Act.

As we understand it, the number of approved reimbursement requests grew to the point where it became clear the Fund would not have a sufficient balance and income to allow timely payment of the requests. As a result, in April, 1995, the Department sent a letter to parties responsible for petroleum releases that the Department was temporarily suspending remediation actions as of April 28, 1995. An exception was created for those sites determined to pose imminent health or safety risks, at which work was to continue. There are approximately 700 sites where remediation was temporarily suspended, while sixty-seven sites were determined to pose sufficient risks to human health or the environment to require continuation of their remediation projects. Non-emergency sites are contacted and allowed to begin work again as funds became available.

The Department determined that the sites presenting emergency situations were to be paid at least partial payments, even though the application may not have been the next in line for payment according to its date and time stamp. The Department based its decision on a provision in the Act allowing the Department to intervene in situations when immediate remedial action is believed necessary to protect public safety or the environment. The

Department interpreted the emergency provisions in the Act as providing an exception to the chronological order requirement for reimbursements in § 66-1523(4). The statute involved states:

> **Remedial actions by the department; third party claims; recovery of expenses.** (1) The department may undertake remedial actions in response to a release first reported after July 17, 1983, and on or before December 31, 1998, with money available in the fund if:
>
> (a) The responsible person cannot be identified or located;
>
> (b) An identified responsible person cannot or will not comply with the remedial action requirements; or
>
> (c) Immediate remedial action is necessary, as determined by the Director of Environmental Quality, to protect human health or the environment.

Neb. Rev. Stat. § 66-1529.02(1) (Cum. Supp. 1994) (emphasis in original).

The Department's rules and regulations, promulgated by the Environmental Quality Council, mirror the Act's provisions. Title 200 NAC 2, para. 004.03, states:

> 004.03 If the department approves reimbursements in excess of the amount in the fund, the department shall make reimbursements in the order in which the complete applications were stamped according to 004.02 of this chapter.

Virtually identical language to that in § 66-1529.02(1) appears in the Department's rules and regulations at 200 NAC 6, para. 001. That provision of the rules and regulations states, in pertinent part:

> 001 Remedial Actions. The department may undertake remedial actions in response to a release first reported after July 17, 1983, with money available in the fund, provided:
>
> > 001.03 Immediate remedial action is necessary, as determined by the director of the department, to protect human health or the environment.

The Department interprets § 66-1529.02(1) as authorizing suspension of the chronological reimbursement provisions in § 66-1523(4) due to the emergency nature of the actions. We understand the Department's position to be that, under § 66-1529.02(1), after

a site has been determined to pose a danger to public safety or the environment, the Department takes constructive control over the remediation action project for the site. The same responsible party or contractor engaged in remediation efforts continues to operate the project in order to prevent loss of time and expense.

In the Department's past experiences in the area of remedial actions for petroleum releases, the Department had found many of the parties responsible for the releases, especially corporate entities, would simply go out of business and abandon the property rather than incur the costs of remediation without assistance. According to the Act's statement of purpose, set forth in § 66-1502, the Act was intended to address that very concern, among others. Section 66-1502(2) states, "[O]wners of petroleum tanks may not have the ability to assess and clean up any releases from those petroleum tanks." Section 66-1502(3) states, "It is essential in this state to encourage owners of petroleum tanks across the state to remain in business to maintain the viability of the [petroleum] distribution network."

If the Department were required to wait to undertake emergency remedial actions until the responsible parties abandoned their sites due to financial considerations, the public's health and safety and the environment would be exposed to potentially serious hazards. The Department would have to hire new contractors and develop a work plan for the remedial project. The resulting time delay would, at least in some circumstances, allow a release already determined to present a danger to human health or the environment, to intensify. Section 66-1502 (1990) explains one purpose for the Act is to address the "serious threat to the health and safety of citizens because petroleum contained in leaking storage tanks is a potential land and ground water contaminant and major fire and explosive hazard." Neb. Rev. Stat. § 66-1502(2).

