ILLINOIS POLLUTION CONTROL BOARD
July 7, 2011

METROPOLITAN PIER AND EXPOSITION AUTHORITY,	)	
Petitioner,	)	
v.	)	PCB 10-73 (UST Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

OPINION AND ORDER OF THE BOARD (by A.S. Moore):

Petitioner Metropolitan Pier and Exposition Authority (MPEA or Authority) appeals a February 18, 2010 determination by the Illinois Environmental Protection Agency (Agency or IEPA) to deny MPEA's application for payment of $389,224.57 from the Underground Storage Tank Fund (UST Fund). MPEA's request concerns a location known as the former Brinks Incorporated (Brinks) site, 234 East 24th Street, Chicago, Cook County (Site or Facility).

In its determination, the Agency denied the entire $389,224.57 amount of MPEA's application. The Agency stated that it had received the application for payment more than one year after January 23, 2008, the date on which the Agency issued the NFR letter for the site. The Agency concluded on this basis that the requested reimbursement of $389,224.57 was ineligible for payment from the UST Fund. On October 30, 2008, the Agency had denied MPEA's December 14, 2007 request for reimbursement on the basis that it was not accompanied by a copy of the eligibility and deductibility decision. The parties have filed cross-motions for summary judgment, on which the Board today rules.

For the reasons described below, the Board finds that there are no genuine issues of material fact and that MPEA is entitled to judgment as a matter of law. Accordingly, the Board grants MPEA's motion for summary judgment and denies the Agency's motion for summary judgment. Having done so, the Board concludes that MPEA's application for payment was approved by operation of law, reverses the Agency's determination, and directs the Agency to reimburse MPEA $392,527.74 from the Fund.

Below, the Board first reviews the procedural history and factual background of the case before summarizing MPEA's petition for review. The Board then summarizes the Agency's motion for summary judgment, MPEA's response and cross-motion for summary judgment, and the Agency's response. In its discussion, the Board first provides the legal and statutory background of the case before discussing the issues and reaching its conclusion.

PROCEDURAL HISTORY

On March 22, 2010, MPEA and the Agency timely filed a joint request to extend the 35-day period during which MPEA may appeal a February 18, 2010 determination by the Agency to deny reimbursement from the UST Fund. In an order dated April 1, 2010, the Board granted the request and extended the appeal period to June 27, 2010.

On June 25, 2010, MPEA filed a petition (Pet.) for review of the Agency's February 18, 2010 determination. Twelve exhibits (Exh. 1-12) accompanied the petition. In an order dated July 1, 2010, the Board accepted the petition for hearing and directed the Agency to file the administrative record of its determination by July 26, 2010. On July 26, 2010, the Agency filed both the administrative record (R.) and a motion for leave to file a reduced number of copies of the administrative record. In an order dated August 19, 2010, the hearing officer granted the Agency's motion for leave to file a reduced number of copies.

On October 7, 2010, the Agency filed a motion for summary judgment (Agency Mot.). On October 19, 2010, MPEA filed a motion for extension of time to file a response to the Agency's motion for summary judgment. In an order dated October 27, 2010, the hearing officer granted the motion and set a deadline of December 10, 2010, to file a response. On December 7, 2010, MPEA requested an extension of the time to file a response to the Agency's motion for summary judgment. In an order dated December 14, 2010, the hearing officer granted the motion and set a deadline of December 15, 2010, to file a response.

On November 30, 2010, MPEA filed a motion to supplement the record with seven specific documents:

> BOL Imaged Document Index dated June 22, 2010 (Exh. A). *See* R. at 1-2, 3201-02.
>
> Stipulation for Entry of Agreed Final Judgment Order and Agreed Order of Possession Between Metropolitan Pier & Exposition Authority and Brink's, Incorporated, a Delaware Corporation (Exh. B). *See* Pet., Exh. 1.
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> Letter dated February 8, 1999, to Brinks from the Office of the Illinois State Fire Marshal (OSFM) regarding reimbursement eligibility and deductibility (Exh. C). *See*. R. at 1916-18.
>
> Letter dated January 23, 2008, to MPEA from the Agency regarding amended high priority corrective action plan (Exh. D). *See* R. at 1873-75.
>
> Letter dated January 23, 2008, to MPEA from the Agency regarding High Priority Corrective Action Completion Report (Exh. E). *See* R. at 1878-93.
>
> Letter dated November 19, 2008, to OSFM from URS Corporation (URS) regarding eligibility and deductibility application (Exh. F).

> Letter dated February 3, 2009, to OSFM from URS regarding eligibility and deductibility application (Exh. G).
>
> Letter dated November 18, 2009, to Agency from URS regarding amended eligibility and deductibility determination (Exh. H).

In an order dated December 14, 2010, the hearing officer granted the motion. On December 14, 2010, MPEA filed a second agreed motion to supplement the record with a single specified document:

> Letter dated December 14, 2007 submitting billing package for UST incident 98-0841. (Exh. I); *see* R. at 2446-2802.

In an order dated December 15, 2010, the hearing officer granted the motion.

On December 15, 2010, MPEA filed a cross-motion for summary judgment. Accompanying it was MPEA's memorandum of law in support of its cross-motion for summary judgment and in response to the Agency's motion for summary judgment (MPEA Resp.). On January 7, 2011, the Agency filed its response to MPEA's cross-motion for summary judgment (Agency Resp.).

FACTUAL BACKGROUND

In a field report dated April 15, 1998, and listing Brinks as "Responsible Party," the Illinois Emergency Management Agency (IEMA) received notice of a release of petroleum products from leaking underground tanks located at 234 W. 24th Street, Chicago. R. at 3. IEMA assigned the incident Number 98-0841. *Id*. On behalf of Brinks, Secor International Incorporated (Secor) on May 12, 1998, submitted to the Agency a 20-Day Certification for release No. 98-0841. *Id*. at 4-6; *see* 35 Ill. Adm. Code 732.202(c) (Early Action). In addition, Secor submitted a Free Product Removal Report dated December 14, 1998, addressing Incident No. 98-0841. R. at 7-46; *see* 35 Ill. Adm. Code 732.203(a)(4) (Free Product Removal). Secor also submitted a 45-Day Report addressing the incident. R. at 47-152; *see* 35 Ill. Adm. Code 732.202(e) (Early Action). On January 12, 1999, the Agency approved the 45-Day Report and directed Brinks to file a site classification work plan within 60 days. R. at 154-56; *see id*. at 153 (Agency review notes).

On December 18, 1998, Brinks submitted an Eligibility and Deductibility Application for Incident No. 98-0841 to the OSFM. R. at 1919-24. On February 8, 1999, the OSFM determined that Brinks was "eligible to seek corrective action costs in excess of $10,000" for Tank 8, a 10,000 gallon diesel tank, and Tank 9, a 10,000 gallon gasoline tank. *Id*. at 1916-18; *see also* Exh. C (OSFM determination). The OSFM also found that Brinks was "ineligible for reimbursement from the fund" for Tanks 1, 2, 3, and 4 because they were "[n]ot in operation at

any time since 1/1/74." R. at 1917, citing 430 ILCS 5/57.9[1]. In addition, the OSFM determined that Brinks was "ineligible for reimbursement from the fund" for Tanks 5, 6, and 7 because they had been properly abandoned in place. R. at 1917, citing 41 Ill. Adm. Code 170.400.

On April 27, 1999, Secor on behalf of Brinks submitted to the Agency a Site Classification Work Plan and Site Classification Budget for Incident 98-0841. R at 157-212; *see* 35 Ill. Adm. Code 732.205(a), (b). Secor proposed a total budget of $34,919.02. R. at 197-212. On May 7, 1999, the Agency approved the proposed Physical Soil Classification and Groundwater Investigation Plan and also approved the accompanying budget. *Id*. at 215-19; *see id*. at 213-14 (Agency review notes).

