

ILLINOIS POLLUTION CONTROL BOARD
July 1, 1993

ZMC, INC. (OMNI PRODUCTS) ¹ ,)	
)	
Petitioner,)	
)	
v.)	PCB 93-100
)	(UST Fund)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

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 to file the record instanter. The record is 14 days late. The motion to file the record instanter is granted.

On June 21, 1993 the Agency also filed a motion for partial summary judgment and a memorandum of law in support of its motion for partial summary judgment. No response has been filed by Omni.

The Agency's motion pertains to certain costs incurred by Omni after September 20, 1989 and prior to January 7, 1991 that the Agency alleges were incurred prior to ESDA² notification. The Agency states that the Board has previously decided cases where pre-ESDA notification costs were sought by the 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; Kronon Motor Sales, Inc., v. IEPA (January 9, 1992), PCB 91-138, aff'd Kronon Motor Sales, Inc., v. IPCB and IEPA, 609 N.E.2d 678. The Agency alleges that no genuine issue of material fact exists that these certain costs were incurred prior to ESDA notification, and that the Board should consequently grant the motion for summary judgment as to these costs.

¹ The original caption in this case stated petitioner solely as "ZMC, Inc." In the application for reimbursement, petitioner is characterized as "ZMC, Inc. (Omni Products)". The Board changes the caption to contain the name as listed on the application.

² ESDA is now the Illinois Emergency Management Agency.

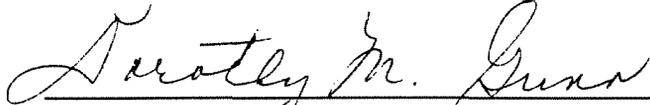
The Agency is correct that the Board has previously held in the cases cited above that costs incurred prior to ESDA notification are not to be reimbursed. However, the Board finds that the Agency has failed to show that no genuine issue of material fact exists that the costs incurred between September 20, 1989 and January 7, 1991 were incurred prior to ESDA notification.

Initially, the Board finds that facts contained in the Agency's memorandum that are not part of the record of this proceeding are not supported by affidavit as required by the Board's procedural rules. (See, 35 Ill. Adm. Code 101.242.) In addition, a reading of the memorandum and Agency record portions cited by the Agency do not support a finding for the Agency without further exploration of the facts surrounding ESDA notification in this case. For example, a portion of the Agency record cited by the Agency in support of its position is subject to differing interpretations. (See, Agency fiscal file at 295, question 6.)

The Board finds that genuine issues of material fact exist, and consequently denies the Agency's motion for summary judgment. These issues may be explored at the hearing which is currently scheduled for July 8, 1993.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the 1st day of July, 1993, by a vote of 7-0.


 Dorothy M. Gunn, Clerk
 Illinois Pollution Control Board