ILLINOIS POLLUTION CONTROL BOARD
April 9, 1992

NORTH OAK CHRYSLER PLYMOUTH,	)	
	)	
Complainant,	)	
	)	PCB 91-214
v.	)	(Enforcement)
	)	
AMOCO OIL COMPANY,	)	
	)	
Respondent.	)	

OPINION AND ORDER OF THE BOARD (by J. Anderson):

Currently pending before the Board are North Oak Chrysler Plymouth's (North Oak) January 10, 1992 motion for summary judgment, Amoco Oil Company's (Amoco) January 17, 1992 response to North Oak's motion and a cross-motion for summary judgment, Amoco's January 21, 1992 motion to strike, North Oak's January 24, 1992 reply to Amoco's response to North Oak's motion for summary judgment, Amoco's January 29, 1992 motion for leave to file a reply to North Oak's response to Amoco's cross-motion for summary judgment, Amoco's January 29, 1992 motion to strike the affidavit of Michael G. Roche, North Oak's January 31, 1992 response to Amoco's motion to strike the affidavit of Michael G. Roche, and North Oak's February 4, 1992 response to Amoco's motion for leave to file a reply.

Also before the Board are the North Oak's February 21, 1992 response and Amoco's February 21, 1992 response to the Board's January 23, 1992 order. In that order, the Board directed the parties to address the following issues:

1. whether the Board has the authority to enter a cease and desist order with respect to 35 Ill. Adm. Code 731.Subpart E, and

2. whether the Board has authority to enter a cease and desist order with respect to 35 Ill. Adm. Code 731.Subpart F without a showing that Amoco has confirmed a release pursuant to the Fire Marshal's rules.[2]

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[1]The Board granted North Oak's January 21, 1992 motion for leave to file a reply to Amoco's response to North Oak's motion for summary judgement in its January 23, 1992 Board Order.

[2]P.A. 87-323 requires the Board to repeal Subpart E, as set forth in the Board's April 9, 1992 final order in R91-14. It also requires the Board to repeal its rules on release investigation and

Before going to the substance of the various motions before the Board, we will first give a brief summary of the facts of this case. Amoco purchased property at 6524 West North Avenue, Chicago, Illinois in 1961. In that same year, Amoco obtained from the City of Chicago Fire Department a permit to install two 6,000 gallon gasoline underground storage tanks (USTs) and one 550 gallon waste oil UST. In 1970, Amoco obtained another permit to install a third 6,000 gallon gasoline UST.[3] On November 8, 1984, the USTs were being used for storage, use or dispensing of regulated substances. On or about July 2, 1986, Amoco registered the USTs with the Office of the Illinois State Fire Marshal (Fire Marshal). Amoco had the USTs removed from the property on July 26, 1986, under the oversight of Chicago's Flammable Liquid Tank Bureau.[4] In August, 1986, after removal of the USTs, Amoco conveyed the property to North Oak, under a real estate sales contract, and by warranty deed and bill of sale. North Oak asserts that, subsequent to the sale of the property, it discovered contamination in the soil and groundwater located at the site of the USTs. North Oak also alleges that such contamination came from Amoco's USTs and states that it notified Amoco about the contamination. Neither party has reported the suspected release to the Illinois Emergency Services and Disaster Agency (ESDA) or taken remedial action at the site.

Amoco's motion for leave to file a reply to North Oak's response to Amoco's cross-motion for summary judgment

As previously stated, on January 29, 1992, Amoco filed a motion for leave to file a reply to North Oak's response to Amoco's cross-motion for summary judgment. On February 4, 1992, North Oak filed a response to Amoco's motion for leave to file.

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confirmation so that release investigation and confirmation are exclusively under the Fire Marshal's rules. The corrective action requirements of Subpart F are triggered only by a confirmed release.

[3]Amoco alleges that, at the time it owned the property, a fifth 550 gallon underground tank existed on the premises. Amoco also states that the tank was used to store heating oil for consumptive use on the premises and that it never removed the tank.

