BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

MICK'S GARAGE, Petitioner,	)	
v.	)	PCB No. 03-126
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	(UST Appeal)

NOTICE

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

Curtis W. Martin
Shaw & Martin
123 South Tenth Street
Suite 302
P.O. Box 1789
Mt. Vernon, IL 62864

Carol Sudman, Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue, East
P.O. Box 19274
Springfield, IL 62794-9274

PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board a RESPONSE TO PETITIONER'S BRIEF, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

John J. Kim
Assistant Counsel
Special Assistant Attorney General
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)
Dated: September 16, 2003

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v.	)	PCB No. 03-126
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RESPONSE TO PETITIONER'S BRIEF

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, John J. Kim, Assistant Counsel and Special Assistant Attorney General, and, pursuant to an order entered by the Hearing Officer dated July 28, 2003, hereby submits its Response to the Petitioner's Brief to the Illinois Pollution Control Board ("Board").

I. BURDEN OF PROOF

Pursuant to Section 105.112(a) of the Board's procedural rules (35 Ill. Adm. Code 105.112(a)), the burden of proof shall be on the petitioner. The burden of proving that challenged costs in a claim for reimbursement are reasonable and related to corrective action rests solely on the applicant for reimbursement. Richard and Wilma Salyer v. Illinois EPA, PCB 98-156 (January 21, 1999), p. 3; See also, Ted Harrison Oil Company v. Illinois EPA, PCB 99-127 (July 24, 2003), pp. 3-4 (the burden of proof is on the owner or operator of an underground storage tank to provide an accounting of all costs). Similarly, in the present case, the burden of proving that the decision under appeal (dated January 10, 2003) was erroneous is upon the Petitioner; more specifically, the Petitioner has the burden of proving that the portion of that decision related to the deductible applicable for the site is incorrect.

II. STANDARD OF REVIEW

Section 22.18b(g) of the Environmental Protection Act ("Act") provides that an applicant may appeal an Illinois EPA decision denying reimbursement to the Board under the provisions of Section 40 of the Act (415 ILCS 5/40). Pursuant to Section 40 of the Act, the Board's standard of review is whether the application submitted to the Illinois EPA would not violate the Act and Board regulations. Ted Harrison, p. 3. In this situation, the Board's standard of review should be whether the information submitted to the Illinois EPA would lead to a violation of the Act and Board regulations if the deductible requested had been granted.

Based on the information within the Administrative Record ("Record") and the testimony elicited at hearing held on July 16, 2003,[1] and applying the relevant law, the Illinois EPA respectfully requests that the Board enter an order affirming the Illinois EPA's decision.

III. THE PETITIONER'S ARGUMENTS ARE BASED ON THE WRONG LAW

In its Brief, the Petitioner argues that pursuant to Section 57.9(b) of the Act (415 ILCS 5/57.9(b)), it is entitled to a decision that the deductible in this case should be assessed at either $10,000.00 or $15,000.00. While this argument will be addressed in more detail below, it must be noted that the Petitioner's reliance on language found in Title XVI of the Act (415 ILCS 5/57, et seq.) is misplaced. Here, the decision issued by the Illinois EPA was done pursuant to Section 22.18b of the Act.

As the Board described in Ted Harrison, the law in Illinois regulating releases from underground storage tanks ("USTs") transitioned from that found in Section 22.18b of the Act to Section 57 of the Act. Ted Harrison, pp. 4-5. Without an express election to proceed pursuant to the "new" law, a site that reported a release prior to the effective date of Section 57 would

[1] Citations to the Administrative Record will hereinafter be made as, "AR, p. ___." References to the transcript of the hearing will be made as, "TR, p. ___."

proceed pursuant to the law found in Section 22.18b. Here, there is no proof in the Record or any documentation provided by the Petitioner that Mick's Garage ever elected to proceed pursuant to Section 57 of the Act. Further, although there is an incident number associated with the site that was issued in 1999, the Petitioner itself admits that the report that led to the issuance of that incident number was made only at the behest of an inspector from the Office of the State Fire Marshal ("OSFM") following removal of the tanks in question. The Petitioner characterizes that report as a second reporting of the initial suspected release of June 11, 1991. Petitioner's Brief, p. 2; AR, pp. 7, 14.

Therefore, since the Petitioner has acknowledged that the incident reported in 1999 was simply a re-reporting of the initial release first reported in 1991, Section 22.18b of the Act controls the decision under review. The Board in making its decision should not consider the Petitioner's arguments based on Section 57.9 of the Act. To do otherwise would be an application of a law that is clearly inapplicable.

