

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

WHEELING/GWA AUTO SHOP,)
Petitioner,)
)
v.) PCB 10-70
) (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
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Dennis G. Walsh
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20 North Wacker Drive, Suite 1660
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PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board a MOTION FOR LEAVE TO REPLY and REPLY TO PETITIONER'S RESPONSE TO ILLINOIS EPA'S 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: October 7, 2010

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MOTION FOR LEAVE TO FILE REPLY

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 Section 101.500(e) of the Illinois Pollution Control Board’s (“Board”) procedural rules (35 Ill. Adm. Code 101.500(e)), hereby files a motion for leave to file a reply to the Petitioner’s Response and Memorandum Opposing IEPA’s Motion for Summary Judgment. In support of this motion for leave, the Illinois EPA provides as follows.

1. The Illinois EPA filed its Motion for Summary Judgment on September 3, 2010.
2. The Petitioner filed its Response on September 30, 2010. This response was filed after the 14 days allowed for under the Act. (See: 35 Ill. Adm. Code 101.500)
3. The issue in this case is one of first impression and material prejudice may result if the Illinois EPA is not allowed to reply. Please note that a similar factual case is currently before the Board in Zervos Three v. IEPA, PCB 10-54.
4. The Petitioner’s arguments require a full reply from the Illinois EPA so that the Board can be fully briefed when making its decision on the case.

5. For the reasons stated herein, the Illinois EPA hereby respectfully requests that the Hearing Officer allow the Illinois EPA to file a Reply to the Petitioner's Response to prevent material prejudice.

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facts are incorrect. Contrary to Petitioner's argument on page 9 of its Response, the OSFM does not determine the eligibility of an **owner**. It determines the eligibility of **tanks**. Whether the tanks are eligible under the Act is not at issue in this case, nor was it the issue in Zervos. Stated again, 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 for costs that qualify under the Act. On the other hand, if the Board determines that the Petitioner was not an owner under the Act, the Petitioner will not be reimbursed at all.

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

The Petitioner suggests that the Illinois EPA is shifting the burden of the remediation costs away from the UST Fund and onto the taxpayers of the Petitioner.² That argument has no merit. The Petitioner is trying to have the State of Illinois act as its insurance policy for its own failure to follow the law. Although located nowhere in the record, the Petitioner claims that this property was transferred by Quit Claim Deed. As the Illinois EPA does not have a copy of such deed in the record, it was not attached to Petitioner's response nor was an affidavit attesting to

² The Illinois EPA must object to any argument relying on this "fact" as a determining factor in the Board's consideration of this matter and decision made upon the record. This Petitioner is not dissimilar in any fashion from any other Petitioner in a similar position, i.e., having not complied with the requirements of the Act and seeking, somehow, reimbursement. This said, simply stated, Petitioner offers that it took title by quit claim deed but provided no further information. Thus, the Board and the Illinois EPA have no information on the manner in which this property was acquired (by eminent domain, at arm's length, etc....) and at what price. To demonstrate how conclusions may change based upon information not within the record, if the Village purchased the property for \$1, and that price reflected that the property was under remediation and required additional expenses to comply with applicable law, then why should the Village be allowed to shift costs onto the fund?

the veracity of the statement included, it will have to accept this claim at face value. In so doing, the Petitioner took the property as is without warranty. The Petitioner then proceeded with remediation prior to submitting an election to proceed as owner. The Petitioner thinks that special treatment should be accorded it because it is a village. What is far more important in a discussion of this argument, presuming the Board should even entertain a discussion of it, is the critical fact that the Petitioner is no more aggrieved than any other person performing remediation contrary to the Act. Further, the Petitioner was treated no differently than the Petitioner in Zervos. If the Petitioner had followed the Act, the Petitioner would be paid for remediation costs eligible under said Act. However it didn't file the election to proceed and now wants to shift blame for its inaction onto the Illinois EPA for doing its legislative duty in following the Act.

Even presuming all the statements offered by the Petitioner are correct, which the Illinois EPA does not concede the point, Petitioner is unable to point to any legal argument or interpretation of applicable law or regulation that would allow it relief. Moreover, certainly neither the Board nor the Illinois EPA can correct the manner of title which the village itself in its sole discretion determined was appropriate for the taking of this property. The real issue is that due to the Quit Claim deed, the Petitioner cannot find another source of funding for the remediation they knew was necessary at the time they took title to the property.³

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

³ Petitioner's argument (forcing the costs upon local tax payers) in practice will be circular and is at best counter-intuitive. Take for granted that costs associated with remediation of this site would be covered by the Village, which is funded by Petitioner's citizens. What Petitioner fails to acknowledge is the fact that these very tax payers will be assessing their costs against other tax payers within this State. Why should this particular group of citizens be allowed to tax other individuals in this State to gain the benefit of local land, which they themselves (through representative actions) claimed and will use for their sole benefit? Again, remediation of this site is required prior to its use for the citizens' benefit. This is not a taxation issue, it is a cost of taking the property for public use

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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.

Most significantly, the question in this case is not one of fact or even some specious claim of public policy and fairness to a local citizenry, but rather, this matter involves interpretation of very clear 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 in 2003 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 to proceed as is required in Section 57.2 in order to be considered an “owner” for reimbursement from the fund until January 17, 2006. And, again, significant time had elapsed prior to submission and in fact 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

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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.

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 simple issue this matter presents, and adds facts to this matter which are not relevant to the decision issues by the

Illinois EPA, the facts and issue are quite simple. In reply, the Illinois EPA notes that: (1) the Petitioner did not submit the election to proceed until after the work was completed and (2) such a submission is necessary under the Act, and (3) the submission is a precondition to reimbursement from the Fund. Therefore, Petitioner's relief cannot be granted.

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.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent

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CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on October 7, 2010, I served true and correct copies of a MOTION FOR LEAVE TO REPLY and REPLY TO PETITIONER'S RESPONSE TO ILLINOIS EPA'S MOTION FOR SUMMARY JUDGMENT via the Board's COOL system, 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
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