ILLINOIS POLLUTION CONTROL BOARD
January 22, 2004

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

OPINION AND ORDER OF THE BOARD (by N.J. Melas):

Both the petitioner, McDonald's Corporation (McDonald's) and the respondent, Illinois Environmental Protection Agency (Agency) have filed motions for summary judgment in this proceeding. In addition, the parties have stipulated to a set of facts. As discussed below, the Board finds that there is no genuine issue of material fact and that summary judgment in favor of the Agency is appropriate. The Board denies McDonald's motion for summary judgment and grants the Agency's motion, thereby affirming the Agency's June 23, 2003 denial of reimbursement for $31,515 in costs.

PROCEDURAL BACKGROUND

On June 23, 2003, the Agency denied reimbursement for $31,515 in costs for corrective action sought by McDonald's. On July 28, 2003, McDonald's filed this appeal.

On October 17, 2003, the parties filed a joint stipulation of facts (Stip.) in this proceeding. On October 30, 2003, McDonald's filed a motion for summary judgment (McMot.) and the Agency responded to that motion on November 10, 2003 (Ag.Resp.). On November 3, 2003, the Agency filed a motion for summary judgment (Ag.Mot.) and on November 6, 2003, McDonald's filed a response (McResp.). The decision deadline in this matter is currently April 2, 2004.

FACTS

McDonald's is a corporation headquartered in the Village of Oak Brook (Oak Brook), DuPage County. Stip. at 1. McDonald's purchased a site at 1120 W. 22nd Street in Oak Brook, DuPage County. Before McDonald's owned the property, the site housed a gasoline filling service station. The site became contaminated due to leaks or spills in connection with the gas station. Two incident numbers were issued to this site: 902922 a d 952344. McDonald's undertook corrective action at the site that consisted of soil excavation and disposal. Stip. at 1-2. Remediation is now complete, and the Agency has issued McDonald's a "no further action"

letter for this site. On June 23, 2003, the Agency denied reimbursement of $31,515 for costs of remediation at the site. Stip. at 2. The Agency's denial letter stated:

> $31,515, deduction in costs that the owner/operator failed to demonstrate were reasonable (Section 22.18b(d)(4)(C) of the Environmental Protection Act).
>
> A deduction in the amount of $7,680 was made on the R.W. Collins invoice numbered 1132324 for the ineligible costs for compaction.
>
> A deduction in the amount of $2,025 was made on the R.W. Collins invoice numbered 113255 for the ineligible costs for compaction.
>
> A deduction in the amount of $21,810 was made on the R.W. Collins invoice numbered 113293 for the ineligible costs for compaction. Stip. at Exh. 6.

The remediation of the site involved removal of contaminated soil and replacement with clean fill. Stip. at 2. Oak Brook offered clean fill to McDonald's for use at the site. Stip. at 3. The clean fill was tested and Oak Brook provided confirmation in writing that the fill was clean. Stip. at 3-4. After placement of the clean fill, McDonald's rolled over the filled area with a sheepsfoot roller to compact the fill sufficiently to prevent voids and severe settlement. Stip. at 4-5.

McDonald's engineers referred to the use of the sheepsfoot roller as "compaction." Stip. at 5. The placement of the fill was not done in a manner which would be sufficient to ensure that the filled soil would provide a base for later construction. *Id*. McDonald's calculated that the cost of this compaction totaled $31,515. The Agency does not contest that the placement of the fill was properly a part of the soil placement process. Stip. at 7.

STATUTORY AND LEGAL BACKGROUND

Because this matter is before the Board on motions for summary judgment, the following section will set forth the standard of review for the consideration of a motion for summary judgment. The section will then include a discussion of the relevant law and standard of review to be applied in reviewing an appeal of an underground storage tank reimbursement.

Summary Judgment

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998). In ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." *Id*. Summary judgment "is a drastic means of disposing of litigation," and therefore it should be granted only when the movant's right to the relief "is clear and free from doubt." *Id.*, *citing* Purtill v. Hess, 111 Ill. 2d 299, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must "present

a factual basis which would arguably entitle [it] to a judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2d Dist. 1994).

