

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

RECEIVED
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JUN 18 2007
STATE OF ILLINOIS
Pollution Control Board

HARLEY FREY, ORIGINAL)
Petitioner,)
v.) PCB No. 07-105
ILLINOIS ENVIRONMENTAL) (UST Appeal)
PROTECTION AGENCY,)
Respondent.)

NOTICE

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

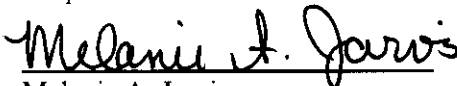
Carol Webb, Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P. O. Box 19274
Springfield, IL 62794-9274

Carolyn S. Hesse
Barnes & Thornburg, LLP
One North Wacker Drive,
Suite 4400
Chicago, IL 60606-2833

PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board an ENTRY OF APPEARANCE, the ADMINISTRATIVE RECORD, and a MOTION FOR SUMMARY JUDGEMENT, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



Melanie A. Jarvis
Assistant Counsel
Division of Legal Counsel
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P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)
Dated: June 14, 2007

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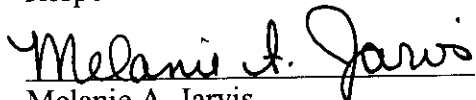
Respondent.

APPEARANCE

The undersigned, as one of its attorneys, hereby enters her Appearance on behalf of the Respondent, the Illinois Environmental Protection Agency.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



Melanie A. Jarvis
Assistant Counsel
Special Assistant Attorney General
Division of Legal Counsel
1021 North Grand Avenue, East
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MOTION FOR SUMMARY JUDGMENT

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, Melanie A. Jarvis, 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, Harley Frey, 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 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 documents within the Administrative Record ("Record" or "AR"). The Illinois EPA asserts that the Record and the arguments presented in this motion are sufficient for the Board to enter a dispositive order in favor of the Illinois EPA on all relevant issues. Accordingly, the Illinois EPA respectfully requests that the Board enter an order affirming the Illinois EPA's decision.

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. ISSUES

1. Whether supporting documentation (i.e. invoices) is required when seeking reimbursement for hauling of backfill and hauling of contaminated soil because without supporting documentation, the Illinois EPA cannot determine if the costs are ineligible for payment from the fund as exceeding the minimum requirements of the Act pursuant to 415 ILCS 5/ 57.7.(c)(3) and 35 Ill. Adm. Code 734.630(cc).
2. Whether the handling charges on hotel costs exceed the minimum requirements of the Act in violation of 415 ILCS 5/57.7(c)(3) and 35 Ill. Adm. Code 734.630(dd) and (o).

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

A. Relevant Facts

The facts in the Illinois EPA record supporting this motion are as follows:

1. Harley Frey, through its consultant CW3M, submitted a reimbursement claim dated November 20, 2006. The claim was received by the Illinois EPA on November 27, 2006. (AR, p.20)
2. The Illinois EPA issued a decision letter on March 23, 2007. (AR, p.1)
3. Invoices were not submitted for the hauling of backfill and the hauling of contaminated soil. (AR, p. 2, p. 11)
4. The submittal included a handling charge on hotel overnight charges. (AR, p.43)
5. The Illinois EPA requested the information necessary to determine if the requirements of the Act and regulations were met on several occasions prior to the issuance of the decision letter. (A.R. p. 9)

B. Relevant Law

415 ILCS 5/57.7(c)(3) - Leaking underground storage tanks; site investigation and corrective action.

(c) Agency review and approval.

- (3) In approving any plan submitted pursuant to subsection (a) or (b) of this Section, the Agency shall determine, by a procedure promulgated by the Board under Section 57.14, that the costs associated with the plan are reasonable, will be incurred in the performance of site investigation or corrective action, and will not be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of this Title.

Section 734.605 Applications for Payment

- a) An owner or operator seeking payment from the Fund must submit to the Agency an application for payment on forms prescribed and provided by the Agency and, if specified by the Agency by written notice, in an electronic format. The owner or operator may submit an application for partial payment or final payment. Costs for which payment is sought must be approved in a budget, provided, however, that no budget must be required for early action activities conducted pursuant to Subpart B of this Part other than free product removal activities conducted more than 45 days after confirmation of the presence of free product.
- b) A complete application for payment must consist of the following elements:
- 1) A certification from a Licensed Professional Engineer or a Licensed Professional Geologist acknowledged by the owner or operator that the work performed has been in accordance with a technical plan approved by the Agency or, for early action activities, in accordance with Subpart B of this Part;
 - 2) A statement of the amounts approved in the corresponding budget and the amounts actually sought for payment along with a certified statement by the owner or operator that the amounts so sought have been expended in conformance with the elements of a budget approved by the Agency;
 - 3) A copy of the OSFM or Agency eligibility and deductibility determination;
 - 4) Proof that approval of the payment requested will not exceed the limitations set forth in the Act and Section 734.620 of this Part;
 - 5) A federal taxpayer identification number and legal status disclosure certification;
 - 6) Private insurance coverage form(s);
 - 7) A minority/women's business form;

- 8) Designation of the address to which payment and notice of final action on the application for payment are to be sent;
 - 9) An accounting of all costs, including but not limited to, invoices, receipts, and supporting documentation showing the dates and descriptions of the work performed; and
 - 10) Proof of payment of subcontractor costs for which handling charges are requested. Proof of payment may include cancelled checks, lien waivers, or affidavits from the subcontractor.
- c) The address designated on the application for payment may be changed only by subsequent notification to the Agency, on a form provided by the Agency, of a change in address.
 - d) Applications for payment and change of address forms must be mailed or delivered to the address designated by the Agency. The Agency's record of the date of receipt must be deemed conclusive unless a contrary date is proven by a dated, signed receipt from certified or registered mail.
 - e) Applications for partial or final payment may be submitted no more frequently than once every 90 days.
 - f) Except for applications for payment for costs of early action conducted pursuant to Subpart B of this Part, other than costs associated with free product removal activities conducted more than 45 days after confirmation of the presence of free product, in no case must the Agency review an application for payment unless there is an approved budget on file corresponding to the application for payment.
 - g) In no case must the Agency authorize payment to an owner or operator in amounts greater than the amounts approved by the Agency in a corresponding budget. Revised cost estimates or