On September 27, 1999, the Agency received from Secor a request for reimbursement from the UST Fund of $198,968.26 in early action and free product removal costs during the period from April 1, 1998, to March 5, 1999. R. at 1933-2182. On February 2, 2000, the Agency responded first by stating that "[t]he deductible amount to be assessed on this claim is $10,000, which is being deducted from this payment." *Id*. at 1926. In addition to that amount, the Agency also deducted $26,850.00 "for costs associated with the replacement of above grade structures. . . ." *Id*. at 1928, citing 35 Ill. Adm. Code 732.606(d). The Agency approved reimbursement of $162,118.26. R. at 1925, 1926, 2183.

On December 14, 1999, the Agency received a Free Product Recovery Progress Report submitted by Secor on behalf of Brinks. R. at 220-97; *see* 35 Ill. Adm. Code 732.203(a)(5). On April 25, 2002, the Agency received from Secor on behalf of Brinks another Free Product Recovery Progress Report. R. at 298-338. Secor described a vapor extraction system, installation of which sought "to augment the existing system and enhance product recovery from the site." *Id*. at 303.

On February 26, 2003, the Agency received from Secor a request for reimbursement from the UST Fund of $81,102.57 in early action costs during the period from April 5, 1999, to March 29, 2002. R. at 2207-2377. On March 24, 2003, the Agency first responded by noting that the deductible of $10,000 had been deducted from a previous request for reimbursement. *Id*. at 2814; *see id*. at 1926 (Agency determination). The Agency then denied reimbursement of the entire claim on various technical and accounting bases. *Id*. at 2184-88. Generally, the Agency determined that the costs reflected work that was not performed within the early action period and had not been approved in a budget. *Id*. at 2186. On May 14, 2003, Secor on behalf of Brinks requested that the Agency re-evaluate its March 24, 2003 determination. *Id*. at 627, 2378; *see also id*. at 621-22 (March 31, 2003 letter from Secor to Agency). Secor argued that, "[a]s the costs were incurred under Free Product Recovery efforts (35 IAC 732), they were not subject to either the early action time frame or high priority corrective action plan and budget." *Id*. at 627. On January 27, 2005, the Agency noted its original March 24, 2003, determination and approved reimbursement of $80,545,36, which reflects $557.21 in accounting deductions originally made by the Agency. *Id*. at 2387, 2392.

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[1] The Board construes this as a citation not to Chapter 430, the Liquefied Petroleum Gas Regulation Act, but to Chapter 415, the Environmental Protection Act, Section 57.9 of which addressed UST Fund eligibility and deductibility. 415 ILCS 5/57.9 (1998).

On March 10, 2003, the Agency received from Secor on behalf of Brinks a Site Classification Completion Report for Incident No. 98-0841. R. at 339-474; *see* 35 Ill. Adm. Code 732.309(a). The report classified the site as "High Priority." R. at 351; *see* 35 Ill. Adm. Code 732.305 (High Priority Sites). On April 3, 2003, the Agency rejected the report on the basis that "the operator is required to define the extent of groundwater and soil contamination including potential off-site impacts. Existing soil and groundwater concentrations indicate that contamination may have migrated off-site." R. at 623, citing 35 Ill. Adm. Code 732.312 (Classification by Exposure Pathway Exclusion); *see* R. at 619-20 (Agency review notes). On May 23, 2003, Secor submitted to the Agency an addendum to its Site Classification Work Plan and Amended Budget. R. at 634-72; *see id*. at 157-212 (original plan and budget). Secor stated that "[t]he purpose of the additional work will be to perform additional soil and groundwater testing in an attempt to determine limits of the impacts at the site. . . ." as requested by the Agency. *Id*. at 633. On June 12, 2003, the Agency approved the amended plan and amended budget. *Id*. at 674-76, 2384-86; *see id*. at 673-74 (Agency review notes).

On March 12, 2003, the Agency received from Secor on behalf of Brinks a Corrective Action Plan for Incident No. 98-0841. R. at 475-618; *see* 35 Ill. Adm. Code 732.404(f) (High Priority Site). The plan included a proposed budget of $175,055.50. R. at 514-31. On June 17, 2003, the Agency rejected the plan and associated budget, noting that

> [t]he operator has not submitted a completed Site Classification Completion Report that summarizes the results of work completed at the site. The corrective action plan must be designed around the results of the completion report and demonstrate that the applicable indicator contaminants meet the remediation objectives for any applicable exposure pathway route including off-site contamination. *Id*. at 680.

The Agency noted that "[a]n amended High Priority Corrective Action Plan and Budget should be submitted to the Agency after submittal and approval of the completed Site Classification Completion Report. *Id*. at 678.

In a letter to the Agency dated June 30, 2003, Secor noted that the Agency had approved an amended Site Classification Work Plan. R. at 683; *see id*. at 674-76 (approval). Secor stated that it had completed the work prescribed in the amended plan and incorporated it into a Site Classification Completion Report Addendum. *Id*. at 684-725. On July 9, 2003, the Agency approved classification of the site as "High Priority." *Id*. at 727; *see id*. at 726 (Agency review notes).

On January 1, 2004, MPEA acquired the site from Brinks under the terms of a stipulation for entry of an Agreed Final Judgment Order and Agreed Order of Possession in a condemnation action, Metro. Pier & Exposition Auth. v. Brink's, Inc., *et al*., No. 02 L 51299 (Circuit Court of Cook County). Exh. B. The stipulation states in part that "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." *See* Exh. B at 8 (Environmental Condition Representation and Agreement).

In a letter dated January 8, 2004, to Mr. Scott McGill of the Agency's UST section, counsel for MPEA notified the Agency that the Brinks site had been acquired by MPEA. R. at 731. The letter stated that "[t]he operation and maintenance of the remedial system at the site have been assumed by MPEA. Based on our discussion, I understand that you will discuss this matter further with your superiors. In particular, you will clarify for me what is needed from the MPEA for purpose of the IEPA's records." *Id*. The Agency received this notification on January 13, 2004. *See id*. On or about August 11, 2004, MPEA submitted to the OSFM three Notifications for Underground Storage Tanks indicating that MPEA had become the new owner of tanks at the Brinks site. *Id*. at 732-52 (addressing Tanks 1-5, 6-9, and 10-11, respectively). The notifications indicate that MPEA had purchased the tanks on January 7, 2004. *Id.* at 736, 742, 748. The Agency received the notifications on August 17, 2004. *See id*. at 732.

On December 23, 2004, URS on behalf of MPEA submitted to the Agency a Corrective Action Plan for Incident No. 98-0841. R. at 753-1131. The Agency received the plan on December 27, 2004. *Id*. at 1136; *see id*. at 753. The submission indicated that the budget plan would be submitted separately. *Id*. at 1130-31, 1132. On January 21, 2005, the Agency modified the proposed plan in two respects, stating that the modifications "are necessary, in addition to those provisions already outlined in the plan, to demonstrate compliance with Title XVI of the Act and 35 Ill. Adm. Code 732." *Id*. at 1136. Specifically, the Agency's modifications provided in their entirety that

1. The operator should propose additional assessment activities to define the extent of Benzo(a)pyrene contamination on and off-site. Benzo(a)pyrene concentrations in soil samples, Br-T5-7W3, Br-T5-7E1, and Br-T8&9 S2, which range from 1.2 mg/kg to 5 mg/kg exceed the Tier 1 cleanup objective of 0.8 mg/kg, And

2. The operator should collect groundwater samples from all existing and proposed monitoring wells at the site. Samples should be analyzed for the BTEX and PNA constituents and the results should be compared to the Tier 1 cleanup objectives. A site location map and geologic cross-section should be provided to depict the horizontal and vertical extent of contamination. *Id*.; *see id*. at 1132-33 (Agency review notes).

On March 9, 2005, URS on behalf of MPEA responded to the Agency's modifications and requested that the Agency approve the December 2004 corrective action plan. R. at 1141-1246. The response to the first modification states that "MPEA and URS believe delineation of benzo(a)pyrene is adequate considering the Property will be covered by an engineered barrier. The engineered barrier consists of the McCormick Place West Expansion building and will cover the entire Property thereby eliminating the ingestion pathway for industrial/commercial workers." *Id*. at 1141; *see id*. at 1247 (Agency review notes). The response to the second modification states that "[i]n accordance with the CAP, URS completed the installation and monitoring of six groundwater monitoring wells." *Id*. at 1141, citing *id*. at 1145-74 (Attachment A). The response also stated that Secor had "provided a site location map with geologic cross section in the Site Classification Completion Report. . . ." *Id*. at 1141; *see id*. at 378, 1144.