Both McDonald's and the Agency have asked that the Board grant summary judgment in their favor. Upon reviewing the pleadings and the record in this matter, the Board agrees that there are no issues of material fact and that it may grant summary judgment as a matter of law. In determining which motion for summary judgment to grant, the Board must look to the burden of proof in an underground storage tank appeal and the arguments presented by the parties.

Underground Storage Tank Fund

In 1993, the General Assembly repealed Section 22.18b of the Environmental Protection Act (Act) and enacted a new Title XVI regarding UST Fund reimbursement applications and determinations. 415 ILCS 5/57 (2002). The new law provided that releases reported to the State on or after the effective date of the amendments, September 13, 1993, would proceed under the new Title XVI. 415 ILCS 5/57.13(a) (2002). Owners or operators who reported releases prior to the effective date could choose to proceed under the new Title XVI by submitting a written statement of election to the Agency. 415 ILCS 5/57.13(b) (2002). Without a written statement of election, Section 22.18b would apply. Ted Harrison Oil Company v. IEPA, PCB 99-127 (July 24, 2003).

The parties agree that the release in this case was reported prior to the adoption of Title XVI and there was no election to proceed under the new law. *See* McMot. at 11; Ag.Mot. at 2. Therefore, the applicable statutory provision is Section 22.18b of the Act. Section 22.18b was amended by P.A. 87-1088, effective September 15, 1992, and P. A. 87-1176, effective January 1, 1993. The language included in these amendments was not included in the Illinois Compiled Statutes. Therefore, citations to Section 22.18b will be to the language as amended by P.A. 87-1088 and P.A. 87-1166.

Section 22.18b(d)(4) provides in pertinent part that:

* *

> Requests for partial or final payment for claims under this Section shall be sent to the Agency and shall satisfy all of the following:
>
> * *
>
> (C) The owner or operator provided an accounting of all costs, demonstrated that the costs incurred to perform the corrective action were reasonable, and provided proof of payment of the applicable deductible amount under paragraph (3) of subsection (d). The accounting of those costs shall be provided to the Agency on a time and materials cost basis (or other Agency approved accounting methods) on Agency prescribed forms. No handling charge is eligible for payment except for handling charges for subcontracts and filed purchases when the charge does not exceed the amount set forth in subsection (i) of this Section.
>
> * *

415 ILCS 5/22.18b (1992), as amended by P.A. 87-1088 and 87-1171.

Section 22.18(e)(1)(C) defines "corrective action" as:

> an action to stop, minimizes, eliminate, or clean up a release of petroleum . . . including release investigation, mitigation of fire and safety hazards, tank removal, soil remediation, hydrogeological investigations, and soil remediation . . . . 415 ILCS 5/22.18(e)(1)(C) (1992)).

Pursuant to Section 22.18b(g) of the Act (415 ILCS 5/22.18b(g) (1992)), an applicant may appeal an Agency decision denying reimbursement to the Board under the provisions of Section 40 of the Act (415 ILCS 5/40 (2002)). Under Section 40 of the Act (415 ILCS 5/40 (2002)), the Board's standard of review is whether the application as submitted to the Agency would not violate the Act and Board regulations. Browning Ferris Industries of Illinois v. PCB, 179 Ill. App. 3d 598, 534 N.E.2d 616 (2nd Dist. 1989). Therefore the Board must decide whether or not the application as submitted to the Agency, demonstrates compliance with the Act and Board regulations. Kathe's Auto Service Center v. IEPA, PCB 96-102 (Aug. 1, 1996). Further, the Agency's denial letter frames the issue on appeal. *Id*. Finally, the burden of proof is on the owner or operator, who must provide an accounting of all costs. Platolene 500, Inc. v. IEPA, PCB 92-9 (May 7, 1992).

MOTIONS FOR SUMMARY JUDGMENT

The following section will summarize the motions for summary judgment and the responses to each motion respectively.

McDonald's Motion for Summary Judgment

McDonald's argues that there are no genuine issues of material fact and summary judgment should be granted to McDonald's. McMot. at 5. McDonald's argues that it is entitled to summary judgment for two reasons. First, the Agency's denial letter does not specify as a denial reason for reimbursement that fill compaction is not corrective action and, in any event, compaction is corrective action. McMot. at 12-15. Second, the cost of compaction was reasonable. McMot. at 15-18. The following paragraphs will elaborate on McDonald's arguments.