The law that was applied by the Illinois EPA in reaching its decision dated February 7, 1992 (AR, pp. 1-2), was Section 22.18b(d)(3)(C)(ii) of the Act. That section provided in pertinent part, "If the costs incurred were in response to a release of petroleum which first occurred prior to July 28, 1989, and the owner or operator had actual or constructive knowledge that such a release occurred prior to July 28, 1989, the deductible amount *** shall be $50,000 rather than $10,000 ***. It shall be the burden of the owner or operator to prove to the satisfaction of the Agency that the owner or operator had no actual or constructive knowledge that the release of petroleum for which a claim is submitted first occurred prior to July 28, 1989.".

This appeal is allowed for by Section 22.18b(g) of the Act, and Section 22.18b(d)(3)(C)(ii) of the Act should be considered controlling to whatever limited extent the

Illinois EPA's decision of February 7, 1992 is scrutinized. Indeed, since no appeal of that decision was ever taken by the Petitioner (TR, p. 24), that decision should be considered to be valid and in effect.

IV. THE RELEVANT AND UNDISPUTED FACTS SUPPORT THE DECISION ISSUED BY THE ILLINOIS EPA

The Petitioner argues that certain undisputed facts, when applied to Section 57.9(b) of the Act, require that the Board find that either the $10,000.00 or $15,000.00 deductible should be applicable. Petitioner's Brief, p. 4. This argument fails for a variety of reasons.

The undisputed facts presented by the Petitioner are that the two 2,000 gallon diesel fuel USTs had not leaked, that any leak that occurred in 1991 related to gasoline USTs registered in 1986, that Mick's Garage could not have had constructive knowledge prior to 1989 of a diesel fuel tank that never occurred, and that there is no evidence in the Record that suggests Mick's Garage had or could have had any knowledge of a leak from a gasoline UST prior to 1989. Id.

Unfortunately, these are not the facts that the Board should find to be relevant or undisputed. While a recitation of all the facts surrounding this case is not needed, there are a number of unusual circumstances that deserve mention.

The following statements are truly undisputed. On June 11, 1991, Mick's Garage reported a suspected release from its site, leading to the issuance of incident number 911582. AR, pp. 7, 9, 10, 14. At the time of the application for reimbursement that led to the issuance of the Illinois EPA's February 7, 1992 decision, Mick's Garage assumed and represented that the diesel fuel USTs at the site were taken out of service in 1980 due to a lead from the line going from the connecting tank to pump. AR, p. 1; TR p. 23. On February 7, 1992, the Illinois EPA issued a final decision setting the deductible for the site at $50,000.00, based on the information presented in the underlying application and Section 22.18b(d)(3)(C)(ii). AR, pp. 1-2. Despite

any later suspicions or changes in position, Mick's Garage did not appeal the February 7, 1992 decision (nor the related March 9, 1992 final decision). TR, p. 24.

On April 8, 1999, six tanks were removed from the Mick's Garage site under the observation of an OSFM inspector. AR, p. 22. At the request of the OSFM inspector, a second reporting of the occurrence first reported in 1991 was made, and a second incident number (990820) was issued. Petitioner's Brief, p. 2; AR, p. 14.

On April 26, 2000, OSFM received an application for eligibility and deductibility from Mick's Garage, and on May 9, 2000, OSFM issued a decision stating that the applicable deductible for the site was $15,000.00. Petitioner's Exhibit 1, p. 1. In the application that led to the May 9, 2000 OSFM decision, Mick's Garage represented that there were 15 USTs at the site and that the occurrence for which reimbursement would be sought was incident number 990820. Petitioner's Exhibit 1, p. 5. Of the 15 tanks identified in that application, the tanks were either associated with incident number 990820 or with an unidentified or inapplicable incident number. Petitioner's Exhibit 1, pp. 7-8. Also, of the 15 tanks, 10 were identified as having had a release; for each of those 10 tanks, the date of notification of the release was listed as April 5, 1999. Id.

On May 17, 2000, the consultant retained by Mick's Garage prepared and presumably sent to OSFM another application for eligibility and deductibility. AR, pp. 5-10. In that application, Mick's Garage stated that the occurrence for which reimbursement would be sought was incident 911582, and that incident number 990820 was reported for the site but was a second reporting of the same occurrence. AR, p. 7. Mick's Garage represented that there were 11 tanks at the site. AR, p. 7. The application also represented that all 11 of the identified tanks were associated with incident number 911582, all had experienced a release, and the releases for all those tanks was reported on June 11, 1991. AR, pp. 9-10.

