

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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OCT 29 2010
STATE OF ILLINOIS
Pollution Control Board

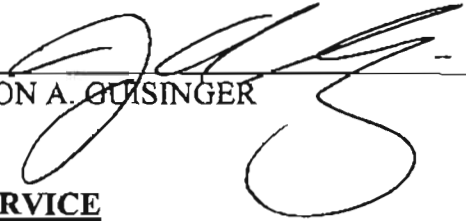
WHEELING/GWA AUTO SHOP,)
)
Petitioner,)
)
v.)
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

PCB No. 10-070
(LUST Appeal - Ninety Day Extension
Granted 3/18/10, Petition Due 6/10/10)

NOTICE OF FILING

TO: See Attached Service List


PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board, the **VILLAGE'S MOTION FOR SUMMARY JUDGMENT**, a copy of which is herewith served upon you.



JASON A. GUISINGER

CERTIFICATE OF SERVICE

I, JASON A. GUISINGER, certify that I served the foregoing Notice of Filing and **VILLAGE'S MOTION FOR SUMMARY JUDGMENT** upon the parties listed on the attached Service List, by the means listed on the attached Service List, before 4:30 p.m. on October 29, 2010.



JASON A. GUISINGER

Dennis G. Walsh
Jason A. Guisinger
KLEIN, THORPE AND JENKINS, LTD.
20 North Wacker Drive, Suite 1660
Chicago, IL 60606
(312) 984-6400

SERVICE LIST

VIA HAND DELIVERY

Pollution Control Board
Attn: John Therriault, Clerk
100 West Randolph Street
James R. Thompson Center, Suite 11-500
Chicago, Illinois 60601-3218

VIA FIRST CLASS MAIL

Division of Legal Counsel
Illinois Environmental Protection Agency
Attn: Melanie A. Jarvis, Ass't Counsel
1021 North Grand Avenue East
P. O. Box 19276
Springfield, IL 62794-9276

VIA FIRST CLASS MAIL

Illinois Environmental Protection
Agency, Bureau of Land
Attn: Michael Piggush
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276

VIA FIRST CLASS MAIL

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

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PCB No. 10-070
(LUST Appeal)

VILLAGE'S MOTION FOR SUMMARY JUDGMENT

Now comes Petitioner, Village of Wheeling ("Village") by counsel, Dennis G. Walsh and Jason A. Guisinger of Klein, Thorpe and Jenkins, LLC., and pursuant to Section 101.516, 35 Ill. Adm. Code, subtitle A, Chapter 1, Subpart E, and moves the Illinois Pollution Control Board for Summary Judgment, specifically reversing Respondent's Final Decision dated February 2, 2010, and finding that Village is an "owner" as that term is defined at 415 ILCS 5/57.2, as amended, and is eligible to seek reimbursement from the Underground Storage Tank Fund. In furtherance thereof, Village states as follows:

FACTS

There are no genuine issues of material fact regarding the Village's eligibility for reimbursement from the Leaking Underground Storage Tank Fund ("LUST Fund"). From the administrative record in this matter and the supporting affidavit, the following facts are undisputed:

On or about August 9, 1995 a release was reported at a site commonly known as the GWA Auto Shop, located at 434 S. Milwaukee Avenue, Wheeling, Cook County, Illinois ("Site"). The Illinois Emergency Management Agency assigned Incident No. 951688 to the

release and the IEPA acknowledged receipt of the notice of release and assigned LCP # 0314975175 to the Site.

The Site remained contaminated and an environmental hazard from 1995 until the Village performed extensive remediation measures concluding in 2009. These remediation efforts were undertaken at substantial cost to the Village.

The Village took title to and possession of the Site on August 9, 2002, pursuant to a Quitclaim Deed, a copy of which is attached hereto as Exhibit A and made a part hereof.¹ From August 9, 2002 through the date hereof, the Site is one that had one (1) or more registered underground storage tanks that had been removed and on which corrective action had not yet resulted in the issuance of a “no further remediation letter” from the IEPA. Since August 9, 2002 through the date hereof, the Village has been, and is, the owner of the Site.

From February 11, 2003 to October 7, 2009, the Village performed appropriate corrective action activities at the site related to Incident No. 951688 and, in the process, incurred reimbursable expenses, properly and lawfully payable to the Village from the LUST Fund administered by the IEPA.

The Village, as owner of the Site, prepared and delivered to the IEPA a written notice dated January 23, 2006, electing to proceed as Owner in the Leaking Underground Storage Tank Program pursuant to §57.2, Title XVI of the Illinois Environmental Protection Act (“Act”). The IEPA received the Village’s Election to Proceed as owner and accepted the same on March 2, 2006. *See* AR at 006-1 through 4.

According to §57.2 of Title XVI of the Act, the Village is an “owner,” as defined therein, and the Village is therefore entitled to approval of and reimbursement for reimbursable expenses

¹ Exhibit A is a copy of the Quitclaim deed certified by the Cook County Recorder of Deeds. A copy of the deed was also attached as Exhibit A to the Village’s Petition for Review of IEPA LUST Decision filed in this matter.

under the LUST Fund for costs incurred in performing corrective action at the Site related to Incident No. 951688.

On October 13, 2009, the Village submitted its Corrective Action Plan and Budget related to Incident No. 951688. Each of the expenses described in the CAP are lawful, proper and necessary corrective action expenses incurred by the Village in responding to Incident No. 951688 and said expenses are authorized by and reimbursable from the Leaking Underground Storage Tank Program and LUST Fund.

