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STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

McDONALD'S CORPORATION,	)
	)
Petitioner,	)
	) PCB 2004-14
v.	) (UST Appeal)
	)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)
	)
Respondent.	)

NOTICE OF FILING AND CERTIFICATE OF SERVICE

The undersigned hereby states on oath that on this 6th day of November, 2003, copies of Petitioner McDonald's Corporation's Response To Respondent IEPA's Motion For Summary Judgment were filed with the Illinois Pollution Control Board and served by First Class Mail, postage pre-paid, upon the parties named on the attached Service List.

McDonald's Corporation

BY:

its attorney

Barbara A. Magel
Mark D. Erzen
Karaganis, White & Magel Ltd.
414 North Orleans Street, Suite 810
Chicago, Illinois 60610
312/836-1177
Fax 312/836-9083

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SERVICE LIST

John J. Kim, Esq.
Assistant Counsel
Illinois Environmental Protection Agency
Division of Legal Counsel
1021 North Grand Avenue East
Springfield, Illinois 62794-9276

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

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PETITIONER McDONALD'S CORPORATION'S RESPONSE TO RESPONDENT IEPA'S MOTION FOR SUMMARY JUDGMENT

Petitioner McDonald's Corporation ("McDonald's") respectfully submits this Response to the Motion For Summary Judgment filed by Respondent the Illinois Environmental Protection Agency (the "IEPA").

As discussed in greater detail below, the IEPA's Motion for Summary Judgment must be denied (and McDonald's Motion for Summary Judgment must be granted) for two reasons:

1. The IEPA As A Matter Of Law Cannot Raise Its "Corrective Action" Argument In This Appeal. The IEPA's June, 2003 denial statement gave one (and only one) reason for the IEPA's decision to deny reimbursement – namely, that the cost at issue had not been demonstrated to be "reasonable." (Joint Stipulation, Exhibit 6.) In its Motion for Summary Judgment, however, the IEPA has totally abandoned "reasonableness" and has instead offered a new and completely different reason for denial that was never mentioned in the denial statement – namely, that "the costs for compaction of backfill material … are [not] corrective action … ." (*See, e.g.*, the IEPA's Motion for Summary Judgment, p. 3.)

The IEPA's attempt to introduce a "corrective action" argument into this appeal is improper. The Board has made it clear that as soon as a LUST Fund denial decision is appealed, the IEPA cannot come forward with any new bases or arguments in an attempt to justify its prior decision. The IEPA is instead legally "bound on review by those cited bases for denial given in its denial statement." *Pulitzer Community Newspapers, Inc. v. IEPA*, PCB 90-142 (Opinion and Order dated December 20, 1990). As a consequence, the IEPA is barred from raising its corrective action argument in this appeal. That argument is not properly before the Board.

Since the IEPA's Motion For Summary Judgment is totally reliant upon the corrective action argument, and since the corrective action argument is not properly before the Board, the IEPA's Motion For Summary Judgment must be denied.

2. The Compaction Was A "Corrective Action." Even assuming *arguendo* that the IEPA can properly raise the "corrective action" argument during this appeal, the IEPA's position on corrective action is wrong. The cost of compaction in this instance was a cost arising out of a corrective action which should be reimbursed from the LUST Fund.

There is no question that, under the Board's decisions, placing backfill into an excavation created by the removal of contaminated soil, for the purpose of bringing the surface of the excavation back up to grade, is a corrective action. There is also no question that the cost of that backfilling is reimbursable from the LUST Fund. *See, e.g., Platolene 500, Inc. v. IEPA*, PCB 92-9 (Opinion and Order dated May 7, 1992), p. 6 ("Backfilling the site would be considered corrective action even though it occurred after the contamination had been removed because it is an action necessary to protect human health and the environment.")

The IEPA has stipulated that the compaction at issue here was properly part of the backfilling process at the Site: "... for purposes of this appeal, IEPA ... does not contest the fact that the compaction of the backfill soil *was properly part of the soil placement process*." (Joint Stipulation, ¶37; emphasis added.)

Since placing the backfill into the excavations at the Site was a corrective action, and since the compaction of that backfill was (by stipulation) properly part of placing the backfill, only one conclusion is possible: the cost of the compaction was a "cost arising out of a corrective action" which is entitled to reimbursement from the LUST Fund.

Consequently, even if the "corrective action" argument raised in the IEPA's Motion For Summary Judgment could properly be considered by the Board (which it cannot), the IEPA's Motion For Summary Judgment must still be denied.

McDonald's therefore respectfully requests that the Board deny the IEPA's Motion For Summary Judgment, grant McDonald's Motion for Summary Judgment, find that the IEPA erred in denying reimbursement for the $31,515 cost at issue in this case, and enter an order allowing that cost to be reimbursed from the LUST Fund.