On March 30, 2005, the Agency noted MPEA's March 9, 2005 response and rejected the corrective action plan. R. at 1249, citing 415 ILCS 5/57.7(c)(4)(D), 35 Ill. Adm. Code 732.405(c). As grounds for its rejection, the Agency stated that

1. The operator should provide a site location map to depict the extent of the proposed engineering barrier. And

2. The operator should propose additional assessment activities to define the extent of soil contamination at the property boundary and potential off-site impacts. R. at 1249; *but see id*. at 1247-48 (Agency review notes finding response "appropriate for Agency approval").

On May 2, 2005, URS responded to the Agency's rejection. *Id*. at 1254-55. Responding to the Agency's request for a site location map, URS stated that "a building will be placed over the project area." *Id*. at 1254, citing *id*. at 1256 (Figure 1: Proposed Development Plan). URS also addressed the request for additional assessment activities. *Id*. at 1254.

On June 3, 2005, URS submitted to the Agency an amendment to the corrective action plan it had submitted on December 23, 2004 and for which it had made additions on March 9, 2005, and May 2, 2005. R. at 1264. URS stated that it would complete and present Tier 2 groundwater modeling addressing potential off-site migration with the Corrective Action Completion Report for the site. *Id*; *see id*. at 1265-68 (Tier 2 Evaluation of Groundwater). On June 27, 2005, the Agency approved the High Priority Corrective Action Plan for Incident No. 98-0841. *Id*. at 1270-71 (letter addressed to Brinks); *see id*. at 1269 (Agency review notes).

In a letter dated June 30, 2005, to the Agency's UST Section, URS notified the Agency that MPEA had acquired the Brinks site. *Id*. at 1274, 1275. The letter stated that,

> [p]er our discussion this morning, ownership of the Brink's, Inc. site has changed to the Metropolitan Pier and Exposition Authority (MPEA). All future correspondence should be mailed to the attention of Tim McHugh at the following address:
>
> Metropolitan Pier and Exposition Authority
> Development Department
> 301 E. Cermak
> Chicago, Illinois 60616
>
> Please change your records to reflect this change in ownership. R. at 1274.

The Agency received the letter July 1, 2005. *See id*. at 1275.

On December 6, 2007, URS submitted to the Agency on behalf of MPEA a corrective action completion report. R. at 1297-1866. URS also submitted a budget package proposing a total budget of $387,719.41 for Incident No. 98-0841. *Id*. at 1278-96.

On December 14, 2007, URS also submitted to the Agency a bill package "intended to meet the requirements for reimbursement" from the UST Fund for Incident No. 98-0841. R. at 2446, Exh. I (showing total amount spent of $392,527.74). Among other elements, the bill package includes a "Budget and Billing Form for Leaking Underground Storage Tank Sites." Under Section A entitled "Site Information," the form asks, "[i]f eligible for reimbursement, where should reimbursement checks be sent? Please note that only owners or operators of USTs may be eligible for reimbursement. Therefore, payment can only made (sic) to an owner or operator." R. at 2449, Exh. I. The form indicates that payment should be made to the order of MPEA at 301 East Cermak in Chicago. R. at 2449, Exh. I. Among its elements, Exhibit I does not include a copy of an OSFM eligibility and deductibility determination. *See* R. at 2446-2802, Exh. I.

In a letter to the Agency's UST section dated January 16, 2008, URS on behalf of MPEA submitted a UST Program Property Owner Summary "intended to complete the Corrective Action Completion Report submitted to your office on December 6, 2007." R. at 1869. Section C of the summary lists MPEA as the property owner. *Id*. at 1871.

On January 23, 2008, the Agency approved the Amended High Priority Corrective Action Plan dated December 6, 2007. *Id*. at 1873, citing 415 ILCS 5/57.7(c) (2008), 35 Ill. Adm. Code 732.405(c); *see also* Exh. D. The Agency also modified the proposed budget by disallowing $3,200.00 in costs on the ground that they "exceed the minimum requirements necessary to comply with the Act." R. at 1875 (approving budget amount of $394,430.00); *see id*. at 1867-68 (Agency review notes).

Also on January 23, 2008, the Agency noted that it had received the corrective action completion report for Incident No. 98-0841. R. at 1878. The Agency stated that the report and accompanying certification show that corrective action at the site conformed to the approved corrective action plan. *Id*. The Agency granted MPEA's request for issuance of an NFR letter subject to specified terms and conditions. R. at 1878-93; *see* Exh. E; *see also* R. at 1894-1909 (NFR recorded April 1, 2008). The letter lists parties in whose favor the letter applies, including "Metropolitan Pier and Exposition Authority, the owner or operator of the underground storage tank system(s)." R. at 1879; *see also id*. at 1884.

On March 14, 2008, the Agency sent by facsimile to URS the following request:

> [p]lease find attached a 120 day waiver for lust incident #98[-]0841, Brinks, Inc., in the amount of $392,527.74 received by the Agency on December 17, 2007. We are requesting this waiver due to staff shortages and lack of resources. Please complete the information in the blank spaces, sign, and <u>fax only the waiver form back to my attention by close of business</u> March 18, 2008. Thank you in advance for your quick response to our request and for granting us the 90 additional days that are need to review this claim. R. at 2428 (emphasis in original).

On March 19, 2008, URS sent by facsimile to the Agency a signed and completed waiver form. In pertinent part, that form waiver stated that, "[p]ursuant to 35 IAC 732.602(e) . . . I, . . .Patricia

Bryan, URS Corporation, consultant on behalf of owner/operator, do hereby waive for a minimum of 120 days the right to a final decision by the Agency regarding a claim for payment from the Lust Fund. The claim subject to this waiver was received by the Agency on 12/17/2007, . . . is associated with incident number 98[-]0841 and is in the amount of $392,527.74." *Id*. at 2427.

On October 30, 2008, the Agency denied MPEA's December 14, 2007 request for reimbursement. R. at 2430-33. Specifically, the Agency deducted $389,224.57 in costs "that were not accompanied by a copy of the eligibility and deductibility decision(s). . . . Metropolitan Pier and Exposition Authority has submitted this request for reimbursement however, they are not the owner or operator of the USTs . . . nor do they have an eligibility and deductibility decision." *Id*. at 2431, citing 415 ILCS 5/57.8 (2008); 35 Ill. Adm. Code 732.103, 732.110(a), 732.601(b)(3), 732.606(s); *see* R. at 2436-38 (payment summary and notes). The Agency also deducted $237.426.99 in costs subject to apportionment of costs eligible for payment from the UST Fund. R. at 2431, citing 415 ILCS 5/57.7, 57.8(m) (2008); 35 Ill. Adm. Code 732.608; *see* R. at 2437-38. In addition, the Agency deducted $385.00 in investigation costs to correspond to the amount approved in the budget. R. at 2431, 2438, 2440; *see id*. at 2444 (seeking budget amendment of $385 in investigation costs).

On November 19, 2008, MPEA submitted to the OSFM an Eligibility and Deductible Application for the site. R. at 2808-14; Exh. F. On December 22, 2008, the OSFM determined that MPEA was eligible to seek corrective action costs in excess of $10,000 for Incident No. 98-0841 for Tank 8, a 10,000 gallon diesel fuel tank. R. at 2803-05. The determination noted that Tank 9, a 10,000 gallon gasoline tank, was "also listed for this site." *Id*. at 2805.

