ILLINOIS POLLUTION CONTROL BOARD
December 14, 1994

MARATHON OIL COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 94-237
	)	(UST Fund)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

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

This matter is before the Board on a motion for partial summary judgment filed by the Illinois Environmental Protection Agency (Agency) on November 2, 1994. The Agency claims that there is no genuine issue of material fact as to whether Marathon Oil Company's costs at issue, totalling $93,911.80[1], occurred prior to Illinois Emergency Services and Disaster Agency notification and therefore these costs are ineligible for reimbursement from the Underground Storage Tank Fund. Marathon Oil Company (Marathon) filed a reply and cross motion for partial summary judgment on November 21, 1994.[2]

For the reasons stated below, the Board affirms the Agency's denial of $93,911.80 in corrective costs. The Board grants the Agency's motion for partial summary judgment in the amount of $93,911.80 and denies Marathon's cross motion for partial summary judgment. Remaining at issue is $1,012.50[3] in costs denied reimbursement by the Agency.

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[1] The Agency's Motion for Partial Summary Judgment itemized a breakdown of Marathon's costs incurred prior to ESDA notification, totaling $93,911.80. In Marathon's Reply and Cross Motion for Partial Summary Judgment, it stated that costs of only $93,843.24 were at issue, with no supporting breakdown. Having reviewed the record, we find the amount at issue is $93,911.80.

[2] Respondent's Motion for Partial Summary Judgment will be cited at "Resp. at ___."; Petitioner's Reply and Cross Motion for Partial Summary Judgment will be cited as "Pet. at ___.".

[3] A total of $94,924.30 in corrective action costs were denied in Attachment A of the Agency's Final Reimbursement Decision; $93,911.80 are at issue for summary judgment; $1,012.50 in costs remain unresolved.

BACKGROUND

Marathon leased and operated a gasoline service station on the site at issue, 1544 Shermer and Illinois Streets, Northbrook, Cook County, Illinois, 60062, from the period of May 12, 1969 through May 11, 1989. On April 14, 1988 four underground storage tanks located at the site were removed. (Resp. at 1; Fiscal File - Book I, p. 86.)[4] On September 4, 1989, Marathon submitted a letter to the Agency which stated that "(a)ll tanks were in good condition; no holes or leaks were observed. The tank removal was witnessed by the City of Northbrook's Fire Prevention Bureau, and they noted no problems at that time." (Agency Record, Technical File - Book III, p.717.) According to the Agency's Motion for Partial Summary Judgment, there were no signs of corrosion or leakage detected at the time the tanks were removed on April 14, 1988.

From September of 1989, the Agency and Marathon and its contractor, corresponded and supplied technical reports and documentation. (Agency Record, Technical File, Books I, II and III, Documents 3 through 26.) Marathon proceeded with corrective action through 1990 while in contact with the Agency. On or about August 19, 1992, Marathon filed an application for reimbursement with the Illinois Underground Storage Tank Fund (Fund). (Resp. at 2; Fiscal File - Book I, p.81.) On September 8, 1992, the Agency sent a letter to Marathon stating that it had been preliminarily determined that Marathon was eligible to seek

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[4] According to the Agency's Motion for Partial Summary Judgment and Marathon's letter to the Agency dated September 4, 1989, all four (4) underground storage tanks located at the site were removed in April 1988. Other reports in the Agency record support this date, for example a letter from the site agent and part owner, B.F. O'Neill & Co. stated that in "late 1988, Marathon removed all underground tanks, pumps, etc.", and a letter from Ms. Carmen Yound, site owner, stated that Marathon removed all underground tanks about a year before the lease expiration date of May 11, 1989. Additional reports support a removal date sometime prior to 1990: the LUST Reimbursement prepared for Marathon by MAECORP, INC. Consulting Services (Technical File - Book I, p.16) and all invoices itemizing Marathon's costs for corrective action reviewed by the Agency covered the period from 5/23/90 to 11/13/90. However, Marathon's Petition for Review states that "Marathon excavated and removed four underground storage tanks and associated contaminated soil ... in October, 1990." Based on the over 1000 pages submitted in the Agency record, we find that the date of tank removal was April, 1988 and that the October, 1990 is a clerical error in Marathon's filing. The Board will decide the instant matter based upon pulling the tanks in April 1988.

reimbursement for corrective action costs. The Agency noted that the decision in the letter did not constitute the Agency's final determination of eligibility.

On August 10, 1994, the Agency sent a letter to Marathon advising them that a voucher would not be submitted to the Comptroller's Office for payment and that such letter constituted the Agency's final action with regard to the submitted invoices. (Resp. at 2; Fiscal File - Book I, pp. 16-18.) Attachment A to the Agency's final determination letter disallowed a total of $93,911.80 of corrective action costs because the costs were incurred prior to Marathon's notification to the Emergency Services and Disaster Agency (ESDA)[5]. (Resp. at 2.)