Significantly, on June 28, 2006, the Illinois Office of State Fire Marshal determined that the Village was eligible for reimbursement of reimbursable expenses in excess of \$10,000 for those expenses incurred in response to incident No. 951688. A copy of the Village's Reimbursement Eligibility and Deductible Application and letter approving the Village's Reimbursement Eligibility and Deductible Application are attached hereto as **Group Exhibit B** and made a part hereof.²

On February 2, 2010, the IEPA, in a final and appealable agency decision, granted in part and denied in part the CAP. The IEPA approved \$38,560.48 in costs and approval of these costs is not in dispute herein. At issue here is the IEPA's denial of \$78,915.82 of reimbursable costs in the CAP, on the following grounds:

On January 23, 2006 the Illinois EPA received the Election to Proceed as "Owner" form from the present owner pursuant to Section 57.2 of the Act. Prior to this date the present owner did not meet the definition of Owner or Operator in Section 57.2 of the Act therefore, all costs incurred prior to this date are not eligible for reimbursement from the Fund to the present "Owner." The Following [sic] costs are deducted from the Budget: \$4,141.00 from Analytical Costs and \$74,774.82 from Remediation and Disposal Costs.

²The eligibility and deductible determination made by the OSFM in this case is further supported by affidavit of counsel for the Village, which is attached hereto as **Exhibit C** and made a part hereof. Moreover, a copy of the eligibility and deductible determination was attached to the Village's Petition for Review as Group Exhibit D.

This decision is arbitrary, capricious and contrary to law. Therefore, the Village filed this appeal and brings this motion for summary judgment.

STANDARD OF REVIEW

Summary judgment is appropriate when the pleadings, depositions, admissions on file and affidavits disclose that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *McDonald's Corp. v. IEPA*, PCB 04-14 at 2 (Jan. 22, 2004). Illinois law encourages summary judgment to expeditiously resolve lawsuits. *Purtill v. Hess*, 111 Ill.2d 229, 240 (1986).

ISSUE ON APPEAL

Is the Village an "owner" as that term is defined at 415 ILCS 5/57.2, and otherwise eligible for reimbursement from the LUST Fund?

ARGUMENT

- A. The Illinois General Assembly amended Title XVI of the Act to expand the definition of "owner" to encourage prompt, quality corrective action at sites with chronic, historic contamination from registered underground storage tanks.**

On January 1, 2006, Public Act 94-274 took effect and amended §57.2 of Title XVI of the Act to expand the definition of "owner" as used in the Act. §57.2 of the Act was amended in order to allow new owners of contaminated property, who were not the actual owners of tanks that caused contamination, to nevertheless participate in the Leaking Underground Storage Tank Program ("LUST Program") and seek reimbursement from the LUST Fund. Specifically, §57.2 was amended to read as follows:

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 a "no further remediation letter" by the Agency pursuant to this Title.

[Emphasis added, indentifying the language added to §57.2 by Public Act 94-274, which was intentionally designed and enacted to expand the definition of "owner" to include new owners as eligible for reimbursement, for the policy justifications cited herein.] *See* 415 ILCS 5/57.2.

- 1. Prior to January 1, 2006, the Village was stuck in a statutory limbo created by the definition of "owner" used in Title XVI of the Act.**

Before Public Act 94-274 took effect, only entities who actually owned an underground storage tank that leaked and caused environmental contamination were eligible to participate in the LUST Program and access the LUST Fund. This statutory scheme created a situation where entities that owned properties contaminated with petrochemicals, but where the contamination was caused by leaking underground storage tanks that had been removed prior to the entity taking title, were shutout of the LUST Program and precluded from accessing the LUST Fund. Not only did this punish property owners who were in no way responsible for a tank release that caused contamination, it also discouraged prospective property owners from buying and remediating contaminated sites that had been abandoned by a previous owner, which is one of the express purposes of the Act.³ The pre-Public Act 94-274 statutory scheme had the additional perverse effect of treating entities responsible for a tank release more favorably than innocent third-parties who subsequently acquired an interest in a contaminated property.

The administrative record in this matter underscores the problems created by the pre-Public Act 94-274 statutory scheme. Indeed, in 2003, the Village contacted the IEPA and

³ The "Intent and Purpose" of Title XVI of the Act is to, in part, "adopt procedures for the remediation of underground storage tank sites due to the release of petroleum and other substances regulated under this Title from certain underground storage tanks or related tank systems."

submitted a Corrective Action Completion Report (“CACR”) to begin working cooperatively with the IEPA to remediate the Site. However, the CACR was rejected by the IEPA in a letter dated November 18, 2003, stating that:

Based on the information available, it appears that the Village of Wheeling is not the owner or operator of the underground storage tank system removed at the property in 1995, resulting in the assignment of incident no. 951688. Therefore, the Village of Wheeling has no reporting requirements for this incident.

See AR at 003-1.⁴

Thus, despite the Village’s desire to take responsibility for and remediate the Site, which had been contaminated since 1995, this barrier in the Act and related administrative regulations prevented the Village from fully participating in the LUST Program.

The frustration caused by this barrier is further highlighted in the IEPA’s Leaking UST Technical Review Notes, dated November 28, 2007. The IEPA noted that the Village’s Corrective Action Completion Report “*could not be reviewed because it was submitted by the Village of Wheeling and not the owner or operator of the UST’s.*” [emphasis added] See AR at 010-3.

Nevertheless, beginning in January of 2003 and ending in June of 2003, the Village removed approximately 5,020 cubic yards of contaminated soil from the Site in order to remediate what the OSFM declared a “‘major’ contamination and groundwater with a sheen.” See AR at 020-1, 2 and 8. The Village paid approximately \$498,421.99 to remove the contaminated soil and remediate the Site. See AR at 020-8.

⁴ The IEPA submitted the Administrative Record in this matter to the Village without any date stamps. The record was submitted in electronic format with each document attached as a separate PDF file. The PDF files were numbered consecutively as 001 through 021. Moreover, each separate PDF file is numbered 1 through however many pages are contained in each PDF file. Therefore, for the purpose of this motion for summary judgment, each reference to the Administrative Record will be in the following form: The PDF file number and then the specific page number in the PDF file referenced. For example, when citing to page 13 of PDF file number 010, AR 010-13 will be used.

