

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

METROPOLITAN PIER AND EXPOSITION	)	
AUTHORITY, an Illinois municipal corporation,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB No. 10-73
	)	(UST Fund Appeal)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

**NOTICE OF FILING**

TO: Attached Service List

PLEASE TAKE NOTICE that on October 7, 2010, I filed with the Clerk of the Illinois Pollution Control Board, Respondent's, Illinois Environmental Protection Agency, Motion for Summary Judgment, a copy of which is attached and served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY

By: Gerald T. Karr  
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DATED: October 7, 2010

**THIS FILING IS SUBMITTED ON RECYCLED PAPER**

**SERVICE LIST**

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	)	
Respondent.	)	

**RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

NOW COMES, Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, ("Illinois EPA" or "Agency"), by and through, Lisa Madigan, Attorney General of the State of Illinois, 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, METROPOLITAN PIER AND EXPOSITION AUTHORITY ("MPEA") 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. 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 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, ("UST 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.

The Illinois EPA asserts that the Petitioner's Petition and documents appended thereto 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**

In UST Fund reimbursement appeals, 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.

## **III. ISSUE**

The issue before the Board is whether the Illinois EPA can authorize payments for costs as set forth in the Illinois EPA's final decision dated February 18, 2010, taking into account the underlying facts and law. As will be argued below, the facts in this case are undisputed and clearly demonstrate that the decision was appropriate and should be affirmed.

## **IV. STATEMENT OF FACTS**

This action arises from Petitioner, MPEA's corrective actions taken at its property located at 234 E. 24<sup>th</sup> Street, Chicago, Illinois ("Facility"). MPEA submitted its application to receive reimbursement under the Leaking Underground Storage Tank Program ("LUST") for corrective actions taken on leaking underground storage tanks at its Facility well beyond the required

deadline. The Illinois Administrative Code dictates that all applications for reimbursement of corrective actions must be submitted no later than one year after the date on which the Agency issues a No Further Remediation Letter. MPEA's application is dated November 18, 2009, while the Illinois EPA issued its No Further Remediation Letter regarding the Facility on January 23, 2008. MPEA admits the same in its Petition. Therefore, Illinois EPA was correct in determining that Petitioner MPEA cannot be reimbursed for its corrective actions under LUST, and summary judgment should be granted to the Respondent.

After discovering leaks of various petroleum products emanating from its existing and pre-existing underground storage tanks, the former owner of the Facility, Brink's Incorporated, submitted a Reimbursement Eligibility and Deductibility Application to the Office of the State Fire Marshall ("OSFM"). (Petition ¶¶ 2-3.) On or about February 8, 1999, the OSFM determined that Tanks 8 and 9 were both eligible for reimbursement. (Petition ¶ 3.) On or about January 1, 2004, MPEA acquired the Facility from Brink's Incorporated. (Petition ¶ 6.) On or about June 27, 2005, the Agency approved the Amended High Priority Corrective Action Plan for the Facility submitted by MPEA. (Petition ¶ 9.) On or about December 6, 2007, MPEA submitted a Second Amended Corrective Action Plan, Corrective Action Completion Report, and a Corrective Action Plan budget. (Petition ¶ 11.) On or about December 14, 2007, MPEA submitted its Application for Reimbursement. (Petition ¶ 12.) On January 23, 2008, the Agency approved a reimbursement budget in the amount of \$394,610.00 and issued a No Further Remediation Letter for the Facility. (Petition ¶¶ 15-16.) On or about October 30, 2008, the Agency issued its final determination in response to MPEA's Application for Reimbursement informing MPEA that it needed to submit additional proof of ownership and eligibility. (Petition ¶ 17.) In response, on or about November 19, 2008, MPEA re-submitted its Eligibility and

Deductibility Application to OSFM along with proof of ownership of the Facility. (Petition ¶ 18.) The Eligibility and Deductibility Application listed “n.a.” under the Illinois Emergency Management Agency Number and Date Notified categories on the Underground Storage Tank Information Sheet. (Petitioner’s Exhibit 7, Attachment entitled, Eligibility and Deductibility Application at 4.) On or about December 22, 2008, OSFM issued its final determination on the Eligibility and Deductibility Application, finding Tank 8 eligible. (Petition ¶ 19.) On or about February 3, 2009, MPEA submitted an amended Eligibility and Deductibility Application, this time listing an Illinois Emergency Management Agency Number and Date Modified on the Underground Storage Tank Information Sheet for Tank 9. (Petition ¶ 20; Petitioner’s Exhibit 9, Attachment entitled Amended Application at 4.) On or about March 9, 2009, OSFM issued its Amended Eligibility determination, finding Tank 9 also eligible. (Petition ¶ 2-21.) On November 18, 2009, MPEA submitted its Application for Reimbursement to the Agency, more than one year and 10 months after the Agency issued its No Further Remediation Letter for the Facility. (Petition ¶ 22.) On February 18, 2010, the Agency issued a final determination denying MPEA’s Application for Reimbursement on the grounds that the Application for Reimbursement was submitted more than one year after the No Further Remediation Letter was issued. (Petition ¶ 23.)

