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September 5, 1980

Henry Warren, Chairman
Board of Environmental Protection
Department of Environmental Protection
Ray Building
Hospital Street
Augusta, Maine 04333

Re: Determinations by Board of Arbitration Pursuant
to 38 M.R.S.A. § 551

Dear Chairman Warren:

In your memorandum of August 11, 1980, you asked for our opinion as to whether a Board of Arbitration convened pursuant to the Oil Discharge Prevention and Pollution Control Law (38 M.R.S.A. § 541 et seq.) is required to hear evidence and determine if a claimant's damage was caused by oil actually discharged by the respondent. Our answer is that the Board of Arbitration is only to consider whether the claimant has been damaged by an illegal discharge of oil, and if so, the amount of damages suffered. The Board of Arbitration does not determine whether the damage was caused by the respondent.

It is helpful to review the statute, Department of Environmental Protection regulations and the judicial interpretation provided by Portland Pipe Line Corporation v. Environmental Improvement Commission, et al., 307 A.2d 1 (Me. 1973), appeal dismissed, 94 S.Ct. 532, 414 U.S. 1035, 38 L.Ed.2d 326 (1973), to explain why the Board of Arbitration does not determine who caused the damage.

Oil Pollution Law

One of the primary purposes of the Oil Discharge Prevention and Pollution Control Law, 38 M.R.S.A. § 541 et seq.,

("Oil Pollution Law")^{1/} is to establish a procedure by which third parties damaged by oil spills may be promptly made whole:

. . . The Legislature intends by the enactment of this legislation to exercise the police power of the State through the Board of Environmental Protection by conferring upon said board the exclusive power to deal with the hazards and threats of danger and damage posed by such transfers and related activities; to require the prompt containment and removal of pollution occasioned thereby; to provide procedures whereby persons suffering damage from such occurrences may be promptly made whole; and to establish a fund to provide for the inspection and supervision of such activities and guarantee the prompt payment of reasonable damage claims resulting therefrom . . .
38 M.R.S.A. § 541.2/ (emphasis added)

1/ The legislative history of the Oil Pollution Law and its subsequent amendments do not lend any specific help in answering the question of the Board of Arbitration's authority to determine who caused an illegal discharge of oil. The Oil Pollution Law grew out of concerns in the late 1960's about the advent of supertankers, the lack of comprehensive federal or state legislation to control commerce in oil, and a sharp increase in oil commerce in Maine. In 1969 the Maine Legislature directed the Legislative Research Committee to study the coastal conveyance of petroleum products (S.P. 524, 1969). The Committee sent to the Legislature in January 1970 (Legislative Research Committee Publication 104-24) a report and a proposed Act relating to the Coastal Conveyance of Petroleum. The proposed Act was modified slightly during the special session of the 104th Legislature and was enacted as the Oil Discharge Prevention and Pollution Control Law, 38 M.R.S.A. § 541 et seq. None of the amendments since 1970 affects the conclusions reached in this opinion.

2/ See also D.E.P. Regulations, Chapter 650, § 3:

. . . (t)hese rules shall be liberally construed so as to secure speedy relief for those persons entitled to compensation on account of damages suffered because of the discharge of oil.

The payment of third-party damages comes from a non-lapsing, revolving fund called the Maine Coastal Protection Fund, 38 M.R.S.A. § 551. Section 551 sets out, inter alia, the procedures by which persons claiming damages which have resulted from an illegal discharge of oil can recover from the Fund and the procedures for establishing and conducting a Board of Arbitration.^{3/}

If a person suffering damages from an illegal discharge of oil ("the claimant"), the Board of Environmental Protection ("B.E.P.") and the person causing the discharge ("the respondent") can agree to the damage claim,^{4/} or in the case of a "mystery spill" (where the respondent is unknown after investigation by the B.E.P.), the claimant and the B.E.P. can agree to the damage claim, the Fund shall pay the claim. § 551.2.A. If there is no agreement as to the amount of the claim among the claimant, B.E.P. and respondent, or in the case of a mystery spill, between the claimant and B.E.P., the claim is transmitted to a Board of Arbitration. § 551.2.B.^{5/}