[4]In its motion for summary judgment, North Oak states that the tanks were removed in 1991, after the sale of the property. (see motion for summary judgment p. 4, par. 8). Amoco, in its memorandum of law in support of its response and cross-motion for summary judgment, states that it presumes that the 1991 date is a typographical error. (see memorandum of law p. 4, footnote 2). A review of the citations that North Oak quotes in support the 1991 date indicate that the tanks were removed in 1986, and that the 1991 date is indeed a typographical error.

In its motion, Amoco notes that a footnote in North Oak's January 24, 1992 reply to Amoco's response to North Oak's motion for summary judgment states that the document also stands as North Oak's response to Amoco's cross-motion. Amoco argues that it should be allowed to file a reply in support of its cross-motion for summary judgment because North Oak's response contains blatant mischaracterizations of the record and of the positions espoused in Amoco's cross-motion for summary judgment. Amoco adds that North Oak's response goes well beyond the normal contours of a reply brief in that it contains additional evidentiary material and argues that it should have the opportunity to such material. Finally, Amoco asserts that although no party will be prejudiced if the motion is granted, it will be materially prejudiced if its motion is not granted.

In response, North Oak argues that no material prejudice will result if Amoco's motion is denied because Amoco simply repeats the arguments made in its cross-motion rather than replying to the arguments presented in North Oak's response brief.

Because the Board has given North Oak the opportunity to file a reply brief on its motion for summary judgment and because Amoco does reply to the arguments presented in North Oak's response brief, the Board hereby grants Amoco's motion to file a reply in support of its cross-motion for summary judgment.

North Oak's motion for summary judgment and Amoco's cross-motion for summary judgment

North Oak cites several arguments in support of its position that Amoco is responsible for remediating conditions at the site. First, North Oak argues that Amoco is the owner of the USTs because it owned the site and USTs from 1961 to 1986 and because the USTs were used to store and dispense a regulated substance (i.e., gasoline). North Oak also notes that Amoco admitted that it is the owner of the USTs when it registered the tanks with the Fire Marshal on July 2, 1986. Next, North Oak cites to AKA Land, Inc. v. IEPA (March 14, 1991), PCB 90-177, in support of its argument that Amoco is the operator of the USTs because it had control and responsibility for the daily operation, including the removal, of the USTs. North Oak also argues that if Amoco is not the owner and operator of the USTs, then no entity would be subject to the UST regulations. North Oak adds that such a result would have a chilling effect on the goal of remediation. North Oak also argues that it notified Amoco of the release and that, as a result, Amoco must report the release to ESDA pursuant

to 35 Ill. Adm. Code 731.150.[5] Finally, North Oak argues that Amoco is also required, pursuant to 35 Ill. Adm. Code 731.152, to conduct an investigation to confirm whether the release has occurred and commence corrective action pursuant to 35 Ill. Adm. Code 731.152(b)(1).

In response, Amoco argues that this matter may be resolved in favor of Amoco on the legal issues. Specifically, Amoco argues that the Board's regulations do not address remedial action in cases where USTs no longer exist and have been previously removed. Rather, Amoco argues that such a situation is regulated by the Fire Marshal.

In addition to the above, Amoco argues that it is not the owner of a UST system because the system was properly removed and disposed of more than five years ago. In fact, Amoco argues that USEPA's definition of "owner" at 50 Fed. Reg. 46605 (November 8, 1985), the real estate sales contract, and the bill of sale support the proposition that North Oak assumed responsibility for the tanks and would be the owner if the UST system had been closed without physical removal. Amoco also argues that it is not the present operator of a UST system because there is no system to operate. In fact, Amoco alleges that North Oak may be considered the operator of the UST system. Amoco also argues that it is not a past operator of the system because it leased the property to independent dealers who had control of and responsibility for the daily operation of the UST system.

