

ILLINOIS POLLUTION CONTROL BOARD  
August 26, 1993

ZMC, INC. (OMNI PRODUCTS),	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 93-100
	)	(UST Fund)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

RICHARD ZACCAGNI, PRESIDENT OF OMNI PRODUCTS, DIVISION OF ZMC, INC, APPEARED ON BEHALF OF PETITIONER;

JAMES G. RICHARDSON, APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by R. C. Flemal):

On May 12, 1993 ZMC, Inc. (Omni Products) (hereinafter, Omni), filed a petition for review of an underground storage tank reimbursement determination. On June 21, 1993 the Illinois Environmental Protection Agency (Agency) filed a motion for partial summary judgment and a memorandum of law in support of its motion for partial summary judgment. The Board denied the motion by written order on July 1, 1993 allowing the matter to proceed to hearing on all issues. Hearing was held on July 8, 1993 in Addison, Illinois. No members of the public attended. No briefs were filed.

For the reasons set forth below, the Board today finds that the Agency correctly denied reimbursement for \$16,167.45 in charges incurred for corrective action associated with a leaking underground storage tank, and that all other issues were withdrawn.

BACKGROUND

In September 1989 OMNI was notified by its neighbor, Hanson Management, of a spill that appeared to come from one of OMNI's underground storage tanks (USTs). Omni contacted its consultant, Hunter/Keck Environmental Services, Inc. (Hunter) to handle the corrective action. OMNI obtained an Illinois generator identification number from Hunter on September 20, 1989. Apparently, OMNI personnel mistook this number for the "incident number", which is the number received from the Illinois Emergency

Management Agency (IEMA)<sup>1</sup> when a release of petroleum-related product is reported to IEMA. (Pet. Exh. 1 at 1-2.) Corrective action commenced at the site<sup>2</sup> and costs were incurred. (See, Rec., generally.) IEMA was not notified of a release relating to a UST at petitioner's site until January 7, 1991. (Joint Exh. 1 at 1). On February 19, 1992 the Agency received petitioner's application for reimbursement for costs incurred in response to a release. (Rec. at 290.) A series of information exchanges ensued (See Rec., generally.)

On April 7, 1993 the Agency denied reimbursement for certain corrective action costs associated with the clean-up. On May 12, 1993 OMNI brought this appeal contesting two of the Agency's denial reasons.

#### DISCUSSION

At hearing petitioner withdrew its appeal pertaining to all issues, except one (Tr. at 6-7.) Therefore, the sole issue in this proceeding is whether the Agency erred in failing to reimburse \$16,167.45 of corrective action costs because these charges were allegedly incurred prior to notification of IEMA.

The parties stipulated that IEMA was not notified of a release relating to an UST at petitioner's site until January 7, 1991. The parties also stipulated that certain costs were incurred before January 7, 1991, and that these costs totalled \$16,167.45. (Joint Exh. 1 at 1.)

It is the Agency's position that since these costs were incurred prior to IEMA notification they are not reimbursable. Section 22.18b(d)(4)(d), applicable to petitioner, 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 the following:

\* \* \*

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<sup>1</sup> IEMA was formerly known as the Emergency Services and Disaster Agency (ESDA).

<sup>2</sup> The application indicates that seven tanks were pulled, that the piping was leaking, and that no one tank could be specifically identified as leaking. (Rec. at 294-304.) The relationship between the tank pulls and corrective action in response to a release is not at issue in this proceeding.

- D. The owner or operator notified the state of the release of petroleum in accordance with applicable requirements.

Requirements found at 35 Ill. Adm. Code 731.150 entitled "Reporting of Suspected Releases" are as follows:

Owners and operators of UST systems shall report to the [IEMA] within 24 hours and follow the procedures in Section 731.152 for any of the following conditions:

- a) The discovery by owners and operators or others of released regulated substances at the UST site or in the surrounding area (such as the presence of free product or vapors in soils, basements, sewer and utility lines or nearby surface waters).

\* \* \*

The Agency states that the Board has previously decided cases where pre-IEMA notification costs were sought by an applicant, and has held that such costs should not be reimbursed. North Suburban Development Corporation v. IEPA (December 19, 1991), PCB 91-109, 128 PCB 263; (holding that IEMA notification is a condition for payment of UST reimbursement claims) Kronon Motor Sales, Inc., v. IEPA (January 9, 1992), PCB 91-138, aff'd Kronon Motor Sales, Inc., v. IPCB and IEPA (1992), 609 N.E.2d 678. (While recognizing seemingly harsh result, the court upheld the Board's determination that denied reimbursement for corrective action taken prior to notification of IEMA.)

Omni does not contest the Agency's position on the law concerning pre-IEMA notification reimbursement. Rather, OMNI asks the Board to consider ordering reimbursement because, as OMNI alleges, the company needs the funds to complete the cleanup project, and because OMNI was unaware that its consultant did not notify IEMA prior to January 7, 1991. (Pet. Exh. 1 at 1-3.)

The Board finds that the regulatory requirements that existed at the time of leak detection required OMNI to give notification to IEMA within 24 hours, and that the statutory language required OMNI to provide the Agency with proof of notification as a condition for payment of such claims. The cases cited above establish precedent that such pre-IEMA notification costs are not reimbursable. Concerning OMNI's position, the Board sympathizes with the situation as presented; however, the Board is not authorized to act contrary to the clear directives of the law.

Accordingly, for the foregoing reasons, the Board hereby affirms the Agency's determination that costs incurred prior to OMNI's notification of a release to IEMA are not reimbursable.

This opinion constitutes the Board's findings of fact and conclusions of law in this matter.

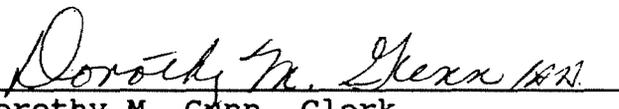
ORDER

The Board hereby affirms the Agency's determination that costs incurred prior to OMNI's notification of a release to IEMA are not reimbursable.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1992)) provides for the appeal of final Board orders within 35 days. The Rules of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill. Adm. Code 101.246 "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 26<sup>th</sup> day of August, 1993, by a vote of 6-0.

  
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board