

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

MERRIMACK, SS.

03-C-0550

STATE OF NEW HAMPSHIRE

v.

HESS CORPORATION, ET AL.

ORDER ON PLAINTIFF'S MOTION
TO DISMISS DEFENDANTS' COUNTERCLAIMS
[INDEX #248]

The State of New Hampshire ("the State") moves to dismiss the defendants' counterclaims asserting that: (1) the Court lacks jurisdiction to hear the counterclaims; (2) the defendants fail to state a claim upon which relief could be granted; (3) the claims fail as a matter of law; and (4) the claims are not ripe for review. The defendants object. Upon review of the parties' submissions, their arguments, and the applicable law, the Court enters the following findings and orders.

The Court would note that the general background of this case has been outlined by the Court in earlier orders. For ease of reference, that description is set forth again.¹

Methyl tertiary butyl ether ("MTBE") is a chemical compound that has been used as a gasoline additive to increase octane levels of the fuel. In 1990, the United States Congress amended the Clean Air Act and established the reformulated gasoline ("RFG") program to reduce vehicle-related air pollution. The RFG program set the specifications for formulating gasoline sold in certain metropolitan areas with high levels of summertime ozone ("smog") levels. The RFG program did not mandate that gasoline manufacturers utilize MTBE or any other specific oxygenate in reformulating the gasoline. Rather, the decision on which oxygenate to use was left to the individual refiners.

Although not required to take part in the RFG program, New Hampshire applied to the United States Environmental Protection Agency ("EPA") to "opt-in" to the program. In 1991, the EPA accepted New Hampshire's application with respect to the state's four southern-most counties- Rockingham, Hillsborough, Merrimack and Strafford- effective January 1, 1995. Between 1995 and 2006, gasoline with MTBE was sold throughout the state. During this time, gasoline containing MTBE is said by the State to have escaped into groundwater, thereby contaminating the groundwater. In 2001, the State petitioned the EPA to "opt-out" of the RFG program on an expedited basis because of issues of MTBE

¹ The following two paragraphs appear, in their entirety, in the Court's recent Order on Defendants' Motion to Dismiss Counts I, II, III and V of the State of New Hampshire's Second Amended Complaint.

contamination. Effective January 1, 2007, the State banned MTBE as an additive for gasoline.

The State of New Hampshire has established an oil discharge and disposal cleanup fund ("ODD fund"), the purpose of which is to:

Establish financial responsibility for the cleanup of oil discharge and disposal, and to establish a fund to be used in addressing the costs incurred by the owners of underground storage facilities and bulk storage facilities for the cleanup of oil discharge and disposal, to protect groundwater, and for reimbursement for third party damages. An additional purpose is to provide a funding source for cleanup and reimbursement for discharges of gasoline ethers pursuant to RSA 146-G.

RSA 146-D:1 (2005). The ODD fund is collected "as a fee imposed on all oil imported into this state." RSA 146-D:3. Any distributor who imports, or who causes oil to be imported into New Hampshire is assessed a fee of \$.015 per gallon of oil at the time of importation into the state. RSA 146-D:3, II. The defendants are subject to the fees assessed by the ODD fund.

The State has established an Oil Fund Disbursement Board ("the Board") to administer the ODD fund. The Board is responsible for adopting rules relative to:

- (a) Processing applications for compensation from the oil discharge and disposal cleanup fund.
- (b) Procedures for verifying claims presented under this chapter.
- (c) Specifying costs in relation to reimbursement claimed.
- (d) Developing eligibility criteria in addition to the requirements of RSA 146-D:6, I and I-a.
- (e) [Repealed]
- (f) Waiver of penalties due or past due under RSA-D:3, III.

RSA 146-D:5.

Owners of eligible facilities may seek reimbursement of "court-ordered damages to third parties for bodily injury or property damage, and for the costs of onsite and off-site cleanup of oil discharges in amounts not to exceed a total of \$1,500,000. RSA 146-D:6, III. However, the "[c]osts of new tanks and associated piping, or repairs to existing tanks and associated piping, shall not be considered eligible costs under this chapter." RSA 146-D:6, V. Additionally, "the fund shall be deemed excess insurance over any other valid and collectible insurance for the costs of cleanup and damages to third parties." RSA 146-D:6, III.

