

Electronic Filing - Received, Clerk's Office, January 7, 2011  
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: Kenneth W. Funk, Esq. Bradley P. Halloran  
Karen Kavanagh Mack, Esq. Hearing Officer  
Emily N. Masalski, Esq. Illinois Pollution Control Board  
Deutsch, Levy & Engel, Chartered James R. Thompson Center, Suite 11-500  
225 W. Washington Street, Suite 1700 100 West Randolph Street  
Chicago, IL 60606 Chicago, Illinois 60601

PLEASE TAKE NOTICE that on January 7, 2011, I filed with the Clerk of the Illinois Pollution Control Board, Respondent's, Illinois Environmental Protection Agency, Response to Petitioner's Cross-Motion for Summary Judgment, a copy of which is attached and served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY

By:   
Gerald T. Karr  
Senior Assistant Attorney General  
Environmental Bureau  
69 West Washington Street  
Suite 1800  
Chicago, Illinois 60602  
(312) 814-3369

DATED: January 7, 2011

**THIS FILING IS SUBMITTED ON RECYCLED PAPER**

**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.	)	

**RESPONDENT'S RESPONSE TO PETITIONER'S  
CROSS-MOTION FOR SUMMARY JUDGMENT**

Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, ("Illinois EPA" or "Agency"), by and through, Lisa Madigan, Attorney General of the State of Illinois, responds in opposition to Petitioner's, METROPOLITAN PIER AND EXPOSITION AUTHORITY ("Petitioner" or "MPEA") cross-motion for summary judgment. For the reasons set forth herein, Respondent respectfully request that the Board deny Petitioner's cross-motion for summary judgment and grant Respondent's motion for summary judgment.

**INTRODUCTION**

Petitioner takes issue with the facts cited by Respondent in its cross-motion for summary judgment and argues that it excludes much of the history of the Parties' communications. This history is rightly excluded, as these facts are irrelevant to the issue at hand. What is on review here is the Illinois EPA's final decision dated February 18, 2010, denying Petitioner's request for payment from the Underground Storage Tank Fund ("UST Fund"). It is the denial letter that frames the issues for the Board. *ESG Watts, Inc. v. Pollution Control Board*, 286 Ill. App.3d 325, 335, 676 N.E.2d 299, 306, 221 Ill. Dec. 778 (1997). Further, it is abundantly clear that 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. The Respondent denied Petitioner's request for reimbursement because it was not submitted in a timely fashion as required by the regulations as set out in the Agency's February 18, 2010, denial letter and the burden rests with the Petitioner to show that it met all the requirements for reimbursement. Petitioner cannot meet this burden no matter how many extraneous facts it raises or claims of mischaracterizations by the Respondent. As such the Petitioner's cross-motion for summary judgment should be denied and the Respondent's motion for summary judgment should be allowed.

### ARGUMENT

Petitioner raises three issues in support of its cross-motion for summary judgment, the first relates to approval of its reimbursement request by operation of law. The major flaw with this argument is that requests for reimbursement can only be granted by operation of law if the Agency receives a complete (emphasis added) application. The application Petitioner is referring to was not complete; therefore the Agency could not take final action. The argument that there were references to ownership by the Petitioner in other Agency documents is irrelevant. The regulations state a complete application must include a copy of the Office of State Fire Marshal ("OFSM") Eligibility and Deductibility Determination. 35 Ill. Adm. Code 732.601 (b) (3). The application had no such document relating to the underground storage tank for which cleanup reimbursement funding was requested. The Respondent was correct in denying this reimbursement request as untimely. The Petitioner's cross-motion for summary judgment must be denied on this argument.

The second argument Petitioner makes in support of its cross-motion for summary judgment is that the Agency had numerous documents that purport to show ownership of the tanks vested with the Petitioner. Again, this argument misses the point that the rules require a completed application for reimbursement within one year of any No Further Remediation

("NFR") Letter for which reimbursement is requested. The record is quite clear that the NFR was issued on January 23, 2008 and Petitioner submitted its application for reimbursement on November 18, 2009. Petitioner makes an argument that its November 18, 2009 application relates back to a December 22, 2008 OSFM determination letter, but yet offers no legal authority for this argument. There is no requirement that the Agency search through its files to supplement incomplete reimbursement requests. The UST Fund is a limited resource and there are rules and regulation in place to insure that only those applicants that have met the requirements for reimbursement receive their requested funds. The Agency was not acting unreasonably or erroneously when it denied the Petitioner's reimbursement request. The Petitioner's cross-motion for summary judgment should be denied on this point as well.

The final argument that Petitioner makes in its cross-motion for summary judgment is the equitable argument of laches. Petitioner's position is that the Agency because of its conduct and the impact it would have on the Petitioner cannot now deny the application for reimbursement. The record is clear that the Petitioner received an Eligibility and Deductibility Determination from the OSFM on December 22, 2008. The problem was the application submitted by Petitioner for this determination was not accurate. It is through no fault of the Agency that the application submitted to the OSFM was in error. The Agency had no role in preparing the Eligibility and Deductibility Determination. It would be unreasonable to place the fault of others on the Agency and the limited resources of the UST Fund. Petitioner did get a corrected Eligibility and Deductibility Determination from OSFM on March 9, 2009, but then waited until November 18, 2009, over nine full months, to submit its application for reimbursement to the Agency. Nowhere in this scenario can it be claimed that the Agency lacked diligence. Petitioner did not have the proper paper work before the Agency as required by regulation, to allow the

Agency to process its claim. As stated before, there are limited resources in the UST Fund and for proper and efficient administration of this Fund there are certain steps that must be met to allow reimbursement. Petitioner did not meet those requirements and it cannot point to perceived actions or inactions of others to boot strap itself to eligibility for reimbursement.

**CONCLUSION**

The Petitioner's admissions in its Petition, taken together, establish that there is no genuine issue of material fact as to Petitioner's inability to receive reimbursement for corrective actions from the LUST Fund. Petitioner has failed in its burden and its cross-motion for summary judgment should be denied and 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: January 7, 2011

GERALD T. KARR  
Senior Assistant Attorney General  
Environmental Bureau  
69 West Washington Street, 18th Floor  
Chicago, Illinois 60602  
(312) 814-3369

**CERTIFICATE OF SERVICE**

I, GERALD T. KARR, an Assistant Attorney General in this case, do certify that on this 7th day of January, 2011, 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 Notice, 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