BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

McDONALD'S CORPORATION, Petitioner,	)	
v.	)	PCB No. 04-14
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	(UST Appeal)

NOTICE

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

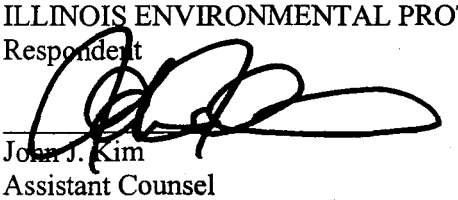
Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

Mark D. Erzen
Karaganis, White & Magel, Ltd.
414 North Orleans Street
Suite 810
Chicago, IL 60610

PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board a RESPONSE TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



John J. Kim
Assistant Counsel
Special Assistant Attorney General
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)
Dated: November 6, 2003

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

McDONALD'S CORPORATION, Petitioner,	)	
v.	)	PCB No. 04-14
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	(UST Appeal)
Respondent.	)	

RESPONSE TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, John J. Kim, Assistant Counsel and Special Assistant Attorney General, and, pursuant to 35 Ill. Adm. Code 101.500, 101.504 and 101.516, hereby respectfully responds to the Motion for Summary Judgment ("Petitioner's motion") filed by the Petitioner, McDonald's Corporation ("McDonald's"). In response to the Petitioner's motion, the Illinois EPA states as follows:

I. THE COMPACTION OF BACKFILL WAS NOT CORRECTIVE ACTION

The Petitioner's argument that the compaction of backfill at the site was corrective action is based on two statements. First, as a matter of law, the compaction was corrective action since the Illinois EPA did not deny the costs related to the compaction on the basis that the compaction was not corrective action. Second, as a matter of fact, the compaction constituted corrective action and thus was eligible for reimbursement. Based on information before the Board and legal precedent, both of these arguments fail.

A. The Illinois EPA Properly Denied The Compaction Costs

The Petitioner first argues that the final decision issued by the Illinois EPA on June 23, 2003 (Exhibit 6 to the Joint Stipulation of Facts), which forms the basis for this appeal, does not support

the Illinois EPA's position that the reimbursement was denied because the compaction was not a corrective action. Petitioner's motion, p. 12. The Petitioner states that nothing in the Illinois EPA's final decision states or suggests that the claim for reimbursement submitted by McDonald's for the cost of compaction was not paid because the Illinois EPA determined that the compaction was something other than corrective action. Petitioner's motion, p. 13.

This argument is wholly unsupported by the clear language of the final decision. The exact wording of Attachment A, Accounting Deductions, of the final decision is as follows:

Item #	Description of Deductions
1.	$31,515.00 deduction in costs that the owner/operator failed to demonstrate were reasonable (Section 22.18b(d)(4)(C) of the Environmental Protection Act). A deduction in the amount of $7,680.00 was made on the R.W. Collins invoice numbered 1132324 for the ineligible costs for compaction. A deduction in the amount of $2,2025.00 was made on the R.W. Collins invoice numbered 113255 for the ineligible costs for compaction. A deduction in the amount of $21,810.00 was made on the R.W. Collins invoice numbered #113293 for the ineligible costs for compaction.

The wording of the final decision provides a more than sufficient basis for the Petitioner to understand the nature of the denial. First, the Illinois EPA properly cited to Section 22.18b(d)(4)(C) of the Illinois Environmental Protection Act ("Act") as being the statutory basis for denial. That section provides that, in a request for a partial or final payment for claims under Section 22.18b of the Act, the owner or operator must provide an accounting of all costs, demonstrate that the costs incurred to perform the corrective action were reasonable, and provide proof of payment of the

applicable deductible amount. In this instance, the Illinois EPA's concern was not whether there was a proper accounting of all costs or whether proof of payment of the applicable deductible had been provided.

Rather, the Illinois EPA's denial was based on the second criteria, namely, that the owner/operator submitting the request for payment must demonstrate that the costs incurred to perform the corrective action were reasonable. That reference is made in the Attachment to the final decision. Further, in the attachment there is a description of each of the invoices on which the subject costs are referenced, along with the statement that the compaction costs were "ineligible costs."

The Illinois EPA's argument raised in its motion for summary judgment is entirely consistent with the description set forth in the Attachment to the final decision; specifically, the cost for compaction was ineligible for reimbursement since it was not a corrective action, and therefore the Petitioner failed to demonstrate that the costs related thereto were reasonable.

A very similar situation arose in the case of Paul Rosman v. Illinois EPA, PCB 91-80 (December 19, 1991). There, the Illinois EPA issued a final determination that included an adjustment in tank removal costs. The wording used by the Illinois EPA in the final decision was that the adjustment was warranted since the owner/operator failed to provide a demonstration that the costs were reasonable as submitted, citing to Section 22.18b(d)(4)(C) of the Act. The Illinois EPA did not believe that those costs met the two-prong test for corrective action that was discussed fully in the present case in the Illinois EPA's motion for summary judgment. Rosman, pp. 5-6.