On February 3, 2009, URS on behalf of MPEA submitted to the OSFM another Eligibility and Deductibility Application for Incident No. 98-0841. Exh. H, Att. 2; Exh. G. On March 9, 2009, the OSFM issued an amended determination that MPEA was eligible to seek corrective action costs in excess of $10,000 for Incident No. 98-0841 for Tank 8 and Tank 9. R. at 2815-26; *see also id*. at 1916-24 (1999 determination for Incident No. 98-0841). On November 18, 2009, URS submitted to the Agency a copy of the OSFM's March 9, 2009 determination. R. at 2832-36; Exh. H, Att. 1. The Agency received the correspondence on November 23, 2009. R. at 2832.

On February 18, 2010, the Agency issued its determination regarding MPEA's application for payment dated November 18, 2009, and denied reimbursement of costs contained in the application. R. at 1910-12, 2827-29. Specifically, the Agency stated that it received the application for payment more than one year after January 23, 2008, the date on which the Agency issued the NFR letter for the site. *Id*. at 1911, 2828. The Agency concluded on this basis that the requested reimbursement of $389,224.57 was ineligible for payment from the UST Fund. *Id*., citing 35 Ill. Adm. Code 732.601(j), 732.606(rr); *see* R. at 2831. The Agency also deducted $237,426.99 as subject to apportionment of costs eligible for payment from the UST Fund. R. at 1911, 2828, citing 415 ILCS 5/57.7, 57.8(m) (2008); 35 Ill. Adm. Code 732.608. In addition, the Agency deducted $385.00 in investigation costs to correspond to the amount approved in the budget. R. at 1911, 2828.

SUMMARY OF PETITION FOR REVIEW

MPEA alleges that it "is the current owner of the former Brink's Incorporated Site, 234 E. 24th Street, Chicago, Illinois . . . , including the underground storage tanks and related piping." Pet. at 1 (¶1). MPEA states that it acquired the Site on or about January 1, 2004, through a stipulation for entry of an agreed final judgment in a condemnation action. *Id*. (¶¶1, 6), citing Metro. Pier & Exposition Auth. v. Brink's, Inc., *et al*., No. 02 L 51299 (Circuit Court of Cook County). MPEA further states that "[t]he Stipulation assigned certain rights to MPEA to receive any UST corrective action costs from the Agency's UST Fund. Pet. at 1-2 (¶1), citing *id*., Exh. 1 at 6-8 (Environmental Condition Representation and Agreement).

MPEA alleges that, on or about April 16, 1998, Brinks notified IEMA that existing and pre-existing USTs at the Site had released various petroleum products. Pet. at 2. (¶2). MPEA states that IEMA assigned the release Incident No. 98-0841. *Id*. MPEA alleges that, on or about December 21, 1998, Brinks submitted to the OSFM an application for reimbursement eligibility and deductibility. *Id.* at 2 (¶3). MPEA states that, "[o]n 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." *Id*., citing *id*., Exh. 2 (determination).

MPEA alleges that, on or about May 7, 1999, the Agency approved a Site Classification Work Plan and budget submitted by Brinks. Pet. at 2 (¶4). MPEA further alleges that, on or about June 12, 2003, the Agency approved an amended plan and budget submitted by Brinks. *Id.* (¶5).

MPEA alleges that the stipulation through which it acquired the Site provides in part that "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." Pet. at 2-3 (¶6) (emphasis in original), citing *id*., Exh 1 at 8 (¶5(F)). MPEA further alleges that, in March and April 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." *Id*. at 3 (¶7).

MPEA states that it submitted a High Priority CAP for the Site to the Agency on or about December 27, 2004, and that it submitted revisions in March, May, and June 2005. Pet. at 3 (¶8). MPEA further states that the amended CAP included a proposal to complete corrective action in two phases. *Id*. MPEA alleges that the first phase "included source removal via extraction and disposal of USTs and impacted soil" between August 24, 2004 and September 8, 2004. *Id*. MPEA further alleges that the second phase "involved the assessment of groundwater conditions post source removal at the Facility and surrounding areas" in January 2005. *Id*. MPEA indicates that, from January 18, 2005, to January 25, 2005, "[a] total of six monitoring wells were installed on and downgradient of the Facility." *Id*. MPEA adds that "[g]roundwater 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." *Id*. MPEA alleges that the Agency "approved the amended CAP with limited modification" on or about June 27, 2005. *Id*. (¶9).

MPEA alleges that, "[a]s 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." Pet. at 3-4 (¶10), citing *id*., Exh. 3.

MPEA alleges that it submitted a second amended CAP, a CACR, and a budget to the Agency on or about December 6, 2007. Pet. at 4 (¶11). MPEA further alleges that it submitted a request for reimbursement of $389,224.57 from the UST Fund for expenses incurred from March 1, 2004, to December 9, 2005. *Id*. (¶12). MPEA adds that it submitted a Property Owner Summary for Incident No. 98-0841 on or about January 16, 2008, "to complete the CACR previously submitted in December 7, 2007." *Id*. (¶13).

MPEA states that the Agency approved the second amended CAP on or about January 23, 2008, with limited modification to the budget. Pet. at 4 (¶14), citing *id*., Exh. 4. MPEA further states that on January 23, 2008, the Agency also approved a budget in the total amount of $392,610.00. *Id*. at 4 (¶15), citing *id*., Exh 4 (Attachment A). MPEA also states that the Agency issued an NFR letter on January 23, 2008, to MPEA as "owner or operator of the underground storage tank system." *Id*. at 5 (¶16), citing *id*., Exh. 5 at 2.

MPEA alleges that the Agency on October 30, 2008, responded to its application for reimbursement of $389.224.57 by stating "that MPEA needed to submit additional proof of ownership and eligibility." Pet. at 5 (¶17); *see id*., Exh. 6 at 2. MPEA further alleges that the Agency disapproved reimbursement of $237,426.99 through apportionment "because not all of the tanks at the Site were eligible." *Id*. at 5 (¶17); *see id*., Exh. 6 at 2. MPEA also alleges that the Agency disallowed reimbursement of $385.00 "because the line item exceeded the approved budget amount for Investigation Costs." *Id*. at 5 (¶17); *see id*., Exh. 6 at 2

MPEA states that it responded to the Agency's determination on or about November 19, 2008, less than one year after issuance of an NFR letter for the Site, by re-submitting an eligibility and deductibility application to the OSFM. Pet. at 5 (¶18), citing *id*., Exh. 7. MPEA further states that it also "submitted additional documentation regarding ownership of the Facility to the Agency." *Id*. at 5 (¶18).

MPEA indicates that, in a determination on or about December 22, 2008, OSFM found "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." Pet. at 5 (¶19), citing *id*., Exh. 8; *see id*., Exh. 2 (1999 OSFM determination). MPEA states that, on or about February 3, 2009, it submitted to OSFM an amended eligibility and deductibility application addressing Tank 9. *Id*. at 6 (¶20), citing *id*., Exh. 9. MPEA further states that, in a determination on or about March 9, 2009, the OSFM found 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)." *Id*. at 6 (¶21) (emphasis in original); *see id*., Exh. 10.

MPEA states that, on November 18, 2009, it "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." Pet. at 6 (¶22); *see id*., Exh. 11. MPEA further states that, in a February 18, 2010 determination, the Agency denied the application for reimbursement "on the basis that it was submitted more than one year after the issuance of the NFR." *Id*. at 6 (¶23); *see id*., Exh. 12. MPEA adds that "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." *Id*. at 6 (¶23); citing *id*., Exh. 12.

MPEA seeks reversal of the Agency's "denial of the Application for Reimbursement because it was based upon the application for reimbursement being submitted more than one year after issuance of the NFR [letter]." Pet. at 7 (¶24). MPEA argues that,

> [t]o 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 eligibility and deductibility determination from OSFM, even through OSFM had previously rendered Tank 8 and Tank 9 eligible for reimbursement in its February 8, 1999 determination letter. *Id*., citing *id*., Exh. 2 (OSFM letter).

MPEA adds that "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 [letter]." *Id.* at 7 (¶25). MPEA argues that "[a]ny filings made 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." *Id.* MPEA further argues that "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. 98[-]0841." *Id.* MPEA states that it completed that work and received an NFR letter dated January 23, 2008 from the Agency. *Id*.

