BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ZERVOS THREE, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 10-54
	)	(LUST FUND APPEAL)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
	)	
Respondent	)	

NOTICE OF FILING

To: See Service List

PLEASE TAKE NOTICE that on August 30, 2010, we caused to be filed with the Clerk of the Illinois Pollution Control Board **Petitioner's Motion for Summary Judgment** and **Stipulation of Facts**, copies of which are attached hereto and served upon you.

Respectfully submitted,

ZERVOS THREE, INC., Petitioner

By: _____
One of its Attorneys

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9185715.1

CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing **Motion for Summary Judgment** and **Stipulation of Facts** were hand delivered on August 30, 2010 to:

John T. Therriault, Assistant Clerk of the Board
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

It is hereby certified that true copies of the forgoing **Motion for Summary Judgment** and **Stipulation of Facts** were mailed, first class on August 30, 2010, to:

Melanie Jarvis
Illinois Environmental Protection Agency,
Bureau of Land
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 West Randolph Street
Chicago, Illinois 60601-3218

William J. Anaya

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	)	
	)	
Respondent	)	

MOTION FOR SUMMARY JUDGMENT

Now comes Petitioner, by counsel, William J. Anaya of Arnstein & Lehr LLP, and pursuant to Section 101.516, 35 Ill. Adm. Code, Subtitle A, Chapter I, Subpart E, and moves the Illinois Pollution Control Board for Summary Judgment, specifically reversing Respondent's Final Decision dated December 21, 2009, and finding that Petitioner is an "Owner" as that term is defined at 415 ILCS 5/57.2, as amended, and is eligible to seek reimbursement from the Underground Storage Tank Fund. In furtherance thereof, Petitioner states as follows:

FACTS

There are no genuine issues of material fact, at least as to those facts involving the question concerning Petitioner's eligibility for reimbursement from the Underground Storage Tank Fund. From the Stipulation of Facts and the Administrative Record in this case, the following facts are evident:

The site under review is commonly known as 9999 West Irving Park Road, in Schiller Park, Illinois (the "Site"). On May 21, 1991, a petroleum release was reported at the Site and the Illinois Emergency Management Agency ("IEMA") assigned Incident Number 911366 to the reported release at the Site. Respondent acknowledged the

incident and assigned its number, LPC#0312855092, to the Site. Thereafter, limited corrective action was undertaken at the Site by "Clark Oil and Refining Co" ("Clark Oil"), associated with removing three, 7,500 gallon, underground storage tanks and related piping. According to Prairie Environmental Specialties, Inc. ("Prairie") in its correspondence to Respondent dated July 17, 1991, the underground storage tanks were removed from the Site in 1991.

In response to various applications seeking reimbursement from the Underground Storage Tank Fund, Respondent acknowledged the conditions at the Site and the costs incurred by Clark Oil in removing the three underground storage tanks and performing periodic monitoring. Respondent authorized reimbursement to Clark Oil in the sum of $150,171.57 from the Underground Storage Tank Fund. The money was paid in 11 installments over 14 years from July 20, 1992 through March 19, 2004. Because Clark Oil never completed a corrective action at the Site, Respondent did not issue a "No Further Remediation" ("NFR") letter for this Site. Through the date hereof, Respondent has not issued an NFR letter related to the Site.

As described in Respondent's correspondence dated December 3, 1992, Clark Oil's limited corrective action at the Site only involved the removal of "705 cubic yards of hydrocarbon impacted soils" for the limited purpose of allowing the "safe installation of the new USTs into the prior cavity." Additional corrective action was still required according to Respondent: "Analytical results from soil borings performed prior to the excavation activities showed hydrocarbon impacted soils extending beyond the excavation limits necessary to install the new USTs."

Thereafter, by correspondence dated August 27, 1993, Respondent notified Clark Oil that Respondent required a formal Corrective Action Plan for the removal of the residual hydrocarbon contamination left at the Site associated with IEMA Incident 911366. Clark Oil did not respond, and on October 20, 1993, and again on March 7, 1994, Respondent notified Clark Oil that Respondent continued to require a formal Corrective Action Plan for the residual hydrocarbon contamination remaining at the Site.

Unsatisfied with no response from Clark Oil, Respondent sent a formal Notice of Violation to Clark Oil on April 26, 1994, indicating therein that "To date, the Agency has not received a Corrective Action Plan for responding to contaminated soil and groundwater" remaining at the Site associated with IEMA Incident Number 911366. On June 3, 1994, Clark Oil replied to Respondent's Notice of Violation, indicating that Clark Oil had contracted with Handex of Illinois, Inc. ("Handex") to prepare a Corrective Action Plan "to address the groundwater concerns at this site." With the letter to Respondent dated June 3, 1994, Clark Oil included a copy of a report prepared by Handex and dated June 1, 1994, describing various groundwater conditions at the Site. Handex concluded that residual contamination associated with IEMA Incident 911366 remained at the Site.

Thereafter, on June 9, 1994, Clark Oil and Handex acknowledged to Respondent that additional investigation of the subsurface soil conditions was indeed necessary to define the extent of hydrocarbon contamination left at the Site associated with IEMA Incident 911366. Clark Oil committed to submit a Corrective Action Plan to Respondent after completing a comprehensive investigation. Respondent replied to Clark Oil by its correspondence dated June 16, 1994 and June 29, 1994, therein confirming, among

other things, that residual hydrocarbon contamination associated with IEMA Incident 911366 continued to exist at the Site.

On October 8, 1994, Handex, on behalf of Clark Oil, submitted additional groundwater data to Respondent, and Respondent replied to Handex on December 6, 1994, indicating that Respondent continued to require a comprehensive soil and groundwater investigation and Corrective Action Plan, including a full description of the extent of residual hydrocarbon contamination remaining at the Site associated with IEMA Incident 911366.

On January 8, 1995, Handex submitted a "Site Assessment Report" to Respondent concluding the residual contamination remained at the Site "above IEPA Cleanup Objectives." According to Handex, this contamination had not been removed during the earlier underground storage tank removal activities at the Site. Respondent acknowledged receipt of the Handex Report on January 20, 1995.