ARGUMENT

1. THE IEPA IS BARRED FROM ARGUING THAT THE COMPACTION IN THIS CASE WAS NOT A "CORRECTIVE ACTION."

The IEPA's denial statement in this case consists of a certified letter dated June 23, 2003. (Joint Stipulation, Exhibit 6.) That denial statement memorialized the IEPA's decision to reject McDonald's request for reimbursement from the LUST Fund for $31,515 in costs relating to compaction. According to the denial statement, the sole basis for the IEPA's decision was that "the owner/operator [*i.e.*, McDonald's, had] failed to demonstrate [that the costs of compaction] were reasonable (Section 22.18b(d)(4)(C) of the Environmental Protection Act)."

McDonald's timely appealed the IEPA's decision to the Board. In that appeal, McDonald's contended, in response to the IEPA's denial statement, that "Petitioner McDonald's has demonstrated that the costs were reasonable." [McDonald's] Petition For Review Of LUST Fund Payment Denial, ¶7.

The IEPA has now filed a Motion For Summary Judgment in the appeal. In that Motion, the IEPA has completely abandoned its earlier position that McDonald's "failed to demonstrate [that the costs of compaction] were reasonable ... ."[1] Instead, the IEPA's Motion For Summary Judgment advances a new argument in which the IEPA claims that "the costs for compaction of backfill material ... [are not eligible for reimbursement from the LUST Fund because they] are [not] corrective action ... ." (*See, e.g.*, the IEPA's Motion for Summary Judgment, p. 3.)

The Board has made it absolutely clear that such an attempt by the IEPA to introduce a new argument or basis supporting a denial decision, while an appeal of that denial decision is pending before the Board, is forbidden. Once the IEPA sets forth the basis for its denial of a LUST Fund reimbursement request in a denial statement, the Agency effectively waives (and may not on appeal raise) any other basis for that denial. As the Board stated in *Pulitzer Community Newspapers, Inc. v. IEPA*, PCB 90-142 (Opinion and Order dated December 20, 1990), this rule is grounded in fundamental fairness, because it is the only way to ensure that the party contemplating an appeal can know what issues can be raised in the appeal:

> ***Principles of fundamental fairness require that an applicant be given notice of the statutory and regulatory bases for denial of an application for reimbursement and that the Agency be bound on review by those cited bases for denial given in its denial statement. Fundamental fairness would be violated if the Agency were free to cite additional statutory and regulatory reasons for denial for the first time at the Board hearing. The Board concludes that the Agency cannot rely upon those regulations not previously cited in the denial letter as support for its denial of Pulitzer's application for reimbursement.*** (Emphasis added.)

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[1] Surprisingly, the IEPA now seems to believe that the compaction was "reasonable." In its Motion, the Agency notes that the goals underlying the compaction were "perfectly logical and reasonable ...," and also states that it is not arguing "that the action of compaction was unreasonable in conjunction with the use of the backfill material." (IEPA Motion For Summary Judgment, p. 6.)

"Reasonableness" and "corrective action" are separate and distinct bases for denial of LUST Fund claims. *See, e.g., Southern Food Park, Inc. v. IEPA*, PCB 92-88 (Opinion and Order dated 12/17/92) at p. 2 (three costs denied by IEPA because they are "not corrective action" and another cost denied because the owner failed to demonstrate that "these costs [are] reasonable"). A denial based upon "reasonableness" also has a different statutory basis than a denial based upon "corrective action." *Compare* Section 22.18b(d)(4)(C) of the Act (repealed) (reasonableness) with Section 22.18(e)(1)(C) of the Act (repealed) (defining "corrective action"). The IEPA's denial statement in this case referred only to §22.18b(d)(4)(C) (reasonableness), and did not mention §22.18(e)(1)(C) (corrective action).

The impact of the *Pulitzer* decision in this case is, consequently, quite clear. In its denial statement (Joint Stipulation, Exhibit 6), the IEPA did not list "not a corrective action" as a basis for rejecting McDonald's request, so the IEPA cannot raise "corrective action" as an argument in this appeal.

The fact that the IEPA cannot properly raise its corrective action argument in this appeal is fatal to the IEPA's Motion For Summary Judgment. The IEPA's Motion For Summary Judgment contains only one argument – namely, that the costs are not "corrective action." Since that argument cannot properly come before the Board, the IEPA's Motion For Summary Judgment must be denied.

2. THE COST OF COMPACTION AROSE OUT OF A "CORRECTIVE ACTION."

Although (as shown above) the IEPA cannot properly argue that the compaction was not a "corrective action," it is nonetheless clear that the compaction in this case was in fact a "corrective action."