New Hampshire has also established the Gasoline Remediation and Elimination of Ethers Fund ("GREE fund"). The purpose of the fund is "for the remediation of groundwater and surface water contaminated by gasoline ether." RSA 146-G:1, II (2005). "The fund may also be used to provide financial reimbursement to owners of public and private water supplies for the treatment and removal of gasoline ethers and associated contaminants when present with those ethers from those supplies." *Id.* New Hampshire requires that any distributor who imports, or causes to be imported, neat gasoline ethers into the state be licensed. RSA 146-G:7, I. "The annual fee for the license shall be \$0.10 per gallon of neat gasoline ethers imported into this state for the purpose of being mixed or blended with gasoline prior to sale to the public." *Id.* These fees are deposited directly into the GREE fund. *Id.*

The GREE fund is separate from the ODD fund. RSA 146-G:1, II. However, the Board also administers the GREE fund. RSA 146-G:4, I. "The extent of reimbursement shall be determined based upon criteria established by rules adopted by the board." RSA 146-G:6, II.

The State of New Hampshire has filed the present action against various gasoline suppliers, refiners, and chemical manufacturers seeking damages for groundwater contamination alleged to have been caused by MTBE. The defendants have filed three counterclaims. The first counterclaim asks the Court to declare that to the extent the defendants are liable for any damages, they are entitled to reimbursement, set off and/or recoupment under RSA 146-D and 146-G. The second counterclaim requests that to the extent the defendants are liable for damages, the Court setoff, abate and/or grant recoupment to the defendants in the amount that they are entitled to under RSA 146-D and 146-G. The third counterclaims asks the Court to declare that the State bears the burden of proof regarding coverage ODD fund coverage. The parties are presently before the Court on the State's motion to dismiss the defendants' counterclaims.

In considering a motion to dismiss, the factual allegations of the party opposing the motion to dismiss are assumed to be true and all reasonable inferences drawn from the factual allegations are construed most favorably to that party. Provencal v. Vermont Mutual Insurance Co., 132 N.H. 742, 745 (1990), Graves v. Estabrook, 149 N.H. 202, 203 (2003). "The court will not, however, assume the truth or accuracy of any allegations which are not well-pleaded, including the statement of conclusions of fact and principles of law."

ERG v. Barnes, 137 N.H. 186, 190 (1993) (internal citations omitted). If facts as alleged would constitute a basis for the granting of legal relief, a motion to dismiss should be denied. LaRoche v. Doe, 134 N.H. 562, 564 (1991). With these principles in mind, the Court turns to the pending issues.

As a threshold matter, the State argues that the Court has no jurisdiction over the defendants' counterclaims because the Court cannot determine the defendants' rights under RSA 146-D and RSA 146-G. The State asserts that "[u]nder both statutes, the Oil Fund Disbursement Board has exclusive authority to determine eligibility for reimbursement." Mem. of Law in Supp. of Pl.'s Mot. To Dismiss Defs.' Countercl. Against the Pl., 2. Further, the State alleges that if the Court were to grant the defendants' counterclaims, the Court would be usurping the power of the Board, and "thus violat[ing] not only the statutory scheme but the separation of powers enshrined in the New Hampshire Constitution." *Id.* at 10 (citing N.H. CONST. Pt. 1, art. 37; State v. LaFrance, 124 N.H. 171, 176 (1983)). The State maintains that neither RSA 146-D nor 146-G provides for a review of Board decisions, and therefore, "apart from a writ of certiorari to the Supreme Court challenging a final decision on reimbursement by the Board, no judicial remedies exist to adjudicate a party's eligibility for reimbursement from the Funds." *Id.*

The defendants respond that they are entitled to declaratory relief from the Court at this time. The defendants submit that because they are seeking only a declaration that they are eligible for ODD and GREE funds, rather than seeking an order requiring payment from the funds, they are entitled to pursue an action

for declaratory judgment. The defendants assert that the State has "emphatically stated that Defendants[sic] claims for reimbursement to the Board would be categorically denied." Defs.' Mem. in Opp'n to Pl.'s Mot. To Dismiss Countercl., 8 (citation omitted). Therefore, the defendants argue that it would be absurd to force the defendants to seek reimbursement from the Board, because the Board will deny their claims.

Upon review of the applicable statutes and rules, the Court concludes that it lacks jurisdiction to rule on the defendants' counterclaims. It is clear from the language of the applicable statutes that all reimbursement claims must first be filed with the Board. The Board is responsible for adopting rules, the purpose of which are to "provide uniform procedures for the conduct of all non-adjudicative and adjudicative proceedings, including requests for reconsideration, declaratory rulings, rulemaking petitions, and hearings in contested cases." N.H. Admin. Code Ch. Odb ("Odb") 201.01(a).

