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:

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PLEASE TAKE NOTICE that on December 15, 2010, the undersigned filed with the Clerk of the Illinois Pollution Control Board, via the Clerk's Office On-Line (COOL) System, ***Petitioner's Cross Motion for Summary Judgment*** and ***Memorandum of Law in Response to Motion for Summary Judgment and Cross-Motion for Summary Judgment*** in the above-entitled cause, a copy of which is attached hereto.

Respectfully submitted,

By: _____

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

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PETITIONER'S CROSS-MOTION FOR SUMMARY JUDGMENT

Petitioner, the Metropolitan Pier and Exposition Authority ("MPEA"), by its attorneys, Deutsch, Levy & Engel, Chartered, hereby respectfully moves the Illinois Pollution Control Board ("Board"), pursuant to 35 Ill. Admin. Code 101.516, for summary judgment in its favor and against Respondent, the Illinois Environmental Protection Agency (the "Agency"). In support of its Motion, MPEA has filed a Memorandum of Law in Support of Cross-Motion for Summary Judgment, in combination with its Response to the Agency's Motion for Summary Judgment.

Respectfully submitted,

By: _____

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

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MEMORANDUM OF LAW IN RESPONSE TO MOTION FOR SUMMARY JUDGMENT AND IN SUPORT OF PETITIONER'S CROSS-MOTION FOR SUMMARY JUDGMENT

Petitioner, METROPOLITAN PIER AND EXPOSITION AUTHORITY ("MPEA"), by its attorneys, responds in opposition to respondent ILLINOIS ENVIRONMENTAL PROTECTION AGENCY's ("Agency") motion for summary judgment. MPEA further cross-moves for summary judgment in its favor. For the reasons demonstrated in this response and cross-motion, the Board should deny the Agency's motion, and enter summary judgment in favor of MPEA.

INTRODUCTION

This case involves an appeal brought by MPEA, challenging the Agency's improper decision to deny reimbursement of certain costs incurred in remediating petroleum contamination at MPEA's facility located at 234 E. 24th Street, Chicago, Illinois ("Facility"). This denial occurred despite the uncontroverted facts that: 1) the subject USTs were timely registered and repeatedly determined (three times) to be eligible for reimbursement by the Office of the State Fire Marshal ("OSFM"); 2) the subject remedial costs were incurred pursuant to a Corrective Action Plan and Budget

submitted by MPEA and approved by the Agency; 3) the Agency issued numerous decision letters, including a No Further Remediation Letter ("NFR letter"), identifying MPEA as the Facility's owner; and 4) the application for reimbursement was timely made. The evidence reveals that the Agency had, and effectively approved by its own actions, all of the information required to render its decision on the reimbursement application within the timeframe prescribed by statute. To the contrary, it was in fact the Agency that failed to issue its decision on the reimbursement request within the time required under applicable regulations, despite being given a 90-day extension of the decision deadline by MPEA. Either by operation of law or the substance of the reimbursement request, reimbursement of MPEA's remedial expenses is required.

Even assuming *arguendo* that the "ownership" component of the reimbursement request was not timely submitted by MPEA, the doctrine of laches prevents the Agency from now attempting to bar MPEA's reimbursement request, since MPEA acted in reliance on the Agency's numerous actions and communications acknowledging it as the owner of the Facility. The Agency's decision should be overturned, and summary judgment granted in favor of MPEA.

STANDARD OF REVIEW

In an appeal of an Agency decision with respect to a LUST Fund reimbursement request, the standard of review is whether the reimbursement application, as submitted by the petitioner, demonstrates compliance with the Environmental Protection Act ("Act") and the Board's regulations. *Rantoul Township High School District No.* 193 *v. IEPA,* PCB 03-42 (April 17, 2003). In rendering its decision, the Board will consider all information that was before the Agency prior to its final determination regarding the

issues on appeal. *Kathe's Auto Service Center v. IEPA*, PCB 95-43, slip op. at 14 (May 18, 1995).

