

ILLINOIS POLLUTION CONTROL BOARD  
June 2, 1994

EMRO MARKETING COMPANY, )  
 )  
Petitioner, )  
 )  
v. ) PCB 93-122  
 ) (UST Fund)  
ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY, )  
 )  
Respondent. )

KEVIN L. KROHN OF MARATHON OIL APPEARED ON BEHALF OF THE PETITIONER.<sup>1</sup>

OPINION AND ORDER OF THE BOARD (by E. Dunham):

This matter comes before the Board on a petition for review filed by Emro Marketing (Emro) on June 21, 1993, pursuant to Sections 22.18b(g)<sup>2</sup> and 40 of the Environmental Protection Act (Act). (415 ILCS 5/22.18b(g) & 40 (1992).) Emro is a subsidiary of Marathon Oil. The petition seeks review of the Illinois Environmental Protection Agency's (Agency) May 17, 1993 determination that Emro is ineligible for reimbursement from the Underground Storage Tank Fund. Emro sought reimbursement for corrective action costs which resulted from a release of petroleum on August 14, 1990 at Emro's facility in Grayslake, Lake County, Illinois.

A hearing in this matter was conducted on April 12, 1994, in Grayslake, Illinois before hearing officer Allen Schoenberger. At hearing the parties submitted the stipulated testimony of Howard Sloan and an affidavit from Paul D. Hancock. Mr. Sloan is an employee of Marathon Oil and serves as an engineering supervisor for Marathon and its subsidiaries. Mr. Hancock is a staff attorney with Marathon Oil. The Petro-Tite Manual (PTM), describing the tightness test performed was also placed into evidence at the hearing. No members of the general public attended the hearing. Emro filed its closing brief on April 21, 1994. The Agency filed its response brief on April 29, 1994. Emro filed a reply brief on May 4, 1994.

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<sup>1</sup> Mr. Krohn is a project engineer with Marathon Oil who appeared at hearing but did not make a statement. The attorneys representing Emro Marketing and the Illinois Environmental Protection Agency did not appear at hearing but agreed to the submission of stipulated testimony and exhibits at the hearing.

<sup>2</sup> Section 22.18b(g) of the Act was repealed in H.B. 300 effective September 13, 1993.

BACKGROUND

In 1990, Emro began construction for a new convenience store/gasoline station in Grayslake, Illinois. (Sloan at 1.) Gi-La Builders were retained to act as general contractor for construction of the facility including installation of the underground storage tank. (Sloan at 2.) Protanic Inc. was retained to perform tightness testing of the tank. (Sloan at 2.) The underground storage tank was installed by Gi-La Builders in August of 1990. (Sloan at 2.)

The contractor elected to use Petro-Tite testing to test the integrity of the tank system. Petro-Tite testing requires that the tank system be filled to absolute capacity and that the system be purged of air. (Sloan at 3.) After the system is filled to capacity, a pump and gauging mechanism is attached to a tank opening creating a closed system. (Sloan at 3.) Petroleum is then circulated through the system. (Sloan at 3.) Any loss of product in the "closed" system indicates that the system is not secure and free of leaks. (Sloan at 3.)

Prior to the arrival of Protanic to conduct the tightness testing, Gi-La Builders removed an automatic tank gauging device from one tank riser, since this device could be damaged during testing. (Sloan at 3.) Gi-La Builders placed a temporary loose fitting cap on the riser. (Sloan at 4.) Upon arrival at the site, Protanic noticed the loose fitting cap and determined that it was inappropriate for the tightness test. (Sloan at 4.) Therefore, the Protanic employees left the site to purchase the necessary cap. (Sloan at 4.)

During the absence of the Protanic employees, the tank truck driver arrived to top off the underground storage tank for the tightness test. (Sloan at 4.) The petroleum level reached maximum capacity and elevated up the riser. (Sloan at 4.) The pressure of the gasoline through the riser pushed the loose fitting cap from the riser and product was released. (Sloan at 4.) Some 755 gallons of product were released through the overflow of which 700 gallons were subsequently recovered. (Sloan at 4.) The remaining 55 gallons are unaccounted for and are the subject of continuing cleanup activities. (Sloan at 4.)

Emro Marketing submitted the Notification of Underground Storage Tank form to the Illinois Office of the State Fire Marshal (OSFM) without the installer's signature as Gi-La Builders refused to sign the form due to lack of payment by Emro which was being withheld due to a dispute concerning liability of the release. (Sloan at 5.) OSFM rejected the form and brought an administrative action against Emro to force submittal of a signed form. (Sloan at 5.) Gi-La Builders then agreed to sign the form and supplied certification that it has been certified or licensed by the OSFM. (Sloan at 5.)

DISCUSSION

The Agency decided that Emro was ineligible for reimbursement based on its determination that the tank "was not installed and operated in accordance with the rules adopted by the Office of the State Fire Marshal" (OSFM). (Ag. Rec. at 2.)

