BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

McDONALD'S CORPORATION,	)
	)
Petitioner,	)
	) PCB 04-14
v.	) (UST Appeal)
	)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)
	)
	)
Respondent.	)

NOTICE OF FILING AND CERTIFICATE OF SERVICE

The undersigned hereby states on oath that on this 30th day of October, 2003, copies of Petitioner's Motion For Summary Judgment were filed with the Illinois Pollution Control Board and served by First Class Mail, postage pre-paid, upon the parties named on the attached Service List.

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PETITIONER'S MOTION FOR SUMMARY JUDGMENT

In 2002 and 2003, Petitioner McDonald's Corporation ("McDonald's") paid a total of $31,515 to compact[1] backfill as it was being placed into excavations at a leaking underground storage tank site in Oak Brook, Illinois (the "Site"). The reason that the backfill was placed into the excavations was to raise the surface of those excavations to grade. The sole reason that the backfill was compacted as part of the placement of the backfill was to prevent future settlement of the backfill.

The Illinois Environmental Protection Agency ("IEPA") has refused to allow the $31,515 cost of compaction to be reimbursed from the Leaking Underground Storage Tank ("LUST") Fund. According to the IEPA, the money that McDonald's spent on compaction was not reimbursable because McDonald's "failed to demonstrate [that the $31,515 spent on compaction was] reasonable … ." (Joint Stipulation, Exhibit 6, Attachment A to Exhibit 6.)

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[1] For purposes of this Motion, the words 'compact' and 'compaction' have a limited and specific meaning. In their Joint Stipulation Of Facts (the "Joint Stipulation"), the parties agreed *inter alia* that: (1) the 'compaction' involved in this case consisted of rolling over the backfill with a sheepsfoot roller; and (2) the sole purpose of the 'compaction' in this case was to prevent voids and severe settlement of the backfill. (*See generally* Joint Stipulation, ¶¶19-26.)

Pursuant to Illinois Administrative Code Title 35, §101.516(b), McDonald's now respectfully moves for entry of summary judgment finding: (1) that the IEPA erred in denying reimbursement for the cost of compaction at the Site; and (2) that the $31,515 cost was (and was demonstrated to be) a reasonable cost of corrective action at this Site which, under the Illinois Environmental Protection Act (the "Act"), should be reimbursed from the LUST Fund.

INTRODUCTION

The basis of this motion is straightforward. The pertinent section of the Illinois Environmental Protection Act provides that "the costs incurred to perform [a] corrective action" are eligible for reimbursement from the LUST Fund if they are "reasonable ... ." 415 ILCS 5/22.18b(d)(4)(C), §22.18b(d)(4)(C) of the Act (now repealed).[2] The undisputed facts show that the $31,515 which McDonald's spent to compact the backfill was a "cost[] incurred to perform [a] corrective action" which was reasonable and was demonstrated to be reasonable.

- ***The compaction of the backfill was a "corrective action."*** The parties in this case have stipulated that the compaction of the backfill at issue here was "properly part of the soil placement process" used to raise the surface of the excavations at the Site to grade. (Joint Stipulation, ¶37.) The Board has previously determined that the placement of backfill into an excavation created by the removal of contaminated soil is a "corrective action." *See, e.g., Platolene 500, Inc. v. IEPA*, PCB 92-9 (Opinion and Order dated May 7, 1992) ("Backfilling ... is an action [which is] necessary to protect human health and the environment" and is therefore a corrective action). Consequently, the placement of the backfill into the excavations – and the compaction of that backfill, which the IEPA has

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[2] As discussed below, although §22.18b of the Act was repealed by Public Act 88-496 (effective September 13, 1993), §22.18b of the Act is still the controlling law in this case.

stipulated was "properly part of the soil placement process" at this Site – was a "corrective action" under the Act.[3]

- ***The compaction of the backfill and the cost associated with that compaction were reasonable and were demonstrated to be reasonable.*** The IEPA deducted the $31,515 cost of compaction because (according to the IEPA) McDonald's "failed to demonstrate" that the cost was "reasonable." (Joint Stipulation, Exhibit 6, Attachment A to Exhibit 6.) There are two possible reasons for the IEPA's determination.[4] Either:

  (1) the IEPA decided that McDonald's should have backfilled the excavations with a material that did not require compaction, so McDonald's choice of soil as the backfill material (which led to a need for compaction) was not reasonable and the cost associated with the compaction of the soil was therefore also (according to the IEPA) not reasonable; or

  (2) the IEPA decided that the soil should have been placed into the excavations without any compaction, so the cost associated with the compaction of the soil was (according to the IEPA) not reasonable.