MPEA argues that its Application for Reimbursement was timely submitted on December 14, 2007 and approved by the Agency on October 30, 2008. (Petition ¶ 24.) This prior Application for Reimbursement was incomplete. An approved Eligibility and Deductibility Application is a necessary part of a complete Application for Reimbursement, according to Section 732.601(b)(3) of the Board’s UST Rules, 35 Ill. Ad. Code Section 732.601(b)(3). Therefore, the Application for Reimbursement submitted by MPEA was not complete until

November 18, 2009, more than one year after the issuance of the No Further Remediation Letter.

Thus, the Application for Reimbursement was properly denied by the Agency.

## V. ARGUMENT

### A. Legal Standard for Summary Judgment

Section 101.516 of the Board's Procedural Rules provides, in pertinent part, as follows:

- (b) If the record, including pleadings, depositions and admissions on file, together with any affidavits, shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law, the Board will enter summary judgment.

35 Ill. Adm. Code Section 101.516(b).

"A motion for summary judgment should be granted when the pleadings, depositions, and affidavits reveal that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Balla v. Gambro, Inc.*, 145 Ill. 2d 492, 508 (Ill. 1991). Furthermore, "[T]he summary judgment procedure is to be encouraged as an aid in the expeditious disposition of a lawsuit . . . ." *Bagnola v. SmithKline Beecham Clinical Labs.*, 333 Ill. App. 3d 711, 716-17 (1st Dist. 2002) (citing *Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986)). "Although plaintiff is not required to prove his case at the summary judgment stage, he must present evidentiary facts to support the elements of his cause of action." *Richardson v. Bond Drug Co. of Illinois*, 387 Ill.App.3d 881, 885, 901 N.E.2d 973, 976 (1 Dist. 2009). In this case, the Petition submitted by MPEA demonstrates that there is no issue as to any material fact. Petitioner has not presented the one fact necessary to support its cause of action: that MPEA submitted a completed Application for Reimbursement within one year of the date on which the No Further Remediation Letter was issued. As Petitioner is unable to prove this critical fact, Respondent is entitled to summary judgment as a matter of law.

**B. MPEA's Application for Reimbursement Was Not Submitted within One Year of the Date on which the No Further Remediation Letter Was Issued.**

Section 732.601(j) instructs, "All applications for payment of corrective action costs must be submitted no later than one year after the date the Agency issues a No Further Remediation Letter . . . ." 35 Ill. Adm. Code 732.610(j). The actions for which MPEA is seeking reimbursement are corrective actions. *See* Petition, par. 1.

In *Kronon Motor Sales, Inc. v. Illinois Pollution Control Board*, the court held, "Courts must give considerable deference to interpretations of statutes and ordinances made by the agency charged with their administration." *Kronon Motor Sales, Inc. v. Illinois Pollution Control Board*, 241 Ill. App.3d 766, 771 609 N.E.2d 678, 682 (1st Dist. 1992) (citing *Spitz v. Goldome Realty Credit*, 151 Ill.2d 71, 600 N.E.2d 1185 (Ill. 1992)). The court upheld, in *Kronon Motor Sales, Inc.*, the Agency's interpretation of LUST section 22.18b(d)(4)(D). *Id.* The Agency interpreted the section as requiring an owner or operator of an underground storage tank ("UST") to notify the Illinois Emergency Services and Disaster Agency upon both the suspected release of a regulated substance, and also upon confirmation that the release had occurred, in order to receive full reimbursement for corrective actions. *Id.* Although recognizing that strict adherence to the notification requirement in LUST did impose a hardship upon the owner or operator of a UST, the court ruled that a court is not permitted to overturn the Agency's decision simply because the court would have reached a different result. *Id.*

Since the LUST Fund has been held to not have a broad remedial purpose due to its limited resources, "the rules and regulations administering it are not to be taken lightly and should not be ignored." *FedEx Ground Package System, Inc. v. Pollution Control Board*, 382 Ill. App.3d 1013, 1015, 889 N.E.2d 697, 699 (1st Dist. 2008). In *FedEx Ground Package System v. Pollution Control Board*, the court upheld the Agency's interpretation of LUST that required



all budgets and plans to be submitted before a No Further Remediation Letter is issued in order to receive full reimbursement. *Id.* at 1016, 700. The court upheld the Agency's interpretation because it was not "unduly restrictive or contrary to the purpose and language of the Act." *Id.*