Thereafter Handex, on behalf of Clark Oil, submitted additional groundwater data from the Site on January 30, 1995. On April 13, 1995, Handex delivered another Site Assessment Report to Respondent, concluding therein that residual hydrocarbon contamination associated with IEMA Incident 911366 continued to exist at the Site "above IEPA Cleanup objectives." Respondent acknowledged receipt of that report in correspondence dated April 26, 1995.

Even though Clark Oil had failed to comply with Respondent's requests for comprehensive investigation and Corrective Action Plan, Respondent nonetheless approved partial reimbursement to Clark Oil from the Underground Storage Tank Fund with its correspondence dated May 26, 1995. Clark Oil was reimbursed for the removal

of the three 7,500 gallon underground storage tanks and for preparing the excavation pits for the installation of three, new underground storage tanks.

On July 24, 1995, Handex, on behalf of Clark Oil, delivered additional groundwater data to Respondent, indicating therein that hydrocarbon contamination associated with Incident 911366 remained at the Site in excess of IEPA cleanup objectives. Again, on September 20, 1995, Respondent approved another partial reimbursement request from Clark Oil, and approved payment from the Underground Storage Tank Fund to Clark Oil, even though Clark Oil had not provided Respondent with a comprehensive investigation or the required Corrective Action Plan.

On October 4, 1995, Handex, on behalf of Clark Oil, notified Respondent that hydrocarbon contamination associated with IEMA Incident 911366 had migrated off-site. Handex indicated that adjoining property owners had been notified accordingly. Attached to the notices to the adjoining property owners is a Site Map identifying the extent of hydrocarbon contamination remaining at the Site, and migrating off site, at that time.

On November 16, 1995, Handex, on behalf of Clark Oil, delivered additional groundwater data from the Site to Respondent, indicating the continued presence of residual hydrocarbon contamination at the Site associated with IEMA Incident 911366.

On January 23, 1996, Respondent again complained to Clark Oil, that Clark Oil had yet to provide Respondent with a comprehensive investigation and Corrective Action Plan it required to address the residual hydrocarbon contamination remaining at the Site associated with IEMA incident 911366. Handex, on behalf of Clark Oil, replied to Respondent, and sought an extension of time to submit a comprehensive

investigation and Corrective Action Plan. Clark Oil requested through March 20, 1996, to comply. By correspondence dated February 20, 1998, Respondent allowed Clark Oil until April 20, 1996, to submit a Corrective Action Plan, and reminded Clark Oil that the required Corrective Action Plan "must address both the soil and groundwater contamination associated with this site."

On August 9, 1996, Handex, on behalf of Clark Oil, delivered a "Groundwater Monitoring Report/Corrective Action Plan" to Respondent, indicating therein that residual contamination associated with IEMA Incident 911366 continued to exist at the Site. Handex, on behalf of Clark Oil, proposed a rudimentary Corrective Action Plan, which included *in situ* remedial work and groundwater monitoring.

By correspondence dated March 13, 1997, Respondent rejected Clark Oil's proposed Corrective Action Plan, indicating, again that "[a] Corrective Action Plan must be submitted to the Agency within 60 days of the date of this letter and must address both soil and groundwater." On July 28, 1997, Handex, on behalf of Clark Oil, requested an extension of an additional 120 days to submit the required comprehensive investigation and Corrective Action Plan.

Thereafter, on August 21, 1997, Handex, on behalf of Clark Oil, submitted additional groundwater data for the Site, indicating that the Site continued to contain hydrocarbon contamination associated with IEMA Incident 911366. On November 10, 1997, Handex, on behalf of Clark Oil, submitted additional information to Respondent concerning the proposed "Bioremediation Corrective Action Plan" for the Site, indicating that historical hydrocarbon contamination associated with IEMA Incident 911366 remained at the Site.

On October 12, 1999, Handex, on behalf of Clark Oil (then known as Clark Retail Enterprises, Inc.), requested that Respondent review Clark Oil's earlier submittal dated November 10, 1997, because, according to Handex, "Clark is anxious to move forward with the corrective action activities" at the Site and remedy the historical hydrocarbon contamination remaining at the Site associated with IEMA Incident 911366. Thereafter, on May 17, 2000, Handex, on behalf of Clark Oil, submitted to Respondent additional groundwater data from the Site. Therein Clark Oil reported the continued presence of residual hydrocarbon contamination at the Site associated with IEMA Incident 911366.

On October 9, 2002, Handex, on behalf of Clark Oil, submitted a formal Corrective Action Plan for the Site, which Respondent had first demanded nine years earlier on August 27, 1993. (The Administrative Record contains two copies of the Corrective Action Report, one indicating the report was "Releasable May 1, 2003 Reviewer MM" and the other indicating it was "Releasable February 28, 2007 Reviewer MD.") Therein, Handex, on behalf of Clark Oil, reports that the Site continued to contain hydrocarbon contamination associated with IEMA Incident 911366 at concentrations that exceed corrective action objectives, and which required further corrective action. As part of the proposed Corrective Action Plan, Handex, on behalf of Clark Oil, proposed additional soil and groundwater removal, as well as Engineered Barriers and Institutional Controls as a proposed remedy for the residual hydrocarbon contamination associated with IEMA Incident 911366.

Nearly two years later, on May 19, 2004 (roughly eleven years after requesting it), Respondent approved Clark Oil's Corrective Action Plan.

Clark Oil took no action to implement any part of Corrective Action Plan. The residual contamination associated with IEMA Incident 911366 remained at Site through November 24, 2003 – the date when Petitioner took title to the Site by Deed.

Through November 24, 2003, Respondent had not issued an NFR letter concerning the Site, or related to the release that gave rise to IEMA Incident Number 911366 at the Site. To date, Respondent has not issued a NFR letter involving the Site and the release that gave rise to IEMA Incident Number 911366.

On November 24, 2003, Petitioner became the Owner of the Site by deed. Thereafter, Petitioner performed remedial activities at the Site consistent with the approved Corrective Action Plan from September 2006 through May 2009 – all as described in Petitioner's Reimbursement Package submitted to Respondent with correspondence dated June 9, 2009, from Superior Environmental Corp. ("Superior").