The Court notes that RSA 146-D specifies who may apply to the Board for reimbursement. RSA 146-D:6, I, I-a. Specifically, "[o]wners of regulated underground storage facilities with current permits and current records shall be eligible to apply to the fund." RSA 146-D:6, I. Likewise, funds will be available to "owners of bulk storage facilities that are in compliance with all applicable federal and state requirements for such facilities." RSA 146-D:6, I-a. The statute also outlines additional registration requirements that must be met for a party to be eligible for reimbursement. *Id.*

Under the Odb, an owner or applicant may submit a request for reimbursement for corrective actions or third-party damages. Odb 404.01. The Odb outlines the specific reimbursement submittal requirements. Odb 404.02. The court finds the Odb outline of the actions the Board is to take after receiving a request for reimbursement especially persuasive. Odb 404.03. Upon receipt of a complete reimbursement request, the Board must request that the New Hampshire Department of Environmental Services ("the department") provide a recommendation for reimbursement. Odb 404.03 (b). Next, the Court notes that the rules provide that the Board shall, "through the department, determine the amount of reimbursement based on the reimbursable cost criteria of Odb 407 and Odb 408 and shall authorize the state treasurer to disburse said amount from the fund." Odb 404.03(c). To the extent that a party disagrees with a decision of the Board, it may request a hearing in front of the Board. Odb 203.

For the forgoing reasons, the Court finds that the Board has exclusive jurisdiction over claims for reimbursement from the ODD and GREE funds. Therefore, the defendants must bring their reimbursement claims directly to the Board, not this Court. Defendants express concern about the likelihood of success of their claims for reimbursement before the Board. However, the Court would note that a number of the defendants have previously qualified for reimbursement from the ODD Fund.

Further, the Court addresses defendant's concerns regarding the ability of the Board to make an impartial decision concerning the matters at bar. The Board is comprised of 12 members who are representatives of the State, the

public, public officials and the oil industry. The Court notes that the relevant statutes and rules contain procedural safeguards in an effort to mitigate against conflicts of interest and bias. "Any member of the board having an individual interest, or an interest in another business, which may conflict with an issue under consideration by the board, shall not participate in any deliberations or vote of the board on the issue before the board." RSA 146-D:4, IV. Further, the rules provide for the withdrawal of a presiding officer for good cause. Odb 203.25(a). The party requesting the withdrawal must show, "by a preponderance of the evidence, that the presiding officer has had personal dealings with a party to the proceeding that would cause a reasonable person to believe that as a result of the dealings, the presiding officer will discount or ignore evidence and law to find in favor of or against the party." Odb 203.25 (d).

The Court would note that where provision for an appeal of a determination of an administrative agency is not provided for in a statute, an aggrieved party is not necessarily without remedy. An aggrieved party may seek judicial review of the administrative determination by petition for a writ of certiorari. "Certiorari may be issued where no appeal, other remedy, or alternative means of obtaining appellate review is authorized by statute. It will also lie where a statute expressly denies any right of appeal or review." 5 R. Wiebusch, NEW HAMPSHIRE PRACTICE, CIVIL PRACTICE AND PROCEDURE, § 38.07. However, "review of an administrative agency's decision on a petition for certiorari is limited to determining whether the agency has acted illegally with respect to jurisdiction, authority or observance of the law or has unsustainably

exercised its discretion or acted arbitrarily, unreasonably or capriciously. We exercise our power to grant such writs sparingly and only where to do otherwise would result in substantial injustice." Petition of Chase Home for Children et al. (New Hampshire Department of Health and Human Services), 155 N.H. 528, 532 (2007) (citations omitted). While the Superior Court does have jurisdiction to hear petitions for a writ of certiorari, DHB, Inc. v. Town of Pembroke, 152 N.H. 314, 318 (2005), the certiorari remedy is considered extraordinary and would not convey original jurisdiction to the Superior Court concerning Odb claims.

Because the Court concludes that it does not have original jurisdiction to address the defendants' counterclaims, the Court declines to address the State's additional objections, such as sovereign immunity. Even if the defendants were to be able to establish that the State has waived sovereign immunity by bringing claims against the defendants, the Court still cannot bypass the power of the Board by adjudicating the counterclaims in an original action.

Summary of Orders

The following orders are entered:

1. State's motion to dismiss defendants' first counterclaim, requesting declaratory judgment pursuant to RSA 491:22, is granted.
2. State's motion to dismiss defendants' second counterclaim, requesting setoff and/or recoupment, is granted.

3. State's motion to dismiss the defendants' third counterclaim, requesting declaratory judgment pursuant to RSA 491:22, RSA 491:22-a, RSA 491:22-b, is granted.

SO ORDERED.

Date

9-25-08


Philip P. Mangones
Presiding Justice