

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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JAN 25 2010
STATE OF ILLINOIS
Pollution Control Board

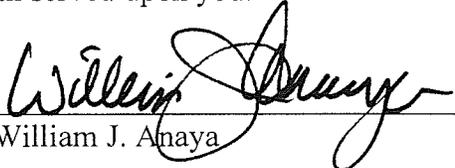
ZERVOS THREE, INC.,)
)
Petitioner,)
)
v.)
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

PCB 10-54
(UST Fund Appeal)

NOTICE OF FILING

To: See Attached Service List.

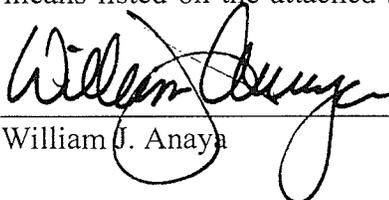
PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board, the PETITION FOR REVIEW OF THE AGENCY LUST DECISION of Zervos Three, Inc., a copy of which is herewith served upon you.



William J. Anaya

CERTIFICATE OF SERVICE

I, William J. Anaya, certify that I served the foregoing Notice of Filing and Appearance upon the parties listed on the attached Service List, by the means listed on the attached Service List, before 5:00 p.m. on January 25, 2010.



William J. Anaya

William J. Anaya
Robert A. McKenzie
Arnstein & Lehr LLP
120 South Riverside Plaza
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Service List

VIA HAND DELIVERY

Pollution Control Board, Attn: Clerk
100 West Randolph Street
James R. Thompson Center, Suite 11-500
Chicago, Illinois 60601-3218

VIA FIRST CLASS MAIL

Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276

VIA FIRST CLASS MAIL

Illinois Environmental Protection Agency, Bureau of Land
Attn: Michael Piggush
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276

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PETITION FOR REVIEW OF AGENCY LUST DECISION

NOW COMES Petitioner, Zervos Three, Inc., by counsel, Arnstein & Lehr LLP, and pursuant to Sections 40, 57.2 and 57.8 of the Illinois Environmental Protection Act (the "Act"), Petitioner appeals the Final Decision of the Illinois Environmental Protection Agency ("Respondent" or "IEPA") issued on December 21, 2009, wherein Respondent denied Petitioner's proper application and claim for reimbursement and payment of \$97,049.28 from the Illinois Leaking Underground Storage Tank Fund (the "LUST FUND") administered by Respondent.

In support of its appeal, Petitioner states as follows:

1. On May 21, 1991 a release was reported at a site commonly known as Schiller Park Clark Service Station 1516, located at 9999 West Irving Park Road, Schiller Park, Cook County, Illinois (the "Site"). The Illinois Emergency Management Agency assigned Incident No. 911366 to the release and Respondent acknowledged receipt of the notice of the release and assigned LPC #0312855092 to the Site.

2. Earlier appropriate and reimbursable corrective action had been undertaken in response to Incident No. 911366. Respondent's record of the LUST FUND reimbursement

payments related to the corrective action associated with Incident No. 911366 is attached hereto at Exhibit A.

3. Petitioner took title and possession to the Site on November 24, 2003 pursuant to a Quitclaim Deed, a copy of which is attached hereto at Exhibit B.

4. From before November 24, 2003 through the date hereof, the Site is one that had one or more registered tanks that had been removed and on which corrective action has not yet resulted in the issuance of a “no further remediation letter” from Respondent.

5. Since November 24, 2003 through the date hereof, Petitioner has been, and is, the owner of the Site.

6. From September 1, 2006 to May 31, 2009 Petitioner performed additional and appropriate corrective action activities at the Site related to Incident No. 911366, and in the process, incurred additional, reimbursable expenses, properly and lawfully payable from the LUST FUND administered by Respondent.

7. Petitioner, as the owner of the Site, prepared and delivered to Respondent a written notice dated June 1, 2009 electing to proceed as Owner in the Leaking Underground Storage Tank Program pursuant to 415 ILCS 5/57.2. Respondent received Petitioner’s written election To Proceed as Owner on June 8, 2009 and forwarded Petitioner an Acceptance of Election to Proceed as Owner on June 18, 2009. Copies of Petitioner’s written Election to Proceed as Owner dated June 4, 2009 and Respondent’s Acceptance of Election to Proceed as Owner Dated June 18, 2009 are attached hereto as Group Exhibit C.

8. According to 415 ILCS 5/57.2, Petitioner is an “owner,” as that term is defined, and Petitioner is therefore entitled to reimbursement for reimbursable expenses under the LUST FUND for costs incurred in performing a corrective action at the Site related to Incident 911366.