  Neither of these alternative explanations for the IEPA's determination is supportable.

  - ***First***, before the IEPA issued the denial which is the subject of this appeal, Carmen Yung (a Senior Environmental Engineer employed by MACTEC (McDonald's remediation contractor)) had telephone conversations with both Ms. Lieura Hackman

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[3] As discussed below, even though it is clear that the compaction at the Site was a "corrective action," it is equally clear as a matter of law that the IEPA cannot dispute the classification of the compaction as a "corrective action" in this appeal. *See, e.g., Pulitzer Community Newspapers, Inc. v. IEPA*, PCB 90-142 (Opinion and Order dated December 20, 1990).

[4] There is apparently no dispute regarding either the method of compaction (*i.e.*, the use of a sheepsfoot roller) or the unit cost (*i.e.*, the dollars per cubic yard) of the compaction at the Site, since the only issues that MACTEC needed to address in its letter to the IEPA following discussions with IEPA personnel (*see* Joint Stipulation, Exhibit 5 (attached), p. 1) had nothing to do with either the use of a sheepsfoot roller or the unit cost of the compaction.

and Ms. Valerie Davis of the IEPA concerning LUST Fund reimbursement. (Joint Stipulation, Exhibit 5, p. 1.) (Exhibit 5 from the Joint Stipulation is attached for the convenience of the Board.)

Based upon those conversations, MACTEC sent a letter to the IEPA addressing (among other things) the possibility that McDonald's could have used a backfill material that did not require compaction.

In that letter (Joint Stipulation, Exhibit 5 (attached)), MACTEC explained that using crushed stone as the backfill material would not have required compaction. MACTEC also indicated that it believed that the use of crushed stone as a backfill material would have been entitled to "full reimbursement" from the LUST Fund.

But MACTEC also told the IEPA why backfilling with soil instead of crushed stone was the reasonable decision at this Site:

- the soil that was being used as backfill was "unwanted" material donated by the Village of Oak Brook, so using this soil as backfill was a beneficial reuse of a potential waste material; and
- more importantly, the use of compacted soil as backfill ***saved more than an estimated $50,000 compared to the cost of using crushed stone.*** (Joint Stipulation, Exhibit 5 (attached), p. 2.)

As MACTEC's letter demonstrated, it was eminently reasonable to use soil instead of crushed stone as backfill at the Site, even though the soil required compaction, because the use of the soil allowed for the beneficial reuse of unwanted material and – more importantly – ***it saved more than an estimated $50,000.***

- ***Second***, MACTEC's letter also addressed the argument that the soil should not have been compacted as part of the soil placement process. MACTEC explained that the compaction at the Site had only one purpose – to prevent voids and severe settlement. According to MACTEC, if the compaction had had any other purpose, the placement of the soil, the compaction, and the testing of the level of compaction would have been different.

  The rationale for compacting the soil was clearly implied in MACTEC's letter: in the absence of compaction, the surface of the excavations at the Site potentially would settle below grade. (*See* Joint Stipulation, Exhibit 5 (attached).) Severe settlement would present (as the Board noted in *Platolene 500, Inc. v. IEPA, supra*) a potential danger to "human health and the environment." Moreover, if the backfill settled then additional fill would have to be brought to the Site to once again restore the Site to grade. (Joint Stipulation, ¶22.) The MACTEC letter therefore demonstrated why it was reasonable to compact the backfill that was used at this Site.[5]

In sum, the material facts in this case are undisputed. Those facts show that the compaction of the fill was part of a corrective action, that the compaction and the cost of compaction were reasonable, and that McDonald's (through its contractor) directly addressed the IEPA's concerns and demonstrated that the compaction and the cost of compaction were reasonable.

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[5] In fact, it would at this point be flatly illogical for the IEPA to claim that the compaction of the soil was not reasonable. The IEPA has stipulated that the "...IEPA did not and does not contest the fact that the compaction of the backfill soil was properly part of the soil placement process." (Joint Stipulation, ¶37.) Since the compaction was "properly part of the soil placement process," and there is no "reasonableness" claim concerning that soil placement process, it is difficult to understand how the compaction (which is properly part of the soil placement process) cannot be "reasonable."