MPEA concludes by claiming that the Agency's denial of the modified reimbursement application was "improper." Pet. at 7 (¶26). MPEA requests that the Board reverse the determination regarding the $389,224.57 in disallowed costs, "remand the matter to the Agency with instruction to approve reimbursement of the disallowed corrective costs," and grant "any other relief as the Board deems just and appropriate." *Id*. at 8 (¶27).

AGENCY MOTION FOR SUMMARY JUDGMENT

The Agency argues that an owner or operator of a UST applying for reimbursement from the Fund must establish eligibility to do so. *See* Agency Mot. at 7. The Agency cites the

Board's UST regulation providing that a complete application for reimbursement must include "[a] copy of the OSFM or Agency eligibility and deductibility determination." *Id*., citing 35 Ill. Adm. Code 732.601(b)(3). The Agency argues that an application can be considered complete and approved "only after the Eligibility and Deductibility Application has been approved and submitted to the Illinois EPA." Agency Mot. at 7.

The Agency claims that it did not receive MPEA's eligibility determination "until well after the date on which the No Further Remediation Letter was issued." Agency Mot. at 7; *see* R. at 1878-91 (NFR letter dated Jan. 23, 2008). The Agency argues that the application for reimbursement did not include proof of eligibility and "was not complete until more than a year after the date on which the No Further Remediation Letter was issued." Agency Mot. at 7. The Agency claims that MPEA itself has admitted submitting a complete application on November 18, 2009. *Id*. at 8, citing Pet. at 6 (¶22) (referring to re-submission). The Agency concludes on this basis that it properly denied MPEA's request. Agency Mot. at 8.

The Agency claims that owners and operators do not have an unlimited statutory right to reimbursement from the Fund. Agency Mot. at 8, citing FedEx Ground Package Sys., Inc. v. PCB, 382 Ill. App.3d 1013, 1016, 889 N.E.2d 697, 700 (1st Dist. 2008). The Agency argues that its interpretations and determinations implementing the UST Program are entitled to deference. Agency Mot. at 6, 7, citing Kronon Motor Sales, Inc. v. PCB, 241 Ill. App.3d 766, 771, 609 N.E.2d 678, 682 (1st Dist. 1992). The Agency further argues that, because the Fund has limited resources and does not have a broad remedial purpose, "the rules and regulations administering it are not to be taken lightly and should not be ignored." Agency Mot. at 6, citing FedEx, 382 Ill. App.3d at 1015, 889 N.E.2d at 699. The Agency claims that these rules and regulations "are to be applied strictly, in spite of hardships wrought on owners or operators." Agency Mot. at 6, 7, citing Kronon, 241 Ill. App.3d at 771, 609 N.E.2d at 682.

On the basis of these authorities, the Agency argues that MPEA must be held to strict compliance with the rules of the UST program. *See* Agency Mot. at 7. The Agency cites rules providing that "a completed Application of Reimbursement must include an approved Eligibility and Deductibility Application" and that the application must "be submitted within one year of the issuance of the No Further Remediation Letter." *Id*.; *see* 35 Ill. Adm. Code 732.601(b)(3), 601(j). The Agency claims that, because MPEA failed to comply with these requirements, the Agency correctly denied MPEA's application. Agency Mot. at 8. The Agency acknowledged that denying reimbursement results in hardship for MPEA. *See id*. at 7. Nonetheless, the Agency suggests that the clear requirements of the UST program require this result even without granting deference to the Agency's decision-making. *See id*. at 7-8.

The Agency concludes that the record establishes "that there is no genuine issue of material fact" regarding MPEA's ability to be reimbursed from the UST Fund for corrective action at the Site. Agency Mot. at 8-9; *see id*. at 5. The Agency argues that it "is entitled to summary judgment as a matter of law." *Id*. at 9, citing 35 Ill. Adm. Code 101.516(b) (Motions for Summary Judgment); *see* Agency Mot. at 1. The Agency claims that MPEA's petition and exhibits and the arguments in the Agency's motion "are sufficient for the Board to enter a dispositive order" in the Agency's favor on all issues. *Id*. at 2. The Agency requests that the

Board "enter an order granting its Motion for Summary Judgment, upholding the decision of the Agency to deny reimbursement" sought by MPEA. *Id.* at 9.

MPEA RESPONSE AND CROSS-MOTION FOR SUMMARY JUDGMENT

A memorandum of law filed by MPEA on December 15, 2010, encompasses both a response to the Agency's motion for summary judgment and MPEA's cross-motion for summary judgment. MPEA Resp. at 1.

MPEA characterizes the Agency's argument in favor of its motion for summary judgment as one that "relies on an overly pedantic view of the regulations, oversimplifies the issues and omits certain critical facts in order to support its position." MPEA Resp. at 8. MPEA argues that the appeal involves issues more complex than the Agency's simple question whether MPEA submitted a complete reimbursement application within one year after being issued an NFR letter. *Id.* The following subsections of the opinion summarize MPEA's arguments.

Agency Decision Deadline

In order to address the issues in this appeal, MPEA states that the Board must first "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." MPEA Resp. at 8.

MPEA cites Section 732.602(d) of the Board's UST regulations, which provides in pertinent part that, "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." MPEA Resp. at 8, citing 35 Ill. Adm. Code 732.602(d). MPEA also notes that, under Section 732.602(e), "[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." MPEA Resp. at 9, citing 35 Ill. Adm. Code 732.602(e).

MPEA claims that the Agency received its application for payment on December 17, 2007. MPEA Resp. at 9, citing R. at 2427-29 (request and waiver); *see* R. at 2446-2802 (reimbursement application dated Dec. 14, 2007); Exh. I (reimbursement application dated Dec. 14, 2007). MPEA further claims that the Agency's decision deadline fell on April 15, 2008. MPEA Resp. at 9; *see* 35 Ill. Adm. Code 732.602(d). MPEA argues that, after it granted a 90-day waiver, the Agency's deadline became July 14, 2008. MPEA Resp. at 9; *see* 35 Ill. Adm. Code 732.602(e); R. at 2427-29 (request and waiver).

MPEA claims that the Agency did not issue a decision on the application until October 30, 2008, "more than one hundred eight (108) days after the extended deadline." MPEA Resp. at 9; *see* Pet., Exh 6. MPEA argues that "under the plain language of the regulations, the Reimbursement Package was deemed approved by operation of law." MPEA Resp. at 9. MPEA states that "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." *Id*.

Proof of Ownership and Eligibility

MPEA characterizes the Agency's position that MPEA did not provide proof of ownership to the Agency within one year after issuance of an NFR letter as "disingenuous," "unfounded," and "wrong." MPEA Resp. at 9, 10. MPEA cites numerous documents establishing ownership that it submitted to the Agency. *Id*., citing R. at 731, 732-52, 1274-75, 1276-1567 (CACR and budget), 1869-72 (Property Owner Summary). MPEA argues that the Agency "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." MPEA Resp. at 10, citing R. at 1873-77 (plan approval), 1878-93 (NFR letter). MPEA urges that "[t]he Agency cannot accept MPEA's ownership for one purpose and reject it for another, simply because it suits its purposes." MPEA Resp. at 10.

Regarding the issue of eligibility, MPEA states that USTs at the Facility "were initially deemed eligible for reimbursement in 1999." MPEA Resp. at 10, citing R. at 1916-24 (application by Brinks and determination). MPEA further states that it requested a second determination, which OSFM issued on December 22, 2008, and amended on March 9, 2009. MPEA Resp. at 10, citing R. at 2803-05 (eligibility of Tank 8), *id*. at 2825-17 (eligibility of Tank 8 and Tank 9). MPEA argues that, although the Agency received the March 9, 2009 determination more than one year after the issuance of the NFR letter, that determination "simply amended the OSFM's December 22, 2008 determination to correct an inadvertent error regarding tank 9," which OSFM had deemed eligible in 1999. MPEA Resp. at 10, n.4. MPEA further argues that, "[b]ecause 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 issuance of the NFR letter." MPEA Resp. at 10.