FACTUAL BACKGROUND

While the Agency's Motion has included some of the relevant facts in this matter, it excludes much of the history of the Parties' communications about the Facility and mischaracterizes other key facts. As such, supplementation and clarification is necessary. These additional facts shed further light on what can only be the correct conclusion in this case: that MPEA timely and on multiple occasions provided the Agency with sufficient documentation to approve its reimbursement request.

On or about April 16, 1998, Brink's Incorporated ("Brink's"), the prior owner of the Facility, 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. Thereafter, limited corrective action was undertaken at the Facility by Brink's. On or about December 21, 1998, an Eligibility and Deductibility Application was submitted to the OSFM; on February 8, 1999 the OSFM determined the subject USTs to be eligible. (AR No. 049).

In response to various applications seeking reimbursement from the Underground Storage Tank Fund, the Agency acknowledged the conditions at the Facility and the costs incurred by Brink's for investigation and classification of the Facility. On May 7, 1999, the Agency authorized reimbursement to Brink's in the sum of $34,919.02 (AR No. 09). On February 2, 2000, the Agency authorized reimbursement to Brink's in the sum of $162,118.26 (AR No. 051). On June 12, 2003, the Agency authorized an additional

reimbursement to Brink's in the sum of $7,892.86 (AR No. 020). On July 9, 2003, the Agency approved the Site Classification Completion Report submitted by Brink's on June 30, 2003, and approved the "High Priority" site classification. (AR No. 024). On January 23, 2005, after further review by the Agency of a Brink's reimbursement request, submitted two (2) years prior, dated March 24, 2003, the Agency authorized an additional $80,545.36 reimbursement to Brink's. (AR No. 057).

On January 1, 2004, the MPEA acquired the Facility from 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 to MPEA the right to recover any further UST corrective action costs from the Agency's UST Fund. (Pet. Ex. 1, ¶5(A)-(F)). Thereafter, on January 8, 2004, counsel for MPEA advised the Agency that MPEA had become the owner of the Facility, and the operation and maintenance of the remedial system at the site had been assumed by MPEA. (AR No. 025). The Agency acknowledged receipt of this letter on January 13, 2004. (AR No. 025). On or about August 11, 2004, MPEA submitted the Office of the State Fire Marshal (OSFM) form "Notification for Underground Storage Tank" as "New Owner," wherein MPEA described the Facility and described the USTs – indicating that the Facility was the same Facility where the Agency had previously approved reimbursement from the Underground Storage Tank Fund. (AR No. 026). The Agency acknowledged receipt of these forms on August 17, 2004 without comment or objection as to MPEA's standing. (AR No. 026). On June 30, 2005, MPEA through its consultant URS again advised the Agency of the change in ownership of the Facility.

(AR No. 38). The Agency acknowledged receipt of this form on July 1, 2005, again, without comment or objection as to MPEA's standing. (AR No. 39).

Thereafter, the Agency repeatedly acknowledged MPEA as the owner of the Facility, and from March 1, 2004 to December 9, 2005, reviewed several MPEA additional submissions without any comment as to its standing to make such submittals. In particular, on June 27, 2005, the Agency approved the Amended High Priority Corrective Action Plan initially submitted by MPEA on December 23, 2004, as amended on June 3, 2005 (AR Nos. 027, 035, 037). On December 6, 2007, MPEA submitted its Budget and related Billing Form for Leaking Underground Storage Tanks, therein certifying to Petitioner's ownership interest in the Facility by submitting the Owner/Operator and Professional Engineer Budget Certification Form for Leaking Underground Storage Tank Sites (AR No. 40; IEPA 0001296). Further, MPEA's Budget described and provided support for all of the activities and costs which MPEA planned to perform and incur in investigating site conditions and performing a lawful corrective action appropriate for the issuance of an NFR. (AR Nos. 027, 035, 037, 040). In addition, on December 6, 2007, MPEA submitted its Corrective Action Completion Report therein certifying to MPEA's ownership interest in the Facility (AR No. 41; IEPA 0001299). MPEA also submitted its LUST Fund Reimbursement Package ("Reimbursement Package") on December 14, 2007 (Second Mot. to Supp., Exhibit I).