Section 22.18b(c) of the Act provides:

(c) Notwithstanding subsection (a) or (b), no owner or operator is eligible to receive money from the Fund for costs of indemnification or corrective action for any underground storage tank installed after July 28, 1989, unless the owner or operator demonstrates to the Agency that the tank was installed and operated in accordance with rules adopted by the Office of the State Fire Marshal. For purposes of this subsection, certification by the Office of the State Fire Marshal that the underground storage tanks were installed in accordance with those rules, shall be prima facie evidence that the owner or operator so installed such underground storage tanks.

OSFM regulations allow several methods for an owner or operator to prove certification of compliance. (41 Ill. Adm. Code 170.420(e).) Among the certifications of installation accepted by the OSFM is proof that the "installer has been certified by or licensed by the Office of the State Fire Marshall." (41 Ill. Adm. 170.420(e)(1).)

In Smith Oil Company v. IEPA (July 30, 1992), PCB 91-243, the Board found that the contractor's certification of compliance and field inspection logs represented prima facie evidence that the tank was installed in accordance with OSFM regulations. Similarly, the Board finds that Emro's certification of compliance represents prima facie evidence that the tank was installed in accordance with OSFM regulations. However, the Board must also consider additional evidence in this matter in rebuttal of the prima facie evidence.

In rebuttal of the prima facie case, the Agency contends that the Petro-Tite testing was not performed in accordance with the manufacturer's procedures. The Agency contends that the manual depicts a process where the tank truck operator fills the tank system while other personnel purge the system of air, determine if the system is at capacity and attach the Petro-Tite equipment. Because the tank truck operator was the only person on site, the Agency contends that the test was not conducted in accordance with the manufacturer's procedures.

Emro contends that leaving a riser open during the tightness test is consistent with the requirements of the test as all air

is to be purged from the system while the tank is being filled. Emro maintains that the Agency has failed to establish any inconsistency with OSFM regulations or which OSFM regulations were breached.

The rules of the OSFM at 41 Ill. Adm. Code 170.420(d) require

All tanks and piping must be properly installed in accordance with a code of practice developed by a nationally recognized association or independent testing laboratory and in accordance with the manufacturer's instructions.

When Emro's contractor elected to perform a Petro-Tite test on the system to prove the integrity of the tank system they were required to perform that test in accordance with the manual. Failure to perform the test in accordance with the procedures described in the manual represents an infraction of the OSFM regulations.

It is true, as Emro asserts, that the Petro-Tite Manual does not specify the number of personnel needed to conduct tank filling and testing. It is also true that the Petro-Tite test requires that the riser be open during filling so that air may bleed out of the system. The Agency, however, is correct in its assertion that the Petro-Tite test envisions close monitoring of the liquid level in the tank/riser system during filling. The tank filling procedure indicates that "The exact tank gage should be taken." (PTM at 7.) The sample Data Chart for Tank System Tightness Test clearly indicates gauging of tank volumes and metered fills. (PTM at 10 & 11.) In the example given in the manual, the filling process was stopped at least twice while the tank was gauged to ensure that no overflow occurred beyond the need to fill the Petro-Tite test equipment. (PTM at 11.)

In Emro's case, there is no evidence that anyone gauged the tank prior to filling, test personnel were not on site while the tank was overfilled, and no evidence was given to indicate how the delivery truck driver was allowed to spill 755 gallons of gasoline into the ground without a spill being detected. The Petro-Tite test methodology requires that UST systems be filled beyond their capacity, and the test admits the possibility that minor correctable leaks may be detected and cured. However, to lose 755 gallons of gasoline during a Petro-Tite test exceeds the reasonable amount of loss of product that could be justified due to the testing procedure.

The stipulated facts in evidence indicate that the failure to install appropriate fittings, which would have sealed the tank system, and the failure to appropriately gauge the tank volume and meter gasoline delivery constituted a failure to conduct the

Petro-Tite test according to manufacturer's specifications. This failure rebuts the prima facie case made by petitioners that the tank system was properly installed prior to the leak. Petition for access to the Underground Storage Tank Fund is therefore denied.

In addition the Board notes that at the time of the spill, the tank was not properly installed as the contractor had not properly performed the tightness test to prove the integrity of the tank. That proper installation could be certified once the loose fitting was replaced does not alter the fact that, when the spill occurred, the tank installation was not certified nor was the installation certifiable at that moment.

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

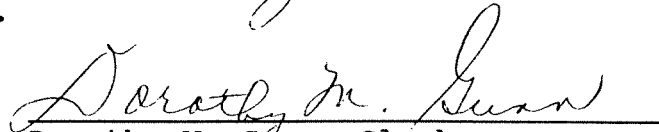
ORDER

For the reasons stated herein, the Board affirms the Agency's denial of eligibility for reimbursement for corrective action resulting from a spill from an underground storage tank at Emro's facility in Grayslake, Illinois.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act, (415 ILCS 5/41 (1992)), provides for appeal of final orders of the Board within 35 days of the date of service of this order. The Rules of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill. Adm. Code 101.246, Motion 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 2<sup>nd</sup> day of June, 1994, by a vote of 6-0.

  
 Dorothy M. Gunn, Clerk  
 Illinois Pollution Control Board