The Department's interpretation harmonizes the conflict which arises from the reimbursement order required in § 66-1523(4), and the ability to take immediate action to protect human health or the environment expressed in §§ 66-1529.02 and 66-1502(2). The Nebraska Supreme Court has held that when dealing with a series of statutes on a particular subject, the statutes "may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of an act are consistent, harmonious, and sensible." ***Omaha Public Power Dist. v. Nebraska Dept. of Revenue***, 248 Neb. 518, 530, (Sept. 8, 1995), citing to ***Fecht v. The Bunnell Co.***, 243 Neb. 1, 497 N.W.2d 50 (1993). In this case, the Act's purpose has been provided in § 66-1502. If the requirements set out in § 66-1523(4) were read in isolation, the stated purposes and objectives of the Act could be frustrated. When construing a statute, the statute's purpose must be taken into consideration, and the statute is to be given a reasonable construction which best achieves that purpose, rather than a construction which would defeat it. ***Omaha Public Power***

Dist. v. Nebraska Dept. of Revenue, 248 Neb. 518, 530 (Sept. 8, 1995).

The Nebraska Supreme Court has also held that an administrative agency's interpretation or construction of a statute over which it has enforcement authority, although not controlling, is to be given considerable weight. *McCaul v. American Savings Co.*, 213 Neb. 841, 331 N.W.2d 795 (1983), *Omaha Public Power Dist. v. Nebraska Dept. of Revenue*, 248 Neb. 518 (Sept. 8, 1995). In a similar vein, the Court has also recognized that "the method and manner of enforcing a law must of necessity be left to the reasonable discretion of administrative officers." *Bartlett v. State Real Estate Comm'n*, 188 Neb. 828, 831, 199 N.W.2d 709, 712 (1972).

Although we agree with the Department's interpretation and believe it is a reasonable reading of the statutes, necessary to harmonize the discrepancy between § 66-1523(4) and 200 NAC 2, para. 004.03, and the provisions in § 66-1529.02(1) and 200 NAC 6, para. 001, it is not clear how this matter would be resolved by the courts if litigation were instituted in this matter. This discrepancy is an area which the Legislature may want to address in order to clarify the Act's provisions.

4) Does the State have any responsibility for damages incurred by either the responsible parties or third parties for the discontinuation of continued remedial action with respect to contaminated sites?

The temporary suspension of remedial work projects may present the potential for State liability for damages incurred due to petroleum leaks. The potential for liability may not be much greater than that presented simply by the State's involvement in the remedial action area through the Act. If a responsible party or a third party could provide sufficient evidence to show the State had acted negligently, however, the State may potentially face liability for such actions or inactions. Anticipating the outcome in this area is difficult due to the myriad of possibilities which could be imagined.

We believe it is important to consider that the Fund provides reimbursement for remedial activities, and only those third-party claims where the responsible party cannot or will not pay the third-party claim. *See* Neb. Rev. Stat. § 66-1529.02(2) (Cum. Supp. 1994). The parties who own the leaking petroleum tanks are the owners or operators of the tanks and the property on which they are located. We see no reason to believe that primary liability for activities occurring on the property would not remain with those responsible parties. Also, as was pointed out in the Department's letter to responsible parties (a copy of which you provided with your opinion request), responsible parties are free to continue their remediation activities, with the understanding that the costs

incurred after April 28, 1995, will not be eligible for reimbursement.

The possibility for the State incurring liability may increase with the prioritization of certain sites as constituting threats to public health or the environment. If activity is suspended at a site later determined to have posed a danger to public health, it is possible a responsible party or third party could attempt to hold the State liable for failure to declare the site as posing such a risk and making the site a priority for reimbursement.

However, in attempting to assess the situation, it should be remembered that the Department bases its decision regarding emergency situations on the information available to it. The Department's decisions are based primarily on the information provided to the Department in the responsible parties' initial work plan, research, and investigation reports. The owner or operator or his or her contractor is responsible for conducting a thorough investigation so as to provide the Department with the necessary facts on which to base an informed decision.

Sincerely,

DON STENBERG
Attorney General

Timothy J. Texel
Assistant Attorney General

08-05-14.op

cc: Patrick J. O'Donnell
Clerk of the Legislature

Approved:

Attorney General