On January 16, 2008, MPEA through its consultant URS submitted a Property Owner Summary Form, at the request of the Agency, to supplement its recent submittals from December 6, 2007 (AR No. 044). On January 23, 2008, Agency approved the Amended High Priority Corrective Action Plan and Budget, dated December 6, 2007,

with modification (AR No. 045). On January 23, 2008, the Agency also approved MPEA's Request for Issuance of a No Further Remediation, acknowledging MPEA's ownership of the Facility on p. 2 of the NFR letter (AR No. 046). In that decision letter, the Agency explicitly states that: "[p]ursuant to Section 57.10(d) of the Act, this letter shall apply in favor of the following parties: 1. Metropolitan Pier and Exposition Authority, the owner or operator of the underground storage tank system..." (emphasis added). (AR No. 046).

Thereafter, at the request of the Agency and via an Agency created form, dated March 19, 2008 (AR No. 060), MPEA granted the Agency an additional 90 days to review its Reimbursement Package. Pursuant to the express terms of that extension, the Agency's decision deadline was extended by 90 days to July 14, 2008. However, not until October 30, 2008 (more than 108 days after the agreed decision deadline and nearly 11 months after the Reimbursement Package was initially submitted), the Agency denied payment of the Reimbursement Package. Amazingly, the Agency determined, despite MPEA's numerous submissions and certifications to the Agency regarding change of ownership (AR Nos. 025, 026, 038, 039, 040, 041, 044) and the Agency's numerous approvals of plans, reports and budgets submitted by MPEA for the Facility, that MPEA was not the owner of the Facility. The Agency determined that yet another eligibility and deductibility decision needed to be made with regard to the USTs, even though the OSFM previously issued an eligibility and deductibility decision dated February 8, 1999, and that document was in the Agency file (AR No. 049).

In an attempt to avoid unnecessary litigation and resolve the purported ownership and eligibility issues, on November 19, 2008, MPEA submitted another Eligibility and

Deductibility Application to OSFM (Mot. to Supp., Exhibit F).[1] On December 22, 2008, ten (10) months following the Agency's issuance of the NFR Letter, OSFM reconfirmed that MPEA was eligible to seek corrective action costs.[2] A copy of that document was transmitted directly to the Agency by the OSFM. (AR No. 062). After not receiving any further communication from the Agency, on November 18, 2009, MPEA submitted a follow up letter to Illinois EPA enclosing an additional copy of the Amended Reimbursement Eligibility and Deductibility decision and inquiring as to its requested approval of its application for payment dated December 14, 2007, a copy of which was also attached. (Mot. to Supp., Exhibit H).[3]

On February 18, 2010, the Agency issued a second decision letter with respect to the Reimbursement Package. (AR No. 064). While implicitly acknowledging that proof of ownership and tank eligibility had been established by their absence in the February 18, 2010 letter, the Agency now asserted that reimbursement could not be made because the application was not complete within one year from issuance of the NFR. (AR No. 064). This appeal followed.

[1] A copy of MPEA's November 19, 2008 Application is attached as Exhibit F to MPEA's Motion to Supplement the Record filed on November 30, 2010, which was granted by the Hearing Officer with no objection from the Agency.

[2] Tank 9 was inadvertently omitted from the determination even though it was listed on UST Information Sheet to the Eligibility and Deductibility Application. Because of the inadvertent omission of Tank 9 from the December 22, 2008 eligibility determination, on March 9, 2009, OSFM reissued an Amended Eligibility and Deductibility determination finding both Tanks 8 and 9 eligible and again transmitted a copy of its determination to the Agency (AR No. 063).