- 2. By enacting Public Act 94-274, the General Assembly stepped in and corrected the strange and counterproductive dichotomy between property owners who caused environmental contamination and those who took title after the fact.**

In recognition of the barriers and disincentives created by the definition of “owner” in Title XVI of the Act, which was working against its express intent and purpose, the General Assembly enacted Public Act 94-274 allowing the Village, and others similarly situated, to elect to proceed as “owner,” so that they could participate in the LUST Program and seek reimbursement from the LUST Fund, even though they were not responsible for the contamination in the first place. The amendments took effect on January 1, 2006 and the Village promptly took advantage by submitting its election to proceed as owner with the IEPA on January 23, 2006. *See* AR at 005-1. On March 2, 2006, the IEPA acknowledged receipt of and accepted the Village’s election to proceed as owner and informed the Village of its resulting obligation for remediating the Site. *See* AR at 006-1 through 4.

At last, the barrier to the Village’s participation in the LUST Program was removed and the Village began working diligently with IEPA staff to seek approval of its remediation activities.⁵ The Village submitted its next Corrective Action Completion Report (“CACR”) to the IEPA on January 12, 2007. *See* AR at 007-1 through 49. This CACR was denied by the IEPA in a letter dated March 23, 2007 because it did not contain a multitude of technical data required by the IEPA for approval. *See* AR at 008-1 through 15.

Therefore, the Village submitted another CACR dated July 19, 2007, which addressed the concerns raised by the IEPA in its denial of the previous CACR. *See* AR at 009-1 through 109. Once again, in a letter dated November 14, 2007, this CACR was rejected and the IEPA

⁵ For a detailed and streamlined outline of the interactions that took place between the Village and the IEPA in this matter, please see the IEPA’s Leaking and UST Technical Review notes at AR 020-1 through 15.

requested additional technical data that it needed to review before approving the CACR. *See* AR 010-1 through 5.

At this point, a meeting was scheduled between IEPA staff and the Village in order to clarify exactly what was needed in order for the Village's CACR to obtain approval. *See* AR at 020-6. That meeting was held on February 28, 2008 and the Village submitted yet another CACR dated October 28, 2008, a SIP dated October 1, 2008 and a supplemented SIP on October 28, 2008, all of which were responsive to the IEPA's requests for technical data and clarification at the February 28, 2008 meeting. *See* AR at 012-1 through 41; AR at 013-1 through 235; and AR at 014-1 through 300.

Nonetheless, in a letter dated February 4, 2009, the IEPA rejected the CACR dated October 28, 2008, because "the proposed Highway Authority Agreement does not limit access to soil exceeding Tier 1 remediation objectives located beneath Milwaukee Avenue." *See* AR at 016-1. The SIP dated October 28, 2008 was also rejected by the IEPA in a separate letter dated February 4, 2009. *See* AR at 017-1 through 5.

Then, in October of 2009, the Village submitted a CAP/Budget and a SIP/Budget. *See* AR at 019-1 through 93. As a courtesy to the Village, the IEPA considered both of these submissions to be CAP Budgets to avoid the necessity of the Village filing a Site Investigation Completion Report. *See* AR at 020-7. The Village requested a total of \$34,378.22 for Site Investigation and \$83,223.06 for Corrective Action. *See* AR at 020-9. This amount was arrived at by the Village after exhaustive discussions with and submissions to the IEPA regarding what costs were reimbursement from the LUST Fund. In fact, the IEPA determined that all of the remediation activities for which the Village sought reimbursement "are appropriate to demonstrate compliance with Title XVI of the Act." *See* AR at 021-1.

This lengthy and exhaustive process engaged in by the Village and IEPA, which led to the remediation of a chronically and historically contaminated site, exemplifies the legislative purpose of Public Act 94-274. Indeed, it shows what can be accomplished when a subsequent property owner is allowed to participate in the LUST Program with the expectation that it will be able to access the LUST Fund.

But the IEPA defeated this purpose when it determined that the Village was not eligible for \$74,774.82 in Remediation and Disposal Costs and \$4,141.00 for Analytical Costs, because these costs were incurred prior to the date that the Village submitted its election to proceed as owner. *See* AR at 021-3 and 4. As discussed below, this decision is unlawful, arbitrary and capricious, and should be overturned.

B. The facts of this case unequivocally demonstrate that the Village satisfied the statutory conditions for reimbursement from the LUST Fund.

Based on the facts under review, it is clear that the Village submitted a written “election to proceed” pursuant to the Act after having acquired an ownership interest⁶ in the Site on which one (1) or more registered tanks had been removed, but on which corrective action had yet resulted in the issuance of a “no further remediation letter” by the IEPA. *See* AR at 020-1 through 15; and Exhibit A. There is no issue of material fact in this regard.

Moreover, the fact that the IEPA approved \$38,560.48 in costs for reimbursement from the LUST Fund confirms that the Village falls within the definition of “owner” under Title XVI of the Act and is otherwise eligible to access the LUST Fund for reimbursable costs. *See* AR at 021-3. The issue, then, is whether the IEPA has the statutory authority to negate an eligibility determination made by the Office of State Fire Marshal (“OSFM”) in a way that exceeds the

⁶ As the facts demonstrate, as well as the certified copy of the Quitclaim deed transferring title to the Site to the Village attached hereto as Exhibit A, the Village acquired an ownership interest in the Site on August 9, 2002. *See Coughlin v. Gustafson*, 332 Ill.App.3d 406, 412 (1st Dist. 2002) (a deed is an instrument in writing which conveys an interest in land; the “main purpose of which is to transfer good title”).

IEPA's statutorily limited role of determining whether costs are reimbursable. As the following analysis makes clear, this issue should be answered in the negative, which requires that the IEPA's decision at issue in this case be reversed.

1. **The plain and unambiguous language of the statute includes the Village as an "owner" eligible for reimbursement from the LUST Fund.**

Again, the statute under review provides that:

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 a "no further remediation letter" by the Agency pursuant to this Title.

[Emphasis added, indentifying the language added to §57.2 by Public Act 94-274] See 415 ILCS 5/57.2.