It is undisputed that Marathon did not notify ESDA of the release in question until after the $93,911.80 in corrective actions costs were incurred. However, the actual date on which ESDA was notified is unclear. The Agency asserts (and uses as the basis for its eligibility determination) that ESDA notification occurred on August 14, 1990. (Resp. at 2.) Marathon claims that it did not give formal notice to ESDA until 1992. (Pet. at 2.)

ARGUMENTS

The primary issue before the Board is whether the Agency should have reimbursed Marathon for corrective action costs incurred prior to Marathon's notification of ESDA.

The Agency's Position

The Agency claims that Marathon's corrective action costs incurred prior to ESDA's notification are not reimbursable from the Fund. The Agency's arguments are twofold. First, the Agency claims that Marathon did not notify ESDA within 24 hours of the discovery of the release pursuant to 35 Ill. Adm. Code 731.150. According to the Agency, Marathon was first made aware that a release had occurred at the site on July 28, 1989 via a report issued by Giles Engineering Associates, Inc. to Marathon, but failed to notify ESDA until August 14, 1990.

Second, the Agency argues that the costs at issue were incurred prior to ESDA's notification as required pursuant to 35

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[5] ESDA is currently called the Illinois Emergency Management Agency.

Ill. Adm. Code 731.150.[6] The Agency points to prior Board decisions which held that costs incurred before ESDA was notified of a release may not be reimbursed. (North Suburban Development Corporation v. IEPA, PCB 91-109 (December 19, 1991); Kronon Motor Sales, Inc. v. IEPA, PCB 91-138 (January 9, 1992), aff'd. Kronon Motor Sales, Inc. v. Illinois Pollution Control Board and IEPA, 609 N.E. 2d 678.)

In determining which statutory and regulatory notification requirements apply to Marathon, the Agency argues that in this case, the Board must look to the date the release was initially discovered and apply the notice requirement in effect on that date and time. (Agency motion citing, Pulitzer Community Newspapers, Inc., v. Illinois Environmental Protection Agency, PCB 90-142 (Dec. 20, 1990).) The Agency argues that the Board should look to the date of the Giles Engineering Report identifying a release on July 28, 1989 as the determinative date. Consequentially, the Agency asserts both 415 ILCS 5/22.18b(d)(4)(D), effective July 28, 1989, and 35 Ill. Adm. Code 731.150, effective June 12, 1989, were the applicable laws in effect at the time Marathon discovered the release.

On July 28, 1989, Section 22.18b(d)(4)(D) of the Act, 415 ILCS 5/22.18b(d)(4)(D) stated:

> Request 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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> ****
>
> D. The owner or operator notified the state of the release of petroleum in accordance with applicable requirements; ...
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> ****

The applicable notification requirements were, and are currently, found at 35 Ill. Adm. Code 731.150. That section required and currently requires:

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[6] There is no issue that the only regulations applicable in this case are the identical in substance rules at 35 Ill. Adm. Code Part 731. On September 22, 1994, Illinois' new LUST rules became effective. However, Marathon has not opted into the new LUST program. Moreover, the Agency and Marathon find determination made on August 10, 1994, predates the effective date of the new regulations.

> Owners and operators of UST systems shall report to the ESDA 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).
>
> ****

Both parties agree that 35 Ill. Adm. Code 731.150 was in effect at all times relevant to this action and required notice to ESDA within 24 hours. Because Marathon initially discovered the release on July 28, 1989 and the did not report to ESDA until August 14, 1990 (or later), the Agency contends it is entitled to partial summary judgment as to the corrective action costs incurred prior to that ESDA notification, totaling $93,911.80.

Marathon's Position

Marathon admits that the deducted expenses at issue were all incurred in 1990 and that it did not give *formal* notice to ESDA until 1992. However Marathon argues that it gave *actual* notice to the *Agency* in a letter from Mr. G.D. Sheely on September 4, 1989. (Pet. at 2; Technical File, Book 111, pp. 716-730.) Marathon contends that it corresponded with the Agency regularly throughout the remediation and over a two-year period beginning in September of 1989. (Pet. at 2; Technical File, books, I, II and III, Documents 3 through 26.) Therefore Marathon claims that the Agency had actual notice of the release prior to the corrective action incurred in 1990 and gave no indication it intended to disallow the expenses. (Pet. at 2.)

Marathon argues that the reason for requiring notice to ESDA is to notify the State of "an emergency or disaster that may threaten the public health or welfare and require immediate governmental response". (Pet. at 3.) Marathon contends that at this site no such response was needed, none was made, and the remediation was at all times under the supervision of the Agency.