On January 31, 2008, (following an IEMA Incident report that was related to Petitioner's remedial activities pursuant to the approved Corrective Action Plan, but which Incident was subsequently consolidated with IEMA Incident 911366), Respondent acknowledged that Petitioner was the Owner of the Site, and formally notified Petitioner that "a release from an underground storage tank system(s) has occurred" at the Site. According to Respondent, because Petitioner is the Owner of the Site, Petitioner "is required to comply with the Leaking Underground Storage Tank (Leaking UST) Program requirements."

Thereafter, on March 31, 2008, Respondent once again acknowledged Petitioner as the Owner of the Site and notified Petitioner of Petitioner's reported failure to submit certain reports to Respondent. Respondent admonished Petitioner:

Your failure to comply with the requirements of the Illinois Environmental Protection Act and applicable regulations may subject you to an enforcement action. The future submission or approval of 20 and/or 45 day report(s) will not waive, discharge or otherwise release you from any potential or actual liability or enforcement action. [Emphasis in original.]

Petitioner responded to Respondent's demands as the acknowledged Owner of the Site (with the responsibilities under the Illinois Environmental Protection Act described by Respondent), and from September 2006 through May 31, 2009, Petitioner performed a full scale investigation and corrective action at the Site consistent with all relevant regulations and the approved Corrective Action Plan. Specifically, Petitioner removed the concrete surface barrier at the Site in order to access the residual contamination in the soil and groundwater left by Clark Oil. Thereafter, Petitioner lawfully and properly removed and disposed of an additional 1007.99 cubic yards of soil contaminated with gasoline associated with IEMA Incident 911366. Petitioner also collected soil samples in order to properly characterize conditions at the Site and the waste soil being removed and disposed from the Site. Petitioner also paid a proper laboratory to confirm that the remaining soil was free of contamination following excavation. Thereafter, Petitioner properly and lawfully backfilled the excavation with clean back fill, and then repaved the surface of the Site, all as more particularly described in Petitioner's Reimbursement Package dated June 9, 2009, and received by Respondent on June 11, 2009.

On June 7, 2009, Petitioner submitted Respondent's form "Election to Proceed as 'Owner,'" wherein Petitioner properly described the Site, the IEMA Incident Number and Respondent's LPC number - all indicating that the Site was the same Site where Respondent had previously approved reimbursement from the Underground Storage

Tank Fund to Clark Oil. Respondent's form "Election" contains the following admonishment:

> Pursuant to Section 57.2 of the Environmental Protection Act [415 ILCS 5/57.2], I hereby elect to proceed as an "owner" under Title XVI of the Environmental Protection Act. I certify that I have acquired an ownership interest in the above-named site, that one or more underground storage tanks registered with the Office of the State Fire Marshal have been removed from the site, and that corrective action on the site has not yet resulted in the issuance of a "no further remediation letter" by the Illinois EPA pursuant to Title XVI of the Environmental Protection Act.
>
> I understand that by making this election I become subject to all of the responsibilities and liabilities of an "owner" under Title XVI of the environmental Protection Act and the Illinois Pollution Control Board's rules at 35 Ill. Adm. Code 734. I further understand that this election cannot be withdrawn.

Petitioner had signed Respondent's form on June 1, 2009, therein certifying to Petitioner's ownership interest in the Site, and acknowledging and accepting Petitioner's responsibilities under Title XVI of the Illinois Environmental Protection Act, and waiving any opportunity to withdraw the election. Respondent's completed form was delivered to Respondent with correspondence dated June 7, 2009, and received by Respondent on June 8, 2009.

Thereafter, by correspondence dated June 9, 2009, Petitioner submitted Petitioner's Reimbursement Package to Respondent, therein describing, and properly supporting, all of the activities and costs which Petitioner had performed and had incurred in investigating site conditions and performing a lawful corrective action and closure of the Site according to the appropriate regulations and the approved Corrective Action Plan. Petitioner sought reimbursement from the Underground Storage Tank Fund for $97,049.28 in properly incurred, and otherwise reimbursable, expenses.

After having acknowledged receipt on June 11, 2009, of Petitioner's Reimbursement Package dated June 9, 2009[1], Respondent, on June 18, 2009, acknowledged receipt of, and affirmatively accepted, Petitioner's election to proceed as Owner. Specifically, Respondent stated:

> By signing the form, you certified that you have acquired an ownership interest in the above-referenced site, one or more underground storage tanks registered with the Office of the State Fire Marshal have been removed from the site, and corrective action on the site has not yet resulted in the issuance of a "no further remediation letter" by Illinois EPA pursuant to Title XVI of the Act. *Based on this certification, your Election To Proceed as "Owner" is accepted.* (Section 57.13 of the Act and 35 Ill. Adm. Code 734.105). [Emphasis Added]
>
> As the new owner, you may be eligible to access the Underground Storage Tank Fund for payment of costs to remediation of the release. For information regarding eligibility and the deductible amount to be paid, please contact the Office of the State Fire Marshal at 217/785-5878.

As directed by law, and as reminded by Respondent, Petitioner contacted OFSM, and by correspondence dated September 3, 2009, OFSM informed Petitioner that OFSM had determined that Petitioner was an Owner, eligible to apply for reimbursement for the Underground Storage Tank Fund, subject to a $10,000 deductible, and so long as none of the following conditions applied:

1. Neither the owner nor the operator is the United States Government.
2. The tank does not contain fuel which is exempt from the Motor Fuel Tax.
3. The costs were incurred as a result of a confirmed release of any of the following substances:
   "Fuel," as defined by Section 1.19 of the Motor Fuel Tax Law
   Aviation Fuel
   Heating oil

[1] See Respondent's ("IEPA/BOL LEAKING UST") stamped "RECEIVED" date (June 11, 2009) on Petitioner's Reimbursement Package. Oddly, Petitioner's Reimbursement Package is not a separate item in the Administrative Record, which is generally kept chronologically. Petitioner's Reimbursement Package is found in the Administrative Record only as an attachment to Respondent's denial thereof.