It is well-settled that the "interpretation of a statute is a matter of law for the court and appropriate for summary judgment." *County of Knox ex rel. Masterson v. Highlands, LLC*, 188 Ill.2d 546, 551 (1999). When interpreting a statute, a court's objective is to ascertain and give effect to the intent of the legislature. *Hernon v. E.W. Corrigan Constr. Co.*, 149 Ill.2d 190, 194 (1992). The most reliable indicator of legislative intent is the language of the statute. *People v. Bryant*, 128 Ill.2d 448, 455 (1989). The language of a statute must be given its plain and ordinary meaning. *People v. Bole*, 155 Ill.2d 188, 197 (1993). Where the statutory language is clear and unambiguous, a court must apply the statute without aids of statutory construction. *Id.* at 198.

§57.2 and §57.9, which both relate to eligibility to access the LUST Fund, are unambiguous.

Indeed, §57.9 provides that:

(a) The Underground Storage Tank Fund shall be accessible by owners and operators who have a confirmed release from an underground storage tank or related tank system of a substance listed in this Section. The owner or operator is eligible to access the Underground Storage Tank Fund if the eligibility requirements of this Title are satisfied and:

- (1) Neither the owner nor the operator is the United States Government.
- (2) The tank does not contain fuel which is exempt from the Motor Fuel Tax Law.
- (3) The costs were incurred as a result of a confirmed release of any of the following substances:
 - (A) "Fuel", as defined in Section 1.19 of the Motor Fuel Tax Law.
 - (B) Aviation fuel.
 - (C) Heating oil.
 - (D) Kerosene.
 - (E) Used oil which has been refined from crude oil used in a motor vehicle, as defined in Section 1.3 of the Motor Fuel Tax Law.
- (4) The owner or operator registered the tank and paid all fees in accordance with the statutory and regulatory requirements of the Gasoline Storage Act.
- (5) The owner or operator notified the Illinois Emergency Management Agency of a confirmed release, the costs were incurred after the notification and the costs were a result of a release of a substance listed in this Section. Costs of corrective action or indemnification incurred before providing that notification shall not be eligible for payment.
- (6) The costs have not already been paid to the owner or operator under a private insurance policy, other written agreement, or court order.
- (7) The costs were associated with "corrective action" of this Act.

If the underground storage tank which experienced a release of a substance listed in this Section was installed after July 28, 1989, the owner or operator is eligible to access the Underground Storage Tank Fund if it is demonstrated to the Office of the State Fire Marshal the tank was installed and operated in accordance with Office of the State Fire Marshal regulatory requirements. Office of the State Fire Marshal certification is prima facie evidence the tank was installed pursuant to the Office of the State Fire Marshal regulatory requirements.

415 ILCS 5/57.9.

In this case, the facts in the administrative record clearly indicate that the Village acquired an ownership interest in the Site, performed responsible corrective action at the Site, and notified the IEPA that the Village elected to proceed as an “owner” under Title XVI of the Act. Further, the fact that the IEPA approved \$38,560.48 in costs proves that the Village is otherwise eligible to access the LUST Fund.

Indeed, the IEPA accepted the Village’s election to proceed as owner on March 2, 2006, subject only to a determination of eligibility by the OSFM. *See* AR at 006-1. On March 2, 2006 the IEPA informed the Village that:

As the new owner, you may be eligible to access the Underground Storage Tank Fund for payment of costs related to remediation of the release. For information regarding eligibility and the deductible amount to be paid, please contact the Office of the State Fire Marshal at 217/785-5878. *Id.*

This instruction from the IEPA makes sense because the OSFM is the state agency charged with the responsibility of determining the eligibility of “owners” to access the LUST Fund, whereas the IEPA’s role is limited to analyzing whether particular costs are reimbursable.

- 2. The General Assembly has assigned separate and distinct roles to the IEPA and OSFM in regard to the administration of the LUST Fund. The OSFM determines who is eligible to access the fund and the IEPA determines what particular costs are reimbursable.**

§57.4 of Title XVI of the Act provides that:

The Office of State Fire Marshal and the Illinois Environmental Protection Agency shall administer the Leaking Underground Storage Tank Program in accordance with the terms of this Title.

415 ILCS 5/57.4.

However, the General Assembly did not assign overlapping and redundant roles to the IEPA and OSFM for the administration of the LUST Program. Rather, §57.9(c) expressly states

that “[e]ligibility and deductibility determinations shall be made by the Office of the State Fire Marshal.” 415 ILCS 5/57.9(c). Thus, as the IEPA correctly stated in its March 2, 2006 correspondence to the Village, once the OSFM has determined that an owner is eligible to access the LUST Fund, the owner is entitled to reimbursement of reimbursable expenses. If the IEPA approves the propriety of the expenses, then the owner is entitled to reimbursement. *See* 415 ILCS 5/57.8(a).

But the IEPA has no statutory authority to veto an eligibility determination made by the OSFM, as it did in this case. According to law, the IEPA’s role in making LUST Fund reimbursement determinations is limited to auditing the appropriateness of the expenses incurred to determine whether they are reimbursable. *See* 415 ILCS 5/57.8(a)(1).

As the facts here demonstrate, on June 26, 2006, the OSFM determined that the Village was eligible for reimbursable expenses from the LUST Fund. A true and accurate copy of the eligibility and deductible determination made by the OSFM is attached hereto as **Group Exhibit B** and made a part hereof.⁷ Further, in its final decision dated February 2, 2010, the IEPA determined that all of the Village’s costs were reimbursable as related to proper corrective action, but modified and reduced the budget by eliminating \$74,774.82 in Remediation and Disposal Costs and \$4,141.00 for Analytical Costs, on the sole basis that the Village was not the “owner” when the costs were incurred. *See* AR at 021-3 and 4. This was improper because it is contrary to the plain and unambiguous statutory language and such an eligibility determination is the sole province of the OSFM, which had already found the Village to be eligible for reimbursement as the “owner.” These facts are not in dispute. Therefore, the IEPA’s decision at issue in this case must be reversed.