[3] A copy of MPEA's November 18, 2009 correspondence is attached as Exhibit H to MPEA's Motion to Supplement the Record filed on November 30, 2010, which was granted by the Hearing Officer with no objection from the Agency.

ARGUMENT

The Agency's summary judgment argument relies on an overtly pedantic view of the regulations, oversimplifies the issues and omits certain critical facts in order to support its position. The Agency claims that the issue here is simply a question of whether MPEA's completed reimbursement application was submitted within the one year time period following the issuance of the NFR. The question is more complex. First, the Board must determine whether the Agency's original decision regarding the underlying Reimbursement Package was issued after the statutory decision deadline (including the 90 day extension agreed to by the MPEA), thus requiring approval of the Reimbursement Package by operation of law under applicable regulations. Second, even if the Reimbursement Package was not approved by operation of law, the Board must determine whether the Agency had all of the documentation needed to approve the Reimbursement Package within one year after issuance of the NFR. Third, even if it did not, the Board must determine whether the actions of the Agency merit application of an equitable remedy, like laches, to this matter to avoid the extremely harsh and unjustified result advanced by the Agency. Whether the matter is resolved on the first, second or third issue raised above, the result should be the same: MPEA is entitled to reimbursement and the decision of the Agency should be reversed.

1. MPEA's Reimbursement Package was Approved by Operation of Law when the Agency Failed to Render a Decision on or by July 14, 2008.

Under Section 732.602(d) of the regulations "if the Agency fails to notify the owner or operator of its final action on an application for payment within 120 days after the receipt of a complete application for payment, the owner or operator may deem the application for payment approved by operation of law." 35 Ill. Adm. Code 732.602(d).

Section 732.602(e) provides that "[a]n owner or operator may waive the right to a final decision within 120 days after the submittal of a complete application for payment by submitting written notice to the Agency prior to the applicable deadline." 35 Ill. Adm. Code 732.602(e). In the present matter, the Agency received MPEA's Reimbursement Application on December 17, 2007. (AR No. 060). The 120 day decision deadline fell on April 15, 2008, per Section 732.602(e). With the 90 day extension granted by MPEA, the decision deadline moved back to July 14, 2008. A decision letter was not issued by the Agency, however, until October 30, 2008: more than one hundred eight (108) days after the extended deadline. Therefore, under the plain language of the regulations, the Reimbursement Package was, deemed approved by operation of law. If, as the Agency cites in its Motion, "the rules and regulations administering the [LUST Program] are not to be taken lightly and should not be ignored," *FedEx Ground Package System, Inc. v. Illinois Pollution Control* Board, 382 Ill. App. 3d 1013, 1015, 889 N.E.2d 697, 699 (1st Dist. 2008), the Board can and should, on this basis alone, reverse the Agency's February 18, 2010 decision and find that the Reimbursement Package was approved by operation of law in its entirety.

2. The Agency had the Documentation necessary to Approve MPEA's Reimbursement Package within One Year after Issuance of the NFR Letter.

Even if the Board feels compelled to address the Agency's assertion that it is the timeliness of the MPEA's submission that is at issue, that contention is unfounded. The Agency bases its contention on two things: that proof of ownership and tank eligibility were not provided to the Agency within the year following the issuance of the NFR. On both fronts, the Agency is wrong. With respect to proof of ownership, the record reveals that numerous documents were submitted to the Agency that establish ownership (*See*

AR Nos. 025, 026, 038, 039, 040, 041, 044). Moreover, the Agency itself explicitly recognized MPEA as the owner of the Facility in its January 23, 2008 letter approving the Amended High Priority Corrective Action Plan and Budget, as well as the NFR letter, dated January 23, 2008 (*See* AR Nos. 045, 046). The Agency's contention that the MPEA was not established as the owner of the subject UST systems prior to January 23, 2009 is wholly disingenuous. The Agency cannot accept MPEA's ownership for one purpose and reject it for another, simply because it suits its purposes.

