

**BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS**

ZERVOS THREE, INC.,)	
Petitioner,)	
)	
v.)	PCB 10-54
)	(UST Fund Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
Respondent.)	

NOTICE

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

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

William J. Anaya
Robert A. McKenzie
Arnstein & Lehr
120 S. Riverside Plaza
Suite 1200
Chicago, IL 60606-3910

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

Melanie A. Jarvis
Special Assistant Attorney General
Assistant Counsel
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: August 30, 2010

**BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS**

ZERVOS THREE, INC.,)	
Petitioner,)	
)	
v.)	PCB 10-54
)	(UST Fund Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
Respondent.)	

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, Zervos Three, Inc. (“Zervos”), 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

Electronic Filing - Received, Clerk's Office, August 30, 2010

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. ISSUE

For purposes of determining whether a party is an "owner" under the Act and therefore eligible for reimbursement from the Underground Storage Tank Fund, is the date an applicant submits a notice of election to proceed as owner the date that determines whether a person is an "owner", or is the date a person takes title to an otherwise eligible site under Illinois law the date that determines if the person is an "owner" provided the applicant later submits a notice of election to proceed as the owner? Specifically, under the facts presented, is Petitioner an "owner" under the Act and therefore eligible for reimbursement under the UST FUND Program?

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

A. Relevant Facts

See agreed Stipulation of Facts filed with the Board on August 30, 2010.

B. Relevant Law

415 ILCS 5/57.2 Definitions

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 has not yet resulted in the issuance of an “no further remediation letter” by the Agency pursuant to this Title.** [Emphasis Added.]

415 ILCS 5/22.18b. Underground Storage Tank Fund; eligibility.

(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:

(1) Neither the owner nor operator of the underground storage tank is the United States Government.

(2) The underground storage tank does not contain fuel which is exempt from the provisions of Section 2a of The Motor Fuel Tax Law.¹

(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.

(4) The owner or operator has registered the tank in accordance with Section 4 the Gasoline Storage Act² of and paid into the Underground Storage Tank Fund all fees required for the tank in accordance with Sections 4 and 5 of that Act³ and regulations adopted by the Office of State Fire Marshal.

(5) The released petroleum is within one or more of the following categories:

(A) Fuel, as that term is defined in Section 1.19 of the Motor Fuel Tax Law.

(B) Aviation fuels, heating oil, or kerosene.

(C) Used oil. For purposes of this Section, “used oil” means any oil that

Electronic Filing - Received, Clerk's Office, August 30, 2010

has been refined from crude oil used in a motor vehicle, as that term is defined in Section 1.3 of the Motor Fuel Tax Law,⁴ and that, as a result of that use, is contaminated by physical or chemical impurities.

(6) For costs of indemnification, in addition to items (1) through (5), the provisions of subsection (e) have been met.

(d) *****

(4) Requests for partial or final payment for claims under this Section shall be sent to the Agency and shall satisfy all of the following:

(A) The owner and operator are eligible under subsections (a) and (c) of this Section.

(B) Approval of the payments requested will not result in the limitations set forth in subsection (b) of this Section being exceeded.

(C) The owner or operator provided an accounting of all costs, demonstrated the costs to be reasonable and provided either proof of payment of such costs or demonstrated the financial need for joint payment to the owner or operator and the owner's or operator's contractor in order to pay such costs.

[Emphasis Added]

C. No Genuine Issues Of Material Fact Exist

The question in this case is not one of fact, but rather of law. Specifically, the question is whether the Petitioner was an “owner” under the Act when they performed the work for which they want reimbursement. Section 57.2 of the Act defines the term “owner” as any person who has submitted to the Illinois EPA a written election to proceed and has acquired an ownership interest in a site on which one or more registered tanks have been removed, but on which corrective action has not yet resulted in the issuance of an “no further remediation letter” by the Illinois EPA pursuant to this Title. It is clear from the record and the stipulation of facts that the Petitioner had an ownership interest in the property starting on November 24, 2003. At the time that the work was performed during the period starting on September 1, 2006 through May 31, 2009 the record indicates that the Petitioner had an ownership interest in the property. However, the Petitioner had not submitted to the Illinois EPA a written election

Electronic Filing - Received, Clerk's Office, August 30, 2010

to proceed as is required in Section 57.2 in order to be considered an “owner” for reimbursement from the fund until June 9, 2009. The month after the work in question was performed.

The written election to proceed is clearly required by the Act. If a person could become an owner without the election to proceed, there would be no need for such an election in the Act. To hold the election to proceed meaningless as the Petitioner suggests would controvert the clear meaning of the statute and the legislature’s intent. Further without the election to proceed, the Illinois EPA would have an additional administrative burden placed upon it. The election to proceed is a clear indication for the Illinois EPA that the person is taking responsibility for the site and can be paid under the fund. Without it, the Illinois EPA would have to ask for property deeds and other evidence to support the ownership of the property at the time that the work was completed to determine who the owner was that should be reimbursed. It is common for these properties to change hands multiple times during a remediation and determining the correct owner to reimburse would become an arduous process.

The Petitioner did not submit the election to proceed until the month after the work was completed. Therefore, the Petitioner was not an “owner” as defined by the Act and cannot be reimbursed from the Fund.

In regards to the concrete, the Illinois EPA already reimbursed the prior owner for costs associated with the removal and disposal of pavement associated with the 705 cubic yards (1,008 tons) of contaminated soil which was excavated and disposed of in June 1991. The information submitted to the Illinois EPA did not indicate the amount of the pavement which was associated with the 705 cubic yards (1,008 tons) of contaminated soil which was excavated and disposed of in June 1991. Therefore, the Illinois EPA did not have enough information to determine if the concrete put into replace the concrete removed was the same amount. Without this additional information the Illinois EPA could not

Electronic Filing - Received, Clerk's Office, August 30, 2010

determine if the replacement of concrete complied with the Act. See, Sections 22.18(e)(1)(c), 22.18b(a)(3) and 22.18b(d)(4)(c) of the Illinois Environmental Protection act.

V. CONCLUSION

For the reasons stated herein, the Illinois EPA respectfully requests that the Board affirm the Illinois EPA's decision determining that the Petitioner is not an "owner" under the Act and deny approval of reimbursement of the costs incurred prior to the submittal of the election to proceed. Further, the Illinois EPA respectfully requests that the Board affirm the Illinois EPA's decision determining that the Petitioner did not submit enough supporting information to allow for the payment for concrete replacement.

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
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)
Dated: August 30, 2010

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on August 30, 2010, I served true and correct copies of a MOTION FOR SUMMARY JUDGMENT via the Board's COOL system, via email and by placing true and correct copies thereof 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 postage affixed thereto, upon the following named persons:

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

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

William J. Anaya
Robert A. McKenzie
Arnstein & Lehr
120 S. Riverside Plaza
Suite 1200
Chicago, IL 60606-3910

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

Melanie A. Jarvis
Special Assistant Attorney General
Assistant Counsel
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)