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: Mr. 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

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

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

PLEASE TAKE NOTICE that on September 17, 2010, we caused to be filed with the Clerk of the Illinois Pollution Control Board **Petitioner's Response to Respondent's Motion for Summary Judgment**, copies of which are attached hereto and served upon you.

Respectfully submitted,

ZERVOS THREE, INC., Petitioner

By: _____
One of its Attorneys

William J. Anaya
Raymond M. Krauze
Arnstein & Lehr, LLP
120 South Riverside Plaza, Suite 1200
Chicago, Illinois 60606-3910
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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing **Petitioner's Response to Respondent's Motion for Summary Judgment** were hand delivered on September 17, 2010:

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 **Petitioner's Response to Respondent's Motion for Summary Judgment** were mailed, first class on September 17, 2010, to:

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

Bradley P. Halloran, Hearing Officer
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Raymond M. Krauze

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	)	
	)	
Respondent.	)	

PETITIONER'S RESPONSE TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Now comes Petitioner, by counsel, William J. Anaya and Raymond M. Krauze of Arnstein & Lehr LLP, and responds to Respondent's Motion for Summary Judgment, as follows:

I. **Respondent Is Not Authorized to Determine an "Owner's" Eligibility to Access the Underground Storage Tank Fund; Only the Office of State Fire Marshal ("OSFM") is Authorized to Determine Petitioner's Eligibility to Access the Underground Storage Tank Fund; Respondent Is Not Authorized to Veto OSFM's Determination of Eligibility.**

Respondent misunderstands its limited role in reviewing applications for reimbursement from the Underground Storage Tank Fund. The Underground Storage Tank Program was established by the Illinois General Assembly for the purposes of satisfying the financial responsibility requirements of the federal Resource Conservation and Recovery Act (42 U.S.C. 6991 *et seq.*), and to protect Illinois' land and groundwater resources. *See* 415 ILCS 5/57. The Illinois General Assembly also provided that OSFM and the Illinois Environmental Protection Agency ("IEPA") have distinct administrative roles in the administration of the Underground Storage Tank Program. *See* 415 ILCS 5/57.3; 415 ILCS 5/57.4. Contrary to Respondent's argument, Respondent has no authority to determine or veto the eligibility of any applicant to the

Underground Storage Tank Fund. Rather, the OSFM is the only state agency with the authority to determine if any applicant is eligible to seek reimbursement from the Underground Storage Tank Fund. 415 ILCS 5/57.8; 415 ILCS 5/58.9.

Under the Underground Storage Tank Program, "[e]ligibility and deductibility determinations shall be made by the Office of the State Fire Marshal." 415 ILCS 57.9(c). Consistent with the statutory language of the Underground Storage Tank Program, the Illinois Pollution Control Board (the "Board") and the Illinois Appellate Court have both held previously that the OFSM, not the IEPA, has the authority to determine an applicant's eligibility for reimbursement. In *R.P. Lumber Co. v. Office of the State Fire Marshal*, 293 Ill. App. 3d. 402, 688 N.E.2d 379 (5th Dist. 1997), the Illinois Appellate Court found that "[t]he OSFM has the authority to determine whether an owner or operator of a UST is eligible to receive compensation for corrective-action costs from the Underground Storage Tank Fund (the Fund) [citation omitted]."

In *Stroh Oil Company v. Office of the State Fire Marshal*, PCB 94-215 (UST Fund), *aff'd*, *Stroh Oil Co. v. State Fire Marshal*, 281 Ill App. 3d. 121, 665 N.E.2d. 540 (4th Dist. 1996), the Illinois Pollution Control Board (the Board) analyzed the legislative history of relevant portions of the Illinois Environmental Protection Act, and held that the statute at issue in this case "gave the [Office of State Fire Marshal] authority to determine whether an owner or operator of a UST site is eligible to seek reimbursement for corrective action costs from the UST Fund, and to determine the appropriate deductible to be applied to reimbursement applications."

Only the OFSM has the authority to determine an owner's eligibility to access the Underground Storage Tank Fund – a fact that is recognized by the Respondent itself on its website. On its website page entitled "An Introduction to Leaking Underground

Storage Tanks," a true and correct copy of which is attached and incorporated herein as Exhibit A, Respondent states in relevant part:

> The OSFM is authorized to:
>
> - Certify tank installation and removal contractors.
> - Monitor compliance regarding leak prevention and detection requirements.
> - Administer financial responsibility requirements.
> - **Determine whether tank owners and operators meet eligibility requirements and, if so, the appropriate deductible amount for payment from the UST Fund.**
> - Order tank owners or operators to remove the USTs and perform initial abatement measures when UST releases threaten human health or the environment.
>
> www.epa.state.il.us/land/lust/introduction.html. (Emphasis Added.)