Relying on the court in ChemRex, Inc. v. Illinois Pollution Control Board, and Illinois Environmental Protection Agency, 195 Ill. Dec. 499, 257 Ill. App. 3d 274, 628 N.E.2d 963 (1st District 1993), Marathon contends that its rights concerning the reimbursement were fixed by the statutory requirements in effect when it notified the Agency of the release and commenced remediation, September 4, 1989. Marathon additionally argues that when it gave notice to the Agency, remediated the tanks, and incurred the costs at issue, there was no statutory consequence

connected to failure to give notice to ESDA within 24 hours. Marathon cites to language added to 415 ILCS 5/22.18b(d)(4)(D)[7], which was not effective until September 6, 1991:

> Requests for partial or final payment for claims under this Section shall be sent the Agency and shall satisfy all of the following:
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> ****
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> D. The owner or operator notified the State of the release of petroleum in accordance with applicable requirements. Costs of corrective action or indemnification incurred before providing that notification shall not be eligible for payment.
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> 415 ILCS 5/22.18b(d)(4)

Because there was no such statutory language or consequence prior to 1991, Marathon argues that Section 22.18b(d)(4)(D) should not be applied retroactively in the absence an express retroactivity provision. Marathon claims that this amendment was meant not to clarify the law but indicated a change in the law because there was no prior reimbursement consequence if ESDA were not notified.

DISCUSSION

At all times pertinent to the instant matter there was a statutory requirement at 415 ILCS 5/22.18b(d)(4)(D) that for expenses to be reimbursable an applicant must have "notified the State ... in accordance with applicable requirements". One of these applicable requirements was that Marathon was required to notify ESDA. Marathon did not notify ESDA prior to incurring the $93,911.80 in expenses, and accordingly these expenses are not eligible for reimbursement.

The Board rejects Marathon's contention that its dealings with the Agency through the course of this matter constituted sufficient notification to the State. It is uncontested that 35 Ill. Adm. Code 731.150 was in effect at all times relevant to these proceedings. Section 731.150 specifically requires that "(o)wners and operators of UST systems shall report to ESDA (emphasis added)" a release or suspected release. The Board

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[7] Marathon cites to 415 ILCS 5/22.18(d)(4)(D). However, Marathon quotes from 415 ILCS 5/22.18b(d)(4)(D). The Board will assume that Marathon intended to cite 415 ILCS 5/22.18b(d)(4)(D), which was effective September 6, 1991.

finds that Marathon's claim that it gave actual notice to the Agency on September 4, 1989 is insufficient to meet the applicable requirements at Section 731.150. Section 731.150 requires notice to be given to ESDA, not to the Agency. Accordingly, Marathon did not notify the State "in accordance with the applicable requirements".

The Board similarly finds no merit in Marathon's contention that notification to ESDA of the Northbrook release was unnecessary because the release did not constitute a threat sufficient to warrant ESDA's involvement. Whether there is ESDA notification is a matter of law, not a matter of owners' value judgments.

The Board also finds no merit in Marathon's contention that it is only those costs incurred after September 6, 1991 for which non-notification constitutes a bar for reimbursement. It was settled law prior to the September 6, 1991 amendment that costs incurred prior to ESDA notification were not reimbursable. (e.g., Kronon Motor Sales, Inc., v. Illinois Pollution Control Board, 609 N.E.2d 678 (Ill. App. 1 Dist. 1992).) Moreover, when the September 6, 1991 amendment became effective, the Board again reviewed and addressed the issue, and was compelled to find that the amendment "does not reflect a new statutory initiative to exclude pre-notification expenses" (North Suburban Development Corporation v. IEPA, PCB 91-109 (December 19, 1991)), but rather a statutory codification of a statutory interpretation well-settled in case law. Therefore because pre-notification costs are excluded under both the old and the new statutory language, the Board is not applying the 1991 amendment retroactively, but instead following well-established case law.

In determining which statutory and regulatory notification requirements apply, the Board finds the same outcome whether it applies the test urged by Marathon (the law that was in effect when it notified the Agency of the release and commenced remediation) or the test put forth by the Agency (the date the release was initially discovered).

As a final matter, the Board addresses Marathon's observation that the Agency gave no indication prior to actual denial that it intended to disallow Marathon's corrective action expenses. In this observation Marathon appears to imply that the Agency acted improperly, and that judgment should thereby be granted to Marathon. The Board can not accept this implication. First, the Agency's technical guidance and clean site assessment are distinct from reimbursement determinations. Second, Marathon was incorrect in relying on the Agency's September 8, 1992 predetermination letter. The Agency specifically stated in their letter that it was not a final eligibility determination. The Agency could not know whether all of the applicable requirements have been met until the application had been submitted. The fact

that the Agency choose not to specifically address the ESDA requirement did not preclude the Agency from denying those costs at the final determination stage. (North Suburban Development Corporation v. IEPA, PCB 91-109 (December 19, 1991).)

Based upon the above findings the Board hereby affirms the Agency's determination regarding the non-reimbursability of costs incurred prior to Marathon's notification of ESDA, totalling $93,911.80. There remains $1,012.50 in denied corrective costs at issue. The Board directs the parties to file a status report as to the disposition of these costs.

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 14th day of December, 1994, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board