Later, on September 11, 2000, OSFM received another application for eligibility and deductibility for the Mick's Garage site. Petitioner's Exhibit 1, pp. 9, 12-16. That application stated that the occurrence for which reimbursement would be sought was incident 911582, and incident number 990820 was reported for the site as a second reporting of the same occurrence. Petitioner's Exhibit 1, p. 13. That application identified 11 tanks at the site, and stated that all tanks had experienced a release that was reported on June 11, 1991. Petitioner's Exhibit 1, p. 15. On September 22, 2000, OSFM issued a decision in response to the application, setting the deductible for the site at $10,000.00. Petitioner's Exhibit 1, pp. 9-10.

On August 8, 2002, Mick's Garage sent a request that the deductible for the site be considered. AR, pp. 14-22. On September 4, 2002, the Illinois EPA issued a final decision stating that the proper deductible would be set at $50,000.00, per the original Illinois EPA decision. AR, pp. 23-25. The decision also referenced that the information sent by Mick's Garage was discussed with a representative of OSFM. AR, p. 23. No appeal of that decision was ever taken.

On November 12, 2002, Mick's Garage sent a Site Characterization Report/Corrective Action Plan to the Illinois EPA for review. AR, pp. 27-35. In that submittal, Mick's Garage again raised the issue of the correct deductible for the site, and references the $10,000.00 and $15,000.00 deductibles assessed by OSFM (though without a clear statement as to which of those two deductibles should be applied). AR, pp. 27-28. The Illinois EPA's decision dated January 10, 2003, was issued in response to that submittal. AR, pp. 35-38.

As seen by these facts, this site has had several different deductibles determined as applicable. The Illinois EPA first set the deductible at $50,000.00 (at a time when the Illinois EPA was empowered to issue such decisions). Later, Mick's Garage submitted at least two

different applications to OSFM seeking new deductible decisions, leading to assessments of $15,000.00 and later $10,000.00 for the site. The information contained within the applications to the Illinois EPA and the OSFM varied, in terms of number of tanks at the site to whether and when the tanks experienced releases. The first application leading to a deductible was submitted to the Illinois EPA in November 1991, and applications were later submitted to OSFM in April and September of 2000.

Given the inconsistent information presented, and the question of whether OSFM even has the authority to issue any decision on the deductible following that issued originally by the Illinois EPA, the facts warrant a decision by the Board that the Illinois EPA's final decision was proper.

V. THE ILLINOIS EPA IS NOT AUTHORIZED TO CHANGE ITS FINAL DECISIONS

It is well-established that the Illinois EPA is not authorized to change or reconsider its final decisions. Reichhold Chemicals, Inc. v. Illinois Pollution Control Board, 204 Ill. App. 3d 674, 561 N.E.2d 1343 (3d Dist. 1990). Here, that means the Illinois EPA is bound to its decision on a deductible as was issued on February 7, 1992. Given that the Petitioner did not file an appeal of that decision, the Petitioner likewise should be considered subject to and bound by the decision. The Illinois EPA's 1992 deductibility decision, never having been appealed, should be considered valid on its face. The best argument that the Petitioner can raise is not whether the decision is correct, but rather whether the Illinois EPA and the Board should look the other way and instead follow one of the subsequent OSFM decisions.

In its letters dated August 8, 2002, and November 12, 2002, Mick's Garage raised the issue of whether the $50,000.00 deductible should be applied to its site. Specifically, the request was made that the Illinois EPA ignore its decision of February 7, 1992, and instead abide by one

of the two different decisions issued by OSFM. At that time in 2002, even if the Illinois EPA did choose to change its February 7, 1992 decision, it was unable to do so (the edict of Reichhold Chemicals notwithstanding) since the authority to issue such decisions had passed (by virtue of the terms of Title XVI of the Act) to OSFM.

VI. OSFM's DECISIONS SHOULD NOT BE CONSIDERED AS VALID

The Petitioner seems to be arguing that, in this case, it was simply asking the Illinois EPA to take note of the passing of authority to issue determinations on deductibility, and to abide by the decision(s) of OSFM regarding deductibility. However, the Illinois EPA could not do so for several reasons.