Amoco also argues that the alleged contamination is not a "release" from a UST within the meaning of the regulations. Specifically, Amoco notes that the reporting and corrective action obligations of 35 Ill. Adm. Code 731.150 and 731.152 were made effective on June 12, 1989, three years after the removal of the USTs, and do not apply to UST sites closed prior to December 22, 1988. Amoco also asserts that even if this matter involved a UST system that was still in existence, 35 Ill. Adm. Code 731.173 requires that the Fire Marshal order a reassessment of the site.

Finally, Amoco argues that North Oak's motion must be denied because its allegation of a suspected release is not supported by affidavit or any other admissible evidence. Rather, Amoco argues that the report that supports the allegation ("Environmental Site Assessment for the 6500 Block of West North Avenue, Chicago, Illinois" by Testing Service Corporation) is hearsay. Amoco also argues that a question of fact exists because its own evidence shows two potential current sources, both attributable to North Oak, of petroleum contamination.

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[5]35 Ill. Adm. Code 731.150 requires a report to ESDA upon discovery by owners and operators or others of a release at a UST site.

When the main body of the UST rules were adopted in R88-27 and R89-4, the Fire Marshal was directed to adopt rules which were "identical in substance" to the USEPA rules, except those dealing with "corrective action". The Fire Marshal was to implement the rules up to the point of corrective action and the Illinois Environmental Protection Agency was to implement the rules pertaining to corrective action. The Board, however, was required to adopt the entire body of the USEPA rules, including those also adopted by the Fire Marshal.

The above statutory scheme has now been modified via P.A. 87-323. P.A. 87-323 limits the Board's rulemaking authority to those corrective action activities which the Illinois Environmental Protection Agency implements. As defined in Section 22.4(d)(4), "corrective action" includes everything but:

> [D]esign, construction, installation, general operation, release detection, release reporting, release investigation, release confirmation, out-of-service systems and their closure and financial responsibility.

Under P.A. 87-323, the rules relating to the above activities are exclusively in the Fire Marshal's rules.[6] As a result, it becomes impossible for the Board to grant the relief requested by North Oak (i.e., to order Amoco to conduct a release investigation or site assessment), absent prior enforcement by the Fire Marshal. In other words, P.A. 87-323 has rendered 35 Ill. Adm. Code 731.150 and 731.152 of no force and effect and has, in effect, divested the Board of jurisdiction in this matter.

As for any argument that P.A. 87-323 does not alter the Board's ability to grant relief because it contains no express directive to repeal the Board's regulations and because a repeal of the regulations affects only those cases filed after the effective date of the repeal, the Board believes that a rule must be repealed once authority for a rule has been withdrawn. The Board is a creature of statute. Moreover, the Environmental Protection Act (Act) supersedes the Board's regulations. As a result, the Board can act only pursuant to the authority expressly conferred on it by the Act and any action outside of

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[6]In fact, the Board is today repealing most of its UST rules in 35 Ill. Adm. Code 731 including the repeal of the release investigation and site assessment requirements of 35 Ill. Adm. Code 731.152 and 731.173, respectively. The Board is also repealing the site assessment requirements of 35 Ill. Adm. Code 731.172 and 731.173. (see In the Matter of UST Update USEPA Regulations (1/1/91 - 6/30/91) (April 9, 1992), R91-14).

the authority granted by the Act is void. (see Village of Lombard v. PCB (1977), 66 Ill. 2d 503, 363 N.E.2d 814; Rossler v. Morton Grove Police Pension Board (1st Dist. 1989), 178 Ill. App. 3d 769, 533 N.E.2d 927). If this were not the case, the Board would be able to keep regulations alive for an indefinite period and until such time as it decided to delete the regulations.

