

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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MAY 20 2005

RICHARD KARLOCK,)
Petitioner,)
v.)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
Respondent.)

PCB No. 05-127
(LUST Appeal)

STATE OF ILLINOIS
Pollution Control Board

NOTICE

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

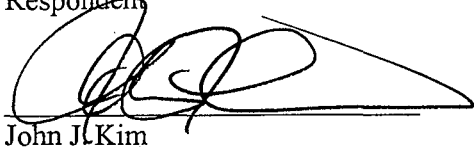
Jeffrey W. Tock
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Champaign, IL 61824-1550

Carol Webb, 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 MOTION FOR SUMMARY JUDGMENT, 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: May 18, 2005

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STATE OF ILLINOIS
Pollution Control Board

PCB No. 05-127
(LUST Appeal)

MOTION FOR SUMMARY JUDGMENT

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 35 Ill. Adm. Code 101.500, 101.508 and 101.516, hereby respectfully moves the Illinois Pollution Control Board ("Board") to enter summary judgment in favor of the Illinois EPA and against the Petitioner, Richard Karlock (“Karlock”), in that there exist herein no genuine issues of material fact, and that the Illinois EPA is entitled to judgment as a matter of law with respect to the following grounds. In support of said motion, the Illinois EPA states as follows:

I. STANDARD FOR ISSUANCE AND REVIEW

A motion for summary judgment should be granted where the pleadings, depositions, admissions on file, and affidavits disclose 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); McDonald's Corporation v. Illinois Environmental Protection Agency, PCB 04-14 (January 22, 2004), p. 2.

Section 57.8(i) of the Illinois Environmental Protection Act (“Act”) (415 ILCS 5/57.8(i)) grants an individual the right to appeal a determination of the Illinois EPA to the Board pursuant to Section 40 of the Act (415 ILCS 5/40). Section 40 of the Act, the general appeal section for permits,

has been used by the legislature as the basis for this type of appeal to the Board. Thus, when reviewing an Illinois EPA determination of ineligibility for reimbursement from the Underground Storage Tank Fund, the Board must decide whether or not the application as submitted demonstrates compliance with the Act and Board regulations. Rantoul Township High School District District No. 193 v. Illinois EPA, PCB 03-42 (April 17, 2003), p. 3.

In deciding whether the Illinois EPA's decision under appeal here was appropriate, the Board must look to the facts and statements within the Petitioner's Petition for Review ("Petition"). The Administrative Record has not yet been filed in this matter, as the parties agree that the facts here are not so much at issue as the question of law. However, the Illinois EPA is including two documents as exhibits to this motion for summary judgment. Exhibit 1 is a copy of the first page of the form reimbursement claim submitted by Karlock, and Exhibit 2 is the Owner/Operator Budget Certification that was included with the reimbursement claim.¹ The Illinois EPA notes that the Petitioner acknowledged in its Petition that it had not yet completed its Site Investigation Completion Report ("SICR"), much less had that report approved. Petition, p. 2. Also, the Illinois EPA notes and will refer later to Exhibit B of the Petition, which consists of a letter from HDC Engineering (the consultant for Karlock) to Niki Weller of the Illinois EPA, along with a certified mail receipt and an Owner/Operator Billing Certification. These documents, and the factual evidence therein, are not in dispute and are sufficient, in conjunction with the relevant law, for Board to enter a dispositive order in favor of the Illinois EPA. Accordingly, the Illinois EPA respectfully requests that the Board enter an order affirming the Illinois EPA's decision.

¹ The exhibits attached to the Petitioner's Petition are Exhibit A and B, and the exhibits attached to the Illinois EPA's motion for summary judgment are Exhibits 1 and 2; hopefully, using numbers for the Illinois EPA's exhibits will keep the two sets separate.

II. 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. In reimbursement appeals, the burden is on the applicant for reimbursement to demonstrate that incurred costs are related to corrective action, properly accounted for, and reasonable. Rezmar Corporation v. Illinois EPA, PCB 02-91 (April 17, 2003), p. 9.

