

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

METROPOLITAN PIER AND EXPOSITION)
AUTHORITY, an Illinois municipal corporation,)
)
Petitioner,) PCB 10-73
) (UST Fund Appeal)
v.)
)
ILLINOIS ENVIRONMENTAL PROTECTION)
AGENCY, an Illinois state agency,)
)
Respondent.)

NOTICE OF FILING

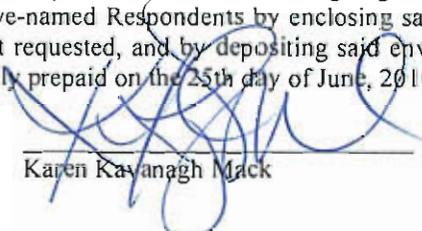
To: Division of Legal Counsel James G. Richardson, Esq.
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John Therriault
Assistant Clerk
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100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601-3218

PLEASE TAKE NOTICE that on June 25, 2010, we filed with the Clerk of the Illinois Pollution Control Board the originals and nine (9) copies each, via personal delivery, of **1) Appearance of Deutsch, Levy & Engel, Chartered and 2) Petition for Review Underground Storage Tank Fund Reimbursement Determination** for filing the above-entitled cause, copies of which are attached hereto.

CERTIFICATE OF SERVICE BY CERTIFIED MAIL

The undersigned hereby certifies that true and correct copies of the Notice of Filing, together with copies of the documents described above, were served upon the above-named Respondents by enclosing same in envelopes addressed to said Respondents, certified mail, return receipt requested, and by depositing said envelopes in a U.S. Postal Service mail box at Chicago, Illinois, with postage fully prepaid on the 25th day of June, 2010.



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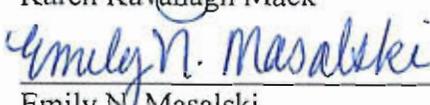
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APPEARANCE

Kenneth W. Funk, Karen Kavanagh Mack, and Emily N. Masalski of Deutsch, Levy & Engel, Chartered, enter their appearance in this proceeding on behalf of the METROPOLITAN PIER AND EXPOSITION AUTHORITY.



Kenneth W. Funk


Karen Kavanagh Mack


Emily N. Masalski

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**PETITION FOR REVIEW OF UNDERGROUND STORAGE
TANK FUND REIMBURSEMENT DETERMINATION**

Petitioner, the Metropolitan Pier and Exposition Authority ("MPEA"), by its attorneys, Deutsch, Levy & Engel, Chartered, petitions the Illinois Pollution Control Board, pursuant to 415 ILCS 5/57.8(i) and 415 ILCS 5/40, for review of the final determination of Respondent, the Illinois Environmental Protection Agency, with respect to Petitioner's claim for reimbursement of corrective action costs from the Illinois Underground Storage Tank Fund ("UST Fund") and in support thereof, states:

1. MPEA is the current owner of the former Brink's Incorporated Site, 234 E. 24th Street, Chicago, Illinois (the "Facility"), including the underground storage tanks and related piping. On or about January 1, 2004, MPEA acquired the Facility from Brink's Incorporated ("Brink's") pursuant to a Stipulation for Entry of an Agreed Final Judgment Order and Agreed Order of Possession ("Stipulation") in a condemnation action titled *Metropolitan Pier & Exposition Authority v. Brink's, Inc. et al.*, Circuit Court of Cook County Case No. 02 L 51299. The Stipulation assigned certain rights to MPEA to recover any UST corrective action costs from

the Agency's UST Fund. (Ex. 1, ¶5(A)-(F).) A copy of the Stipulation is attached hereto as Exhibit 1.

2. On or about April 16, 1998, Brink's notified the Illinois Emergency Management Agency ("IEMA") of a release of various petroleum products from existing and pre-existing underground storage tanks ("USTs") at its Facility, to which IEMA assigned Incident No. 98-0841.

3. On or about December 21, 1998, Brink's submitted a Reimbursement Eligibility and Deductibility Application to the Office of the State Fire Marshal ("OSFM"). On or about February 8, 1999, OSFM issued a determination letter finding that corrective action costs associated with Tank 8 (10,000 gallon diesel) and Tank 9 (10,000 gallon gasoline) were both eligible for reimbursement. A copy of the February 8, 1999 OSFM Eligibility Determination letter is attached hereto as Exhibit 2.

4. On or about May 7, 1999, the Illinois Environmental Protection Agency (the "Agency") approved the Site Classification Work Plan and Site Classification Work Plan Budget submitted by Brink's.