McDonald's therefore respectfully asks the Board to find that the $31,515 cost of compaction was demonstrated to be a reasonable cost of corrective action, that the IEPA's decision denying reimbursement of the $31,515 from the LUST Fund was in error, and that the $31,515 requested by McDonald's should be allowed for reimbursement under the LUST Fund.

UNDISPUTED FACTS

The Petitioner in this case is McDonald's Corporation, and the Respondent is the Illinois Environmental Protection Agency (the "IEPA"). (Joint Stipulation, ¶¶1, 2.)

This dispute involves a former gasoline station located at 1120 West 22nd Street in Oak Brook, Illinois (the "Site"). (Joint Stipulation, ¶3.) The Site is located at the north-east corner of the intersection of 22nd Street and Spring Road, which is the first intersection that drivers encounter after exiting I-88 and entering Oak Brook. (Joint Stipulation, ¶¶3, 4 and Exhibits 1-3 (photographs and a map showing the location of the Site).)

A number of years ago, the soil at the Site became contaminated with hydrocarbons as a result of spills or leaks that occurred in connection with the operation of a gasoline filling and service station (since demolished) at the Site.[6] (Joint Stipulation, ¶7.) McDonald's, which purchased and is the current owner of the Site, has undertaken the remediation of the Site. (Joint Stipulation, ¶8.)

A Corrective Action Plan for the remediation of the Site was filed with the IEPA and approved by the Agency in May, 2002. (Joint Stipulation, ¶8.) The Corrective Action Plan, generally speaking, called for the excavation and removal of the contaminated soil from the Site to a landfill, and the replacement of that volume with clean fill. (Joint Stipulation, ¶10.)

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[6] McDonald's was not involved in the operation of the service station. (Joint Stipulation, ¶8.)

When officials with the Village of Oak Brook (the village in which the Site is located) found out about the remediation of the Site, they asked McDonald's to use excess soil that the Village owned as fill. (Joint Stipulation, ¶11.) That soil (the "backfill soil") was located in a pile on 31st Street in Oak Brook, fairly near to the Site. (Joint Stipulation, ¶12.) The backfill soil was offered at no charge to McDonald's. (Joint Stipulation, ¶12.)

McDonald's contractor for the remediation, MACTEC Engineering and Consulting of Georgia, Inc. ("MACTEC"), then contacted Ms. Valerie Davis of the IEPA. Ms. Davis indicated that the backfill soil would be acceptable as fill at the Site if assurances could be provided which confirmed that the backfill soil did not come from a contaminated source. In compliance with this request, the Village of Oak Brook confirmed in writing that to the best of its knowledge, the backfill soil did not come from a contaminated source. (Joint Stipulation, ¶¶13, 14.)

In addition, the IEPA also requested that one sample of the backfill soil be collected and tested for priority pollutants. (Joint Stipulation, ¶13.) In compliance with this request, a sample of the backfill soil was taken and tested. The results of the test of the sample of backfill soil showed that the backfill soil was suitable for use as fill at the Site. (Joint Stipulation, ¶15.)

In addition to the assurances from the Village of Oak Brook and the favorable result from the test for priority pollutants, MACTEC further recommended that the backfill soil be continuously screened prior to its use as fill at the Site. (Joint Stipulation, ¶16.) The backfill soil was therefore initially continuously screened before it was taken to the Site. That screening did not detect any elevated PID readings or visual or olfactory signs of contamination. (Joint Stipulation, ¶16.)

MACTEC then again contacted Ms. Davis of the IEPA concerning the screening procedure. Ms. Davis recommended that additional soil samples be collected and tested in lieu of the continuous screening. (Joint Stipulation, ¶16.) As a result, nine additional samples of the

backfill soil were taken and tested, and were found (with one exception relating to arsenic concentration) to be within the most stringent TACO Tier 1 soil remediation objectives. MACTEC therefore concluded that the backfill soil was not contaminated. (Joint Stipulation, ¶17.)

The backfill soil was loaded at the 31st Street location and transported to the Site for use as fill. After that soil arrived at the Site, it was placed into the excavations that had been formed by the removal of the contaminated soil and then rolled over "a few times" by a sheepsfoot roller. (Joint Stipulation, ¶¶18, 19, Exhibit 5 (attached), p. 2.)