⁷ The eligibility and deductible determination made by the OSFM in this case is further supported by affidavit of counsel for the Village, which attached hereto as **Exhibit C** and made a part hereof. Moreover, a copy of the eligibility and deductible determination was attached to the Village’s Petition for Review as Group Exhibit D.

C. The IEPA's interpretation of Title XVI of the Act at issue in this case is not entitled to deference.

In this case, there is no need to consult the regulations, nor is there any need to give any deference to the IEPA's interpretation of Title XVI of the Act because the relevant provisions are clear and unambiguous. Pursuant to applicable law, the IEPA does not have the authority to determine eligibility for reimbursement from the LUST Fund.

Generally, where an administrative agency is charged with the administration of a statute, courts may defer to the agency's interpretation of statutory ambiguities. *Hadley v. Ill. Dept. of Corr.*, 224 Ill.2d 365, 370 (2007). However, as argued extensively above, the statutory provisions at issue here are plain and unambiguous. Moreover, the IEPA has no statutory authority to review whether an applicant is eligible to access the LUST Fund as an "owner." Therefore, no deference should be given to the IEPA's interpretation of the Act in regard to LUST Fund eligibility. Certainly, the IEPA's determinations regarding what expenses are reimbursable from the LUST Fund should be given deference because the IEPA was given the statutory authority to make such determinations. But the deference must stop there.

Further, even if the IEPA, not the OSFM, were charged with making LUST Fund eligibility determinations, the Board will not defer to an agency's interpretation that is contrary to the plain language of the statute. *Dean Foods v. Ill. Pollution Control Bd.*, 143 Ill.App.3d 322, 334 (1st Dist. 1986). Moreover, deference to an agency's interpretation of an ambiguous statute is only applied in instances where the agency's interpretation is continued and consistent so that the legislature may be regarded as having concurred with it. *Moy v. Dept. of Registration & Educ.*, 85 Ill.App.3d 27, 33 (1st Dist. 1980). Here, the IEPA's interpretation of the statute is a matter of first impression and has not reached the point being considered continued and consistent.

The IEPA's interpretation of Title XVI of the Act is arbitrary, capricious and contrary to the statutes plain and unambiguous language. Therefore, the Board should not defer to the IEPA's interpretation and should reverse the IEPA's decision at issue here.

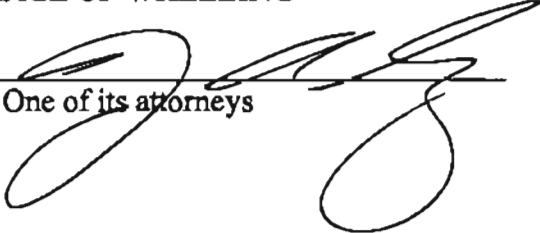
CONCLUSION

The IEPA has determined that all of the Village's costs for which it is seeking reimbursement are reimbursable costs under Title XVI of the Act. The OSFM has determined that the Village is eligible to access the LUST Fund as an "owner." Therefore, the Board should reverse the IEPA's final decision, award the Village reimbursement from the LUST Fund in the amount of \$78,915.82, and order the IEPA to reimburse the Village for its attorneys' fees and costs associated with this appeal. The Village requests further relief as may be equitable and just.

Dated: October 29, 2010

Respectfully submitted,

VILLAGE OF WHEELING

By: 
One of its attorneys

Dennis G. Walsh
Jason A. Guisinger
KLEIN, THORPE AND JENKINS, LTD.
20 North Wacker Drive, Suite 1660
Chicago, IL 60606
(312) 984-6400

Exhibit A

OBAS UM 221493/22079460

**TRUSTEE'S DEED
(ILLINOIS)**

0020942293

1306/0254 45 001 Page 1 of 3
2002-08-27 11:49:06
Cook County Recorder 25.00

THIS INDENTURE, made this 9th
day of August, 2002, between
WILLIAM ALEXANDER as
trustee under the William
Alexander Revocable Trust dated the
1st day of November, 1996,
grantor and



VILLAGE OF WHEELING
255 W. Dundee Rd.
Wheeling, IL 60090

Grantee _____

WITNESSETH, That grantor _____, in consideration of the sum of TEN and NO/100THS (\$10.00) DOLLARS, receipt whereof is hereby acknowledged, and in pursuance of the power and authority vested in the grantor _____ as said trustee and of every other power and authority the grantor _____ hereunto enabling, does hereby convey and quit claim unto the grantee _____, the following described real estate, situated in the County of Cook and State of Illinois, to wit:

Lot 12 (except the West 25 feet as measured at right angles to the West line of said Lot 12) in Rosegate Subdivision, being a Resubdivision of Lot A in Block 12 in Meadowbrook Unit No. 3, a Subdivision of part of the North Half of Section 11, Township 42 North, Range 11, East of the Third Principal Meridian, and part of the North West Quarter of Section 12, Township 42 North, Range 11, East of the Third Principal Meridian, according to Plat of said Rosegate Subdivision registered in the Office of the Registrar of Titles in Cook County, Illinois on November 8, 1962 as Document 2064839.

Subject to: General Real Estate Taxes for 2001 and subsequent years; easements of record;


together with the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining.

Permanent Real Estate Index Number(s): 03-12-116-022

Address(es) of real estate: 434 S. Milwaukee Ave., Wheeling, IL 60090

IN WITNESS WHEREOF, the grantor _____, as trustee _____ as aforesaid, has here unto set his hand and seal _____ the day and year first above written.

as Trustee as aforesaid
Print or Type Name

(Seal)  (Seal)

as Trustee as aforesaid
Print or Type Name
William Alexander

2
94
0

BOX 333-CTI

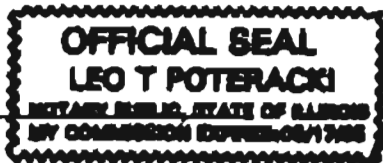
STATE OF ILLINOIS

1888.

COUNTY OF COOK

I, the undersigned, a Notary Public in and for said County, in the State aforesaid, DO HEREBY CERTIFY that WILLIAM ALEXANDER personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that he signed, sealed and delivered the said instrument as his free and voluntary act as such trustee, for the uses and purposes therein set forth.