Compaction of the Fill was Corrective Action

McDonald's argues that the issue of whether the compaction was corrective action is already decided since the Agency's denial letter does not indicate that reimbursement is denied on that basis. McMot. at 13. In support, McDonald's points to the language of the denial letter arguing that the denial letter simply states that "the owner/operator failed to demonstrate" that the costs were reasonable. *Id*. McDonald's asserts that the Agency may not raise additional reasons to support the denial of reimbursement on appeal and relies on Pulitzer Community Newspapers, Inc. v. IEPA, PCB 90-142 (Dec. 20, 1990) to support this principle. McMot. at 13.

McDonald's further asserts that even if the Board examines the issue of whether or not compaction is corrective action, the record clearly supports reimbursement. McMot. at 14. McDonald's argues that the Agency in the stipulation agrees that compaction is "properly a part of the soil placement process" (Stip at 7). McMot. at 14. Moreover, the Board has allowed reimbursement for compaction and density testing in prior proceedings. McMot. at 14, *citing* Platolene 500, PCB 92-9 (May 7, 1992) and State Bank of Whittington v. IEPA, PCB 92-152 (June 3, 1993). Therefore, McDonald's maintains that the placement of backfill and compaction of the backfill were in fact corrective action. McMot. at 15.

Cost of Compaction Was Reasonable

McDonald's argues that there are two reasons the Agency may have decided that the cost of compaction was not reasonable. First, McDonald's opines that the Agency may have decided that it should have used a material other than soil to backfill. McMot. at 15. However, as the engineers for McDonald's pointed out, the use of the soil saved an estimated $50,000 and put to beneficial use a potential waste. McMot. at 16. Therefore, McDonald's asserts that record demonstrates that the use of soil rather than some other material as backfill was reasonable. McMot. at 17.

McDonald's opines that the second reason that the Agency may have decided that the costs were unreasonable is that compaction was not necessary so the cost associated with compaction was unreasonable. McMot. at 15. McDonald's asserts that the record supports the necessity of compacting the fill. McMot. at 17. McDonald's argues that absent compaction the surface excavations at the site would likely settle below grade and severe settlement would present a potential danger to human health and the environment. *Id*. McDonald's argues that this is a special and important concern given that the site is located on a major intersection in a highly developed area. *Id*. Furthermore, McDonald's maintains that if the site were to settle additional fill would have to be brought to the site at a greater cost. *Id.* Finally, McDonald's argues that compaction was undertaken for the limited purpose of preventing voids and severe settlement and the compaction does not meet industry standards for later construction. McMot. at 18.

Agency's Response

The Agency argues that the denial letter encompasses the rationale that compaction was not corrective action, and the compaction of fill was not corrective action. Ag.Resp. at 1-2. The Agency also argues that McDonald's did not demonstrate that the costs were reasonable. Ag.Resp. at 7. The following paragraphs will set forth the Agency's arguments in more detail.

Agency Denial Letter

To support its contention that the denial letter encompasses the concept that compaction was not corrective action, the Agency points to the exact language of the denial letter. The Agency states that the denial letter includes a citation to Section 22.18b(d)(4)(C) of the Act (415 ILCS 5/22.18b (1992) and the language of the denial letter indicates that the deductions were made from the reimbursement for "the ineligible costs for compaction" at the site. Ag.Resp. at 2.

The Agency argues that in an analogous case, Paul Rosman v. IEPA, PCB 91-80 (Dec. 19, 1991), the Board found that the Agency's final determinations letter was sufficient to meet the standards of fundamental fairness, according to the Agency. Ag.Resp. at 3.