The IEPA has stipulated that it will not contest the fact that compaction of the backfill at this Site was "properly part of the soil placement process" used to raise the surface of the excavations at the Site to grade. (Joint Stipulation, ¶37.) The Board has long held that backfilling an excavation created by the removal of contaminated soil is a "corrective action." *See, e.g., Platolene 500, Inc. v. IEPA*, PCB 92-9 (Opinion and Order dated May 7, 1992). Simple logic dictates that since the compaction was "properly part of" a corrective action, it too was a "corrective action."

The Board's own decisions support this conclusion. The Board has in the past found that the cost of compaction is entitled to reimbursement from the LUST Fund where the compaction was part of the corrective action. *See, e.g., State Bank of Wittington v. IEPA*, PCB 92-152 (Opinion and Order dated June 3, 1993).[2] Although the facts in *State Bank* differ from the facts here in that the compaction in the *State Bank* case was intended, in part, to prevent contamination from entering the backfill, *State Bank* stands for a more fundamental proposition: namely, that the cost of soil compaction which is properly part of a corrective action should be allowed.

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[2] The Board did refuse to allow recovery of the cost of backfilling an excavation where the purpose of the backfilling was to provide "a solid foundation for a nearby building." *Princeton/Beck Oil Company v. IEPA*, PCB 93-8 (Opinion and Order dated May 5, 1993). That is not an issue here. There are no buildings at the Site in this case, and it is undisputed that the compaction at issue was ***solely*** intended to prevent voids and severe settling. (*See* Joint Stipulation, ¶¶20, 26.)

That is exactly the situation here. The backfilling at this Site was properly part of a corrective action. The IEPA has stipulated that the compaction was properly part of the backfilling.[3] When an activity such as compaction is a proper part of a corrective action, that activity is itself a corrective action, eligible to be reimbursed from the LUST Fund. The cost of compaction here is therefore reimbursable from the LUST Fund.

The IEPA nonetheless argues that the compaction in this case was akin to pouring new concrete and is therefore not reimbursable. (*See, e.g.*, IEPA Motion For Summary Judgment, p. 5.) The IEPA's argument completely misses the mark both legally and factually. Placing backfill into an excavation is not in either a legal or a factual sense akin to pouring concrete, and the Board has never treated the two as being "directly analogous." (IEPA Motion For Summary Judgment, p. 4.) The Board decisions cited by the IEPA show that pouring new concrete at a LUST site, in almost all instances, is not part of the remedial action, is not necessary to protect against a risk to human health and the environment, and is a benefit primarily to the owner/operator. Pouring concrete is therefore not eligible for reimbursement.

Board decisions such as *Platolene* and *State Bank of Wittington* show that even though backfilling normally takes place after the removal of the contaminated soil, it is necessary to protect against a risk to human health and the environment and is not primarily for the benefit of the owner/operator. Backfilling is therefore eligible for reimbursement.

The IEPA's Motion For Summary Judgment also asks the Board to apply the "two-prong" test which has been used to determine (for example) the eligibility of the cost of pouring

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[3] The reasons that the compaction was properly part of the backfilling are now clear to the IEPA. As the IEPA noted in its Motion For Summary Judgment, the goals underlying the compaction were "perfectly logical and reasonable ...," and the IEPA is not arguing "that ... compaction was unreasonable in conjunction with the use of the backfill material." (IEPA Motion For Summary Judgment, p. 6.)

concrete for reimbursement from the LUST Fund. (*See* IEPA's Motion For Summary Judgment, pp. 5-7.) Application of the two-prong test to the facts of this case is unnecessary. The Board has already ruled in *Platolene, supra*, that backfilling meets the two-prong test (even though the backfilling takes place after the remediation is complete), because backfilling addresses a health and safety issue. As the Board held in *Platolene*: "Backfilling the site would be considered corrective action even though it occurred after the contamination had been removed because it is an action necessary to protect human health and the environment." Consequently, even though the backfilling at the Site may not have directly "stop[ed], minimize[d], eliminate[d], or clean[ed] up a release of petroleum," it was nonetheless a "corrective action" under the rulings of this Board.[4]

Backfilling is, under long-standing rulings of the Board, properly a corrective action. The Board and the IEPA should therefore be supportive of any effort by an owner (such as McDonald's) to backfill excavations in a reasonable, cost effective way. In this case, the most reasonable, most cost effective way to backfill the Site (as MACTEC demonstrated) was to take soil (supplied at no cost by Oak Brook), place that soil in the excavations at the Site, and do the minimum compaction necessary to prevent voids and settlement. The reasonableness of this