III. ISSUE

The question before the Board is whether the Illinois EPA correctly deducted \$26,245.05 in costs from the Petitioner's claim for reimbursement as set for in the final decision dated December 10, 2004. Petition, Exhibit A. The Illinois EPA's final decision notes that the costs were deducted for lack of supporting documentation, in that an approved SICR had not been submitted. The Illinois EPA further notes that the Illinois EPA would review the costs presented when the SICR has been approved.

Also, the Illinois EPA's final decision stated that the Owner/Operator Billing Certification form was missing from the claim package, and that a Budget Certification was included instead.

Therefore, to answer the question before the Board, there are two legal issues that must be resolved. First, is the Illinois EPA correct in withholding approval of reimbursement of costs related to site investigation activities if a SICR has not yet been approved. Second, did the claim for reimbursement by Karlock fail to include a required certification form. The Illinois EPA argues that the answers to both these questions is in the affirmative, and thus the Board should enter an order granting summary judgment in favor of the Illinois EPA.

IV. THE ILLINOIS EPA IS ENTITLED TO SUMMARY JUDGMENT BASED ON THE FACTS AND LAW

A. Relevant Facts

The basic and relevant facts are as follows. On or about September 14, 2004, Karlock sent a claim for reimbursement of costs associated with site investigation activities to the Illinois EPA. Petition, Exhibit A, p. 1; Exhibit 1. The Illinois EPA received that claim on September 16, 2004. Exhibit 1. In the claim Karlock sought reimbursement of \$26,245.05 in costs. Petition, Exhibit A, p. 1. The claim included an Owner/Operator Budget Certification form. Exhibit 2. The Illinois EPA issued a final decision dated December 10, 2004, in which it withheld approval of the costs in question. Petition, Exhibit A, p. 3. On January 4, 2005, Karlock's consultant mailed a copy of an Owner/Operator Billing Certification form to the Illinois EPA. Petition, Exhibit B.

B. No Genuine Issues Of Material Fact Exist

The parties are in agreement to the facts as presented above, evidenced by reference to documents provided by the Petitioner in its Petition and the two pages taken directly from the claim for reimbursement itself. The questions in this case are not of fact, but rather of law. Specifically, the question is whether the facts warrant the deduction of costs based on the submission of site investigation costs prior to approval of the SICR and the failure to include the Owner/Operator Billing Certification form.

C. The Site Investigation Costs Are Not Reimbursable Until The SICR Is Approved

One of the two reasons for denial of the costs submitted was that the costs pertained to site investigation activities, and a SICR has not yet been approved by the Illinois EPA. Section 57.7 of the Illinois Environmental Protection Act ("Act") (415 ILCS 5/57.7) was amended in 2002 by four different bills (PA 92-554, 92-574, 92-651 and 92-735), each of which was signed into law. Each

bill addressed a different subsection of Section 57.7, but to date the General Assembly has not passed a bill reconciling those differing provisions. However, of the four different bills, only PA 92-554 changed the procedure of corrective action in that it substituted the concept of site investigation in place of site classification. For releases that took place on or after the effective date of PA 92-554, the site investigation provisions are applicable. Here, the release was reported on August 20, 2002. Exhibit 1. Therefore, the release is subject to corrective action using the site investigation provisions of Section 57.7 as amended by PA 92-554.

Had the release been governed by the previously-utilized site classification procedure, then Section 732.601(h) of Title 35 of the Board's regulations (35 Ill. Adm. Code 732.601(h)) would have been applicable. That regulation provides that applications for payment of costs associated with site classification may not be submitted prior to approval or modification of the site classification completion report. So, if the costs in question had been for site classification activities, and the costs were submitted prior to approval of a site classification completion report, there is no doubt that the costs would have been properly denied pursuant to Section 732.601(h).

In the present situation, there is no doubt that Section 732.601(h) does not strictly apply, since the Petitioner performed site investigation activities, not site classification activities. However, there is no corresponding and effective regulation that addresses the situation in which site investigation costs are submitted for approval prior to the approval of a SICR.² In the absence of any corresponding or analogous regulation concerning approval of site investigation costs prior to the approval of a SICR, it is acceptable for the Illinois EPA to handle such requests for payment in a

² The Illinois EPA notes that there is a pending rulemaking before the Board that would add new regulations regarding site investigation activities and, presumably, approval of site investigation costs in regards to approval of a SICR. However, those regulations are not yet in final form, and certainly are not effective, and therefore cannot be relief upon by either party as being an authority.

manner consistent with the previously-used method under site classification. The site investigation concept, though somewhat different in substance than the site classification method, is directly analogous to site classification in that site investigation is the step prior to initiating formal corrective action (just as site classification was), and is the step that must be completed (via an approved SICR) before corrective action may commence (just as site classification was via an approved site classification completion report).