Respondent's website page says nothing of its authority to determine an applicant's eligibility to access the Underground Storage Tank Fund. Respondent describes its limited authority with regard to leaking underground storage tanks as follows:

> The IEPA is authorized to:
>
> - Review and evaluate technical plans and reports to determine if tank owners or operators are complying with environmental laws and regulations governing leaking UST site investigations and cleanups.
> - Require tank owners or operators to perform corrective action when UST releases threaten human health or the environment.
> - **Review and evaluate tank owners' and operators' budgets and claims for payment from the UST Fund.**

- Issue No Further Remediation (NFR) Letters to tank owners or operators once the Leaking UST Program requirements and cleanup objectives have been met.

Id. (Emphasis Added.)[1]

By its own admission, Respondent's authority is limited. Respondent's only proper authorities under the statute are: (i) to review the activities performed by the applicant and determine if those activities are consistent with the statutory purposes of the Underground Storage Tank Fund (to protect the environment and satisfy the financial responsibility requirements imposed by the federal Resource Conservation and Recovery Act), and (ii) to determine if the costs reportedly incurred were reasonable from an engineering and geologic perspective. 415 ILCS 5/57.8; 35 Ill. Adm. Code Parts E and F.

In light of the contrary authority cited above, it is wholly inappropriate for Respondent to deny Petitioner's application for reimbursement from the Underground Storage Tank Fund based on Respondent's determination that Petitioner is not an eligible "owner" as that term is described in the recently amended statute -- especially after the OSFM unequivocally determined that Petitioner is an eligible "owner." Simply stated, Respondent does not have the extra authority Respondent employs in this case to veto OSFM's determination of Petitioner's eligibility.

Moreover, it is surprising that Respondent attempts to mask its super authority argument under the guise that it has proper authority to make technical and fiscal determinations of eligible activities and costs. According to Respondent, "when reviewing an Illinois EPA determination of ineligibility for reimbursement from the

[1] Respondent also directs owners to contact the Office of the State Fire Marshal with any questions concerning "financial responsibility requirements; or eligibility and deductible determinations for the UST Fund." On the same web page, questions concerning "the review of budget plans and technical reports, or the status of applications for payment from the UST Fund" are directed to Respondent.

Underground Storage Tank Fund, the Board must decide whether or not the application as submitted demonstrates compliance with the Act and Board regulations. [Citation Omitted]." Respondent's Motion for Summary Judgment, p. 2 *citing Rantoul Township High School Dist. No. 193 v. Illinois Environmental Protection Agency*, PCB 03-42 (UST Appeal) dated April 17, 2003. While it is certainly accurate to argue that the Board must satisfy itself that the "application as submitted satisfies compliance with the Act and Board regulations," it is wrong to imply that the Board must ignore Respondent's usurpation of authority under the guise of performing a technical review of Petitioner's application to the Underground Storage Tank Fund. One thing is abundantly clear in this case: Respondent did not review the costs or the activities in Petitioner's application for reimbursement. Rather, after failing to make a determination on the merits of Petitioner's application within 120 days following its receipt, Respondent only reviewed Petitioner's written election to proceed under Title XVI of the Environmental Protection Act, and denied Petitioner's application on unauthorized procedural grounds. As discussed below, even Respondent's brief mention of the concrete expenses belies any real analysis on the merits of Petitioner's application for reimbursement from the Underground Storage Tank Fund.

On the other hand, the "ineligibility determination" in *Rantoul Township High School District No. 193 v. Illinois Environmental Protection Agency*, PCB 03-42 (UST Appeal) dated April 17, 2003, cited by Respondent, involved Respondent's denial (on the merits) of $77,671.67 in costs reportedly incurred by that petitioner in relocating underground utilities, backfill compaction, density testing, and like charges. Respondent found that those costs were ineligible for reimbursement because the activities which gave rise to those costs were not appropriate corrective action activities.

In that case, Respondent had authority to make its "ineligibility determination" of those costs, but nothing in the Board's decision in *Rantoul* supports Respondent's purported authority to determine or veto an "owner's" eligibility.

Similarly, *Rezmar Corporation v. Illinois Environmental Protection Agency*, PCB 02-91 (UST Appeal), dated April 17, 2003, also cited by Respondent, involved the Board's review of Respondent's determination (on the merits) that $118,877.28 of costs reportedly incurred by that petitioner were ineligible "Early Action" costs. Nothing in that case supports Respondent's purported super authority to veto the eligibility determinations made by the OSFM. Moreover, nothing in *Rezmar* supports Respondent's argument that Petitioner bears the burden of proof on the issue of Respondent's purported exercise of extra-jurisdictional authority to make or veto an eligibility determination, especially to the extent that Petitioner specifically denies that Respondent has any such extra-jurisdictional authority by this appeal and Petitioner's Motion for Summary Judgment. If anything, Respondent has the burden of proving that Respondent has the authority to determine Petitioner's eligibility to access the Underground Storage Tank Fund after OSFM exercised its statutory authority and deemed Petitioner eligible pursuant to the factors described at 415 ILCS 57.9.