With respect to tank eligibility, the USTs in question were initially deemed eligible for reimbursement in 1999 (AR No. 049). MPEA requested a second determination from the OSFM which was issued on December 22, 2008 (and amended on March 9, 2009). (AR Nos. 062, 063). That determination found MPEA eligible for reimbursement as Owner of the Facility. A copy of the determination was delivered directly to the Agency. While the amended determination of March 9, 2009, was in the Agency's possession a little over a year after the NFR was issued, the March 9, 2009 letter simply amended the OSFM's December 22, 2008 determination to correct an inadvertent error regarding tank 9.[4] Because the amended OSFM Eligibility determination letter relates back to the December 22, 2008 letter, the decision should be deemed to be well within the first year after the issuance of the NFR letter.

Based on these facts, it is clear that the Agency had all of the documentation in its own files within the one year period after issuance of the NFR letter that it needed to approve the Reimbursement Package. *Kathe's Auto Service Center*, PCB 95-43, slip op. at 14. While the Board may give deference to the Agency's interpretation of regulations

[4] Tank 9 was previously determined eligible by the OSFM in its February 8, 1999 Eligibility determination (AR No. 049), a copy of which was provided to the Agency at that time.

it is charged with administering, the Board is not bound by such interpretation if it is unreasonable or erroneous. *Kronon Motor Sales v. Illinois Pollution Control Board*, 241 Ill. App. 3d 766, 771, 609 N.E.2d 678, 682 (1st Dist. 1992). Accordingly, the Board should grant summary judgment in MPEA's favor, and reverse the Agency's unreasonable and erroneous decision in this matter.

3. **Equity Bars Imposition of the Agency's Decision Denying the Reimbursement Package.**

Even assuming, *arguendo,* that the Agency did not receive all the documentation it needed regarding eligibility and ownership within the applicable timeframe, the Agency is barred from denying MPEA relief by the doctrine of laches. Laches is an equitable doctrine that bars an entity (here, the Agency) from taking action against a party (here, MPEA) because of the entity's delay in taking action. There are two principal elements of laches: 1) a lack of diligence by the party asserting the claim; and 2) prejudice to the opposing party. *Indian Creek Development Company v. Burlington Northern Santa Fe Railway Company,* PCB 07-44 (June 18, 2009), 2009 WL 1766180, *7, *citing City of Rochelle v. Suski,* 206 Ill. App. 3d 497, 564 N.E.2d 933, 936 (2d Dist. 1990), and *Van Milligan v. Board of Fire & Police Commissioners,* 158 Ill.2d 84, 620 N.E.2d 830, 833 (1994). The Board has previously held that it can consider claims of laches. *See, e.g., Indian Creek,* PCB 07-44 (June 18, 2009), 2009 WL 1766180, *7; *People of the State* of *Illinois v. QC. Finishers, Inc.,* PCB 01-7 (July 8, 2004), 2004 WL 1615869, *7-8; *Community Landfill Company,* PCB 01-70 (December 6,2001), 2001 WL 1598272, *4; *People of the State* of *Illinois v. John Crane Inc.,* PCB 01-76 (May 17, 2001), 2001 WL 578498, *7-8.

Both of the elements of laches are present here. First, the record makes clear that the Agency cannot claim it was not aware that MPEA had assumed ownership and responsibility for the Facility and its ongoing remediation efforts. The Agency had numerous and repeated opportunities raise the question of MPEA's standing, and yet it waited more than four years before raising the issue of proof of ownership in this matter. This delay clearly demonstrates a lack of due diligence, on the part of the Agency for which it should be estopped from asserting that MPEA failed to establish ownership. In fact, as noted earlier, the Agency affirmatively took actions by which it declared MPEA as the owner of the Site. For example, the Agency specifically states that the MPEA is the owner in the NFR Letter. (AR No. 046). Further, Section 732.110(c) of the regulations provides that "[a]ll plans, budget plans, and reports must be signed by the owner or operator and list the owner's or operator's full name, address, and telephone number." 35 Ill. Adm. Code 732.110(c). Thus, by approving the Corrective Action Completion Report and issuing the NFR Letter, the Agency is certifying that the owner has submitted the approved report. If the Agency's decision in this case is read any other way, then the conclusion would have to be that the Agency did not follow the law in issuing the NFR Letter.