In Rosman, the Agency denied adjusted tank removal costs and the denial letter indicated that the adjustment was warranted because the owner/operator failed to demonstrate that the costs were reasonable. Ag.Resp. at 3, *citing* Rosman, slip op. 5-6. The Agency did not believe that the costs met the test for corrective action. *Id*. The petitioner in that case argued that the denial letter did not conform to the precepts of fundamental fairness as discussed by the Board in Pulitzer. Ag.Resp. at 3. The Board determined that, while "poorly articulated," the Agency letter was not fundamentally unfair and that the wording was sufficient to support the Agency's argument. Ag.Resp. at 4, *citing* Rosman, slip op. 7.

The Agency argues that in the present case the Agency letter does contain specific language stating that the costs for compaction were ineligible. Ag.Resp. at 4. The Agency concedes that the denial letter could have been more precise. However, based on Rosman, the Agency maintains the denial letter was sufficient. *Id*.

Compaction Was Not Corrective Action

The Agency argues that the record does not support McDonald's contention that compaction was corrective action. Ag.Resp. at 6. The Agency agrees that after excavating the site, it is a proper part of soil placement to compact soil. However, the Agency argues that there is a difference between soil placement to fill an excavated site and corrective action. Ag.Resp. at 6. The Agency analogizes Board cases regarding use of concrete at a site with the compaction of soil. *Id*. The Agency argues that whether an activity, either pouring concrete or compaction, may be prudent for restoring a site is not the same issue as whether the activity is reimbursable. *Id*.

In this instance, the Agency argues that compaction of the soil was clearly a task set apart from soil placement and compaction does not meet the definition of corrective action. Ag.Resp. at 6. The Agency notes that the costs for soil placement were allowed and only the costs for compaction were denied. Ag.Resp. at 6-7. The Agency also distinguishes this case from Whittington, noting that in Whittington the petitioner demonstrated that compaction had a remedial purpose. Ag.Resp. at 7

Costs of Compaction Were Not Reasonable

The Agency opines that McDonalds' statements about why the Agency reached its decision are pure speculation and irrelevant to the issue at hand. Ag.Resp. at 8. The Agency argues that the question before the Board is whether the compaction was corrective action, not whether the mindset of the Agency was one of two scenarios. *Id*. The Agency argues that clearly backfilling is reimbursable and was in fact reimbursed. Ag.Resp. at 8-9. It is the compacting following the backfill that McDonald's failed to demonstrate is corrective action. Ag.Resp. at 9. The Agency notes that while compaction may be appropriate in this situation, the

purpose of the UST Fund is narrow and can only be used to reimburse for activities that meet the definition of corrective action. *Id*. at 9.

Agency's Motion for Summary Judgment

The Agency argues that the issue is this case is a question of law and not fact and therefore, summary judgment is appropriate. Ag.Mot. at 4. The Agency asserts as a matter of law costs for compaction sought by McDonald's are not corrective action. Ag.Mot. at 5. Therefore, the Agency appropriately denied the costs for reimbursement. *Id*. The Board will detail the Agency's arguments below.

Compaction Was Not Corrective Action

The Agency argues that the Board employs a two-prong test to determine the "main intent" of the activity for which reimbursement is sought. Ag.Mot. at 5, *citing* Enterprise Leasing Company v. IEPA, PCB 91-174 (Apr. 9, 1992); Platolene 500, PCB 92-9 (May 7, 1992); and Southern Food Park v. IEPA, PCB 92-88 (Dec. 17, 1992). The two-prongs according to the Agency are: (1) whether the costs were incurred as a result of action to stop, minimize, eliminate, or clean up a release; and (2) whether the costs were the result of such activities as tank removal, soil remediation, and free product removal. *Id*.

The Agency argues that the soil compaction done by McDonald's fails to meet the test. Ag.Mot. at 6. The Agency asserts that McDonald's compacted the soil for the purposes of preventing voids and settlement so McDonald's would not have to backfill the site again in the future. *Id*. The Agency maintains that such purpose has nothing to do with stopping, minimizing, eliminating, or cleaning up the release of petroleum. *Id*. The Agency asserts that here McDonald's compacted soil following the backfill to restore the site to grade level, a proper part of the soil placement process. The Agency contends there is a clear distinction between what may be a normal part of soil placement and what is corrective action. *Id*.