The Board of Arbitration is convened, in accordance with § 551.3, after the respondent has been determined by the B.E.P. for purposes of the Board of Arbitration:

Board of Arbitration. The Board of Arbitration shall consist of 3 persons, one to be chosen by the person determined in the

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- ^{3/} The fact that a claimant must file a claim within 6 months of the occurrence of the discharge (see 38 M.R.S.A. § 551.2; D.E.P. Regulations, Chapter 650, § 6-7) does not mean that the Board of Arbitration must determine the timeliness of the filing and, perhaps necessarily, determine causation through its determination of the date from which the 6-month period begins to run. Rather it is the B.E.P. which determines the timeliness of the claim, after which the B.E.P. determines the respondent and begins the arbitration procedures.
- ^{4/} "Awards from the Fund on damage claims shall not include any amount which the claimant has recovered, on account of the same damage, by way of settlement with or judgment of the federal courts against the person causing or otherwise responsible for the discharge." 38 M.R.S.A. § 551.2.E.
- ^{5/} Note that both §§ 551.2.A and 551.2.B concern reaching agreement as to the damage claim; there need not be any agreement or admission as to who caused the spill.

first instance by the board^{6/} to have caused the discharge, one to be chosen by the board to represent the public interest and one person chosen by the first 2 appointed members to serve as a neutral arbitrator . . . (emphasis added) 38 M.R.S.A. § 551.3.

The statute further provides that "(r)epresentation on the Board of Arbitration shall not be deemed an admission of liability for the discharge." § 551.3.F.

Oil Pollution Damage Claim Regulations .

Rules adopted by the Board of Environmental Protection to implement the statutory damage claims procedure outlined above reinforce the conclusion that the Board of Environmental Protection, not the Board of Arbitration, determines who is responsible for the oil discharge for purposes of the arbitration proceeding. At the outset, the rules define "respondent" as ". . . the person determined in the first instance by the Board of Environmental Protection to have caused the discharge, and shall include the agents, servants or principal of such person." (emphasis added). Department of Environmental Protection (D.E.P.) Regulations, Chapter 650, § 2.

In accordance with the D.E.P. Regulations, the respondent is determined by the Board of Environmental Protection as follows:

At the next regularly scheduled meeting of the Board of Environmental Protection, following at least seven (7) days receipt by it of Answers pursuant to Rule 11.A hereof, or if no Answers are filed, then following by at least seven (7) days the expiration of the time for answering, the Board of Environmental Protection shall make a determination, based upon the information set forth in the claim, the Answers, and other information which may be submitted to it by the Commissioner,

6/ "The following words and phrases as used in this subchapter shall, unless a different meaning is plainly required by the context, have the following meaning:

. . . 3. Board. "Board" shall mean the Board of Environmental Protection . . ."
38 M.R.S.A. § 542.

of the identity of the person who caused the discharge together with the identity of the Licensee ultimately responsible, if other than the person determined by the Board of Environmental Protection to have caused the discharge. The Board of Environmental Protection shall immediately notify the Claimant, the Respondent and the Licensee, if any, of its determination. (emphasis added) D.E.P. Regulations, Chapter 650, § 11.A.2.

There is nothing in the Damage Claims regulations which directs anyone but the B.E.P. to determine the discharger's identity.^{7/}

The duty of the Board of Arbitration, according to the regulations, is to determine a "claim" after the respondent has been ascertained by the Board of Environmental Protection; see, for example, § 12 ("If the Claimant and the Respondent or the Claimant and the Board of Environmental Protection do not agree upon the claim . . ."), § 17 (powers and duties of Board of Arbitration "reasonably necessary for the processing and determination of claims . . ."), § 19 (" . . . where a hearing has not been held, the Board of Arbitration shall schedule a hearing upon any claim for which an award has been made or denied . . ."), and § 26 (forms shall be captioned "In the matter of Claim of _____ for damages from oil discharge . . ."). Although there is no statutory definition of "claim," the word is used interchangeably with "the amount of damage alleged to be suffered." See e.g. 38 M.R.S.A. § 551.2. After the Board of Arbitration has determined the claim, the claim is paid out of the Fund to the claimant. The Board of Arbitration is not called upon to make any other determination according to the regulations.