5. On or about June 12, 2003, the Agency approved the Amended Site Classification Work Plan and Budget submitted by Brink's.

6. On or about January 1, 2004, MPEA acquired the Facility from Brink's via condemnation proceedings. As part of the acquisition by MPEA, a Stipulation was entered into between the parties and filed with the Circuit Court of Cook County, which provided, in part, "(F) Brink's agrees to assign to the Authority, if required by the IEPA, the right to apply for and

receive all LUST Fund Reimbursements for costs incurred by the Authority after its possession of the Subject Property." (Ex. 1, ¶5(F).)

7. After the change of ownership in January 2004, a supplemental site investigation was completed to establish the current soil and groundwater conditions at the Facility and to aid construction activities with the new facilities. The supplemental site investigation was completed in March and April 2004.

8. On or about December 27, 2004, MPEA submitted its High Priority Corrective Action Plan ("CAP") for the Facility to the Agency. MPEA submitted additional revisions to the Agency in March, May, and June 2005. The Amended CAP, proposed, *inter alia*, that the corrective action ("CA") would be completed in two phases. Phase I CA was conducted from August 24, 2004 to September 8, 2004 and included source removal via excavation and disposal of USTs and impacted soil. In January 2005, Phase II CA was completed and involved the assessment of groundwater conditions post source removal at the Facility and surrounding areas. A total of six monitoring wells were installed on and downgradient of the Facility from January 18, 2005 to January 25, 2005. Groundwater samples were collected from each of the wells on January 24, 2005 and January 25, 2005. Groundwater elevations were collected January 24, 2005 and January 28, 2005; February 1, 2005; and December 6, 2005.

9. On or about June 27, 2005, the Agency approved the Amended CAP with limited modification.

10. As a result of discussions with the Agency, on or about June 30, 2005, MPEA's environmental consultant URS Corporation sent correspondence to the Agency regarding the

change of ownership and acquisition of the Facility by MPEA. A copy of the June 30, 2005 correspondence to the Agency is attached as Exhibit 3.

11. On or about December 6, 2007, MPEA submitted a Second Amended CAP, Corrective Action Completion Report ("CACR"), and Corrective Action Plan Budget to the Agency.

12. On or about December 14, 2007, MPEA submitted its Application for Reimbursement from the Underground Storage Tank Fund ("Application for Reimbursement") in the amount of \$389,224.57 for the period from March 1, 2004 to December 9, 2005.

13. On or about January 16, 2008, MPEA submitted the Property Owner Summary for LUST Incident Number 980841 to complete the CACR previously submitted on December 7, 2007.

14. On or about January 23, 2008, the Agency approved the Second Amended CAP with limited modification to the Corrective Action Plan Budget. A copy of the January 23, 2008 approval letter from the Agency to MPEA is attached hereto as Exhibit 4.

15. By letter dated January 23, 2008 to MPEA, (Ex. 4, Attachment A) the Agency APPROVED a reimbursement budget in the following amounts:

Investigation Costs	\$10,865.00
Analysis Costs	\$6,345.00
Personnel Costs	\$113,497.00
Equipment Costs	\$584.00
Field Purchases and Other Costs	<u>\$263,319.00</u>
TOTAL:	\$394,610.00

16. On or about January 23, 2008, the Agency issued a No Further Remediation Letter ("NFR") to MPEA as "owner or operator of the underground storage tank system". (Ex. 5, ¶1.) A copy of the NFR issued to MPEA is attached hereto as Exhibit 5.

17. On October 30, 2008, the Agency issued MPEA its final determination in response to MPEA's Application for Reimbursement stating that MPEA needed to submit additional proof of ownership and eligibility (despite having already approved the CAP, CACR and Budget all submitted by MPEA), but that certain of the costs requested in the application were nonetheless allowed. Specifically, the entirety of MPEA's Application for Reimbursement was allowed, except for an apportionment of \$237,426.99 because not all of the tanks at the Site were eligible. Additionally, \$385.00 was disallowed because the line item exceeded the approved budget amount for Investigation Costs. A copy of the October 30, 2008 determination letter from the Agency to MPEA is attached hereto as Exhibit 6.

18. In response to the Agency's determination letter, on or about November 19, 2008, less than one year after the Agency's issuance of the NFR letter, MPEA re-submitted its Eligibility and Deductibility Application to OSFM and submitted additional documentation regarding ownership of the Facility to the Agency. A copy of the November 19, 2008 re-submittal Eligibility and Deductibility Application to OSFM is attached hereto as Exhibit 7.