Used oil, which has been refined from crude oil used in a motor vehicle, as defined in Section 1.3 of the Motor Fuel Tax Law

4. The owner or operator registered the tank and paid all fees in accordance with the statutory and regulatory requirements of the Gasoline Storage Act.
5. The owner or operator notified the Illinois Emergency Management Agency of a confirmed release, the costs were incurred after the notification and the costs were a result of a release of a substances listed in this Section. Costs of corrective action or indemnification incurred before providing the notification shall not be eligible for payment.
6. The costs have not already been paid to the owner or operator under a private insurance policy, other written agreement, or court order.
7. The costs were associated with "corrective action."

By correspondence dated December 21, 2009, Respondent acknowledged that Petitioner was the Owner of the Site, and that the Site was the location where registered underground storage tanks had been removed, and was the site where historic corrective action had yet been initiated, but additional activities were required in order for Respondent to issue an NFR letter. Respondent also notified Petitioner that Respondent had denied the requested deductible because: "The deductible amount for this claim is $10,000, which was previously deducted from the Invoice Voucher dated May 5, 1994."

While Respondent did not review the merits of Petitioner's Reimbursement Package, Respondent nonetheless denied Petitioner's request for reimbursement, as follows:

The following costs are not reimbursable:

1. It appears that all of the bills in this bill package were billed to Zervos Three. However, it does not appear that Zervos Three was the owner/operator of the 3-7,500 gallon gasoline underground storage tanks systems (which were removed in June 1991) during the billing period (September 2006 – May 2009). Based on the Election To Proceed As Owner Form dated June 1, 2009, Zervos Three was not

the owner/operator of the underground storage tank systems until June 1, 2009. Therefore, the entire bill package is not reimbursable. Section 22.18b(a)(3) of the Illinois Environmental Protection Act.

2. Please refer to RW Collins Invoice 486, dated September 30, 2007. This invoice includes costs associated with the removal & disposal of all of the pavement from the site. The Illinois EPA will not reimburse costs associated with the removal & disposal of pavement which are beyond what was associated with the removal & disposal of pavement which are beyond what was associated with the 705 cubic yards (1,008 tons) of contaminated soil which were excavated & disposed of in June 1991. Information submitted to Illinois EPA does not indicate the amount of pavement which was associated with the705 cubic yards (1,008 tons) of contaminated soil which were excavated & disposed of in June 1991. Therefore, the entire invoice is not reimbursable. Sections 22.18(e)(1)(C), 22.18b(a)(3) & 22.18b(d)(4)(C) of the Illinois Environmental Protection Act.

On December 23, 2009, Superior, on behalf of Petitioner, notified Respondent that OFSM had previously determined that Petitioner was eligible for reimbursement, and that all of the corrective action activities that were undertaken by Petitioner, and which were described in Petitioner's Reimbursement Package, had been incurred by Petitioner well after Petitioner had purchased an interest in the Site. Superior, on behalf of Petitioner, also noted that Petitioner's Reimbursement Package had been delivered to Respondent, and was received by Respondent on June 11, 2009. Inasmuch as Respondent's denial was not dated until December 21, 2009, well over 120 days had passed since the submission of Petitioner's Reimbursement Package without Respondent's approval or rejection. According to Superior, Petitioner's Reimbursement Package was approved by operation of law following the passage of 120 days without Respondent's decision to the contrary. Superior, on behalf of Petitioner, asked Respondent to reconsider Respondent's purported denial of Petitioner's Reimbursement Package.

On January 8, 2010, Respondent replied to Superior's December 23, 2009 correspondence and indicated that Respondent had sent Superior "an electronic message on October 22, 2009 with regard to [Respondent's] concerns with this bill package. However, [Respondent] had never received any response. My boss instructed me to issue a final decision on December 8, 2009." There is no electronic message dated October 22, 2009, from Respondent located anywhere in the Administrative Record.

Respondent further explained:

> 2. The 3-7,500 gallon gasoline underground storage tank systems in question were removed in June 1991. [Petitioner] did not purchase the site property until August 2003. [Petitioner] did not elect to proceed as owner until June 2009. There is not any way that [Petitioner] can be considered to be the owner of the 3-7,500 gallon gasoline underground storage tank systems in question prior to June 2009. All of the costs in question were incurred prior to June 2009.
>
> 3. I have tried to find information about how to prorate the costs associated with the replacement of the pavement. However, I was not able to find any information with which to do this.
>
> 4. Please note that this particular bill package is regulated in accordance with 35 Illinois Administrative Code 731, not 35 Illinois Administrative Code 734.

Later on January 8, 2010, Superior, on behalf of Petitioner, replied to Respondent, and indicated that Respondent's on-line database clearly identifies the Site as being regulated pursuant to 35. Ill. Adm. Code 734, and the 120 day rule applies to Petitioner's Reimbursement Package. Moreover, according to Superior, the date that Petitioner gained an interest in the real estate is used to determine whether or not Petitioner is eligible for reimbursement and not the date of receipt of Respondent's form.

On January 11, 2010 Respondent prepared a detailed reply to Petitioner, re-iterating Respondent's position with regard to the ownership of the historic underground storage tanks that had been removed from the Site before Petitioner acquired an ownership interest in the Site. According to Respondent:

> The applicability of 35 Illinois Administrative Code 734, as well as the applicability of [Petitioner] being the owner of the tanks (for the tanks in question), is not retroactive. The applicability of 35 Illinois Administrative Code 734, as well as [Petitioner] being the owner of the tanks (for the tanks in question) begins in June 2009, and goes forward in time from there. It is not retroactive.
>
> When the costs in question were incurred (which was prior to June 2009) this LUST Incident was regulated in accordance with 35 Illinois Administrative Code 731, and [Petitioner] was not the owner of the tanks (for the tanks in question). Therefore, this particular bill package is regulated in accordance with 35 Illinois Administrative Code 731, and the costs in question were not incurred by the owner of the tanks (for the tanks in question).

Respondent's letter dated December 21, 2009 (denying Petitioner's Reimbursement Package because Respondent had determined that Petitioner was not an eligible owner entitled to reimbursement from the Underground Storage Tank Fund) is final agency action, and Petitioner timely filed this appeal.

STANDARD OF REVIEW

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to material fact and the moving party is entitled to judgment as a matter of law. *McDonald's Corp. v. IEPA*, PCB 04-14 at 2 (Jan. 22, 2004). Illinois law encourages summary judgment to expeditiously resolve lawsuits. *Purtill v. Hess*, 111 Ill.2d 229, 240, 489 N.E. 2d 867,871 (1986).