9. On June 11, 2009, Petitioner delivered and Respondent received, Petitioner's application and claim for reimbursement from the LUST Fund in the amount of \$97,049.28, for additional, appropriate and reimbursable corrective action expenses incurred in performing corrective action activities at the Site related to Incident No. 911366 from September 1, 2006 to May 31, 2009. A copy of Petitioner's application and claim for reimbursement is attached hereto at Group Exhibit D.

10. Each of the expenses described in Petitioner's application and claim for reimbursement are lawful, proper, and necessary corrective action expenses incurred by Petitioner in responding to Incident No. 911366, which expenses are properly reimbursable from the Leaking Underground Storage Tank Program and LUST FUND administered by Respondent.

11. On September 3, 2009, the Illinois Office of State Fire Marshal determined that Petitioner was eligible for reimbursement of reimbursable expenses in excess of \$10,000 for those expenses incurred in response to Incident No. 911366. A copy of the Illinois Office of State Fire Marshal's determination is attached hereto as Exhibit E.

12. On December 21, 2009, Respondent denied Petitioner's application and claim for reimbursement from the LUST FUND on the following grounds:

1. It appears that all of the bills in this bill package were billed to Zervos Three. However, it does not appear that Zervos Three was the owner/operator of the 3-7,500 gallon gasoline underground storage tank systems (which were removed in June 1991) during the billing period (September 2006 → May 2009). Based upon the Election To Proceed As Owner Form dated June 1, 2009, Zervos Three was not the owner/operator of the underground storage tank systems until June 1, 2009. Therefore, the entire bill package is not reimbursable. Section 22.18b(a)(3) of the Illinois Environmental Protection Act.

2. Please refer to RW Collins Invoice 486, dated September 30, 2007. This invoice includes costs associated with the removal & disposal of all of the pavement from the site. The Illinois EPA

will not reimburse costs associated with the removal & disposal of pavement which are beyond what was associated with the 705 cubic yards (1,008 tons) of contaminated soil which were excavated & disposed of in June 1991. Information submitted to the Illinois EPA does not indicate the amount of pavement which was associated with the 705 cubic yards (1,008) tons of contaminated soil which were excavated & disposed of in June 1991. Therefore, the entire invoice is not reimbursable. Sections 22.18(e)(1)(C), 22.18b(a)(3) & 22.18b(d)(4)(C) of the Illinois Environmental Protection Act.

A copy of Respondent's letter is attached hereto as Exhibit F.

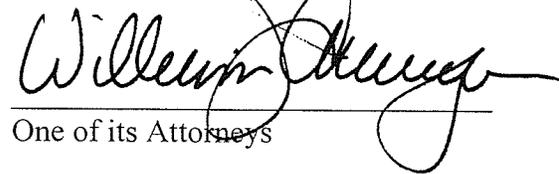
13. Respondent's letter dated December 21, 2009 is final agency action.
14. Respondent's letter dated December 21, 2009 was served on Petitioner by Certified Mail on December 24, 2009, which date of service was confirmed by the United States Postal Service ("USPS"). A copy of the USPS's confirmation of delivery is attached hereto, at Exhibit G.
15. Respondent's final decision dated December 21, 2009 denying Petitioner's application and claim for reimbursement from the LUST FUND is erroneous, unlawful, arbitrary and capricious for the following reasons, among others:
 - A. Petitioner is the owner of the Site entitled to reimbursement from the LUST Program (Title XVI of the Act) pursuant to 415 ILCS 5/57.2 and the regulations promulgated thereunder. Respondent's assertion that Petitioner was not the owner until June 1, 2009 is contrary to the law, and is an arbitrary and capricious interpretation of the law;
 - B. Petitioner properly documented that the concrete removal expenses were incurred by Petitioner as part of corrective action activities related to Incident No. 911366, and those expenses are proper, reimbursable expenses from the LUST FUND;

- C. From and after receipt of the written notice to proceed under 35 Ill. Admin. Code 734 on June 8, 2009 as described above, Respondent was required to review Petitioner's application and claim for reimbursement within 120 days pursuant to 35 Ill. Adm. Code Section 734.610(d). Respondent failed to approve or deny Petitioner's application and claim for reimbursement by October 6, 2009, and therefore, Petitioner's application and claim for reimbursement was deemed approved by operation of law;
- D. Respondent's final decision denying Petitioner's application and claim for reimbursement lacks foundation or statutory bases to the extent that Sections 22.18 and 22.18b of the Act were repealed in 1993 by Illinois Public Act 88-496.

WHEREFORE, Petitioner requests that the Illinois Pollution Control Board enter an order reversing Respondent's final decision dated December 21, 2009 and order Respondent to reimburse Petitioner for the expenses described in Petitioner's application and claim for reimbursement from the LUST FUND in the amount of \$97,049.28, plus attorneys fees and costs, and for such other and further relief as the Illinois Pollution Control Board deems just.

Respectfully submitted,

ZERVOS THREE, INC.



One of its Attorneys

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