In order to be reimbursed for corrective actions under LUST, a UST must be eligible. Section 732.601(b)(3) of the Illinois Administrative Code dictates that a complete application for reimbursement must include "[a] copy of the OSFM or Agency eligibility and deductibility determination." 35 Ill. Adm. Code 732.601(b)(3). Therefore, only after the Eligibility and Deductibility Application has been approved and submitted to the Illinois EPA, may an Application for Reimbursement be considered complete and subsequently approved.

In this case, the Agency did not receive proof of eligibility until well after the date on which the No Further Remediation Letter was issued. Thus, the Application for Reimbursement was not complete until more than a year after the date on which the No Further Remediation Letter was issued. Consequently, MPEA's Application for Reimbursement was properly denied by the Agency.

The courts have explicitly held that the provisions of LUST are to be applied strictly, in spite of hardships wrought on owners or operators. There are limited resources supporting LUST so therefore its provisions must not be taken lightly. Furthermore, the courts have ruled that deference must be given to an agency decision on the applicability of LUST. Therefore, despite the hardship of not receiving reimbursement for corrective actions, MPEA must be held strictly to LUST's rules. The rules state that a completed Application for Reimbursement must include an approved Eligibility and Deductibility Application, and the Illinois Administrative Code requires the Application for Reimbursement be submitted within one year of the issuance of the No Further Remediation Letter. Even without granting deference to the Agency's decision

to deny MPEA's Application for Reimbursement, the same result should be reached. MPEA's Application for Reimbursement was not complete until more than one year after the No Further Remediation Letter was issued. Under Illinois law, the Agency correctly denied MPEA's Application for Reimbursement.

Moreover, an owner or operator is not absolutely entitled to reimbursement under LUST. As the court held in *FedEx Ground Package, Inc.*, "although there exists a statutory right to reimbursement from the Fund, we do not find that this right is unlimited." *FedEx Ground Package System, Inc. v. Pollution Control Board*, 382 Ill. App.3d 1013, 1016, 889 N.E.2d 697, 700 (1st Dist. 2008). MPEA was required to closely adhere to the rules under LUST in order to receive reimbursement for corrective actions. As MPEA failed to do so, it can claim no entitlement to reimbursement.

There is no issue of material fact regarding the fact that MPEA did not submit its complete Application for Reimbursement no later than one year after the date on which the No Further Remediation Letter was issued by the Agency. The Agency issued the No Further Remediation Letter regarding the Facility on January 23, 2008. Petition, par. 16. By its own admission, MPEA submitted its completed Application for Reimbursement, including the proof of ownership and eligibility determination, on November 18, 2009. Petition, par. 22. Pursuant to Section 732.601(j), 35 Ill. Adm. Code 732.601(j), MPEA's Application for Reimbursement was properly denied by the Agency. Therefore, Respondent is entitled to summary judgment as a matter of law.

## **VI. CONCLUSION**

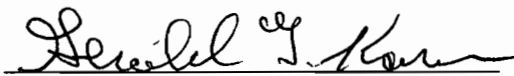
The Petitioner's admissions in its Petition, taken together, establish that there is no genuine issue of material fact as to Petitioner MPEA's inability to receive reimbursement for

corrective actions from the LUST Fund. Accordingly, pursuant to Section 101.516(b) of the Board's Procedural Rules, 35 Ill. Adm. Code 101.516(b), Respondent, Illinois EPA is entitled to summary judgment as a matter of law as to Petitioner MPEA's Petition. Illinois EPA asks the Board to enter an order granting its Motion for Summary Judgment, upholding the decision of the Agency to deny reimbursement as sought by the Petitioner.

Respectfully submitted.

ILLINOIS ENVIRONMENTAL PROTECTION  
AGENCY

LISA MADIGAN,  
Attorney General  
State of Illinois

By: 

DATE: October 7, 2010

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**CERTIFICATE OF SERVICE**

I, GERALD T. KARR, an Assistant Attorney General in this case, do certify that on this 7th day of October, 2010, I caused to be served by First Class Mail the foregoing Notice of Filing and Respondent's Motion for Summary Judgment, upon the individuals listed on the attached service list, by depositing the same in the U.S. Mail depository located at 100 West Randolph Street, Chicago, Illinois in an envelope with sufficient postage prepaid.

  
GERALD T. KARR