ISSUE ON APPEAL

Is Petitioner an "Owner," as that term is defined at 415 ILCS 5/57.2, and otherwise eligible for reimbursement from the Underground Storage Tank Fund?

ARGUMENT

A. The Policy Supporting the Statutory Amendment Encourages Prompt, Quality Corrective Action at Sites with Chronic, Historic Contamination From Registered Underground Storage Tanks.

Petitioner is a hero. Petitioner, a closely-held corporation, spent $97,049.28 of its own money cleaning up Clark Oil's mess – a mess that had remained uncontrolled since at least 1993. Petitioner cleaned a mess that had been created by a large multi-national corporation – a large oil company – who for twelve years had thumbed its nose at Respondent, and who never completed a responsible corrective action at the Site during those twelve years. Respondent threatened and cajoled Clark Oil to comply with Illinois law, but to absolutely no avail. Even though Clark Oil never completed a corrective action at the Site, and eventually abandoned its mess at the Site, Respondent rewarded Clark Oil by authorizing reimbursement of more than $150,000.

Most remarkably, the $150,000 reimbursement payment to Clark Oil was for mere incidental corrective action expenses associated with the installation of three new tanks at Clark Oil's retail gasoline site, and groundwater monitoring expenses that were never approved by Respondent as appropriate.

After removing three underground storage tanks, and replacing three new underground storage tanks in the excavated pit, Clark Oil merely monitored the Site. For well over a decade, Clark Oil even refused to investigate the Site or prepare a Corrective Action Plan, much less complete a proper corrective action at the Site. Respondent's sanction for Clark Oil's intransigence? Simple: Respondent authorized

the payment of $150,000 for activities associated with installing new tanks at the Site and for some groundwater monitoring. In that instance, Respondent seemingly found a way "to prorate the costs associated with development costs"— a courtesy, perhaps, but one that was not otherwise afforded Petitioner, and one which was specifically denied Petitioner in Respondent's January 8, 2010 correspondence to Petitioner.

Clark Oil never implemented the Corrective Action Plan – Petitioner did, and out of its own pocket, and Respondent's response was to deny Petitioner access to the Underground Storage Tank Fund based on an unreasonable, unlawful, arbitrary, capricious, and unconstitutional interpretation of the law and regulations.

That is not to say that Petitioner acted out of pure altruism. Indeed, Petitioner does not seek out contaminated sites solely for the purpose of funding responsible corrective actions for the common good. Rather, in this instance, Petitioner considered various commercial options, and accepted the burden of cleaning this Site based on Petitioner's commercial interests in the Site, and the Illinois General Assembly's assurance that new owners of sites with historic hydrocarbon contamination from registered underground storage tanks were eligible for reimbursement for "reimbursable expenses." Even after only a cursory reading of the "Election to Proceed" form signed and submitted by Petitioner, it is clear that Petitioner willingly accepted the responsibility to perform corrective action at a site where the mess had been created by someone else, because the Illinois General Assembly had intentionally expanded the universe of eligible owners – beyond the eligibility provided under the old law – to encourage just such responsible action. OFSM agreed, and found Petitioner eligible for reimbursement

at a site where registered underground storage tanks had been removed, and where Respondent had not issued a previous NFR letter.

Indeed, the policy supporting an intentional expansion of the group of owners eligible for reimbursement actually worked in this instance. Previously, new owners shied away from such sites largely because cleanup liability presented a major disincentive to new ownership, and because new owners were not eligible for reimbursement from the Underground Storage Tank Fund. Here, because the Illinois General Assembly had removed the disincentive, Petitioner was encouraged to purchase and accept the responsibility to clean Clark Oil's chronic mess. The incentive worked, after Respondent had not been able to extract anything similar from Clark Oil for well over a decade.

No new money need be appropriated or taxed to effectively encourage such responsible action. Unfairness has been eliminated and new owners are encouraged to purchase and clean certain, formerly unproductive sites, with money and programs that are currently available and in place. This scenario will be repeated hundreds of times in Illinois, unless Respondent's interpretation of the law, and Respondent's purported role in determining eligibility under the pretense limited of cost review (Respondent's only proper role, *See* 415 ILCS 5/57.8(a)(l)) is adopted.

B. The Facts Clearly Indicate That Petitioner Satisfied The Statutory Conditions For Reimbursement From the Underground Storage Tank Fund.

Based on the facts under review, it is clear that Petitioner submitted a written "Election to Proceed" under Title XVI of the Illinois Environmental Protection Act after

having acquired an ownership interest in a site[2] on which one or more registered tanks had been removed, but on which corrective action has not yet resulted in the issuance of an "no further remediation" letter by Respondent pursuant to Title XVI of the Illinois Environmental Protection Act. In the present instance, there is no question that Petitioner is the Owner of the Site, and that the Site qualifies for reimbursement from the Underground Storage Tank Fund.

The question is: Can Respondent interpret the regulations to negate eligibility clearly determined by the Office of the State Fire Marshall (OFSM), where OSFM analyzed standards provided by the Illinois General Assembly, and where the statute is being relied upon by the regulated community and is successfully encouraging prompt, quality corrective action at sites with historic and chronic contamination associated with registered underground storage tanks? For many reasons, the answer is no, and the Board should reverse Respondent's errant final decision.

C. The Plain and Unambiguous Language of the Statute Includes Petitioner as an "Owner" Eligible For Reimbursement.

The statute under review provides:

> When used in connection with, or when otherwise relating to, underground storage tanks, the terms, "facility," "owner," "operator," "underground storage tank," "(UST)," "petroleum" and "regulated substance" shall have the meanings ascribed to them in Subtitle I of the Hazardous and Solid Waste Amendments of 1984 (P.L. 98-616) of the Resource Conservation and Recovery Act of 1976 (P.L. 94-580); ...**provided further however that the term "owner" shall also mean any person who has submitted to the Agency a written election to proceed under this Title and has acquired an ownership interest in a site on which one or more registered tanks have been removed, but on which corrective action**

[2] As the facts demonstrate, Petitioner acquired an ownership interest in the Site by way of a quitclaim deed on November 24, 2003. *See Coughlin v. Gustafson*, 332 Ill. App. 3d 406, 412, 772 N.E.2d 864, 869 (1st Dist. 2002) (a deed is an instrument in writing which conveys an interest in land; the "main purpose of which is to transfer good title").

has not yet resulted in the issuance of an "no further remediation letter" by the Agency pursuant to this Title.

