

ILLINOIS POLLUTION CONTROL BOARD
February 4, 2010

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|------------------------|---|-------------------|
| ZERVOS THREE, INC., |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| v. |) | PCB 10-54 |
| |) | (UST Fund Appeal) |
| ILLINOIS ENVIRONMENTAL |) | |
| PROTECTION AGENCY, |) | |
| |) | |
| Respondent. |) | |

ORDER OF THE BOARD (by G. T. Girard):

On January 25, 2010, Zervos Three, Inc. (Zervos Three) timely filed a petition asking the Board to review a December 21, 2009, determination of the Illinois Environmental Protection Agency (Agency). The Agency's determination concerns Zervos Three's underground storage tank (UST) site located at 9999 West Irving Park Road, Schiller Park, Cook County. For reasons below, the Board accepts Zervos Three's petition for hearing.

Under the Environmental Protection Act (Act) (415 ILCS 5 (2008))¹, the Agency decides whether to approve proposed cleanup plans and budgets for leaking UST sites, as well as requests for cleanup cost reimbursement from the State's UST Fund, which consists of UST fees and motor fuel taxes. If the Agency disapproves or modifies a submittal, the UST owner or operator may appeal the decision to the Board. *See* 415 ILCS 5/40(a)(1), 57-57.17 (2008); 35 Ill. Adm. Code 105.Subpart D. In this case, the Agency denied Zervos Three's requested claim for reimbursement and payment of \$97,049.28 from the Illinois Leaking Underground Storage Tank Fund (the "LUST FUND") for the Schiller Park UST site. Zervos Three appeals on the grounds that the decision was "erroneous, unlawful, arbitrary and capricious" because (1) Zervos Three is owner of the site and was the owner of the site prior to June 1, 2009; (2) Zervos Three properly documented the removal expenses that it incurred; (3) the Agency failed to approve or deny Zervos Three's application for reimbursement within the 120 day period mandated by 35 Ill. Adm. Code Section 734.610(d); and (4) the Agency lacked a statutory bases to deny reimbursement because Sections 22.18 and 22.18b of the Act were repealed in 1993 by Illinois Public Act 88-496. Zervos Three's petition meets the content requirements of 35 Ill. Adm. Code 105.408.

The Board accepts the petition for hearing. Zervos Three has the burden of proof. *See* 35 Ill. Adm. Code 105.112(a). Hearings will be based exclusively on the record before the Agency at the time the Agency issued its determination. *See* 35 Ill. Adm. Code 105.412. Accordingly, though the Board hearing affords petitioner the opportunity to challenge the Agency's reasons

¹ All citations to the Act will be to the 2008 compiled statutes, unless the provision at issue has been substantively amended in the 2008 compiled statutes.

for its decision, information developed after the Agency's decision typically is not admitted at hearing or considered by the Board. *See Alton Packaging Corp. v. PCB*, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987); *Community Landfill Co. & City of Morris v. IEPA*, PCB 01-170 (Dec. 6, 2001), *aff'd sub nom. Community Landfill Co. & City of Morris v. PCB & IEPA*, 331 Ill. App. 3d 1056, 772 N.E.2d 231 (3rd Dist. 2002).

Hearings will be scheduled and completed in a timely manner, consistent with the decision deadline (*see* 415 ILCS 5/40(a)(2) (2008)), which only Zervos Three may extend by waiver (*see* 35 Ill. Adm. Code 101.308). If the Board fails to take final action by the decision deadline, Zervos Three may deem its request granted. *See* 415 ILCS 5/40(a)(2) (2008). Currently, the decision deadline is May 25, 2010, which is the 120th day after the date on which the Board received the petition, January 25, 2010. *See* 35 Ill. Adm. Code 105.114. The Board meeting immediately before the decision deadline is scheduled for May 20, 2010.

Unless the Board or the hearing officer orders otherwise, the Agency must file the entire record of its determination by February 24, 2010, which is 30 days after the Board received Zervos Three's petition. *See* 35 Ill. Adm. Code 105.410(a). If the Agency wishes to seek additional time to file the record, it must file a request for extension before the date on which the record is due to be filed. *See* 35 Ill. Adm. Code 105.116. The record must comply with the content requirements of 35 Ill. Adm. Code 105.410(b).

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on February 4, 2010, by a vote of 5-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board