The use of the sheepsfoot roller was solely to compact the soil sufficiently to prevent voids and severe settlement. (Joint Stipulation, ¶20.) McDonald's wanted to prevent the presence of voids and the possibility of severe settlements because voids and severe settlement would cause the surface of the Site to sink below grade at the Site. (Joint Stipulation, ¶ 21.) If the surface of the Site were to sink below grade, it would be necessary to bring additional fill to the Site to once again restore the Site to grade. (Joint Stipulation, ¶22.)

The placement of the backfill soil at the Site, including the thickness of the lifts (*i.e.*, the layers in which the fill was deposited) used during the placement of the backfill soil, was ***not*** designed, conducted, intended or engineered for the purpose of insuring that the backfill soil would provide a sufficient base for later construction at the Site. (Joint Stipulation, ¶26.) To the contrary: even though in-place density testing is typically conducted after compaction whenever the compaction is for the purpose of readying a site for construction, no in-place density testing of the backfill soil after it was placed at the Site and rolled over with a sheepsfoot roller has ever been conducted. (Joint Stipulation, ¶¶24, 25.)

In its submission of its LUST Fund reimbursement request to the IEPA, McDonald's included bills from a subcontractor for the loading, transportation, placement and compaction of the backfill soil at the Site. At the request of the IEPA, McDonald's remediation and excavation contractors calculated that the cost of the "compaction" included in those bills – i.e., the cost of rolling the sheepsfoot roller on the backfill soil after it was placed at the Site – was in total $31,515. (Joint Stipulation, ¶27.)

In a final decision dated May 12, 2003 from the IEPA to McDonald's, the IEPA deducted from the approved costs of reimbursement the $31,515 cost of the "compaction" of the backfill soil at the Site. McDonald's did not appeal the May 12, 2003 final decision. (Joint Stipulation, ¶¶29, 30.)

Instead, in response to the IEPA's May 12, 2003 decision, MACTEC (McDonald's remediation contractor) had conversations with Ms. Lieura Hackman and Ms. Valerie Davis of the IEPA, and then sent a letter to the IEPA submitting information for the IEPA's consideration. (Joint Stipulation, Exhibit 5 (attached).) That letter, dated May 20, 2003, indicated that the purpose of the "compaction" was to "prevent voids [in] and severe settlement" of the backfill soil that had been used as fill, and that the "compaction" was therefore properly part of the soil placement process. (Joint Stipulation, ¶32.)

MACTEC's May 20, 2003 letter also stated that the use of crushed stone instead of the backfill soil as fill would have raised the total cost of the remediation by more than $50,000 above the total cost which was the basis for McDonald's reimbursement request. (Joint Stipulation, ¶33.)

MACTEC's May 20, 2003 letter further stated that the use of Oak Brook's backfill soil as fill instead of crushed stone "helped the Village of Oak Brook to dispose of their unwanted soil and turned it into use." The letter also contended that McDonald's "should not be penalized by employing cost saving and environmental conservation methods in site remediation when McDonald's could have obtained full reimbursement if crushed stone was used as backfill material." (Joint Stipulation, ¶34.)

MACTEC's May 20, 2003 letter served as a request for reimbursement of the $31,515 cost related to compaction of backfill. The cost and justification for the request for reimbursement are set forth in the May 20, 2003 letter. The letter indicates that the cost of compaction is sought for reimbursement. (Joint Stipulation, ¶35.)

In a final decision dated June 23, 2003, the IEPA deducted $31,515 in "costs that the owner/operator failed to demonstrate were reasonable (Section 22.18b(d)(4)(C) of the Environmental Protection Act)." The Illinois EPA identified three invoices that formed the bases for the deduction of costs. The Illinois EPA characterized those costs as being "ineligible costs for compaction." The IEPA's decision dated June 23, 2003 is attached to the Joint Stipulation as Exhibit 6. (Joint Stipulation, ¶36.)

In arriving at its final decision dated June 23, 2003 and for purposes of this appeal, the IEPA did not and does not contest the fact that the compaction of the backfill soil was properly part of the soil placement process. (Joint Stipulation, ¶37.)