Second, MPEA has been prejudiced by the Agency's lack of diligence and inconsistency. In the four years between MPEA's acquisition of the Facility and the Reimbursement Package decision letter, MPEA diligently worked to investigate and remediate the property in accordance with applicable regulations. This is demonstrated by the regular communication between MPEA and the Agency. (AR Nos. 025, 049, 060-064). In making its remediation decisions and in obtaining funds to implement

investigation and remediation, MPEA relied upon the approvals of the Agency of the various reports submitted, including the CAP and Budget. This detrimental reliance will unduly prejudice MPEA, if the decision is allowed to stand.

Additionally, to allow the Agency to interpret the statute and regulations in an overly strict manner would be a miscarriage of justice, contrary to its purposes. Specifically, the MPEA agreed to a 90 day waiver of the 120 day decision deadline. (AR No. 060). The Agency, however, took nearly 11 months to review and issue its initial decision with regard to the reimbursement application. Thus, the Agency left MPEA with basically no time to address any concerns the Agency had with its Reimbursement Package, effectively "running out the clock" on MPEA. To bar MPEA's submission on a technical basis, when the Agency failed to meet its deadline and used up nearly all of the twelve (12) months following the issuance of the NFR is simply unfair. Such a ruling may also encourage the Agency to employ similar tactics to avoid paying the legitimate claims of other remedial applicants in the future.

MPEA recognizes that applying laches to public bodies is disfavored. However, as the Board has noted, the Illinois Supreme Court has held that laches can apply to governmental bodies under compelling circumstances. *John Crane Inc.*, PCB 01-76 (May 17, 2001), 2001 WL 578498, *7-8, *citing Hickey v. Illinois Central Railroad Co.*, 35 1I1.2d 427, 220 N.E.2d 415 (1966). This case presents such compelling circumstances. Even putting aside the untimeliness of the Agency's decision, the Agency acted incongruously by approving the CAP and Budget (and later the CACR) submitted by MPEA, and issuing the NFR letter to MPEA as owner, but later contending that MPEA was not the owner of the property. These circumstances justify the imposition of laches to

prevent the Agency from leading applicants into cleaning up sites by approving work plans and their related budgets, issuing NFR letters to applicants as Owners and then contending that they are not owners of the property and ineligible for reimbursement under the budget the Agency approved.

CONCLUSION

As set forth above, the Metropolitan Pier and Exposition Authority's Reimbursement Package was improperly rejected by the Illinois Environmental Protection Agency both for reasons based in law and equity. There is no genuine issue of material fact, and MPEA is entitled to judgment as a matter of law. MPEA moves the Board to deny the Agency's motion for summary judgment; to grant MPEA's cross-motion for summary judgment; to enter an order invalidating the Agency's decision with respect to the Reimbursement Package; and for such other relief as the Board deems equitable and just.

Respectfully submitted,

METROPOLITAN PIER AND EXPOSITION AUTHORITY, an Illinois municipal corporation

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CERTIFICATE OF SERVICE

I, Michelle Muslin, a non-attorney, certify that I served a copy of the attached Notice of Filing and ***Petitioner's Cross Motion for Summary Judgment*** and ***Memorandum of Law in Response to Motion for Summary Judgment and Cross-Motion for Summary Judgment*** upon the above-named persons at the addresses there stated by causing true and correct copies thereof to be placed in a properly addressed envelopes with proper postage affixed and by depositing said envelopes in a U.S. Post Office Mail Box at 225 West Washington Street, Chicago, Illinois 60606, prior to 5:00 p.m. on December 15, 2010.

Michelle Muslin