Judicial Interpretation

The Court's decision in Portland Pipe Line Corporation v. Environmental Improvement Commission, et al., 307 A.2d 1 (Me.

^{7/} In its decision the Board of Arbitration is required to name the respondent and the date and nature of the discharge, but since this information has been determined by the Board of Environmental Protection previously, the naming of the respondent by the Board of Arbitration should be considered a requirement for proper record-keeping only (since a claimant may have claims pending from more than one discharge) rather than a finding to be made separately by the Board of Arbitration. D.E.P. Regulations, Chapter 650, § 22.B.

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1973); appeal dismissed 94 S.Ct. 532, 414 U.S. 1035, 38 L.Ed.2d 326 (1973), further supports our reading of the statutes and regulations in saying that the Board of Arbitration does not determine who is responsible for an illegal discharge. In responding to the plaintiff's constitutional challenge to the Oil Pollution Law on the grounds that the Board of Arbitration's determination of damages constitutes a denial of procedural due process, the Court said:

The board (of arbitration), in meeting the statutory purpose of establishing procedures whereby injured third parties may be promptly made whole, merely decides the amount to be paid out of the Fund to the aggrieved third party. (emphasis in the original). Portland Pipe Line, 307 A.2d 1, 16.

The Court goes on to point out that recovery for expenditures from the Fund is in a subsequent judicial proceeding brought by the Attorney General in which the State must, independent from damages assessed by the Board of Arbitration, prove damages and causation.

Neither are we convinced that, as plaintiffs assert, Section 552 makes the damages assessed by the board binding on the Court. Plaintiffs cite

" . . . the state need only plead and prove the fact of the prohibited discharge . . . (emphasis added)

as a legislative determination that damages (amount of reimbursement to the Fund) need not be proved.

The section is entitled "Liabilities of Licensees." The subsection is headed "State need not plead or prove negligence." The use of the word "only" exempts the State from proving anything other than causation in order to establish liability. It does not require that causation be the single issue before the Court in the collection suit brought by the Attorney General.

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Reading the section as a whole, we are convinced that the Legislature intended to provide that the State be required to plead and prove only the fact of the prohibited discharge to establish liability. It was never intended that there be no requirement that the State prove damages in the action before the Court. (emphasis in the original).
Portland Pipe Line, 307 A.2d 1, 16.

Legislative Intent

Apart from other arguments, it appears logical that the Board of Arbitration does not require evidence that the respondent caused the spill. A major purpose of the law, to promptly make whole those who have been damaged by oil spills, would be frustrated if the Board of Arbitration were to engage in potentially lengthy deliberations trying to reach a conclusion about causation. Also, it would seem anomalous that a person suffering from a mystery spill might recover damages more quickly than in a situation where the respondent were either named or known. The potential extent of this anomaly is demonstrated by a recent situation in which a Board of Arbitration was convened to determine awards for claims resulting from two separate spills which occurred only days apart in the same geographical area. If causation had to be proven, the claimant might be delayed in receiving a prompt payment from the Fund while the Board of Arbitration considered which spill caused which damage.

Conclusion

It is therefore our opinion that the Board of Arbitration determines only whether a claimant has been damaged by an illegal discharge of oil, and if so, the amount of such damages. The Board of Arbitration does not determine whether the damages suffered by the claimant resulted from a discharge by the respondent.

If you have any further questions, please contact me at your convenience.

Very truly yours,


RICHARD S. COHEN

Attorney General

RSC/d