Contrary to Respondent's theory in this case, Respondent's only authority is to review the technical and financial aspects of Petitioner's application to the Underground Storage Tank Fund, and in the process, determine if the activities performed were necessary ("corrective action" activities that protect the environment) and the costs incurred were reasonable (from a technical, engineering and geological, perspective). 415 ILCS 5/58. *See also* 35 Ill. Adm. Code Part 734, Subparts E, F, G and H, and

Appendices A-E; 35 Ill. Adm. Code §734.625 "Eligible Corrective Action Costs"; 35 Ill. Adm. Code §734.630 "Ineligible Corrective Action Costs."

Certainly, the Board must satisfy itself that the "application as submitted satisfies compliance with the Act and Board regulations." *See* Respondent's Motion for Summary Judgment, p. 2. *See also* 415 ILCS 5/57.8(a)(6)(A)–(E) and 35 Ill. Adm. Code §734.605(b)(1)–(10), which describe the contents of "complete application." In this case, the Board will find that Petitioner's Reimbursement Package dated June 9, 2009 (acknowledged received by Respondent on June 11, 2009) contains each and every required item.

Contrary to Respondent's argument, the issue raised by Respondent's Motion for Summary Judgment is not whether or not Petitioner is an "owner" under the Illinois Environmental Protection Act and "therefore eligible for reimbursement under the UST FUND Program," as argued at pages 2-5 of Respondent's Motion for Summary Judgment. The issue here is whether or not Respondent has the authority to make or veto a determination of Petitioner's eligibility after the OSFM has specifically found Petitioner eligible to access the Underground Storage Tank Fund. Respondent lacks the purported authority to make any such eligibility determination, and the Board should deny Respondent's Motion for Summary Judgment accordingly.

II. The Board Should Enter Summary Judgment in Favor of Petitioner.

Respondent concedes that from and after November 24, 2003: Petitioner had an ownership interest in an otherwise eligible site (i.e., a site that had contained registered underground storage tanks, since removed, and which required additional corrective action before Respondent was authorized to issue an NFR Letter). Petitioner performed otherwise appropriate Corrective Action work at the Site from September 1, 2006

through May 31, 2009, while Petitioner maintained its ownership interest in the Site. Petitioner submitted an otherwise appropriate, written notice of election to proceed as "owner" to Respondent before applying for reimbursement from the Underground Storage Tank Fund. *See* Respondent's Motion for Summary Judgment, pp. 4-5.

Respondent fails to mention other facts that are clear from the Administrative Record, and which are also not in dispute: The prior owner submitted a Corrective Action Plan for the Site on October 9, 2002. Respondent approved that Corrective Action Plan on May 19, 2004. Respondent acknowledged Petitioner as the Owner of the Site by its correspondence dated January 31, 2008 and March 31, 2008. On June 18, 2009, Respondent acknowledged receipt and **acceptance** of Petitioner's "Notice of Intent to Proceed as Owner" before Petitioner submitted its otherwise complete Reimbursement Package describing the corrective action activities performed by Petitioner consistent with the Corrective Action Plan submitted by the prior owner and approved by Respondent.

Also, on September 3, 2009, the OSFM determined that Petitioner was eligible to access the Underground Storage Tank Fund (and that none of the conditions stated in the OSFM letter disqualified Petitioner's eligibility). Petitioner submitted a complete Reimbursement Package to Respondent with correspondence dated June 9, 2009 (acknowledged received by Respondent on June 11, 2009) – performing the corrective action activities consistent with the previously approved Corrective Action Plan. And, Respondent failed to take any action or make any determination with regard to

Petitioner's Reimbursement Package until December 21, 2009 – well over 120 days later.[2]

Based on the foregoing facts, and as described in Petitioner's Motion for Summary Judgment, the Board should deny Respondent's Motion for Summary Judgment and grant Petitioner's Motion for Summary Judgment in favor of Petitioner.

III. Respondent's Claim of Administrative Efficiency Demonstrates That Respondent Misunderstands Its Limited Role in the Administration of the Underground Storage Tank Fund.

Respondent's argument of administrative convenience demonstrates its gross misunderstanding of its limited role in assisting in the administration of the Underground Storage Tank Fund and the scope and purpose of the written election to proceed. ("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 the work was completed to determine who the owner was that should be reimbursed." *See* Respondent's Motion for Summary Judgment, p.4.