PROCEDURAL BACKGROUND

This proceeding arises out of a Petition To Appeal which was filed by McDonald's seeking to reverse the IEPA's decision dated June 23, 2003, insofar as that decision denied $31,515 in costs based upon the IEPA's determination that "the owner/operator failed to demonstrate [that those costs] were reasonable... ." (Illinois Administrative Code Title 35, §105.408(a); Joint Stipulation, ¶5.) The Petition To Appeal was filed within thirty-five days of service of the IEPA's June 23, 2003 decision, thus making the Petition To Appeal timely. (Illinois Administrative Code Title 35, §105.408(b); Joint Stipulation, ¶6.)

The parties have filed a "Joint Stipulation of Facts" with the Board to provide a set of undisputed facts for the purpose of filing motions for summary judgment.

THE LAW

Section 22.18b of the Act applies to this case. Although §22.18b was repealed by Public Act 88-496, effective September 13, 1993, §22.18b continues to apply to releases reported prior to the effective date of Public Act 88-496 unless an election has been made to proceed under the new law.

The release involved in this case was reported prior to the effective date of Public Act 88-496, and McDonald's has not elected to proceed under the new law. Consequently, §22.18b continues to apply. *See, e.g., Home Oil Company v. IEPA*, PCB 02-205 and 02-206 (Consolidated) (Order dated April 3, 2003), pp. 2-3 ("In this proceeding, Home Oil reported the release in 1991. Neither party contends that Home Oil elected to proceed under the new Title XVI. Therefore, Section 22.18b applies here"). *See also* Joint Stipulation, Exhibit 6, Appendix A (the IEPA determination dated June 23, 2003 cites §22.18b as controlling statute).

The ground for this appeal from the IEPA's June 23, 2003 decision is that the decision of the IEPA denying reimbursement of $31,515 from the LUST Fund is contrary to the requirements of Section 22.18b(d)(4)(C) of the Illinois Environmental Protection Act, 415 ILCS 5/22.18b(d)(4)(C) (now repealed). Section 22.18b(d)(4)(C) provides that "the costs incurred to perform [a] corrective action" are eligible for reimbursement from the LUST Fund if they are "reasonable ... ." McDonald's has the burden of proof. Illinois Administrative Code Title 35, §105.112(a).

This motion for summary judgment is brought pursuant to Illinois Administrative Code Title 35, §101.516(b), which provides that "[i]f the record, including pleadings, depositions and admissions on file, together with any affidavits, shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law, the Board will enter summary judgment."

ARGUMENT

1. THE COMPACTION WAS A "CORRECTIVE ACTION."

To be eligible for reimbursement from the LUST Fund, a cost must arise out of a "corrective action." Section 22.18b(d)(4)(C) of the Act. The compaction at issue in this case was clearly a "corrective action" both as a matter of law and as a matter of fact: ***First***, in its final order giving rise to this appeal, the IEPA did not deny reimbursement for the cost of compaction based upon a claim that the compaction was not a "corrective action." Consequently, as a matter of law, the compaction's status as a "corrective action" is now settled and cannot be challenged. ***Second***, the compaction at the Site was in fact a "corrective action."

A. The Compaction's Status As A "Corrective Action" Is Now Settled And Cannot Be Challenged.

The IEPA's final decision dated June 23, 2003 concerning the cost of compaction (Joint Stipulation, Exhibit 6) states that certain costs from McDonald's claim are not being paid, and refers to Attachment A as containing the "reasons [why those costs] are not being paid." Attachment A provides one (and only one) reason – namely, that "the owner/operator failed to demonstrate [that the costs of compaction] were reasonable (Section 22.18b(d)(4)(C) of the Environmental Protection Act)."

Nothing in the IEPA's June 23, 2003 final decision states or suggests that McDonald's claim for the cost of compaction was not paid because the IEPA determined that the compaction giving rise to the cost was something other than a "corrective action."

The law is clear that once the IEPA has given its reason(s) for denying a claim for LUST Fund reimbursement, it may not on appeal raise other or additional reasons to support its decision. The stated reason(s) for denial "frame[] the issues on review," and the IEPA is foreclosed from raising any other reasons during the appeal. As the Board held in *Pulitzer Community Newspapers, Inc. v. IEPA*, PCB 90-142 (Opinion and Order dated December 20, 1990):

> Here, there is no question that the Agency's denial statement [refusing to allow costs to be reimbursed from the LUST Fund] complied with Section 39(a) of the Act and properly framed the issues on review. Pursuant to Section 39(a) of the Act, where the Agency has determined that permit denial is warranted, the denial statement constitutes the Agency's "final action". *Principles of fundamental fairness require that an applicant be given notice of the statutory and regulatory bases for denial of an application for reimbursement and* ***that the Agency be bound on review by those cited bases for denial given in its denial statement. Fundamental fairness would be violated if the Agency were free to cite additional statutory and regulatory reasons for denial for the first time at the Board hearing.*** *The Board concludes that the Agency cannot rely upon those*

regulations not previously cited in the denial letter as support for its denial of Pulitzer's application for reimbursement. (Emphasis added.)