The Agency draws an analogy between the facts of this case and Board cases regarding replacement of concrete. Ag.Mot. at 6. The Agency asserts that in the concrete cases the Board examined the use of the concrete in the context of whether replacement of concrete meets the definition of corrective action. *Id*. The Agency argues that what may be prudent or proper in the context of restoring a site is not the same issue as whether that same activity is corrective action. *Id*.

The Agency also asserts that the second prong is also not met because the compaction did not relate to tank removal, soil remediation, or free product removal. Ag.Mot. a 7. Finally, the Agency opines that the "main intent" for the compaction was the restoration of the site and therefore compaction was not intended as a part of corrective action. *Id*.

Agency Decision Consistent with Past Cases

The Agency cites to a number of cases involving claims for reimbursement for soil compaction costs. Ag.Mot. at 7. The Agency asserts that in each of those cases the Board

employed the two-prong test to determine if reimbursement was appropriate. *Id*. In Southern Food Park, the Agency points to the Board's determination that the general rule was that actions that occurred prior to backfilling would be considered corrective action and the actions that occurred afterward would be considered restoration. Ag.Mot. at 8, *citing* Southern Food Park, slip op. at 4.

McDonald's's Response

McDonald's responds to the Agency's motion by reiterating its position that the Agency cannot argue that compaction was not corrective action. McResp. at 3. McDonald's also argues that the cost of compaction "arose" out of corrective action. McResp. at 5. The Board will not repeat the arguments regarding the appropriateness of the Agency's argument that compaction was not corrective action here as the argument was fully set forth above. The following paragraphs will summarize McDonalds' argument that the cost of compaction "arose" out of corrective action.

Compaction Was Corrective Action

McDonald's argues that the compaction of soil at the site was corrective action and points to the stipulation of facts to support its argument. McResp. at 6. McDonald's notes that the Agency agreed in the stipulation that compaction was "properly a part of the soil placement process" and McDonald's argues that Board has long held that backfilling an excavation is corrective action. McResp. at 6, *citing* Stip. at 7 and Platolene 500, PCB 92-9 (May 7, 1992). Thus, McDonald's argues simple logic dictates that compaction was part of corrective action. McResp. at 6.

McDonald's takes issue with the analogy by the Agency of this case to the Board cases dealing with the replacement of concrete. McResp. at 7. McDonald's argues that this case is not either legally or factually analogous to the concrete cases. *Id*. McDonald's asserts that pouring concrete is not normally eligible for reimbursement while backfilling is eligible for reimbursement. *Id*.

McDonald's argues that the use of the two-prong test is not necessary in this case, as the Board has already determined that backfilling is corrective action. McResp. at 8, *citing* Platolene 500, PCB 92-9 (May 7, 1992). McDonald's argues that the Board and Agency should therefore be supportive of backfilling in an economical way, as McDonald's did here. McResp. at 8-9. Finally, McDonald's argues that the compaction was done to prevent voids and settlement so that the surface would not sink below grade. McResp. at 9. McDonald's asserts that preventing voids and settlement was a way for McDonald's to insure that there are no future health and safety issues at the site.

DISCUSSION

Having determined that summary judgment is appropriate, the Board will examine whether McDonald's motion or the Agency's motion should be granted. There are two issues the Board must decide in order to rule on the cross-motions for summary judgment. First,

whether the Agency's denial letter specifies as a denial reason that the costs for compaction were not corrective action. Second, whether or not compaction of the soil was corrective action. The Board will elaborate on each of these issues below.

Agency's Denial Letter

The parties disagree as to the scope of the Agency's denial letter. McDonald's argues that the language of the denial letter does not extend to the concept that compaction was not corrective action and therefore ineligible for reimbursement under Section 22.18b(d)(4)(C) of the Act (415 ILCS 5/22.18b (1992)). Conversely, the Agency believes that the letter did include denial on the basis that the compaction was not corrective action. The Board agrees with the Agency.

It is well-settled that the denial letter frames the issues on appeal. Centralia v. IEPA, PCB 89-170 at 6 (May 10, 1990). As discussed above, the burden of proof is on the petitioner to prove that the Agency's denial letter was insufficient to warrant affirmation. If the Agency's denial letter does not make the petitioner aware of the statutory and regulatory bases for denial, the proceeding may be fundamentally unfair. Rosman, PCB 91-80, slip op. at 11 (Dec. 19, 1991); *citing* Pulitzer, PCB 90-142 at 7 (Oct. 20, 1990). Here, the Agency's denial letter did not specifically state the compaction costs were ineligible for reimbursement because they did not constitute corrective action.