Given under my hand and official seal, this 9 th day of August, 2002.



Commission expires

[Signature]

Notary Public

This instrument was prepared by:

LEE POTERACKI
Nudo, Poteracki & Assoc., P.C.
1700 Higgins Road, Suite 650
Des Plaines, Illinois 60018

MAIL TO:

Recorder's Box 324
(NFC)

SEND SUBSEQUENT TAX BILLS TO:

Village of Wheeling
255 W. Dundee
Wheeling, IL 60090

20942293

Exempt under provisions of Paragraph
b Section 4, Real Estate Transfer
Tax Act.

8-9-2002
Date

[Signature]

Buyer, Seller or Representative

STATEMENT BY GRANTOR AND GRANTEE

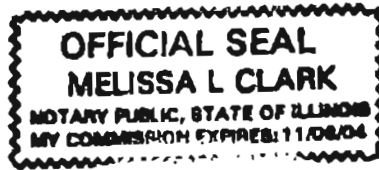
The grantor or his agent affirms that, to the best of his knowledge, the name of the grantee shown on the deed or assignment of beneficial interest in a land trust is either a natural person, an Illinois corporation or foreign corporation authorized to do business or acquire and hold title to real estate in Illinois, a partnership authorized to do business or acquire and hold title to real estate in Illinois, or other entity recognized as a person and authorized to do business or acquire and hold title to real estate under the laws of the State of Illinois.

Dated 8-9, 2002 Signature: [Signature]
Grantor or Agent

Subscribed and sworn to before me by the said LEE POTERACKI

this 9 day of August

[Signature]
Notary Public



21942293

The grantee or his agent affirms and verifies that the name of the grantee shown on the deed or assignment of beneficial interest in a land trust is either a natural person, an Illinois corporation or foreign corporation authorized to do business or acquire and hold title to real estate in Illinois, a partnership authorized to do business or acquire and hold title to real estate in Illinois, or other entity recognized as a person and authorized to do business or acquire and hold title to real estate under the laws of the State of Illinois.

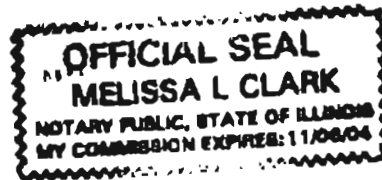
Dated August 9, 2002 Signature: [Signature]
Grantor or Agent

Subscribed and sworn to before me by the

said Natalie Colon

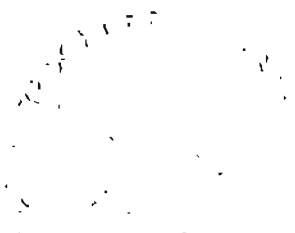
this 9 day of August

[Signature]
Notary Public



NOTE: Any person who knowingly submits a false statement concerning the identity of a grantee shall be guilty of a Class C misdemeanor for the first offense and of a Class A misdemeanor for subsequent offenses.

[Attach to deed or ABI to be recorded in Cook County, Illinois, if exempt under provisions of Section 4 of the Illinois Real Estate Transfer Tax Act.]



I CERTIFY THAT THIS
IS A TRUE AND CORRECT COPY

OF DOCUMENT # 0020942293

OCT 21 10

RECORDER OF DEEDS COOK COUNTY

Exhibit B

GROUP EXHIBIT D



Office of the Illinois
State Fire Marshal

General Office
217-785-8888

FAX

217-782-1882

Divisions

ARSON INVESTIGATION

217-782-0116

BOILER and PRESSURE

VESSEL SAFETY

217-782-8888

FIRE PREVENTION

217-785-4714

MANAGEMENT SERVICES

217-782-8888

INSPECTION

217-785-8828

HUMAN RESOURCES

217-785-1026

PERSONNEL STANDARDS

and EDUCATION

217-782-4842

PETROLEUM and

CHEMICAL SAFETY

217-785-8878

PUBLIC INFORMATION

217-785-1821

WEB SITE

www.state.il.us/sfm

CERTIFIED MAIL - RECEIPT REQUESTED #7005 1820 0007 5291 5789

June 28, 2006

Village of Wheeling
111 S. Northgate Parkway
Wheeling, IL 60090

In Re:

Facility No. 2-003674
IEMA Incident No. 95-1688
GWA, Inc. d/b/a The Auto Shop
434 S. Milwaukee Ave.
Wheeling, Cook Co., IL

Dear Applicant:

The Reimbursement Eligibility and Deductible Application received on May 25, 2006 for the above referenced occurrence has been reviewed. The following determinations have been made based upon this review.

You have filed an "Election to Proceed as Owner" and have received acceptance from the Illinois Environmental Protection Agency. It has been determined, therefore, that you are eligible to seek payment of costs in excess of \$10,000. The costs must be in response to the occurrence referenced above and associated with the following tanks:

Eligible Tanks

- Tank 1 6,000 gallon Gasoline
- Tank 2 4,000 gallon Gasoline
- Tank 3 4,000 gallon Diesel

You must contact the Illinois Environmental Protection Agency to receive a packet of Agency billing forms for submitting your request for payment.

An owner or operator is eligible to access the Underground Storage Tank Fund if the eligibility requirements are satisfied:

1. Neither the owner nor the operator is the United States Government.
2. The tank does not contain fuel which is exempt from the Motor Fuel Tax Law.
3. The costs were incurred as a result of a confirmed release of any of the following substances:

"Fuel", as defined in Section 1.19 of the Motor Fuel Tax Law

Aviation fuel

Heating oil

Kerosene

Used oil, which has been refined from crude oil used in a motor vehicle, as defined in Section 1.3 of the Motor Fuel Tax Law.

4. The owner or operator registered the tank and paid all fees in accordance with the statutory and regulatory requirements of the Gasoline Storage Act.
5. The owner or operator notified the Illinois Emergency Management Agency of a confirmed release, the costs were incurred after the notification and the costs were a result of a release of a substance listed in this Section. Costs of corrective action or indemnification incurred before providing that notification shall not be eligible for payment.
6. The costs have not already been paid to the owner or operator under a private insurance policy, other written agreement, or court order.
7. The costs were associated with "corrective action".