Given that there is no existing regulation that provides any guidance on the question of whether site investigation costs may be reimbursed prior to approval of a SICR, and that the previous iteration of the pre-corrective action phase of work (i.e., site classification) did have a regulatory requirement that a completion report must be approved prior to approval of related costs, the Illinois EPA's action here was consistent with the only relevant guidance available; namely, Section 732.601(h). The Illinois EPA's final decision could not cite to a regulatory provision regarding payment of site investigation costs, but it did properly cite to Section 57.7(a)(5) of the Act (415 ILCS 5/57.7(a)(5)) (as amended by PA 92-554), which sets out the requirement that within 30 days of completing site investigation, a site investigation completion report is to be submitted.³ Similarly, although the final decision could not cite to Section 732.601(h) of the Board's regulations as a direct authority for denying approval of the site investigation costs, it is that regulation's language that serves to guide the Illinois EPA and the Board here. Based on the persuasive language of Section 732.601(h) to the facts presented, the Illinois EPA's denial of the site investigation costs was correct.

³ The Illinois EPA acknowledges that the final decision's citation to Sections 57.12(c) and (d) of the Act (415 ILCS 5/57.12(c), 5/57.12(d)) may have been in error, as the provisions cited do not directly pertain to the situation at hand.

D. The Petitioner Failed To Timely Provide The Proper Certification Form

Regardless of how the Board rules on the Illinois EPA's argument presented above concerning the approval of site investigation costs prior to approval of a SICR, the Illinois EPA's final decision could and should be affirmed solely on the basis that Karlock failed to provide the proper certification form with the original claim for reimbursement.

In the original claim for reimbursement, Karlock submitted an Owner/Operator and Professional Engineer Budget Certification Form for Leaking Underground Storage Tank Sites ("budget certification form"). Exhibit 2. However, as Karlock clearly noted in the first page of the claim forms submitted, the package was a claim for reimbursement, not a budget proposal. Exhibit 1. After the Petitioner read the final decision, it submitted the proper Owner/Operator and Professional Engineer Billing Certification Form for Leaking Underground Storage Tank Sites ("billing certification form") to the Illinois EPA approximately one month after issuance of the final decision. Petition, Exhibit B.

The Board's review of permit appeals, including appeals of decisions related to the Leaking Underground Storage Tank Program, is generally limited to information before the Illinois EPA during the Illinois EPA's statutory review period, and is not based on information developed by the permit applicant or the Illinois EPA after the Illinois EPA's decision. Alton Packaging Corp. v. Pollution Control Board, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987); Saline County Landfill, Inc. v. Illinois EPA, PCB 02-108 (May 16, 2002). So while the Board should not rely on the information contained within Exhibit B of the Petition, it does indicate that the proper form was not submitted until after the issuance of the decision. Put another way, if the Board properly excludes the documents and information contained within Exhibit B to the Petition, then

there is clearly no proof that the billing certification form was submitted to the Illinois EPA before the issuance of the final decision.

The difference between a budget certification form and a billing certification form is not inconsequential, since the purpose of a billing certification form is to provide the owner/operator's certification that the costs included within the claim for reimbursement were properly incurred, that the information concerning the claim for reimbursement was done under the owner/operator's supervision, and that the information within the claim is accurate. The failure of the Petitioner to provide the billing certification form rendered the claim package incomplete, and thus the decision to withhold approval of the costs included in the claim request was correct. The Board should therefore grant summary judgment in favor of the Illinois EPA.

V. CONCLUSION

For the reasons stated herein, the Illinois EPA respectfully requests that the Board affirm the Illinois EPA's December 10, 2004 decision to deny approval of reimbursement of the site investigation costs.

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: May 18, 2005

This filing submitted on recycled paper.