An "owner's" eligibility determination is not, and has never been, Respondent's responsibility. Eligibility of an "owner" is determined by the OSFM. Because Respondent misunderstands its proper and limited administrative role in the administration of the Underground Storage Tank Fund, Respondent seeks to usurp OSFM's authority in this case. In the process, Respondent places too much significance on the timing and the effect of the new owner's election to proceed. It is not a deed, and it does not create ownership interests, and the date it is received by Respondent is not jurisdictional for purposes or accessing the Underground Storage

[2] All of the foregoing facts are available in Respondent's Administrative Record. Respondent did not prepare the record with identifying numbers for ease of reference or citation. Therefore, Petitioner refers to those documents in this Brief and it's previous Motion For Summary Judgment by identifying the documents and the dates described on each.

Tank Fund. Because OSFM makes the determination of who is eligible to access the Underground Storage Tank Fund, it only matters that the new owner's election to proceed was received by Respondent, and that the new owner agreed to be bound by the requirements of Title XVI.

Moreover, Respondent's claim of administrative convenience is a red herring. As is clear in Respondent's correspondence to Petitioner dated June 18, 2009, Respondent merely accepted Petitioner's word that Petitioner had "acquired an ownership interest" in the Site. Currently and historically, Respondent performs no further investigation into ownership because OSFM makes the determination of an "Owner's" eligibility. Respondent makes a curious argument for administrative convenience, suggesting that an earlier notice would negate Respondent's purported need for further investigation, although it is difficult to understand how the timing of the receipt of the notice would make any difference. If the notice is received before or after the corrective action activities are performed, the notice is the same and does not provide any corroboration or fact beyond the new owner's certificate of ownership. Respondent performs no further investigation in any event, even though a notice received before corrective action has the same information as one received afterwards.

Moreover, even if Respondent had the authority it purports to have (which it does not), Respondent is able to request additional information from the applicant before analyzing the Reimbursement Package on the merits whether or not the notice is received before or after the corrective action is performed. The information is the same, and it only must be received before reimbursement in order to protect the public fisc from an improper distribution from the Underground Storage Tank Fund.

However, Respondent is not complaining that Petitioner failed to cooperate with Respondent by failing to provide additional information to corroborate Petitioner's ownership interest in this case. Here, Respondent purports to have authority to determine an "owner's" eligibility and to veto OSFM's prior determination of eligibility based on Respondent's improper interpretation that the date of the receipt of the notice of election is jurisdictional. Even if administrative convenience was a concern, it is clear that the extra-jurisdictional and unlawful authority being exercised by Respondent is overkill. Administrative efficiency is not served by Respondent's errant and unlawful interpretation of the statute, and the Board should not be persuaded accordingly.

If Respondent has any serious questions about an "owner's" purported eligibility, then before Respondent authorizes a distribution from the Underground Storage Tank Fund, Respondent can demand that the putative "owner" supply Respondent with additional information in the same manner that Respondent currently seeks additional technical information from an applicant. And, **in the highly unlikely event** a putative "owner" actually incurred corrective action expenses in cleaning a site where the applicant had no ownership interest, and if Respondent (somehow) determines that the applicant is a total stranger, then Respondent may challenge the efficacy of making a payment to a total stranger based on real evidence and not an arbitrary, capricious, and unlawful usurpation of authority involving a tortured interpretation of the statute and late notice. Indeed, even timely notice (as suggested by Respondent) from a total stranger would not provide the Respondent with any indication of the lack of ownership interest.

Notwithstanding implausible scenarios, in this case, a real new owner performed a corrective action and incurred substantial costs at a site that had been contaminated for well over a decade by the previous owner. Here, Respondent seeks to discourage

cleanups and to punish a new owner for no good reason.[3] If the mirror image of this issue occurred in an enforcement action, Respondent would certainly argue that Petitioner's responsibilities under Title XVI are not excused because corrective action costs were incurred before new owner delivered the election to proceed to Respondent.

The point is: Because the new owner has no regulatory responsibility for contamination associated with historic underground storage tanks **under Title XVI, and Respondent has no authority under Title XVI to demand that the new owner follow Title XVI**, whenever a new owner submits an election to proceed as owner, the new owner accepts additional responsibility, and waives every right to revoke acceptance of that new responsibility. The net effect is that Respondent gains a responsible person (**where none existed previously**), who is willing to perform a corrective action under Title XVI of the Illinois Environmental Protection Act, (mandated by subchapter I of the Resource Conservation and Recovery Act, 42 U.S.C. 6991 *et seq.,)* **which includes access to the Underground Storage Tank Fund established in Illinois just so that owners of underground storage tank systems can satisfy the stringent financial responsibility requirements of federal law.** *See* 42 U.S.C. Section 6991b(d) and 42 U.S.C. 6991(c).