[Emphasis Added, identifying the recent amendment to the Statute under review, intentionally designed and enacted to expand the definition of "Owner" to include new owners as eligible for reimbursement, for the policy justifications cited herein.] See 415 ILCS 5/57.2 Definitions

It is well-settled that the "interpretation of a statute is a matter of law for the court and appropriate for summary judgment." *County of Knox ex rel. Masterson v. Highlands, L.L.C.*, 188 Ill.2d 546, 551, 723 N.E.2d 256, 260 (1999). In interpreting a statute, a court's objective is to ascertain and give effect to the intent of the legislature. *Hernon v. E.W.Corrigan Constr. Co.*, 149 Ill.2d 190, 194, 595 N.E.2d 561, 562 (1992). The most reliable indicator of legislative intent is the language of the statute. *People v. Bryant*, 128 Ill.2d 448, 455, 539 N.E.2d 1221, 1224 (1989). The language of a statute must be given its plain and ordinary meaning. *People v. Bole*, 155 Ill.2d 188, 197, 613 N.E.2d 740, 744-45 (1993). Where the statutory language is clear and unambiguous, a court must apply the statute without further aids of statutory construction. *Id.* at 198.; *People v. Zaremba*, 158 Ill.2d 36, 40, 630 N.E.2d 797, 799 (1994).

Section 57.2 is not ambiguous and neither is Section 57.9 (or its predecessor, Section 22.18b), all of which relate to eligibility in the Underground Storage Tank Fund. Section 57.9 provides:

> (a) The Underground Storage Tank Fund shall be accessible by owners and operators who have a confirmed release from an underground storage tank or related tank system of a substance listed in this Section. The owner or operator is eligible to access the Underground Storage Tank Fund if the eligibility requirements of this Title are satisfied and:
>
> (1) Neither the owner nor the operator is the United States Government.
>
> (2) The tank does not contain fuel which is exempt from the Motor Fuel Tax Law.

(3) The costs were incurred as a result of a confirmed release of any of the following substances:

(A) "Fuel", as defined in Section 1.19 of the Motor Fuel Tax Law.
(B) Aviation fuel.
(C) Heating oil.
(D) Kerosene.
(E) Used oil which has been refined from crude oil used in a motor vehicle, as defined in Section 1.3 of the Motor Fuel Tax Law.

(4) The owner or operator registered the tank and paid all fees in accordance with the statutory and regulatory requirements of the Gasoline Storage Act.

(5) The owner or operator notified the Illinois Emergency Management Agency of a confirmed release, the costs were incurred after the notification and the costs were a result of a release of a substance listed in this Section. Costs of corrective action or indemnification incurred before providing that notification shall not be eligible for payment.

(6) The costs have not already been paid to the owner or operator under a private insurance policy, other written agreement, or court order.

(7) The costs were associated with "corrective action" of this Act.

If the underground storage tank which experienced a release of a substance listed in this Section was installed after July 28, 1989, the owner or operator is eligible to access the Underground Storage Tank Fund if it is demonstrated to the Office of the State Fire Marshal the tank was installed and operated in accordance with Office of the State Fire Marshal regulatory requirements. Office of the State Fire Marshal certification is prima facie evidence the tank was installed pursuant to the Office of the State Fire Marshal regulatory requirements.

Respondent often cites to Section 22.18b, but the Illinois General Assembly repealed Section 22.18b. Nonetheless, that provision provides similar direction:

(a) An owner or operator is eligible to receive money from the Underground Storage Tank Fund for costs of corrective action or indemnification only if all of the following requirements are satisfied:

* * *

(3) The costs of corrective action or indemnification were incurred by an owner or operator as a result of a release of petroleum, but not including any hazardous substance, from an underground storage tank.

415 ILCS 5/22.18 (Repealed P.A. 88-496).

As the facts in the Administrative Record clearly demonstrate, Petitioner purchased the Site, performed a responsible corrective action at the Site, and notified Respondent that Petitioner elected to proceed as an "Owner" under Title XVI of the Illinois Environmental Protection Act. Equally important, Respondent affirmatively accepted Petitioner's election to proceed as Owner on June 18, 2009, subject only to a determination of eligibility by OFSM. On June 18, 2009, Respondent stated to Petitioner:

> As the new owner, you may be eligible to access the Underground Storage Tank Fund for payment of costs to remediation of the release. For information regarding eligibility and the deductible amount to be paid, please contact the Office of the State Fire Marshal at 217/785-5878.

Indeed, the OFSM is the state agency charged with the responsibility of determining the eligibility of "Owners'" entitled to access the Underground Storage Tank Fund. *See* 415 ILCS 5/57.9(c). As Respondent correctly indicated in Respondent's June 18, 2009 correspondence to Petitioner, once the OFSM determines that an Owner is eligible, that Owner may apply to the Underground Storage Tank Fund for reimbursement of reimbursable expenses. If Respondent approves the propriety of the expenses, then that Owner is entitled to reimbursement.

Eligibility to the Underground Storage Tank Fund is a determination made only by OFSM – not Respondent. *See* 415 ILCS 5/57.9(c); *see also* 415 ILCS 57.8(a)(1). Respondent cannot veto the OFSM's determination of eligibility under the rubric of purportedly reviewing the reasonableness of costs once eligibility has been favorably determined (especially when, as here, Respondent refused to review Petitioner's Reimbursement Package). According to the statute, Respondent may only audit

expenses. *See* 415 ILCS 5/57.8(a)(1). While Respondent arguably has the final administrative word on the propriety and reasonableness of costs incurred in pursuing a corrective action, Respondent does not have authority to veto an OFSM's final decision determining eligibility. Respondent's analysis is limited to the propriety and reasonableness of costs reportedly incurred in pursuing a proper corrective action, and can never be used as a back door means to effectively deny eligibility to the Underground Storage Tank Fund.