**BUDGET AND BILLING FORM FOR
LEAKING UNDERGROUND STORAGE
TANK SITES**

A. SITE INFORMATION

Site Name: Karloek Service Station/Farney's Garage

Site Address: 522 South Main Street City: Rankin

Zip: 60960

County: Vermilion IEPA Generator No.: 1830705004

IEMA Incident No.: 20021180 IEMA Notification Date: 8/20/02

Date this Form was Prepared: August 24, 2004

This form is being submitted as a:

☐ Budget Proposal

☐ Budget Amendment (Budget Amendments must include only the costs over the previous budget.)

Amendment Number: _____

☒ Billing Package for costs incurred pursuant to 35 Illinois Administrative Code (IAC), Part 732 ("new program").

This form is being submitted for the Site Activities indicated below (check one):

☐ Early Action

☐ Site Classification

☐ Low Priority Corrective Action

☐ High Priority Corrective Action

☒ Other (indicate activities) Site Investigation Plan

**DO NOT SUBMIT "NEW PROGRAM" COSTS AND "OLD PROGRAM"
COSTS AT THE SAME TIME, ON THE SAME FORMS.**

A-1

This form must be submitted in duplicate.

EXHIBIT

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SEP 16 2004

EPA/BOL

Illinois Environmental Protection Agency

Owner/Operator and Professional Engineer Budget Certification Form for
Leaking Underground Storage Tanks Sites

In accordance with 415 ILCS 5/57, if an owner or operator intends to seek payment from the UST Fund, an owner or operator must submit to the Agency, for the Agency's approval or modification, a budget which includes an accounting of all costs associated with the implementation of the investigative, monitoring and/or corrective action plans.

I hereby certify that I intend to seek payment from the UST Fund for performing Site Investigation activities at Karlock Service Station LUST site. I further certify that the costs set forth in this budget are necessary activities and are reasonable and accurate to the best of my knowledge and belief. I also certify that the costs included in this budget are not for corrective action in excess of the minimum requirements of 415 ILCS 5/57 and no costs are included in this budget which are not described in the corrective action plan. I further certify that costs ineligible for payment from the Fund pursuant to 35 Illinois Administrative Code Section 732.606 are not included in the budget proposal or amendment. Such ineligible costs include but are not limited to:

- Costs associated with ineligible tanks.
- Costs associated with site restoration (e.g., pump islands, canopies).
- Costs associated with utility replacement (e.g., sewers, electrical, telephone, etc.).
- Costs incurred prior to IEMA notification.
- Costs associated with planned tank pulls.
- Legal defense costs.
- Costs incurred prior to July 28, 1989.
- Costs associated with installation of new USTs or the repair of existing USTs.

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SEP 16 2004
IEPA/BOL

Owner/Operator: Richard Karlock Title: Owner
Signature: [Signature] Date: 9/14/04

Subscribed and sworn to before me the 14th day of September, 2004.
(Budget Proposals and Budget Amendments must be notarized when the certification is signed.)

Eileen Marie Johnson
(Notary Public)

OFFICIAL SEAL
EILEEN MARIE JOHNSON
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 7/18/05

P.E.: Kevin Saylor

P.E. Signature: [Signature] Date: 9-14-04

OFFICIAL SEAL
KEVIN R. SAYLOR
062-058772
REGISTERED
PROFESSIONAL
ENGINEER
OF
ILLINOIS
2004

Subscribed and sworn to before me the 14th day of September, 2004.
(Budget Proposals and Budget Amendments must be notarized when the certification is signed.)

Eileen Marie Johnson
(Notary Public)

Seal:

OFFICIAL SEAL
EILEEN MARIE JOHNSON
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 7/18/05

The Agency is authorized to require this information under 415 ILCS 5/1. Disclosure of this information is required. Failure to do so may result in the delay or denial of any budget or payment requested hereunder. This form has been approved by the Forms Management Center.

IL 532 2273
LPC 499 Rev. Mar-94
BB:jk\BUDCERT.WPD

EXHIBIT

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CERTIFICATE OF SERVICE


I, the undersigned attorney at law, hereby certify that on May 18, 2005, I served true and correct copies of a MOTION FOR SUMMARY JUDGMENT, 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

Jeffrey W. Tock
Harrington & Tock
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