19. On or about December 22, 2008, OSFM rendered its final determination on MPEA's re-submitted Eligibility and Deductibility Application, finding that MPEA was eligible for reimbursement for corrective action costs associated with Tank 8, but inexplicably omitting the eligibility as to Tank 9, which the OSFM previously determined as eligible on February 8, 1999. A copy of the OSFM's Eligibility Determination letter is attached hereto as Exhibit 8.

20. On or about February 3, 2009, MPEA submitted an Amended Eligibility and Deductibility Application to OSFM regarding Tank 9's eligibility for reimbursement. A copy of the February 3, 2009 Amended Eligibility and Deductibility Application is attached hereto as Exhibit 9.

21. On or about March 9, 2009, OSFM rendered its Amended Eligibility determination, finding that MPEA was in fact eligible to seek corrective action costs in excess of \$10,000 associated with **both** Tank 8 (10,000 gallon diesel fuel) and Tank 9 (10,000 gallon gasoline). A copy of the OSFM's Amended Eligibility Determination letter is attached hereto as Exhibit 10.

22. On November 18, 2009, MPEA re-submitted its Application for Reimbursement from the Underground Storage Tank Fund to the Agency, not for purposes of reconsideration of costs already approved or submitting additional costs, but solely for purposes of providing the "proof of ownership" and "eligibility" determination requested by the Agency in its October 30, 2008 letter. A copy of the November 18, 2009 Supplemental Application is attached hereto as Exhibit 11.

23. On February 18, 2010, the Agency issued a final determination denying MPEA's Application for Reimbursement on the basis that it was submitted more than one year after the issuance of the NFR. At the same time, the letter included an identical finding as the October 30, 2008 determination requiring an apportionment in the amount of \$237,426.99, based on the total gallons eligible for payment from the UST Fund, and that Investigation Costs were eligible for reimbursement subject to \$385.00 in "deductions" set forth in the letter. A copy of the February 18, 2010 final determination letter from the Agency to MPEA is attached hereto as Exhibit 12.

24. MPEA requests that the Board reverse the Agency's final determination and denial of the Application for Reimbursement because it was based upon the application for reimbursement submitted more than one year after issuance of the NFR. To the contrary, MPEA's Application for Reimbursement was timely submitted on December 14, 2007, and was approved by the Agency on October 30, 2008, but was only subject to proof of ownership and submission of an eligibility and deductibility determination from OSFM, even though OSFM had previously rendered Tank 8 and Tank 9 eligible for reimbursement in its February 8, 1999 determination letter. (*See Ex. 2.*)

25. Furthermore, the proof of MPEA's ownership was provided to the Agency on or about June 30, 2005, and the requested Eligibility and Deductibility Application was timely re-submitted by MPEA to OSFM on November 19, 2008, less than one year after the Agency's issuance of the NFR. Any filings by MPEA to the OSFM regarding eligibility, or to the Agency as to reimbursement, were made only to again provide ownership and eligibility information to the Agency, which it already possessed from earlier filings. In addition, the work performed by MPEA was conducted pursuant to the approved Second Amended CAP, as modified by the Agency, and was necessary to remediate the contamination associated with LUST Incident No. 980841. Moreover, the work performed was completed and a "No Further Remediation" letter, dated January 23, 2008, was ultimately issued by the Agency.

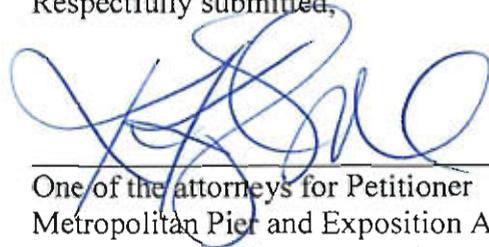
26. Accordingly, the Agency's denial of the Modified Application for Reimbursement is improper and should be reversed.

27. MPEA reserves the right to present additional grounds for reversal of the Agency's final reimbursement determination with respect to the \$389,224.57 disallowed costs, as they may appear during the course of this appeal.

WHEREFORE, the Petitioner, Metropolitan Pier and Exposition Authority, respectfully requests that this Board grant a hearing in this matter and reverse the Agency's February 18, 2010 final reimbursement determination with respect to the \$389,224.57 disallowed costs and remand this matter to the Agency with instruction to approve reimbursement of the disallowed corrective costs, and any other relief as the Board deems just and appropriate.

Respectfully submitted,

By:



One of the attorneys for Petitioner
Metropolitan Pier and Exposition Authority,
an Illinois municipal corporation

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