The IEPA did not deny reimbursement for the cost of compaction because the compaction was not a "corrective action." Consequently, the compaction must be treated as a "corrective action" and its status as a "corrective action" cannot be challenged. For the purpose of this appeal, the compaction is, as a matter of law, a "corrective action."

B. The Compaction Was In Fact A "Corrective Action."

Although the compaction's status as a "corrective action" cannot properly be challenged in this appeal, it is nonetheless clear that the compaction was in fact a "corrective action."

As noted above, the parties in this case have stipulated that the compaction of the backfill at this Site was "properly part of the soil placement process" used to raise the surface of the excavations at the Site to grade. (Joint Stipulation, ¶37.) The Board has held that backfilling an excavation created by the removal of contaminated soil is a "corrective action." *See, e.g., Platolene 500, Inc. v. IEPA*, PCB 92-9 (Opinion and Order dated May 7, 1992). In fact, in one case the Board (reversing the IEPA's determination) allowed LUST Fund reimbursement of the cost of compaction and density testing, in addition to the cost of backfilling, where the compaction and density testing had a remedial purpose. *State Bank of Wittington v. IEPA*, PCB 92-152 (Opinion and Order dated June 3, 1993).[7]

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[7] In one instance the Board refused to allow recovery of the cost of backfilling an excavation. However, in that case the purpose of the backfilling was to provide "a solid foundation for a nearby building." *Princeton/Beck Oil Company v. IEPA*, PCB 93-8 (Opinion and Order dated May 5, 1993). *Princeton/Beck* is not applicable here, since there are no buildings at the Site. Moreover, the parties in this case have stipulated that the compaction at issue was solely intended to prevent voids and severe settling. (*See* Joint Stipulation, ¶¶20, 26.)

The placement of the backfill into the excavations at the Site here – and the compaction of that backfill, which the IEPA has stipulated was "properly part of the soil placement process" – was in fact a "corrective action" under the Act.

2. THE COST OF COMPACTION WAS DEMONSTRATED TO BE REASONABLE.

The IEPA deducted the $31,515 cost of compaction because (according to the IEPA) McDonald's "failed to demonstrate" that the cost was "reasonable." (Joint Stipulation, Exhibit 6, Attachment A to Exhibit 6.) The IEPA did not elaborate on this statement but, as noted above, there are only two possible explanations for the IEPA's determination:[8]

- ***First***, is it possible that the IEPA decided that McDonald's should have backfilled with a material which did not require compaction, so McDonald's use of soil as the backfill material (which required compaction) was not reasonable and the cost associated with the compaction of the soil was also (according to the IEPA) not reasonable; or

- ***Second,*** the IEPA decided that the soil should have been placed into the excavations without any compaction, so the cost associated with the compaction of the soil was (according to the IEPA) not reasonable.

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[8] As noted above, there is no hint of any concern on the part of the IEPA regarding the method of compaction (*i.e.*, the use of a sheepsfoot roller) or the unit cost per yard of compaction. The use of a sheepsfoot roller is a standard practice, and the cost of that work was broken out to a dollars-per-yard number and provided to the IEPA at the IEPA's request. Since the only issues that MACTEC addressed in its letter to the IEPA following discussions with the IEPA (*see* Joint Stipulation, Exhibit 5 (attached), p. 1) had nothing to do with either the method or the unit cost of the compaction, it is apparent that the method and cost of compaction were not of concern to the IEPA at this Site.

Neither of these alternative explanations for the IEPA's denial of reimbursement can withstand examination.

There is no doubt that McDonald's use of soil, as opposed to some other backfill material not needing compaction, was reasonable.[9] MACTEC (McDonald's remediation contractor) explained the reasoning in a letter to the IEPA dated May 20, 2003 (Joint Stipulation, Exhibit 5 (attached)).