Summarizing, MPEA claims 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." MPEA Resp. at 10, citing Kathe's Auto Serv. Ctr. v. EPA, PCB 95-43, slip op. at 14 (May 18, 1995). Although MPEA acknowledges that the Board may extend some deference to the Agency's interpretation of UST regulations, "the Board is not bound by such interpretations if it is unreasonable or erroneous." MPEA Resp. at 10-11, citing Kronon, 241 Ill. App. 3d at 771, 609 N.E.2d at 682. MPEA argues that the Board should grant its motion for summary judgment "and reverse the Agency's unreasonable and erroneous decision in this matter." MPEA Resp. at 11.

Laches

MPEA argues that, if the Board does not determine that the Agency timely received all necessary documentation regarding ownership and eligibility, then "the Agency is barred from denying MPEA relief by the doctrine of laches." MPEA Resp. at 11. MPEA describes laches as 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." *Id*. Elaborating, MPEA lists two

principal elements of the doctrine: "1) a lack of diligence by the party asserting the claim; and 2) prejudice to the opposing party." *Id*. (citations omitted). MPEA argues that "[t]he Board has previously held that it can consider claims of laches." *Id*. (citations omitted).

MPEA first argues that "the Agency cannot claim it was not aware that MPEA had assumed ownership and responsibility for the Facility and its ongoing remediation efforts." MPEA Resp. at 12. MPEA argues that, although these ongoing efforts provided the Agency many opportunities to question MPEA's ownership, the Agency "waited more than four years before raising the issue of proof. . . ." *Id*. In addition, MPEA states that, among other instances in which the Agency recognized MPEA's ownership, the NFR letter specifically lists MPEA as the owner of the facility. *Id*., citing R. at 1879. MPEA claims that the record and the Agency's four-year delay in raising the issue should bar the Agency from asserting the MPEA has failed to establish ownership. MPEA Resp. at 12.

Second, MPEA claims that it "has been prejudiced by the Agency's lack of diligence and inconsistency." MPEA Resp. at 12. MPEA argues that its ongoing communication with the Agency demonstrates diligence in remediating the Site. *Id*., citing R. at 731, 1916-18, 2427, 2430-33, 2803-05, 2815-17, 2827-30. MPEA claims that it has detrimentally relied upon Agency approvals in the process of remediating the Site. MPEA Resp. at 12-13. MPEA asserts that, if the Board affirms the Agency, this reliance will cause MPEA undue prejudice. *Id*. at 13.

MPEA also argues that affirming the Agency's interpretation of the Act and Board regulations would thwart the intent of those authorities. MPEA Resp. at 13. MPEA notes that, after it agreed to a 90-day waiver of the 120-day decision deadline for its reimbursement application, the Agency took nearly 11 months to issue a decision. *Id*., citing R. at 2427-29. MPEA argues that "[t]o 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 letter is simply unfair." MPEA Resp. at 13. MPEA claims that upholding the Agency would encourage additional delays to avoid paying future claims. *Id*.

Although MPEA acknowledges that application of laches to public entities is not favored, it argues that "the Illinois Supreme Court has held that laches can apply to governmental bodies under compelling circumstances." MPEA Resp. at 13, citing People v. John Crane, Inc., PCB 01-76, slip op. at 8 (May 17, 2001). MPEA claims that its appeal presents such circumstances. MPEA Resp. at 13. After again noting the "untimeliness of the Agency's decisions, MPEA argues that "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." *Id*. Applying laches here, claims MPEA, would "prevent the Agency from leading applicants into cleaning up sites . . . and then contending that they are not owners of the property. . . ." *Id*. at 14.

Summary

MPEA characterizes the Agency's denial of reimbursement as improper on both legal and equitable grounds. MPEA Resp. at 14. MPEA argues that "[t]here is no genuine issue of material fact, and MPEA is entitled to judgment as a matter of law." *Id*. MPEA requests that the

Board deny the Agency's motion for summary judgment, grant its cross-motion, reverse the Agency's determination, and grant "such other relief as the Board deems equitable and just." *Id*.

AGENCY RESPONSE TO MPEA CROSS-MOTION FOR SUMMARY JUDGMENT

The Agency disputes MPEA's claim that the Agency "omits certain critical facts in support of its position" (MPEA Resp. at 8) and "excludes much of the history of the Parties' communication" (Agency Resp. at 1). The Agency argues that "[t]his history is rightly excluded, as these facts are irrelevant to the issue at hand." *Id*. The Agency stresses that the Board reviews the February 18, 2010 denial letter, which frames the issues in this appeal. *Id*., citing ESG Watts, Inc. v. PCB, 286 Ill. App. 3d 325, 335, 676 N.E.2d 299, 306. (1997). The Agency argues that it denied MPEA's request for reimbursement because it was not timely under the Board's regulations. Agency Resp. at 2. The Agency claims that MPEA cannot overcome the burden of proving that it met the requirements for reimbursement "no matter how many extraneous facts it raises or claims of mischaracterizations. . . ." *Id*., citing 35 Ill. Adm. Code 105.112(a) (Burden of Proof).

The Agency responds to the three issues raised by MPEA in its memorandum of law. The following subsections of the opinion summarize the Agency's arguments.

Agency Decision Deadline

The Agency dismisses MPEA's argument that it is entitled to judgment by operation of law because the Agency's determination was not timely. The Agency characterizes this position as flawed because "requests for reimbursement can only be granted by operation of law if the Agency receives a *complete* application." Agency Resp. at 2 (emphasis in original). The Agency argues that, in the absence of a complete application, it cannot take final action. *Id*. The Agency further argues that it is not relevant that other Agency documents refer to MPEA as owner of the Site. *Id*. The Agency cites the Board's UST regulations to claim that a complete application must include a copy of the OSFM's eligibility and deductibility determination. *Id*., citing 35 Ill. Adm. Code 732.601(b)(3). The Agency claims that, because MPEA's application lacked this document, it correctly denied the request. Agency Resp. at 2.

Proof of Ownership and Eligibility

The Agency also discounts MPEA's argument that the administrative record included documents showing that MPEA was the owner of the Site. The Agency argues that "this argument misses the point that the rules require a completed application for reimbursement within one year of any No Further Remediation letter. . . ." Agency Rep. at 2-3. The Agency claims that, after it issued an NFR letter on January 23, 2008, MPEA submitted its application on November 18, 2009. *Id*. at 3. The Agency dismisses MPEA's claim that the November 18, 2009 application relates back to a December 22, 2008 OSFM determination by stating that MPEA "offers no legal authority for this argument." *Id*. The Agency asserts that it is not required to "search through its files to supplement incomplete reimbursement requests." *Id*. The Agency claims that it was not unreasonable or erroneous in denying the request on this basis.

Laches

The Agency responds to MPEA's argument regarding laches by stating that it received an inaccurate application for reimbursement. Agency Resp. at 3. The Agency notes that MPEA received an Eligibility and Deductibility Determination on December 22, 2008. *Id*. The Agency argues that "[i]t is through no fault of the Agency that the application submitted to the OSFM was in error." *Id*. The Agency further argues that MPEA did obtain a corrected determination but then waited more than nine months to submit its application for reimbursement. *Id*. The Agency claims that it played no role in preparing the erroneous application to the OSFM or in preparing the Eligibility and Deductibility Determination. *Id*. The Agency asserts that these circumstances provide no basis to claim that the Agency lacked diligence. *Id*. The Agency states that MPEA did not satisfy requirements for submitting a complete application and "cannot point to perceived actions or inactions of other to boot strap itself to eligibility for reimbursement." *Id.* at 4.

Summary

The Agency concludes that the record presents "no genuine issue of material fact as to Petitioner's inability to receive reimbursement for corrective actions from the LUST Fund." Agency Resp. at 4. The Agency argues that MPEA has failed to meet its burden and that its cross-motion for summary judgment should be denied. The Agency requests that the Board "enter an order granting its motion for summary judgment, upholding the decision of the Agency to deny reimbursement as sought by Petitioner." *Id*.

