

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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STATE OF ILLINOIS  
Pollution Control Board

S&D REALTY, INC.,	)	
Petitioner,	)	
	)	
v.	)	PCB 09-33
	)	(LUST Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION	)	
AGENCY,	)	
Respondent.	)	

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RESPONSE TO THE RESPONDENT'S MOTION IN LIMINE

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NOW COMES the Petitioner, S&D Realty, Inc. (hereinafter "Petitioner"), by and through its attorneys, the Law Offices of Cohen & Hussien, P.C., and for its Response to the Respondent's Motion In Limine states as follows:

**Background and Facts**

1. On June 13, 2008, the Petitioner submitted to the Agency an application for payment from the Underground Storage Tank Fund for Leaking UST incident number 20050020 pursuant to § 57.8(a) of the Illinois Environmental Protection Act, and 35 Ill. Adm. Code 732, Subpart F. The Agency received the application on June 27, 2008. The application for payment covers the period from January 8, 2005, to April 18, 2005. The amount requested was \$153,801.58.
2. By letter dated October 10, 2008, the Agency made a final decision on the Petitioner's application. The Agency denied Petitioner reimbursement in the amount of \$13,340.08 "for costs for removal, disposal, or abandonment of UST if the tank was removed or abandoned, or permitted for removal or abandonment, by

- the Office of the State Fire Marshal before the owner or operator provided notice to Illinois Emergency Management Agency of a release of petroleum, pursuant to § 57.8(k) of the Environmental Protection Act and 35 Ill. Adm. Code 734.630(k).”
3. The Agency also denied reimbursement in the amount of \$98,760.00 “for costs which lack supporting documentation. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 734.630(cc).”
  4. The Agency identified two costs which lacked supporting documentation. First, “Remediation and disposal costs do not have backup invoices for backfill costs, overburden costs, permit costs, in the amount of \$46,960.00.” Second, “Paving and demolition costs do not have backup invoices for concrete removal and replacement, and the dismantling and reassembling of gasoline pumps in the amount of \$51,800.00.”
  5. On February 12, 2009, the Petitioner filed its Petition for Review of the Illinois Environmental Protection Agency decision that denied reimbursement for the costs of the tank removal and for costs which lack supporting documentation. On March 5, 2009, the Board granted the Petitioner’s Petition for Review.
  6. On September 3, 2009, the Petitioner disclosed Eric D. Hasman as a retained expert to testify about the costs for the work that was completed on the remediation project for which the property owner does not have the physical receipts and invoices. Also included with said disclosure was Mr. Hasman’s Report, dated August 27, 2009, and Mr. Hasman’s resume.
  7. On October 29, 2009, the Respondent filed its Motion In Limine Directed to the

Hearing Officer to enter an order preventing Mr. Hasman from testifying or the Petitioner presenting any other form of evidence arising from or related to an August 27, 2009, report prepared by Mr. Hasman concerning the UST site that is the subject of this appeal.

### **Argument**

8. The Respondent claims that its Motion In Limine should be granted because, “in reimbursement appeals, the applicant for reimbursement has the burden to demonstrate that costs are related to corrective action, properly accounted for, and reasonable.” Further, the Respondent cites 35 Ill. Adm. Code 732.601(b)(9), which states that a complete application for payment must include, “An accounting of all costs, including but not limited to, invoices, receipts, and supporting documentation showing the dates and descriptions of the work performed.” Despite the Respondent’s contentions, the Motion In Limine should be denied.
9. It has been established that the Petitioner does not have all of the physical receipts and invoices for the work completed during the remediation project. This is due in part because the Petitioner’s general contractor for the remediation project, Courtesy Services, Inc., does not have all of the physical receipts and invoices. When the Petitioner demanded the same from Courtesy Services, Inc., the Petitioner learned that the principal of Courtesy Services, Inc. had a major stroke and is not able to assist the Petitioner in this matter. The Petitioner learned that all of the records that Courtesy Services, Inc. has for the Petitioner, save for the

few receipts and invoices submitted to the Agency for reimbursement, are missing.

10. Despite these circumstances, the Petitioner should still be allowed to recover the reasonable costs it incurred during the remediation project as a result of Mr. Hasman's Report. As a licensed professional geologist with experience in underground storage tank removals similar to the case at hand, Mr. Hasman has the type of scientific, technical, or specialized knowledge to assist the trier of fact to determine the reasonable costs associated with the completion of the remediation project in this case. In turn, Mr. Hasman's Report, which was based upon his experiences and upon a reasonable degree of geological and engineering certainty, clearly lays out (1) the costs that are related to the remediation project, (2) that these costs are properly accounted for, and (3) that these costs are reasonable.
11. Further, 35 Ill. Adm. Code 732.601(b)(9) is not inclusive, as the Respondent is attempting to argue. The Code simply asks for an accounting of all costs from supporting documentation, which the Report provides. It should be noted that the Report is not adding new costs to the amount requested in its original application to the Agency. Rather, the Report is supplementing the application by showing that the remediation project was completed and showing that the costs requested in the application were reasonable for the type of work that was done. This, in turn, serves the same purpose as if the receipts and invoices for all of the costs had been submitted in the application to the Agency in the first place.

12. While the Report is silent on the exact dates that the work was performed, there is no question that the work was completed. The Report details the work that was completed, the Report references photographs that were taken of the work being completed, and the Respondent never challenges the fact that the work was not completed. And to further support this contention, on page 3 of the Report, Mr. Hasman states that, “It should be noted that for each step of the tank removal and installation a representative from the City of Chicago Department of Environment or the Fire Department is on-site to document or inspect the removal or installation of the USTs and piping.”
13. The Respondent also claims that its Motion In Limine should be granted because the Board will not consider new information not before the Illinois EPA prior to its final determination regarding the issues on appeal.
14. However, the Petitioner could not anticipate that the Agency would decline its requests for reimbursement due to the lack of actual invoices and receipts. The Petitioner provided all the documents it could get from Courtesy Services, Inc. Upon the Agency’s rejection of its reimbursement package, the Petitioner has again attempted to provide sufficient information to provide reimbursement to the Petitioner through the disclosure of Mr. Hasman and Mr. Hasman’s Report to show the reasonable costs associated with this remediation project. The Petitioner therefore should be allowed to supplement the Record in order to clarify the issues raised by the Agency’s rejection. Allowing the Petitioner to do so would not undermine the role of the Agency in making these kinds of determinations in the

future.

WHEREFORE, the Petitioner, S&D Realty Inc., respectfully petitions the Illinois Pollution Control Board to deny the Respondent's Motion In Limine and for any other relief deemed just and appropriate.

November 12, 2009

Respectfully Submitted,

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One of the Petitioner's Attorneys

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