

**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 RESPONSE TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,  
Respondent

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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: September 17, 2010

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**RESPONSE TO PETITIONER’S 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(e), hereby respectfully replies to the Response to Petitioner’s Summary Judgment (“Petitioners’ response”) filed by the Petitioner, Zervos Three, Inc. In response, the Illinois EPA states as follows:

**I. INTRODUCTION**

The Petitioner asserts that this is a case about eligibility and that the Illinois EPA is somehow undermining the authority of the Office of State Fire Marshal. The Illinois EPA strongly disagrees with the Petitioner’s assertion. This is not a case where an eligibility determination is at issue. This is a case involving the definition of the term “owner” under the Act, nothing more and nothing less. If the Board determines that the Petitioner was an owner under the Act, the Petitioner will be reimbursed. On the other hand, if the Board determines that the Petitioner was not an owner under the Act, the Petitioner will not be reimbursed.

For the reasons that will be explained below, the Illinois EPA’s decision comported with the law and facts as presented, and the Illinois Pollution Control Board (“Board”) should affirm the Illinois EPA’s decision.

## II. ARGUMENT

While Petitioner claims to be a hero, a claim to which the Illinois EPA can take no position, what can be said of Petitioner is that the argument it advances in this matter can fairly be classified as a classic mythological legend. What is not fanciful argument is that the Illinois EPA is a creature of statute. As a creature of statute, the Illinois EPA can only perform the tasks given to it by the Illinois Legislature. The Act and Board regulations promulgated thereunder are what control the actions of the Illinois EPA. The Illinois EPA can only approve payment pursuant to the laws that it must follow. If the laws are unfair or inequitable, the solution does not lie with the Illinois EPA, for it cannot ignore the laws that it has been directed by the Illinois Legislature to follow. It would require a change in the law by the Legislature to cure any inequities perceived by the Petitioner. As discussed below, there is a legislative and administrative purpose for the election to proceed form.

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. To reiterate what the Illinois EPA said in its Motion for Summary Judgment, 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

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EPA a written election 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. While the Illinois EPA is required to conform its actions to comply with the Act, so too must the Petitioner be held to the same standard. Simply put, the Petitioner did not comply with the law. It did not submit its election to proceed prior to completing work on the site. The Act states that such an election is required in order to be considered an owner. The Petitioner ignored this requirement and now seeks payment from the fund. It paints itself the hero, while it failed to follow the law.

The written election to proceed is clearly required by the law. It is a law that the Illinois EPA, as a creature of statute, must follow for if a person could become an owner without the election to proceed, there would be no need for such an election. For the Illinois EPA to ignore the election to proceed and to therefore hold the election to proceed meaningless as the Petitioner suggests would controvert the clear meaning of the statute and the legislature’s intent.

There is a clear legislative purpose for the election to proceed, for without the election to proceed, the Illinois EPA would have an additional administrative burden placed upon it. It must be strongly reiterated that 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. Further, the situation could arise wherein multiple persons claim

reimbursement for the identical work for which the Illinois EPA would be tasked with determining who the real owner is. The election to proceed was the solution for this problem and should not be disregarded lightly.

While the Petitioner does a good job trying to muddle the issue and exaggerate the facts, the facts and issue are quite simple. 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 receive reimbursement from the Fund for work performed prior to the submittal of the election to proceed.

#### **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

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Dated: September 17, 2010

**CERTIFICATE OF SERVICE**

I, the undersigned attorney at law, hereby certify that on September 17, 2010, I served true and correct copies of a RESPONSE TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT via the Board's COOL system, via email by agreement, 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  
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