That is, in order to be eligible to access the Underground Storage Tank Fund, the new owner must accept the responsibility to clean someone else's mess – a responsibility that will not otherwise attach to the new owner because the new owner was not the owner of the underground storage tank system at the time of the release. [4]

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[3] Again, it may be that Respondent is concerned that Respondent failed to make an administrative determination in this case within the 120 day time frame established by the statute and by the Board. That 120 days passed without one word from Respondent about this issue or any other, belies Respondent's argument in favor of administrative efficiency.

[4] Nor is there any cleanup liability for a new owner who qualifies as an "innocent purchaser" pursuant to 415 ILCS 5/22.2(j)(C); Nor is there any cleanup liability for a new owner who qualifies as a bona fide

That point is clearly expressed in the form prescribed by Respondent, where the new owner states:

> 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, once made, this election cannot be withdrawn."

See "Election to Proceed as 'Owner'," dated June 1, 2009, attached to Petitioner's correspondence to Respondent, dated June 4, 2009 (acknowledged received by Respondent on June 8, 2009).

To make the point even clearer, in accepting Petitioner's election to proceed as "owner," Respondent made it clear to Petitioner that Respondent accepted Petitioner to the Program, and that Respondent intended to enforce the law accordingly. Petitioner willingly accepted that responsibility, and in reliance on the statutory promise of reimbursement from the Underground Storage Tank Fund, Petitioner performed a complete corrective action at a contaminated site left abandoned by the previous owner, and in the process Petitioner incurred $97,049.28 in otherwise reimbursable expenses. Respondent's "bait and switch" tactic in this case is unlawful, arbitrary, and capricious.

IV. Respondent May Have Errantly Authorized Reimbursement to the Prior Owner for Concrete Removal and Replacement, But That Fact Does Not Disqualify the Expenses Incurred by Petitioner in Removing Contaminated Soil Under That Concrete.

In a concession that Petitioner is eligible to access the Underground Storage Tank Fund, Respondent purports to deny Petitioner's request for reimbursement for the expenses incurred in removing concrete which covered contaminated soil. That Respondent did not merely seek an explanation from Petitioner before denying

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prospective purchaser pursuant to 415 ILCS 5/22.2b. And, there is no statutory environmental cleanup liability under the Illinois Environmental Protection Act for a new owner, except to the extent of its proportionate share of responsibility, which in this case would be 0%. 415 ILCS 5/58.9(a)(1).

Petitioner's request for reimbursement out of hand, is evidence that Respondent's purported review of Petitioner's application for reimbursement from the Underground Storage Tank Fund was illusory, and that Respondent's denial review was arbitrary, capricious, and unlawful.

According to Respondent:

> 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) 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 (1008 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 concreted put into replace the concrete removed was the same amount. Without this additional information the Illinois EPA could not determine if the replacement of concrete complied with the Act. [Citations Omitted.]

See Respondent's Motion for Summary Judgment, pp. 5-6.

It is important to note, that Petitioner obviously had not performed the earlier excavation referred to by Respondent, and therefore does not have any such information. Nonetheless, it is clear from the Administrative Record that Respondent has all of the known information concerning the earlier tank pull and excavation. *See* e.g., Report prepared by Prairie Environmental Specialists, Inc. (Prairie), dated March 23, 1992. Therein, Prairie describes the tank pull and the excavation activities associated with removing 705 cubic yards of contaminated soil. At page 9 of Prairie's Report, Prairie describes the removal of "concrete overlying the tanks." Also, on pages 20-24, Prairie notes:

> A total of 705 cubic yards of the **most visibly impacted and odorous soil** has been removed from this cavity. It is PRAIRIE's contention that **the remaining impaction here** can be better addressed by use of a soil venting system. The only areas of **impaction which remain** at depth are small clay joints and stringer sands less than one inch (1") thick along the south and west cavity walls. Granular fill materials overlying native soils

> also **exhibit moderate impaction**, especially in the shallow areas around the pump islands (SB-5 and SB-6) piping trenchers, north wall, east wall and west wall.
>
> Groundwater was not encountered during the excavation operations, while a relatively pristine clay floor was discovered approximately fourteen (14') below grade surface. **Tainted water has been observed entering the cavity from joints and stringer sands**. However, the relatively small groundwater volume indicates that the source for this water is probably moisture collecting in the voids and interstitial spaces from the unsaturated vadose zone and surface infiltration. The tank cavity created a perched water table condition, that was temporarily interrupted by the UST replacement.
>
> * * * *
>
> **Residual soils containing BTEX concentrations above the IEPA guidelines** may be addressed by use of existing soil ventilation system. In addition, natural biodegradation of the remaining contaminants will occur as a result of the sub-surface exposure to ambient oxygen.