The facts in this case are very similar to Rosman where the Agency denied reimbursement because the costs were not reasonable, citing Section 22.18b(d)(4)(C) of the Act (415 ILCS 5/22.18b (1992)). In Rosman, the Board found the denial letter sufficient to meet the precepts of fundamental fairness. Rosman, slip op. at 15. In this case, the Agency's denial letter not only cites to Section 22.18b(d)(4)(C) of the Act (415 ILCS 5/22.18b (1992)), as was the case in Rosman, but also specifically indicates that the costs were "ineligible" for reimbursement.

The Agency's general citation to Section 22.18b(d)(4)(C) of the Act (415 ILCS 5/22.18b (1992)) distinguishes this case from Pulitzer. In Pulitzer, the Agency attempted to rely on regulations not cited in the denial letter to support the Agency's decision. Pulitzer, *slip op*. at 7. The Board determined that it would be fundamentally unfair if the Agency could rely on regulations not in the denial letter to deny reimbursement. *Id*.

In contrast, here the denial letter included a reference to Section 22.18b(d)(4)(C) of the Act (415 ILCS 5/22.18b (1992)), which requires that McDonald's demonstrate "that the costs incurred to perform the corrective action were reasonable." Thus, the denial letter refers to both corrective action as well as reasonableness of cost. The Agency did not rely on additional statutory or regulatory reasons for denial in the motion for summary judgment or responsive pleadings. Accordingly, the Board finds that the Agency's letter appropriately denies reimbursement on the basis that the compaction was not corrective action and satisfies fundamental fairness requirements.

Compaction

Next the Board must determine whether or not compaction of backfill was corrective action. The Board, based on the statutory provisions of Section 22.18(e)(1)(C) of the Act (415 ILCS 5/22.18(e)(1)(C) (1992)), has established a two-prong test to determine if activities at a site are corrective action. *See* Rosman; Enterprise Leasing Company v. IEPA, PCB 91-174 (Apr. 9, 1992); Platolene 500, PCB 92-9 (May 7, 1992). The two-prong test is whether: (1) the costs were incurred as a result of action to "stop, minimize, eliminate, or clean up a release of petroleum . . ." ; or (2) the costs were the result of such activities as tank removal, soil remediation, and free product removal. The facts in this case clearly establish that compaction was not corrective action. Compaction was not undertaken as a result of action to stop, minimize, eliminate, or clean up a release or prevent further contamination. Rather, the facts demonstrate, and the parties stipulate, that the compaction was done to insure that additional backfilling would not be necessary in the future.

A review of the cases cited by the parties indicates that while backfilling is generally eligible for reimbursement, the compaction of the backfill is not generally reimbursed. In Whittington, where the Board did allow reimbursement for compaction at the site, the facts established that the compaction was a part of the site remediation. The same is not true here. The record establishes that compaction was done to prevent voids and severe settlement. Stip. at 4-5. Such action is restoration of the site, not corrective action. Therefore, the Agency properly denied reimbursement for the costs of compaction at the site.

It should also be noted, and the Agency makes clear, that the denial of reimbursement is for compaction, not the backfilling of the site. The Agency approved reimbursement for backfilling at the site and the Board need not review that issue.

This opinion constitutes the Board's findings of fact and conclusions of law.

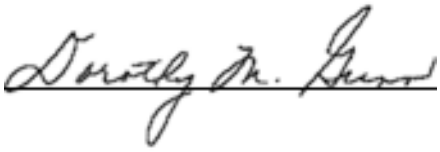
ORDER

The Board denies McDonald's motion for summary judgment and grants the Agency's motion in this matter. Accordingly, the Board affirms the Agency's June 23, 2003 decision denying reimbursement for compaction of backfill at the site because compaction is not corrective action. There are no remaining issues in this proceeding and the docket is closed.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2000); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on January 22, 2004, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board