Notwithstanding the above, the Board also notes that the UST regulations, which became effective on June 12, 1989, do not apply to sites where USTs do not exist. In other words, the Board's regulations, which became effective three years after the removal of the tanks (i.e., on July 26, 1986), were not intended to be applied retroactively to cover tanks that were removed prior to December 22, 1988. Rather, jurisdiction over a case involving USTs removed prior to December 22, 1988, lies as a matter of law with the Fire Marshal rather than the Board. Specifically, 41 Ill. Adm. Code 170.650 provides for reassessment of the site of a UST system removed prior to December 22, 1988, by the Fire Marshal.[7] That section states:

> When directed in writing by the Office of the State Fire Marshal, the owner and operator of an UST system removed before December 22, 1988 must assess the excavation zone (including, if so ordered, re-excavating and assessing the site where the tank had been located) in accordance with Section 170.640 if release from the UST may have, in the judgment of the Office, pose a current or potential threat to human health and the environment.

As for North Oak's assertion that Amoco is an owner or operator, as those terms are defined in the Board's regulations, the Board again notes that the Board's regulations are inapplicable to USTs that were removed prior to the effective date of the regulations. As to North Oak's citation to AKA Land to support its proposition that Amoco is the operator, we note that that case is distinguishable from the instant case. AKA Land involved the situation where tanks remained in place when the site was closed, and were not removed from the site until after the effective date of the Board's regulations.

Because the Board is unable to grant the requested relief and because jurisdiction over this matter rests, as a matter of law, with the Fire Marshal rather than the Board, the Board need not address the evidentiary (i.e., factual) disputes of this case or North Oak's prayer for penalties or a judgment holding Amoco responsible for response costs to be incurred by the State.

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[7]The corresponding federal regulation can be found at 40 CFR 280.72.

The Board wishes to note, however, that it disagrees with North Oak's assertion that there will be a chilling effect on the goal of remediation and that no entity would be subject to the UST regulations if the Board determines that Amoco is not the owner or operator of the USTs. Our action today should in no way be construed as a reluctance or a failure to hold a party responsible for remediation. Rather, the Board is simply stating that it has no jurisdiction over the instant case.

Accordingly, for the foregoing reason, the Board denies North Oak's motion for summary judgment and grants Amoco's cross-motion for summary judgment.

Amoco's motion to strike the affidavit of Michael G. Roche

On January 29, 1992, Amoco filed a motion to strike the affidavit of Michael G. Roche, a geologist employed by Testing Service Corporation. North Oak submitted the affidavit as an attachment to its reply brief in support of its motion for summary judgment. In the affidavit, Mr. Roche attested that he personally supervised the preparation of a document entitled "Environmental Site Assessment for the 6500 Block of West North Avenue, Chicago, Illinois". The document was prepared to memorialize the findings made by Testing Service Corporation after it examined the property to determine whether it was contaminated. On January 31, 1992, North Oak filed a response opposing Amoco's motion to strike. Because the Board's decision on the motion for summary judgment was based upon a question of law, the Board need not rule upon Amoco's motion to strike Mr. Roche's affidavit.

Amoco's motion to strike

On January 21, 1992, Amoco filed a motion requesting the Board to strike certain allegations made by North Oak in its complaint (i.e., that Amoco agreed to properly remove all USTs on the site prior to the completion of the sale of the property). Specifically, Amoco asserts that the allegation has no basis in fact. North Oak has not filed a response to the motion.

Based upon the Board's decision on the motions for summary judgment, the Board need not rule upon Amoco's motion to strike.

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

ORDER

Because the Board lacks jurisdiction in this matter and is unable to grant the relief requested, the Board grants Amoco's cross-motion for summary judgment, denies North Oak's motion for summary judgment, and closes the docket in this matter.

Section 41 of the Environmental Protection Act, Ill. Rev. Stat. 1991, ch. 111 ½, par. 1041, provides for appeal of final Orders of the Board within 35 days. The rules of the Supreme Court of Illinois establish filing requirements.

IT IS SO ORDERED.

B. Forcade dissented.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 9th day of April, 1992, by a vote of 6-1.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board