This constitutes the final decision as it relates to your eligibility and deductibility. We reserve the right to change the deductible determination should additional information that would change the determination become available. An underground storage tank owner or operator may appeal the decision to the Illinois Pollution Control Board (Board), pursuant to Section 57.9 (c) (2). An owner or operator who seeks to appeal the decision shall file a petition for a hearing before the Board within 35 days of the date of mailing of the final decision, (35 Illinois Administrative Code 105.102(a) (2)).

For information regarding the filing of an appeal, please contact:

Dorothy Gunn, Clerk
Illinois Pollution Control Board
State of Illinois Center
100 West Randolph, Suite 11-300
Chicago, Illinois 60601
(312) 814-3620

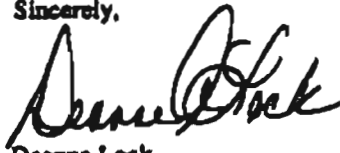
The following tanks are also listed for this site:

Tank 4 500 gallon Used Oil

Your application indicates that there has not been a release from these tanks under this incident number. You may be eligible to seek payment of corrective action costs associated with these tanks if it is determined that there has been a release from one or more of these tanks. Once it is determined that there has been a release from one or more of these tanks you may submit a separate application for an eligibility determination to seek corrective action costs associated with this/these tanks.

If you have any questions, please contact our Office at (217) 785-1020 or (217) 785-5878.

Sincerely,



Deanne Lock
Administrative Assistant
Division of Petroleum and Chemical Safety

cc: IEPA
Facility File

2-003674
RECEIVED
MAY 25 2006
5-06

Leaking Underground Storage Tank Fund
Eligibility and Deductible Application

DIV. OF PETROLEUM
CHEMICAL SAFETY

All underground storage tank owners or operators planning to seek reimbursement of corrective action costs from the Leaking Underground Storage Tank (LUST) Fund must submit this application. Instructions and definitions to aid in completing the application are attached.

The application must be completed in its entirety. Answers of unknown are not accepted and may be grounds for returning your application. All signatures and seals must be originals signed in ink. Incomplete applications will be returned to the Applicant. Any revisions to the original application must be dated and initialed by the person entering the new information. This must be the same person who signs the application. If a facility is not in compliance with registration requirements, the application will be returned.

Do not submit IEPA reports or bills with the application. A duplicate copy of the application is not required. Following the review of the application, the Applicant will receive a certified letter of eligibility stating the deductible amount.

OSFM Facility ID #: 2-003674

1. Name of Applicant: VILLAGE OF WHEELING

Current Tank Owner: X Current Tank Operator _____ Former Tank Owner: _____ Former Tank Operator: _____

Mailing Address of Applicant: 111 S. NORTHGATE PARKWAY

City: WHEELING State: IL Zip: 60090

Contact Person: F. WALLACE DOUTHWAITE

2. Current Owner: _____

Tank _____ Property: _____ Lessee: _____ (check all that currently apply)

Mailing Address: _____

City: _____ State: _____ Zip: _____

Phone: () _____

a) Date Facility Property Purchased: 2003 Leased: _____

b) Were tanks in the ground on date of purchase/lease? Yes _____ No X

c) If answer to 2b is no, were tanks installed after your purchase/lease? Yes _____ No X

d) Have you ever operated these tanks: pumped product in or out during the ordinary course of operation?
Yes _____ No X

The OSFM is requesting disclosure of information to process your Eligibility and Deductible Application in order to accomplish the statutory purpose as stated in 415 ILCS, Act 5, Environmental Protection Act. This is REQUIRED because failure to provide the requested information will result in this form not being processed, and there will be no eligibility or deductible determination for purposes of the LUST Fund. This form has been approved by the Forms Management Center.

3. Previous owner/operator: GWA AUTO SHOP c/o MR. WILLIAM ALEXANDER

Tank: Property: Lessee: (check all that apply)

Current mailing address: N/A

City: _____ State: _____

Phone: () _____

RECEIVED
MAY 25 2006

DIV. OF PETROLEUM
CHEMICAL SAFETY

4. Facility Name: GWA AUTO SHOP

Facility Address: 434 S MILWAUKEE AVENUE

City: WHEELING County: COOK

5. Incident # for the occurrence under which you intend to seek reimbursement: 951688

6. Name and official title of the person who notified IEMA of the occurrence and the date reported:
Name/Title: MR. WILLIAM ALEXANDER Date Reported: 8/9/1995

7. Other incident numbers reported at the site: (A separate application must be filed for each occurrence which you intend to seek reimbursement. Please indicate if any of the additional incident numbers are erroneously reported incidents, or a second reporting of the same occurrence for which you intend to seek reimbursement.)

Other Incident Numbers

Date Reported

1) _____

2) _____

3) _____

8. Total number of USTs at the site: 4 (include USTs presently at the site and USTs that have been removed or abandoned in place)

9. Total number of USTs at the site that have had a release: _____ (An UST release includes a leak from an underground tank, a release from underground piping associated with the tank, plus overfills of the UST during filling.)