BOARD DISCUSSION

Because this matter is before the Board on the parties' motions for summary judgment, this section of the Board's opinion will set forth the standard of review for the consideration of a motion for summary judgment. The section will then discuss the standard of review and burden of proof to be applied in reviewing an appeal of an underground storage tank reimbursement before citing the applicable statutory and regulatory authorities.

Summary Judgment

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998). In ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." *Id*. Summary judgment "is a drastic means of disposing of litigation," and therefore it should be granted only when the movant's right to the relief "is clear and free from doubt." *Id., citing* Purtill v. Hess, 111 Ill. 2d 299, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must "present a factual basis which would arguably entitle [it] to a judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2d Dist. 1994).

The Agency argues that the record establishes "that there is no genuine issue of material fact" regarding MPEA's ability to be reimbursed from the UST Fund for corrective action at the Site. Agency Mot. at 8-9; *see id*. at 5. The Agency claims that it "is entitled to summary judgment as a matter of law." *Id*. at 9, citing 35 Ill. Adm. Code 101.516(b) (Motions for Summary Judgment); *see* Agency Mot. at 1. The Agency claims that the petition and exhibits filed by MPEA and the arguments in its own motion "are sufficient for the Board to enter a dispositive order" in the Agency's favor on all issues. *Id*. at 2.

Similarly, MPEA argues that "[t]here is no genuine issue of material fact, and MPEA is entitled to judgment as a matter of law." MPEA Resp. at 14.

Upon reviewing the pleadings and the record in this matter, the Board agrees that there are no issues of material fact and that it may grant summary judgment as a matter of law. In determining which motion for summary judgment to grant, the Board must look to the burden of proof in an underground storage tank appeal and the arguments presented by the parties.

Standard of Review and Burden of Proof

Section 57.8(i) of the Act, addressing the UST Fund, allows an owner or operator to appeal Agency determinations pursuant to Section 40 of the Act. 415 ILCS 5/40, 57.8(i) (2010). The standard of review under Section 40 of the Act (415 ILCS 5/40 (2010)) is whether the application, as submitted to the Agency, would not violate the Act and Board regulations. Ted Harrison Oil Co. v. IEPA, PCB 99-127, slip op. at 5 (July 24, 2003); citing Browning Ferris Industries of Illinois v. PCB, 534 N.E.2d 616 (2nd Dist. 1989). The Board will not consider new information that was not 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). The Agency's denial letter frames the issues on appeal. Pulitzer Community Newspapers, Inc. v. IEPA, PCB 90-142 (Dec. 20, 1990).

The Board's procedural rules provide that, in appeals of final Agency determinations, "[t]he burden of proof shall be on the petitioner. . . ." 35 Ill. Adm. Code 105.112(a), citing 415 ILCS 5/40(a)(1), 40(b), 40(e)(3), 40.2(a).

Statutory and Regulatory Authorities

Section 57.8(a)(1) of the Act provides in pertinent part that

> [i]n the cases of any approved plan and budget for which payment is being sought, the Agency shall make a payment determination within 120 days of receipt of the application. . . . If the Agency fails to approve the payment application within 120 days, such application shall be deemed approved by operation of law and the Agency shall proceed to reimburse the owner or operator the amount requested in the payment application. 415 ILCS 5/57.8(a)(1) (2010).

Part 732 of the Board's regulations addresses releases from USTs reported September 23, 1994, through June 23, 2002. 35 Ill. Adm. Code 732.

Section 732.601(b)(3) of the Board's UST regulations, which addresses applications for payment from the Fund, provides that

> b) A complete application for payment shall consist of the following elements:
>
> * * *
>
> 3) A copy of the OSFM or Agency eligibility and deductibility determination. 35 Ill. Adm. Code 732.601(b)(3).

Section 732.601(j) provides in pertinent part that "[a]ll applications for payment of corrective action costs must be submitted no later than one year after the date the Agency issues a No Further Remediation Letter. . . ." 35 Ill. Adm. Code 732.601(j).

Section 732.602(a), which addresses the Agency's review of application for payment from the UST Fund, provides in pertinent part that

> a) At a minimum, the Agency must review each application for payment submitted pursuant to this Part to determine the following:
>
> 1) whether the application contains all of the elements and supporting documentation required by Section 732.601(b) of this Part. 35 Ill. Adm. Code 732.602(a)(1).

Section 732.602(d) of the Board's UST regulations, which addresses review of applications for payment from the Fund, provides in pertinent part that

> the Agency shall have the authority to approve, deny or require modification of applications for payment or portions thereof. The Agency shall notify the owner or operator in writing of its final action on any such application for payment. Except as provided in subsection (e) of this Section, 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) of the Board's UST regulations provides in its entirety 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. Any waiver shall be for a minimum of 30 days." 35 Ill. Adm. Code 732.602(e).

Board Discussion

By letter dated December 14, 2007, MPEA submitted to the Agency a bill package for incident number 98-0841 at the Site "intended to meet the requirements for reimbursement" from

the Fund. R. at 2446; Exh. I. The Agency received MPEA's bill package on December 17, 2007. R. at 2446, 2448; *see id*. at 2427 (waiver). Based upon this application date and under Section 732.602(d), the Agency's 120-day decision deadline was April 15, 2008. *See* 35 Ill. Adm. Code 732.602(d).

Approximately 30 days before that deadline on March 14, 2008, Catherine S. Elston of the Agency's LUST Claims Unit sent a facsimile to Patricia M. Bryan of URS. R. at 2428. The cover sheet of that facsimile included the following language:

> Please find attached a 120 day waiver for lust incident #98[-]0841, Brinks, Inc., in the amount of $392,527.74 received by the Agency on December 17, 2007. We are requesting this waiver due to staff shortages and lack of resources. Please complete the information in the blank spaces, sign and fax only the waiver form back to my attention by close of business March 18, 2008. Thank you in advance for your quick response to our request and for granting us the 90 additional days that are needed to review the claim. *Id*.

With a cover sheet dated March 19, 2008, Patricia Bryan of URS sent an Agency form facsimile transmittal sheet to Catherine S. Elston of the Agency. With handwritten information competing the form, it states in pertinent part that,

> [p]ursuant to 35 IAC, Section 732.602(e)/734.610(e) (whichever is applicable), I, Patricia Bryan, URS Corporation, consultant on behalf of owner/operator, do hereby waive for a minimum of 120 days the right to a final decision by the Agency regarding a claim for payment from the Lust Fund. The claim subject to this waiver was received by the Agency on 12/17/2007, is associated with incident number 98[-]0841 and is in the amount of $392,527.74. R. at 2427.

In a letter dated October 30, 2008, the Agency stated that it had completed review of MPEA's December 2007 application for reimbursement of $389,224.57. R. at 2430; *see* 35 Ill. Adm. Code 732.602(a). The Agency disallowed the entire requested amount on the basis that it was "not accompanied by a copy of the eligibility and deductibility decision(s)." *Id*. at 2431. The Agency cited authorities including Section 732.601(b)(3) of the Board's UST regulations, which requires that a complete application for payment must include "[a] copy of the OSFM or Agency eligibility and deductibility determination." *Id*., citing 35 Ill. Adm. Code 732.601(b)(3). The Agency also cited Section 732.606(s), which characterizes as ineligible for payment "[c]osts for any corrective activities, services or materials unless accompanied by a letter from OSFM or the Agency confirming eligibility and deductibility in accordance with Section 57.9 of the Act." R. at 2431, citing 35 Ill. Adm. Code 732.606(s). As a further basis for disallowing payment, the Agency noted that, although MPEA submitted the application for reimbursement, "they are not the owner or operator of the USTs . . . nor do they have an eligibility and deductibility decision." R. at 2431, citing 35 Ill. Adm. Code 103 (definitions). The Agency also deducted $237.426.99 in costs subject to apportionment of costs eligible for payment from the UST Fund. R. at 2431, citing 415 ILCS 5/57.7, 57.8(m) (2008); 35 Ill. Adm. Code 732.608; *see* R. at 2437-38. In addition, the Agency deducted $385.00 in investigation costs to correspond to the amount

approved in the budget. R. at 2431, 2438, 2440; *see id*. at 2444 (seeking budget amendment of $385 in investigation costs).