As the facts here demonstrate, by correspondence September 3, 2009, OFSM determined that Petitioner was eligible for reimbursement under the Underground Storage Tank Program after apparently analyzing Section 57.9 and Respondent's acceptance of Petitioner's election to proceed. It is important to note that none of the conditions subsequent described in Section 57.9 (or in repealed Section 22.18b) disqualified Petitioner's eligibility.

The statutory provisions are clear and unambiguous. Petitioner is eligible for reimbursement from the Underground storage Tank Fund.

D. Respondent's Denial is Unconstitutional and Misinterprets the Law and The Regulations, Neither of Which Provide The Conditions Relied Upon By Respondent In Denying Petitioner's Eligibility to the Underground Storage Tank Fund.

As agued above, the relevant statutory provisions are clear and unambiguous, and support the policy of expanding the group of "owners' eligible for reimbursement to include Petitioner under the facts of this case. Nonetheless, as described in the e-mail exchange included in the Administrative Record, Respondent sought guidance from the regulations, where no guidance was needed, and where Respondent's analysis created ambiguity where none exists.

In the Final Decision dated December 21, 2009, Respondent denied Petitioner's reimbursement claim because, according to Respondent, "it does not appear that [Petitioner] was the owner/operator of the 3-7,500 gallon gasoline underground storage tanks systems (which were removed in June 1991) during the billing period (September 2006 – May 2009). Based on the "Election To Proceed As Owner" form dated June 1, 2009, [Petitioner] was not the owner/operator of the underground storage tank systems until June 1, 2009."[3]

The response to Respondent's denial is, of course, within that sentence. As Respondent indicates, those underground storage tanks had been removed from the Site twelve years before Petitioner took title to the Site, and Petitioner was never the owner of the three underground storage tanks that provide the eligibility nexus to the Underground Storage Tank Fund. Under the circumstances, Petitioner could never be considered the "owner" of those removed tanks – retroactively (as suggested by Respondent) or otherwise. Indeed, before the amendment expanding the definition of "Owners" to include new owners, this may have been a relevant conclusion. That is, of course, the point of the clear and unambiguous amendment to the statute which Respondent simply ignores.

After Petitioner elected to proceed as the "Owner" of a site that once had contained registered underground storage tanks, Petitioner was fully obligated to perform a proper corrective action (i.e., Petitioner could not withdraw its notice to proceed as "Owner"), but, Petitioner became eligible for reimbursement from the

[3] Tellingly, for other purposes, Respondent had no trouble recognizing Petitioner as the Owner of the Site. See, Respondent's correspondence dated January 31, 2008 and March 31, 2008. Stipulation, Exhibits C and D and the Administrative Record.

Underground Storage Tank Fund for the reasonable costs and expense incurred in pursuing that mandated corrective action.

Respondent simply ignores the statutory amendment, effectively vetoing the Illinois General Assembly in virtually the same manner that Respondent purportedly exercises unfounded authority to veto the final decision of OFSM. Under Respondent's analysis, no subsequent Owner of a site where underground storage tanks had been removed would ever be eligible for reimbursement from the Underground Storage Tank Fund no matter how the Illinois General Assembly writes the law. Respondent is a powerful state agency, but it too must follow the law. More importantly, Respondent is restrained by the separation of powers clause in the Illinois Constitution from effectively vetoing the Illinois General Assembly's actions as it purports to do in this instance.

Next, Respondent is just wrong to conclude that Petitioner became the owner of the underground storage tank systems on June 1, 2009. The written Election To Proceed in this case is dated June 1, 2009, but it is not a deed to the Site, nor is it a deed or assignment available to provide "retroactive" ownership in tanks that had been removed 18 years earlier as Respondent implies. Respondent places entirely too much emphasis on the date of this simple notice and Petitioner's Election to Proceed. The written election is merely notice to Respondent, and it creates no substantive property or ownership rights as Respondent errantly suggests. It is simply a notice to Respondent to treat the person notifying Respondent as an Owner of a **site** (not as the owner of tanks which no longer exist because they were removed 18 years earlier) for corrective action and reimbursement purposes. Without it, Respondent has no authority to demand corrective action from a new Owner for historic contamination. *See* 415

ILCS 5/22.2b and 415 ILCS 5/58.9. With it, after the new Owner performs a responsible and appropriate corrective action, that same new Owner is eligible for reimbursement for appropriate and reasonable reimbursable expenses. The presence of the notice is jurisdictional, but not the timing.

In the Administrative Record, Respondent places a great deal of significance as to whether or not this is a matter "regulated" under 35 Ill. Adm. Code Sections 731 or 734. (*See* correspondence from and to Respondent in December 2009 through January 2010.) As we will analyze below, neither code section affects eligibility under any reasonable interpretation. Moreover, Respondent's analysis of which code section applies misses the point, because eligibility is determined by OFSM analyzing an unambiguous statute, and not by Respondent analyzing the timing of the notice with reference to code sections. Respondent is wrong to conclude that the notice determines the date of ownership of the site – the deed does. Respondent is wrong to imply that the timing of the notice determines eligibility or ineligibility under the statute. The Illinois General Assembly decided that issue by amending the statute.

In the final analysis, Respondent's only proper authority is to audit the propriety and the reasonableness of the expenses incurred in pursuing corrective action pursuant to 415 ILCS 5/57.8(a)(1) – whether or not that corrective action occurred before or after the notice of election was dated and delivered. Respondent has no authority to determine eligibility in any event, but it is also clear that Respondent is not prejudiced at all by the date of the notice of election. Respondent still reviews the reasonableness and propriety of the incurred expense, and, in the process, Respondent may determine that Petitioner has yet to complete a proper corrective action. And, following the notice

of election, Petitioner is bound to complete the required action. Respondent has no more authority than that.

For eligibility purposes, it simply does not matter whether or not this site is regulated under Sections 731 or 734, although it really is impossible to conclude that Section 731 applies for just the reasons Respondent articulates. That is, to suggest that 731 applies (while ignoring the statute) is to pre-determine ineligibility, which is not within Respondent's authority.