That letter was prepared after Carmen Yung (a Senior Environmental Engineer employed by MACTEC) had telephone conversations with Ms. Lieura Hackman and Ms. Valerie Davis of the IEPA concerning reimbursement, and it was intended to address (among other things) the question of whether McDonald's should have used a backfill material that did not require compaction. MACTEC explained that crushed stone did offer the advantage of not requiring compaction, and opined that if crushed stone had been used, those costs would have been approved for reimbursement.

MACTEC further explained, however, that backfilling with crushed stone instead of soil was not the reasonable way to proceed at this Site for two reasons: (1) The soil that McDonald's used as backfill was unwanted material provided by the Village of Oak Brook, so using this soil as backfill was a way to beneficially use a potential waste material; and (2) the use of compacted soil as backfill saved more than an estimated $50,000 compared to the cost of using crushed

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[9] It should be noted that the IEPA was, from the very beginning, well aware that McDonald's remediation contractor had been offered and was intending to use (if it was suitable) soil owned by the Village of Oak Brook as backfill at the Site. (Joint Stipulation, ¶¶13, 18.) It is also clear that IEPA helped to set the criteria by which that soil was (in terms of contamination) deemed suitable for use as backfill at the Site. (Joint Stipulation, ¶¶13-17.)

stone. (Joint Stipulation, Exhibit 5 (attached), p. 2.) These two reasons show, beyond serious debate, that the use of soil instead of crushed stone was reasonable and that that reasonableness was demonstrated.

Second, MACTEC's letter also addressed the argument that, even if it was reasonable to use soil as a backfill material, the soil should not have been compacted as part of the soil placement process. MACTEC explained that the compaction had only one purpose: to prevent voids and severe settlement. Compacting the soil to prevent voids and severe settlement was reasonable because in the absence of compaction, the surface of the excavations at the Site would in all likelihood settle below grade. (Joint Stipulation, Exhibit 5 (attached).) Severe settlement would present (as the Board noted in *Platolene 500, Inc. v. IEPA*, PCB 92-9 (Opinion and Order dated May 7, 1992)) a potential danger to "human health and the environment."[10] This is a special and important concern given the fact that the Site is located on a major intersection in a heavily developed area. (*See, e.g.*, Joint Stipulation, ¶3; Exhibits 1, 2 and 3 (photographs and map showing that the Site is located at a major intersection in a highly developed area.)) Moreover, if the backfill did settle, then additional fill would have to be brought to the Site at additional cost to once again restore the Site to grade. (Joint Stipulation, ¶22.)

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[10] The need to compact fill to prevent settlement is a well known and accepted industry practice. *See, e.g.*, U.S. Army Field Manual FM 5-410, "Military Soils Engineering," Chapter 8 (Soil Compaction), Section 1 (Soil Properties Affected by Compaction), (available at http://www.adtdl.army.mil/cgi-bin/atdl.dll/fm/5-410/toc.htm): "Certain advantages resulting from soil compaction have made it a standard procedure in the construction of earth structures ... . * * * A principal advantage resulting from the compaction of soils used in embankments is that it reduces settlement that might be caused by consolidation of the soil within the body of the embankment. This is true because compaction and consolidation both bring about a closer arrangement of soil particles. Densification by compaction prevents later consolidation and settlement of an embankment."

Finally, MACTEC's letter also pointed out that the compaction was for a very limited purpose (the prevention of voids and severe settlement), and that the compaction did not, and was never intended to, meet the "industry standard [for later construction on the fill] (which would [have] require[d] slower placement in thin lifts, in-place density testing and higher costs)." (Joint Stipulation, Exhibit 5 (attached), p. 2; *see also* Joint Stipulation, ¶¶20, 24-25.) The fact that the compaction did only what was minimally required (and no more) is additional evidence of the reasonableness of the compaction that was undertaken at the Site. MACTEC's letter, in short, clearly demonstrated that it was reasonable to compact the backfill to prevent settlement.[11]

CONCLUSION

The material facts in this case are not in dispute. Those facts show that the compaction of the fill was part of a corrective action, that the compaction and the cost of compaction were reasonable, and that McDonald's (through its contractor) directly addressed all of the IEPA's concerns and demonstrated that the compaction and the cost of compaction were reasonable.

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[11] The IEPA has also stipulated that "...IEPA did not and does not contest the fact that the compaction of the backfill soil was properly part of the soil placement process." (Joint Stipulation, ¶37.) Since the IEPA has determined that the soil placement process was demonstrated to be "reasonable," it is logically impossible to understand how the IEPA can find that a "proper[] part of the soil placement process" was not demonstrated to be reasonable.