First, there is a very real question of whether OSFM had any authority to issue a deductible decision in this case. As the Petitioner noted several times, including in its applications to OSFM, the incident reported in 1999 was simply a re-reporting of the original incident which was reported in 1991. The most recent application submitted by Mick's Garage to OSFM indicated that any reimbursement for the tanks in question would be sought pursuant to the 1991 incident number, and that the 1999 incident number related to the same occurrence.

If that is true, and the Illinois EPA believes it is, then OSFM would have had no authority to issue any decision on deductibility for the Mick's Garage site. There is no evidence that demonstrates that Mick's Garage ever elected to proceed pursuant to Section 57 of the Act; therefore, remediation and pursuit of reimbursement for the site must be done in accordance with Section 22.18b of the Act. Pursuant to that legal framework, OSFM did not have any authority to issue decisions on the question of what is the correct deductible. Since OSFM did not have any deductibility authority pursuant to Section 22.18b, and since the site remains subject to regulation pursuant to Section 22.18b in the absence of an election to proceed otherwise, the

OSFM decisions should be considered to have no validity. The Illinois EPA cannot deviate from its original decision, one that was never appealed, and instead process claims for reimbursement based on decisions made by an agency that has no authority to issue those decisions. In a broader sense, this issue is the same as was raised earlier; namely, whether any provision of Section 57 of the Act should be found to be applicable for the Mick's Garage site, since no election to proceed pursuant to that Section was ever made by Mick's Garage. Since no such election was made, no provisions of Section 57 (including that which confers the authority upon OSFM to issue deductibility decisions) should be found to be applicable.

Second, even if the Illinois EPA (or the Board, for that matter) were to decide that the OSFM decisions should be given some weight, the question becomes which of the two decisions should be followed? Even the Petitioner is hedging on that issue, as it notes in its brief that the $10,000.00 deductible applies, or "[a]t the very least, the $15,000.00 deductible applies." Petitioner's Brief, p. 4. If the Board finds that the Illinois EPA's decision dated January 10, 2003 was in error, then it must also find that the Illinois EPA should have instead followed one of the two decisions issued by OSFM. The Illinois EPA would then be required to have to pick and choose between differing decisions based on differing information within the respective applications.

If the simple answer of following the most recent application in time were to be given, then the Board would be opening the door for an owner or operator to simply apply over and over again to OSFM for deductibility determinations with the hopes that the lowest possible deductible would eventually be granted. Though the information differed between the two applications submitted to OSFM, the applications were submitted only months apart, and each almost 10 years following the incident that is supposedly at issue and identified by the Petitioner

as being related to the only occurrence (i.e., 911582) and three years after the removal of the tanks themselves. There is a very real question as to why after such a long period of time there was such an abrupt change in information from one application to the other, and a very real possibility that a potential for abuse of the system would be allowed if the second OSFM decision were to be deemed the "correct" decision. If the Board allows that either the first or second OSFM decision should be followed, it is creating a situation in which OSFM can issue decisions when it is otherwise not empowered to do so, with the added invitation for an applicant to submit multiple applications for the same site in hopes of continually lowering the deductible.

VII. CONCLUSION

For all the reasons and arguments included herein, the Illinois EPA respectfully requests that the Board affirm its January 10, 2003 decision. The Illinois EPA had no choice but to adhere to its decision dated February 7, 1992, and the Petitioner was likewise bound by that decision. Since no election to proceed with remediation of the site pursuant to Section 57 of the Act was ever made, no provision of that Title of the Act is applicable. Accordingly, OSFM did not have any authority to issue either of its two deductible decisions. Even if OSFM does somehow have the authority to issue deductible determinations for a site that has experienced a pre-1993 release, it is unclear which of its two decisions should be followed. The Illinois EPA does not have the authority to weigh competing decisions issued by OSFM and decide which of the different decisions was correct, and therefore reliance upon the only decision that was clearly issued pursuant to a recognized statutory authority was the correct decision. For these reasons, the Illinois EPA respectfully requests that the Board affirm the Illinois EPA's January 10, 2003 decision.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

John J. Kim
Assistant Counsel
Special Assistant Attorney General
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544, 217/782-9143 (TDD)
Dated: September 16, 2003

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on September 16, 2003, I served true and correct copies of a RESPONE TO PETITIONER'S BRIEF, by placing true and correct copies in properly sealed and addressed envelopes and by depositing said sealed envelopes in a U.S. mail drop box located within Springfield, Illinois, with sufficient First Class Mail postage affixed thereto, upon the following named persons:

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

Curtis W. Martin
Shaw & Martin
123 South Tenth Street
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