In the final analysis, whether or not administrative review is under Section 731 or Section 734, the Illinois General Assembly, by statute, and the Board, by rule, have each provided access to the Underground Storage tank Fund to new owners no matter when the notice is prepared. *See* 35 Ill. Adm. Code Section 734.100(b) and 415 ILCS 5/57.2.

In this case, upon electing to proceed, the electing party and Respondent must both proceed under 35 Ill. Adm. Code Section 734 for corrective action and reimbursement purposes (although, Respondent's audit of the expenses may apply to the standards of earlier regulations).

The Illinois General Assembly provided the following guidance in statutes:

> If a release is reported to the proper state authority prior to June 24, 2002, the owner or the operator of an underground storage tank may elect to proceed in accordance with the requirements of this Title by submitting a written statement to the agency of such election. If the owner or operator elects to proceed under the requirements of this Title all costs incurred in connection with the incident prior to notification **shall be reimbursable** in the same manner as was allowable under the then existing law. **Completion of corrective action shall then follow the provisions of this Title.** [Emphasis added.] 415 ILCS 5/57.13(b).

In other words, whether Respondents technical review is under new or former regulations, Petitioner is eligible for reimbursement. Clearly corrective action standards

are analyzed under the current law and regulations, while costs (not eligibility) may be considered by Respondent under former law.[4]

Respondent's form election – signed by Petitioner – states just that. And, the Board promulgated a specific rule relating to the "Election To Proceed under Part 734" at 35 Ill. Adm. Code Section 734.105, which reflects the statute.

> If an owner or operator elects to proceed pursuant to this Part, corrective action costs incurred in connection with the release and prior to the notification of election **must be payable** from the Underground Storage Tank Fund in the same manner as was allowable under the law applicable to the owner or operator prior to the notification of election. Corrective action costs incurred after the notification of election **must be payable** from the Fund in accordance with this Part. [Emphasis Added.]

That is, costs **must be payable** from the Underground Storage Tank Fund whether or not the notice of election was executed by an applicant prior to or after the costs were incurred. New owners are eligible to access the Underground Storage Tank Fund no matter the timing of the notice of election. The rule does not purport to provide Respondent with authority to determine or void eligibility. The timing of the election does not qualify or disqualify an Owner from accessing the Underground Storage Tank Fund as Respondent argues. To the contrary, funds will be payable in any event, even though the method of analyzing those costs may take into account differing standards of reasonableness and propriety.

To the extent that Respondent has interpreted the law and regulations as providing Respondent with authority to determine eligibility to the Underground Storage Tank Fund, veto OSFM's determination of eligibility, and ignore the Illinois General Assembly's statutory mandate, Respondent's interpretation of the law and regulations is

[4] This distinction is anomalous, and may encourage "forum" shopping. It may be that the Illinois General Assembly meant only that the former law would apply to those owners who do not file a notice, but once they provide the notice – no matter when – Respondent and the Owner must follow current law.

unconstitutionally vague and a violation of the doctrine of separation of powers. On the other hand, Petitioner's interpretation of the law and the regulations is reasonable, and preserves the Program from constitutional challenge.

Respondent's purported denial of Petitioner's eligibility because Petitioner "was not the owner/operator of the underground storage tank systems" is contrary to the statute and should be reversed by the Illinois Pollution Control Board.

E. Respondent's Interpretation of the Law At Issue Not Entitled to Deference.

Here, because the statute is clear and unambiguous, there is no need to consult the regulations, nor is there any need to imply that Respondent's interpretation of the law is entitled to deference. Under the law, Respondent does not have the authority to determine eligibility to the Underground Storage Tank Fund in any event.

Ordinarily, where an administrative agency is charged with the administration of a statute, courts may defer to the agency's interpretation of statutory ambiguities. *Hadley v. Ill. Dept. of Corr.*, 224 Ill.2d 365, 370, 864 N.E.2d 162, 165 (2007). Here, Respondent does not determine eligibility and the statute presents no ambiguity.

Even if the statute were ambiguous and even if Respondent, and not OSFM, were charged with administering eligibility determinations, the Board will not defer to an agency's interpretation that is contrary to the plain language of the statute. *Dean Foods v. Ill. Pollution Control Bd.*, 143 Ill. App. 3d 322, 334, 492 N.E.2d 1344, 1353 (2d Dist. 1986); *see also Interlake, Inc. v. Indus. Comm.*, 95 Ill.2d, 181, 192-93, 447 N.E.2d 339, 345 (1983). Moreover, deference to an agency's interpretation of an ambiguous statute is only applied in instances where the agency's interpretation is continued and consistent so that the legislature may be regarded as to having concurred in it. *Moy v.*

Dept. of Registration & Educ., 85 Ill. App. 3d 27, 33, 406 N.E.2d 191, 195 (1st Dist. 1980); Ill. Attorney General Opinion, 99-008, July 9, 1999. Here, the statute was passed before Respondent offered this interpretation.

Because Respondent's interpretation of the law in question is unconstitutional, arbitrary, capricious and contrary to the statute's plain language, the Board should not defer to Respondent's interpretation.

F. Respondent Failed To Make A Payment Determination Within 120 Days Following Receipt of Petitioner's Reimbursement Package; Petitioner's Reimbursement Package Is Deemed Approved by Operation of Law and Petitioner is Entitled To Reimbursement in the Amount of $97,049.28.

From the Administrative Record, it is clear that Petitioner's Reimbursement Package was received by Respondent on June 11, 2009. Respondent made its only (and final) payment determination on December 21, 2009 – more than 120 days after acknowledging receipt thereof. The relevant statute provides: "If the Agency fails to approve the payment application within 120 days, such application shall be deemed approved by operation of law and the Agency shall proceed to reimburse the owner or operator the amount requested in the payment application." 415 ILCS 5/57.8(a)(1).

Petitioner is entitled to reimbursement of $97,049.28 by operation of law.

Conclusion

For the foregoing reasons, the Board should reverse Respondent's final decision, award Petitioner reimbursement from the Underground Storage Tank Fund in the amount of $97,049.28, and order Respondent to reimburse Petitioner its attorneys' and experts' fees, and costs associated with this appeal.

Dated: August 30, 2010

Respectfully submitted,

ZERVOS THREE, INC.,
Petitioner

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