10. Type of release: (check all that apply) Answers of unknown will not be accepted.

UST leak _____ Overfill of an UST during filling

_____ Underground piping leak _____ Other (detailed description required)

a) How was the release discovered? (check all that apply)

_____ Inventory Loss _____ Subsurface Investigation

_____ Product in Observation Well _____ Significant Event (i.e., overfill, vandalism, etc.)

_____ Subsurface Work/Repair Other (detailed description required)

b) Date release discovered: 8/9/1995 during removal of tanks

11. Is the UST owner or operator the U.S. government? Yes _____ No X

12. Is the UST owner or operator a rail carrier registered pursuant to Section 18c-7201 of the Illinois Vehicle Code? Yes _____ No X

13. Is the UST located at an airport with over 300,000 operations per year, for years prior to 1991, and over 170,000 operations per year beginning in 1991, located in a city of more than 1,000,000 inhabitants? Yes _____ No X

14. Date corrective action work began or scheduled to begin: FEBRUARY 11, 2003 MAY 25 2005

15. Date corrective action work completed: JULY 25, 2003

DIV. OF PETROLEUM
CHEMICAL SAFETY

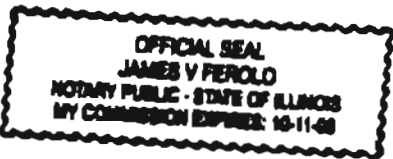
The following certification must be completed by the UST owner/operator:

I, F. WALLACE DOUTHWATE (circle the following that apply) the Owner Operator or designated agent of 434 S MILWAUKEE AVENUE leaking underground storage tank site, do hereby certify under penalty of law, that this application and the supporting documentation attached hereto were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gathered and evaluated the information submitted therein. I affirm that the information is, to the best of my knowledge and belief, true, accurate and complete. Such affirmation is made under penalty of perjury as defined in Section 32-2 of the Criminal Code, 720 ILCS 5/32-2. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowingly committing violations. The "Eligibility and Deductible Determination" decided pursuant to this document is subject to the costs defined in Title 35: Environmental Protection Illinois Administrative Code (IAC) 731, 732, 742 and Public Act 92-0554.

Signature (owner, operator or designated agent)
[Handwritten Signature]

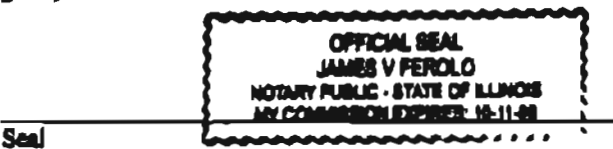
Title: VILLAGE MANAGER

Date: MAY 12, 20 06



Subscribed and sworn to before me this 12th day of MAY, 20 06
(application must be notarized when the certificate is signed)

[Handwritten Signature]
Notary Public



Note: Original signatures in ink and seals are required for the certification and notarization. Attach the UST information sheet behind this page. This form may be copied on a photocopier but may not be altered in any way. DO NOT reproduce on a computer; this will be grounds for rejection.

UST Information Sheet

The information below must be provided for each UST at the site. (USTs presently at the site and USTs that have been removed or abandoned)

All spaces must be completed for each tank. Answers of unknown will not be accepted.

You may photocopy this page if more space is needed.

OSFM Facility ID #: 2-003674

Circle one under each column.

Tank ID #	Product Code	Size (Gallons)	Date Installed	Date Registered	Date Out of Service	Date Removed	IEMA Number	Date IEMA Notified	Registration Fee Paid	Has UST Had a Release	In UST Legally Abandoned	In-Place?
1	G	6,000	1/1/1974	3/26/1988	5/1/1995	8/9/1995	951688	8/9/95	Y	N	Y	N
2	G	4,000	1/1/1974	3/26/1988	5/1/1995	8/9/1995	951688	8/9/95	Y	N	Y	N
3	D	4,000	1/1/1974	3/26/1988	5/1/1995	8/9/1996	951688	8/9/95	Y	N	Y	N
4	U	500	1/1/1902	6/20/1995	12/3/1993	8/9/1995			Y	N	Y	N
									Y	N	Y	N
									Y	N	Y	N
									Y	N	Y	N
									Y	N	Y	N
									Y	N	Y	N
									Y	N	Y	N
									Y	N	Y	N
									Y	N	Y	N

Product Codes - (refer to instructions for definitions): G - Gas, D - Diesel, A - Aviation fuels, K - Kerosene, M - New Motor Oil
 Substance (description required); N - Any product not included under another code. (description required)

PETROLEUM
 MAY 25 2006

Comments:

DIV. OF PETROLEUM
 CHEMICAL SAFETY

Exhibit C

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

AFFIDAVIT OF JASON A. GUISINGER

I, Jason A. Guisinger, being duly sworn upon oath depose and state as follows:

1. I am one of the Village Attorneys for the Village of Wheeling, Illinois ("Village").
2. In my position as one of the Village Attorneys of the Village, I am familiar with and have access to Village records. Moreover, I am familiar with the Village's record creation, retention and related public disclosure requirements pursuant to Village ordinance and policy, the Illinois Local Record Retention Act and Illinois Freedom of Information Act.
3. I have worked extensively on the Village's appeal to the Illinois Pollution Control Board of the Illinois Environmental Protection Agency's LUST Fund decision captioned as *Village of Wheeling/GWA Auto Shop v. Illinois Environmental Protection Agency*, PCB No. 10-070.
4. In the course of my work on said matter and after review of the Village's records and the Cook County Recorder of Deeds records, I have determined that the Village acquired title to the property commonly known as 434 S. Milwaukee Avenue, Wheeling, Illinois ("Site"), on August 9, 2002, by quitclaim deed recorded with the Cook County Recorder of Deeds as document no. 0020942293.
5. Moreover, after a review of the Village's records, as well as confirmation with the Illinois Office of State Fire Marshal ("OSFM"), I have determined that on June 28, 2006, the OSFM determined that the Village was eligible to access the LUST Fund for corrective action taken at facility no. 2-003674, which is the Site, and assigned a \$10,000 deductible. A true and accurate copy of the OSFM eligibility and deductible determination is attached to the Village's Motion for Summary Judgment as Group Exhibit B, along with the Village's application to the OSFM for said determination. Moreover, the documents at Group Exhibit B are public records that were made by the Village at or near the time eligibility and deductible decisions were made by persons with knowledge of these matters, they were kept in the course of the regularly conducted activity of the Village and the documents were made by the regularly conducted activity as a regular practice of the Village.
6. I make these statements based on my own personal knowledge and I could testify competently thereto if called upon to do so.

Further affiant sayeth naught.


Jason A. Guisinger
Village Attorney

Subscribed and sworn to before
me this 29th day of October, 2010


Notary Public

259632_1