McDonald's therefore respectfully moves for entry of summary judgment finding: (1) that the IEPA erred in denying reimbursement for the $31,515 cost of compaction at the Site; (2) that the $31,515 cost was (and was demonstrated to be) a reasonable cost of corrective action at this Site; and (3) that under the Illinois Environmental Protection Act, IEPA must now allow the $31,515 cost of compaction for reimbursement from the LUST Fund.

McDonald's Corporation

BY: _____
their attorney

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MACTEC

May 20, 2003

Illinois Environmental Protection Agency
Bureau of Land - #24
LUST Claims Unit
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276

Attention: Mr. Douglas E. Oakley

Subject: **Claims for Reimbursement under LUST Fund**
LPC #0434705070 – DuPage County
McDonald's Corporation
1120 West 22nd Street, Oak Brook, Illinois
IEPA Incident Nos. 902922 & 952344
MACTEC Project No. 52000-2-2681-08

Dear Mr. Oakley::

Reference is made to the two Illinois Environmental Protection Agency (IEPA)'s letters, both dated May 12, 2003 addressed to McDonald's Corporation (McDonald's) regarding McDonald's requests for reimbursement of corrective action costs from the Illinois Underground Storage Tank Fund for the above-referenced facility. In the Agency's letter, $1,234.19 associated with furnishing and installing limestone for the property and $31,965.00 associated with compaction of fill material and transportation of CA-1 crushed stone, were deducted from the costs of reimbursement.

Based on the telephone conversations between Ms. Carmen Yung of Mactec Engineering and Consulting of Georgia, Inc., (MACTEC) and Ms. Lieura Hackman of the IEPA on May 15, 2003 and between Ms. Carmen Yung and Ms. Valerie Davis of the IEPA on May 16, 2003, MACTEC is submitting the following information for your consideration:

<u>$1,234.19 and $450 – Cost for Furnishing and Installing Limestone for the Property (R.W. Collins Invoices #113255)</u>

Crushed stone was used to provide temporary paving over the entrance and exit ways of the subject property and the Village of Oak Brook's soil pile located at 31st Street in Oak Brook to facilitate

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630-571-2162 • Fax: 630-571-0439

EXHIBIT 5

movement of trucks during excavation and transportation of contaminated soil and backfill soil. The crushed stone was later used as backfill material for part of the excavated areas (to provide support to the asphalt driveway). Since it was used as backfill material, the cost for transportation and placing of the limestone at the Village of Oak Brook's soil pile should be eligible for reimbursement.

$31,515 – Cost for Compaction

The Village of Oak Brook's soil pile located at 31st Street in Oak Brook was loaded to trucks and transported to and placed at the subject property as backfill material (which was described in R.W. Collin's invoices as "Load clay fill at source pile, haul to 22nd St., place and compact with sheepsfoot roller").

The backfill soils, after being placed in the excavations were rolled over by a sheepsfoot roller a few times in order to prevent voids and severe settlement. The "compaction" performed at the site was part of the soil placement process and should not be treated as compaction according to the industry standard (which would require slower placement in thin lifts, in-place density testing and higher costs). Therefore, we feel that the above cost should be eligible for reimbursement.

Moreover, the cost of using the Village of Oak Brook's soil pile as backfill material including loading, transportation and placement at $15.00 per cubic yard is substantially lower than the cost of using crushed stone at $18.00 per cubic yard. In total, McDonald's has saved more than $50,000 by using the Village of Oak Brook's soil instead of crushed stone. Also, by using the Village of Oak Brook's soil, McDonald's has helped the Village of Oak Brook to dispose of their unwanted soil and turned it into use. McDonald's should not be penalized by employing cost saving and environmental conservation methods in site remediation when McDonald's could have obtained full reimbursement if crushed stone was used as backfill material.

It is therefore requested that the above costs be included for reimbursement.

Should you have any questions regarding this submittal or require any additional information, please feel free to contact Ms. Carmen Yung at 630-328-0420.

Sincerely,

MACTEC Engineering and Consulting of Georgia, Inc.

Carmen Y. Yung
Senior Environmental Professional

Brian M. Devine, P.E.
Principal

Cc: Den Koide, McDonald's