In other words, Respondent has information from the Administrative Record indicating that not all of the contamination had been removed or addressed by the previous owner, and that the previous owner left the Site and the tank pit contaminated under the area where the concrete had been removed. Respondent also has information from the Administrative Record that contaminated groundwater was discharging into the tank pit – and that the source of which was in contact with contaminated soils left on site unattended. The Administrative Record is also replete with several reports (discussed in Petitioner's Motion for Summary Judgment) that were submitted to Respondent for well over a decade, and which confirmed that the Site remained significantly contaminated and uncontrolled.

Respondent also has information from the Administrative Record that even the clean backfill placed in the tank pit by the previous owner was coming into daily contact with residual contamination abandoned at the Site by the previous owner. Respondent also has information from the Administrative Record that the *in situ* remedy at the tank

pit was wholly inadequate. *See* Review Notes, Julie Hollis, dated November 20, 1992, and Respondent's correspondence to Clark Oil December 3, 1992.

It really should come as no surprise to Respondent that the entire site – even the area under the concrete removed by Petitioner – was contaminated and had to be removed in order for Petitioner to perform a complete and proper corrective action.

Why Respondent reimbursed the previous owner for any costs under these circumstances is a mystery. Suffice to say, Petitioner performed a complete and proper corrective action at the Site and should be reimbursed for those costs. It may be that some of the concrete removed by Petitioner is in the same area where the prior owner had removed concrete in 1991. It may be that Respondent reimbursed the prior owner for removing the concrete from that area. Petitioner does not have any information one way or the other. What Petitioner does know is that the concrete described in Petitioner's Reimbursement Package dated June 9, 2009 had to be removed in order to perform a complete and proper corrective action because he soil beneath it was contaminated.

That Respondent may have foolishly authorized reimbursement ten years earlier to a prior owner who did not perform even a partial corrective action, and who left residual contamination at the Site, is not a relevant or an appropriate consideration to deny Petitioner's request for reimbursement for the costs of removing the concrete. The point is obvious. In order to remove contaminated soil, it was necessary for Petitioner to remove the concrete. It is also clear that Respondent's purported review of this item was illusory, and Respondent's denial of Petitioner's claim was unlawful, arbitrary, and capricious.

V. Respondent Failed to Make a Decision on Petitioner's Reimbursement Package Dated June 9, 2009 Within 120 Days, and Petitioner is Entitled to Reimbursement in the Amount of $97,049.28 by Operation of Law.

From the Administrative Record, it is clear that Petitioner's Reimbursement Package dated June 9, 2009, was received by Respondent on June 11, 2009. Respondent made its only (and final) decision on December 21, 2009 – more than 120 days after acknowledging receipt of Petitioner's Reimbursement Package. 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). Therefore, Petitioner is entitled to reimbursement from the Underground Storage Tank Fund in the amount of $97,049.28, by operation of law.

VI. Petitioner is Entitled to an Award of Its Attorneys' Fees and Costs Incurred in Pursuing This Appeal, Preparing Petitioner's Motion for Summary Judgment, and Responding to Respondent's Motion for Summary Judgment.

Under the circumstances, Petitioner is entitled to recover its attorneys' fees and costs from Respondent. Section 57.8(l) of the Illinois Environmental Protection Act provides that the Board "may authorize payment of legal fees" under Title XVI. 415 ILCS 5/57.8(l) (2004). *See also* 35 Ill. Admin. Code 734.630(g). To the extent that the statute provides for the reimbursement of legal fees, the statute is a "fee-shifting" statute. *See Brundidge, et al. v. Glendale Fed. Bank, F.S.B.* 168 Ill.2d 235, 245, 659 N.E.2d 909, 914 (1995). The Board strictly construes the statute, and the amount of fees to be awarded lies within the broad discretionary powers of the Board. *See*

Globalcom, Inc. v. Illinois Commerce Comm'n., 347 Ill. App. 3d 592, 618, 806 N.E.2d 1194, 1214 (1st Dist. 2004).

The Board has addressed reimbursement for legal expenses in appealing Respondent's decisions under the Underground Storage Tank Fund. In *Illinois Ayers Oil Co. v. Illinois Environmental Protection Agency,* PCB 03-214 (August 5, 2004), the petitioner appealed Respondent's rejection of that petitioner's corrective action plan and budget. The Board reversed Respondent and found that the petitioner was entitled to an award if all of its legal expenses. Similarly, in *Swift-T-Food Mart v. Illinois Environmental Protection Agency*, PCB 03-185 (August 19, 2004), the Board awarded the petitioner all of its attorneys' fees after the Board reversed the Agency's order denying reimbursement of requested costs of corrective action. *See also Ted Harrison Oil Co., v. Illinois Environmental Protection Agency*, PCB 99-127 (October 16, 2003) (finding that petitioner was entitled to reimbursement of all its attorneys' fees).