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4 It must be noted that the IEPA did not disallow any costs related to backfilling at this Site other than the cost of compaction – a clear indication that the IEPA understands that the cost of backfilling is reimbursable. It should also be noted that IEPA's argument that any expense that is not "stopping, minimizing, eliminating or cleaning up" is non-reimbursable goes much too far. If that argument is taken literally, all LUST Fund reimbursement would stop as soon as the last bit of petroleum is removed. That would mean that the LUST Fund would not reimburse the post-remediation removal of equipment, the post-remediation decommissioning of treatment facilities, the post-remediation filling of excavations, and other expenses which are now being reimbursed and which are, beyond debate, a necessary and proper cost of a corrective action. The IEPA's argument is not only at odds with the facts and present practice, it would (if adopted) also discourage cleanups, because the LUST Fund will (under the IEPA's argument) reimburse the cost of digging out contaminated soil, but force the owner/operator to pay to fill the resulting hole by himself. That additional cost will likely result in owner/operators being reluctant to begin remedial projects.

approach should be obvious to the Board and the IEPA: it saved more than an estimated $50,000 compared with the use of washed stone. The IEPA and the Board should encourage actions, such as those here, which minimize to the extent possible the need to draw on the LUST Fund.

Finally, the IEPA contends (without citation to the record) that the "main intent for compaction was to restore the site." (IEPA Motion For Summary Judgment, p. 7.) This is grossly misleading and wrong. First, there is no evidence showing how the Site looked prior to the remediation. The pictures of the Site that are in the record (Joint Stipulation, Exhibits 1 and 2) show that there is nothing on the Site at this time. The IEPA's claim that the "main intent of the compaction was to restore the Site" is completely baseless.[5]

Second, the IEPA's claim flies in the fact of the stipulated facts. The parties have stipulated that "McDonald's used the sheepsfoot roller to roll over the backfill soil after the backfill soil was placed into excavations at the Site *solely to compact the fill sufficiently to prevent voids and severe settlement*" and that "McDonald's wished to avoid the presence of voids and the possibility of severe settlement because voids and severe settlements would cause the surface of the Site to sink below grade at the Site." (Joint Stipulation, ¶¶20-21.) These stipulations show that McDonald's intent was to insure that there are no future health and safety issues at the Site, not restoration.

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[5] The IEPA argues that McDonald's had "reasons" for using soil (which required compaction) as backfill – namely, to re-use a potential waste material and to save a substantial amount of money – as though those reasons were a basis to deny reimbursement for the cost of compaction. *See* IEPA's Motion For Summary Judgment, p. 4. These "reasons" for using soil as backfill are simply facts that arose from the use of the soil as backfill. None of them is objectionable *per se*, nor should they be objectionable to the Board. In fact, the IEPA's suggestion that saving money on backfilling is somehow wrong is absurd. McDonald's use of waste soil saved more than $50,000 in remediation costs in comparison to the use of fully reimbursable washed stone. It also used excess soil for a beneficial purpose. These are not reasons to complain.

Notwithstanding the IEPA's attempt to falsely color the situation, the facts show that McDonald's and its contractor simply backfilled the Site in a manner that was both reasonable and low-cost. That backfilling was a proper "corrective action," and the compaction was properly part of the backfilling. Consequently, even if the "corrective action" argument raised in the IEPA's Motion For Summary Judgment could properly be considered by the Board (which it cannot), the IEPA's Motion For Summary Judgment must still be denied.

CONCLUSION

The IEPA's argument that compaction is not a "corrective action" is improper. That argument was never part of IEPA's denial statement, and it cannot be raised now on appeal. Since the IEPA's Motion For Summary Judgment is totally reliant upon its new corrective action argument, and since the corrective action argument cannot properly be brought before the Board, the IEPA's Motion For Summary Judgment must be denied.

In addition, the compaction of the fill was a corrective action under the precedent of the Board. Consequently, even if the "corrective action" argument raised in the IEPA's Motion For Summary Judgment could properly be considered by the Board (which it cannot), the IEPA's Motion For Summary Judgment must still be denied.

McDonald's therefore respectfully asks the Board to deny the IEPA's Motion For Summary Judgment and, based upon the same reasoning and finding, to enter summary judgment finding: (1) that the IEPA erred in denying reimbursement for the $31,515 cost of compaction at the Site; (2) that the $31,515 cost was (and was demonstrated to be) a reasonable cost of corrective action at this Site; and (3) that under the Illinois Environmental Protection Act, IEPA must now allow the $31,515 cost of compaction for reimbursement from the LUST Fund.

McDonald's Corporation

BY: ____________________
their attorney

Barbara A. Magel
Mark D. Erzen
Karaganis, White & Magel Ltd.
414 North Orleans Street, Suite 810
Chicago, Illinois 60610
312/836-1177
Fax 312/836-9083