The Agency made this determination more than 10 months after it had received MPEA's application for payment. The Agency has argued that MPEA's application was incomplete. The Agency claims that only a complete application can be deemed granted by operation of law because the Agency did not act within the 120-day deadline. *See* Agency Mot. at 7, Agency Resp. at 2. The Agency effectively argues that, because it determined on October 30, 2008, that MPEA's application was incomplete, the 120-day deadline had not applied to it, and the application could not be deemed granted by operation of law. On the basis of the applicable regulations and the record in this case, however, the Board believes that the Agency's position lacks support and must be rejected.

Section 732.601 of the Board's UST regulations addresses applications for payment from the UST Fund for releases reported September 23, 1994 through June 23, 2002. 35 Ill. Adm. Code 732.601. Subsection (a) provides in pertinent part that "[a]n owner or operator seeking payment from the [UST] Fund shall submit to the Agency an application for payment on forms prescribed and provided by the Agency. . . ." 35 Ill. Adm. Code 732.601(a). Subsection (b) provides that a complete application for payment consists of ten specified elements. 35 Ill. Adm. Code 732.601(b)(1-10). Among those elements is "[a] copy of the OSFM or Agency eligibility and deductibility determination." 35 Ill. Adm. Code 732.601(b)(3). As noted above under "Factual Background," MPEA's application did not include this element. *See* R. at 2446-2802, Exh. I; *see also* R. at 1916-18, Exh. C (Brinks' 1999 determination).

Section 732.602 addresses the Agency's review of applications for payment from the UST Fund. 35 Ill. Adm. Code 732.602. Subsection (a) lists four determinations for which the Agency must, at a minimum, review each application for payment submitted to it. 35 Ill. Adm. Code 732.602(a). Subsection (a)(1) specifically states that the Agency must review an application to determine "whether the application contains all of the elements and supporting documentation required by Section 732.601(b). . . ." 35 Ill. Adm. Code 732.602(b)(1). In other words, the Agency is required to review an application to determine whether it is complete. In addition to this completeness determination, the Agency must determine whether various specified costs are reasonable, sufficiently documented, or consistent with an approved budget, and whether the requested amounts are eligible for payment. 35 Ill. Adm. Code 732.602(a)(2-4).

Subsection (d) provides that, following its review of an application for payment, the Agency can approve, deny, or require modification of it. 35 Ill. Adm. Code 732.602(d). Subsection (d) continues by stating that

> [t]he Agency shall notify the owner or operator in writing of its final action on any such application for payment. Except as provided in subsection (e) of this Section [waiver], 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) (emphasis added); *see* 415 ILCS 5/57.8(a)(1) (2010) ("In the case of

> any approved plan and budget for which payment is being sought, the Agency shall make a payment determination within 120 days of receipt of the application.").

The Board can only conclude that the completeness determination required by Section 732.602(a)(1) is encompassed entirely within the 120-day deadline for final action on an application. By requiring final action within 120 days after receiving a complete application, the regulation requires that the Agency on or before that 120-day deadline will either deny an application as incomplete or will determine that an application is complete and then either approve it or modify it on other grounds. This conclusion finds additional support in the following provision regarding waivers.

Subsection (e) provides in its entirety 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. Any waiver shall be for a minimum of 30 days." 35 Ill. Adm. Code 732.602(e) (emphasis added). In light of the completeness determination required under subsection (a)(1), this language requires that the Agency on or before the 120-day deadline will either deny an application as incomplete or determine that it is complete and either accept or request a waiver of the deadline.

In this case, the record is clear that the Agency requested that MPEA waive its decision deadline (R. at 2428), signifying with that request that it had received a complete application for payment. If the Agency had received an incomplete application, the Agency would have lacked any basis to request a waiver, and MPEA would not have been able to execute one.

However, the Board views the Agency as having sought a waiver for precautionary reasons. Approximately 90 days after receiving MPEA's application, the Agency requested that that URS grant a waiver. R. at 2428. The Agency apparently considered that it might determine after expiration of the 120-day decision deadline that MPEA's application was in fact complete. Had the Agency reached that determination on or before August 13, 2008, a 120-day waiver could have prevented the application from being granted by application of law. Based on its determination that the application was incomplete and its position that the application could not have been granted by operation of law, however, the Agency effectively claims that it was not subject to the 120-day decision deadline and that the waiver executed by URS did not apply to its October 30, 2008 determination.

The record regarding this waiver casts some doubt on the Agency's position that MPEA's request was not granted by operation of law. The record includes communication between the Agency and URS including references to "a 120-day waiver," thanks for granting "90 additional days that are need to review the claim," and a waiver "for a minimum of 120 days." R. at 2427-28. Section 732.602(e) provides that a waiver must be for minimum of 30 days, but it provides no maximum duration. *See* 35 Ill. Adm. Code 732.602(e). The Board can only conclude that, if the Agency had sought a waiver of more than 120 days in duration or an open-ended waiver, its form would have so indicated consistently and specifically. The Board thus regards the term "a minimum of" as mere surplusage and views the waiver as extending the Agency's decision

deadline by 120 days to August 13, 2008. This is consistent with the Agency's facsimile request, which refers to "a 120 day waiver."

The record is clear that the Agency determined that MPEA's application was incomplete on October 30, 2008, more than 10 months after MPEA submitted it. R. at 2430-33. The Agency argues that MPEA's application cannot be deemed granted by operation of law because MPEA had not submitted a complete application that would trigger the 120-day deadline. The Board cannot accept this position. As described above, this argument lacks support in the substance of the Board's UST regulations.

In addition, it is plain to the Board that the Agency's position would lead to absurd and unfair results. The Agency effectively argues that, as long as it determines that an application is incomplete, there is no deadline for it to do so. Consequently, no such incomplete application can be deemed approved by operation of law. This position conceivably would allow the Agency to take 12, 18, 24, or more months to determine that an application is incomplete. As applications for payment must be submitted within one year after the date on which the Agency issues an NFR letter (35 Ill. Adm. Code 732.601(j)), an owner or operator who has received an NFR letter could have an application denied as incomplete long after the application deadline had passed. Such a construction could foreclose reimbursement altogether, a result that can only be characterized as absurd and unfair. IEPA v. Jersey Sanitation, 336 Ill. App. 3d 582, 589, 784 N.E.2d 867, 872 (4th Dist. 2003); Modine Mfg. Co. v. PCB, 40 Ill. App. 3d 498, 502, 351 N.E.2d 875, 879 (2nd Dist. 1976). The Board declines to construe its regulations to establish an open-ended deadline for the Agency to determine that an application for payment from the UST Fund is incomplete.

Accordingly, the Board concludes that, because the Agency failed to reach a completeness determination for more than ten months after receiving MPEA's request for payment, MPEA is entitled to deem its application approved by operation of law. Even if MPEA had validly waived the Agency's decision deadline, the Agency reached its determination that MPEA's application was incomplete more than two months after the date to which MPEA had purportedly waived that deadline. Accordingly, the Board grants MPEA's motion for summary judgment, denies the Agency's motion for summary judgment, reverses the Agency's October 30, 2008 determination, concludes that MPEA's application for payment was granted by operation of law, and directs the Agency to reimburse MPEA $392,527.74 from the Fund.

CONCLUSION

For the reasons stated above, the Board grants MPEA's motion for summary judgment and denies the Agency's motion for summary judgment. In doing so, the Board concludes that MPEA's application for payment was approved by operation of law, reverses the Agency's determination, and directs the Agency to reimburse MPEA $392,527.74 from the Fund.

This opinion constitutes the Board's findings of fact and conclusions of law.

ORDER

1. The Board grants MPEA's motion for summary judgment and denies the Agency's motion for summary judgment. Accordingly, the Board reverses the Agency's determination, and concludes that MPEA's application for payment was approved by operation of law.

2. The Board directs the Agency to reimburse MPEA $392,527.74 in corrective action costs from the Fund.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2010); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on July 7, 2011, by a vote of 5-0.

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board