Moreover, Petitioner need not prevail on all its claims to be entitled to reimbursement of its legal fees. In *Webb & Sons, Inc. v. Illinois Environmental Protection Agency*, PCB 07-24 (May 3, 2007), the petitioner appealed Respondent's rejection of its proposed budget. On appeal, the Board reversed in part, and affirmed in part. Nevertheless, the Board found that Section 57.8(l) of the statute entitled petitioner an award of attorneys' fees.

In the present case, Petitioner is challenging Respondent's purported authority to determine Petitioner's eligibility to access the Underground Storage Tank Fund, and Respondent's denial of Petitioner's Reimbursement Package. Petitioner requests leave to introduce evidence in support of its attorneys' fees and costs.

VII. 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: September 17, 2010

Respectfully submitted,

ZERVOS THREE, INC.,
Petitioner

By: _____
One of its Attorneys

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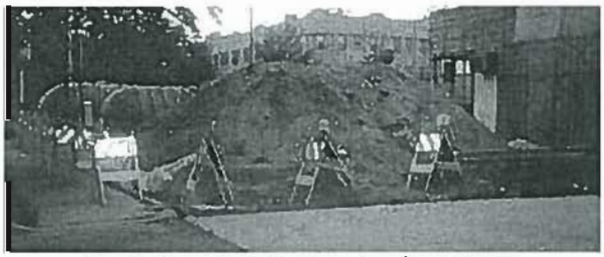
9212853.1

Exhibit A

An Introduction to Leaking Underground Storage Tanks

Leaking underground storage tanks (USTs) are a significant source of environmental contamination and may pose the following threats to human health and safety:

- fire and explosion;
- inhalation of dangerous vapors;
- contamination of soil and groundwater;
- contamination of drinking water;
- contamination of streams, rivers, and lakes.



Underground storage tank upgrade

These threats are minimized when responsible parties respond quickly and efficiently after a tank release. State agencies and environmental consultants are ready to assist UST owners and operators in responding to leaking USTs.

Agencies that Deal with USTs and Leaking USTs

The Illinois Office of the State Fire Marshal (OSFM) regulates the daily operation and maintenance of UST systems. If a release occurs, tank owners or operators, or their designated representatives, must notify the Illinois Emergency Management Agency (IEMA), which then notifies the Illinois Environmental Protection Agency (Illinois EPA). The Illinois EPA's Leaking Underground Storage Tank Section begins oversight of remedial activities only after the tank release has been reported to the IEMA.

The OSFM is authorized to:

- Certify tank installation and removal contractors.
- Monitor compliance regarding leak prevention and detection requirements.
- Issue permits for tank installations, repairs, upgrades, closures, and removals.
- Administer financial responsibility requirements.
- Determine whether tank owners and operators meet eligibility requirements and, if so, the appropriate deductible amount for payment from the UST Fund.
- Order tank owners or operators to remove the USTs and perform initial abatement measures when UST releases threaten human health or the environment.

The Illinois EPA is authorized to:

- Review and evaluate technical plans and reports to determine if tank owners or operators are complying with environmental laws and regulations governing leaking UST site investigations

and cleanups.

- Require tank owners or operators to perform corrective action when UST releases threaten human health or the environment.
- Review and evaluate tank owners' and operators' budgets and claims for payment from the UST Fund.
- Issue No Further Remediation (NFR) Letters to tank owners or operators once the Leaking UST Program requirements and cleanup objectives have been met.

Act Immediately if You Suspect a Tank Release

If a release has not been confirmed but you believe free product (petroleum not dissolved in water) or product vapors pose a serious threat, take the following steps as appropriate:

- Extinguish all smoking materials or open flames that could ignite explosive vapors.
- Call the local fire department.
- Take care not to activate electrical switches or equipment that could cause sparks and ignite explosive vapors.
- Evacuate the area.

Drums of gasoline-contaminated water

- Follow the environmental regulations, as required of tank owners or operators or their designated representatives, including:
  - Call IEMA *immediately* whenever a release causes a sheen on nearby surface waters, or
  - Call IEMA within 24 hours of any other release, and
  - Stop the leak and contain the spill.

The IEMA maintains a 24-hour hotline. In Illinois, call 800-782-7860. Out of state, call 217-782-7860.

Environmental Consultants Offer Technical Expertise

Environmental consultants, including removal contractors and professional engineers and professional geologists, offer many services to help you handle your UST release in a timely and efficient manner. You will find consultants listed in the Yellow Pages of your local phone book. The Illinois EPA does not endorse or recommend consultants. Before signing a contract, make sure the consultant can perform the following activities:

- Determine the appropriate regulations to which a particular incident is subject, and conduct remediation and/or pursue closure accordingly.
- Conduct a site investigation or classification to determine if remedial actions are required.
- Follow proper sample collection protocols to assure valid and reliable results. (Deviations may result in additional sampling and expense.)
- Assure that laboratory samples are analyzed according to proper methods and procedures by an accredited laboratory to avoid costly retesting.

- Interpret laboratory results and organize this data into reports for review by the Illinois EPA's Leaking UST Section.
- Provide equipment and personnel to conduct the required remedial activities or hire subcontractors to perform such work.
- Arrange for safe and proper handling of contaminated soil and groundwater.
- Evaluate cost and liability factors resulting from interim measures, as well as from final disposal or treatment options, for contaminated soil and groundwater.
- Obtain all necessary manifests and permits before moving or disposing of contaminated materials.
- Prepare reports and provide certifications by Licensed Professional Engineers or Licensed Professional Geologists as required by environmental laws and regulations.
- Prepare budgets and submit claims for payment from the UST Fund. An Illinois Licensed Professional Engineer or Licensed Professional Geologist must certify that all regulatory requirements have been met before any budgets or claims can be reviewed. The Illinois EPA will not authorize payment of ineligible or unreasonable costs, costs from work that deviates from approved plans, or costs for site investigation or corrective action activities that exceed the minimum requirements stated in the environmental laws and regulations.

Tank Owner or Operator Requirements

Owners or operators required to report leaking UST releases to the IEMA must also meet the requirements of the Environmental Protection Act and 35 Illinois Administrative Code 731, 732, or 734. Once notified of the release by the IEMA, the Leaking UST Section mails a letter requiring compliance with Leaking UST Program regulations and the submittal of applicable technical forms.

Sampling groundwater

Tiered Approach to Corrective Action Objectives (TACO) Based on Site Conditions and Exposure Risks

TACO is the Illinois EPA's method for developing cleanup objectives for contaminated soil and groundwater. These cleanup objectives protect human health while taking into account site conditions and land use.

TACO offers tank owners and operators the following choices:

- Exclusion of exposure routes (inhalation, soil ingestion, and groundwater ingestion),
- Use of area background concentrations as screening tools or remediation objectives, and
- Three tiers for selecting remediation objectives.

In Tier 1, the tank owner or operator compares site sample analytical results to baseline cleanup objectives contained in "look-up" tables. Under Tier 2, a tank owner or operator considers data previously gathered for Tier 1, the physical and chemical properties of the contaminants, the site-specific soil and groundwater parameters, and the application of institutional controls and engineered barriers. Tank owners and operators can use Tier 3 for sites where physical barriers limit remediation, a full-scale risk assessment is performed, alternative mathematical modeling is applied, or a common-sense solution is warranted.

After establishing cleanup objectives under TACO, a tank owner or operator may:

- Reduce contaminant concentrations to meet the established objectives through active remediation (e.g., dig and haul or treatment in place),
- Restrict exposure to contaminated soil or groundwater or both by using engineered barriers or institutional controls,
- Take no action, if contaminant concentrations present at the site do not exceed remediation objectives, or
- Use any combination of the options above.

An engineered barrier, such as asphalt paving, clean soil, or a permanent structure, controls migration of and access to contamination. An institutional control imposes restrictions and conditions on land use. For example, a tank owner or operator may choose to limit the site to industrial/commercial use. When the property owner and the tank owner or operator are separate entities, the property owner must agree to any type of land use limitation.

A leaking UST site qualifies to receive an NFR Letter once the tank owner or operator meets all Leaking UST Program requirements and the applicable TACO cleanup objectives. Within 45 days, the tank owner or operator must file the NFR Letter with the county recorder of the county in which the site is located to ensure that current and future users of the property will be informed of any conditions such as engineered barriers and institutional controls that were relied upon to address contamination caused by an UST release.

Where to Direct Your UST and Leaking UST Questions

If you have questions concerning permits required for tank installations, upgrades or removals; leak prevention or detection requirements; financial responsibility requirements; or eligibility and deductible determinations for the UST Fund, contact:

Office of the State Fire Marshal

Division of Petroleum and Chemical Safety
1035 Stevenson Drive
Springfield, Illinois 62703
217-785-1020
www.state.il.us/osfm/PetroChemSaf/home.htm

If you have questions concerning the review of budget plans and technical reports, or the status of applications for payment from the UST Fund, contact:

Illinois Environmental Protection Agency

Leaking Underground Storage Tank Section
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
1-217-782-6762
www.epa.state.il.us/land/lust/index.html

This publication is for general information only and is not intended to replace, interpret, or modify laws, rules, or regulations.

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