An argument was raised by the Petitioner that the final decision was insufficient to conform to the precepts of fundamental fairness as discussed by the Board in Pulitzer v. Illinois EPA, PCB

90-142 (December 20, 1990). The Pulitzer case discussed the need for fundamental fairness in Illinois EPA final decisions, finding that it would be unfair to allow the Illinois EPA to cite to additional statutory and regulatory reasons for denial at the time of hearing. Rosman, pp. 4-5, citing, Pulitzer, p. 7.

Rosman argued that since it obtained numerous bids for the tank removal in question, its costs were reasonable. The Illinois EPA argued that the costs were inherently unreasonable since they were outside the scope of corrective action. The Board held that the final decision issued by the Illinois EPA was not fundamentally unfair and was consistent with the Illinois EPA's argument. Rosman, p. 6. The Board did note that the letter in that case was "poorly articulated," and that it could have been framed more precisely. Id. But it did find that the wording was sufficient for the Illinois EPA to make its arguments. The Board concluded that the Illinois EPA's failure to be more specific resulted in a denial of fundamental fairness. Rosman, p. 7.

Similarly, in the present situation the Board is reviewing a letter that also cites to Section 22.18b(4)(d)(C) of the Act, one that also denied costs for an activity that the Illinois EPA did not believe met the definitional test for corrective action. There is a difference though, in that the final decision under appeal here does contain a specific reference that the costs for compaction were ineligible. It is true that the Illinois EPA could have been more specific in its wording, but the question is not whether more specific words could have been used, but rather whether the words that were used meet the test for fundamental fairness and whether they are consistent with the position taken by the Illinois EPA. Based on the Rosman case, there is no doubt that the language of the Attachment in the June 23, 2003 final decision was more than adequate to meet the Pulitzer standard.

In Rosman, the Board also noted that there were other provisions of Section 22.18b of the

Act that the Illinois EPA could have cited to for the proposition that costs that were not corrective action were ineligible for reimbursement. Rosman, pp. 6-7. In a later case, though, the Board addressed an argument by a Petitioner that the Illinois EPA could not rely on all of the statutory provisions of a general citation to a statute if a more specific denial reason is given. The Board there found that although a more specific denial reason is often given in a final decision, any failure to meet the requirements of the Act is an appropriate reason for denial. Ted Harrison Oil Company v. Illinois EPA, PCB 99-127 (July 24, 2003). Thus, even though there may have been other statutory provisions that the Illinois EPA could have cited to, the section that was cited to in the denial letter is nonetheless appropriate.

The Petitioner is arguing that the Illinois EPA did not raise a concern that the compaction was not corrective action, and thus it is improper to raise that argument now. As has been shown, the Attachment to the denial letter does raise that concern, contains more information than a similarly-worded letter that was considered by the Board in Rosman, and is consistent with the arguments presented in the Illinois EPA's motion for summary judgment.[1] For the same reasons that the Board ruled in Rosman that the Illinois EPA's argument that the tank removal costs were unreasonable since they were not related to corrective action, the Board should here find that the June 23, 2003 decision letter contains more than sufficient language to support the Illinois EPA's arguments that compaction was not corrective action. At no time did the Illinois EPA concede that point, and no language in the final decision warrants that finding.

B. As A Matter Of Fact, The Compaction Was Not Corrective Action

[1] As was argued in Rosman, the fact that the compaction activities at the McDonald's site do not meet the definition of corrective action makes the costs related thereto inherently unreasonable. The language of Section 22.18b(d)(4)(C) of the Act in question, requiring that an owner/operator demonstrate that the costs incurred to perform the corrective action were reasonable, implicitly (if not explicitly) include the requirement that the costs be related to corrective action to begin

The Petitioner also argues in its motion that in fact the compaction at the McDonald's site was corrective action. Petitioner's motion, p. 14. This is an erroneous statement, unsupported by fact or law. In support of this contention, the Petitioner first directs the Board's attention to the Joint Stipulation of Fact ("Stipulation"), in which the parties stipulated that the compaction of the backfill was properly part of the soil placement process. Petitioner's motion, p. 14; Stipulation, par. 37. Unfortunately, the Petitioner is attempting to read far more into that particular stipulation than is there. The Illinois EPA does not dispute the notion that, as part of any backfilling of soil or material into an excavation at a site in which an underground storage tank ("UST") was removed, it may be a proper part of the soil placement to compact that soil. However, there is a clear distinction between what may be a normal part of a soil placement process and what is, by definition, corrective action.

By analogy, it is clear from a long line of Board cases that replacement of concrete at an UST excavation may be appropriate, if for no other reason than to provide an area of safe footing. But those Board cases also examine the need for use of such concrete replacement in the context of whether the action meets the definition of corrective action.[2] Simply put, whether an activity is considered to be prudent or proper in the context of restoring a site is not the same issue as whether that same activity is corrective action that may be reimbursable. Was it proper to McDonald's to compact or tamp the backfill that was placed into the excavation to prevent voids or settling? Likely so. But that act of compaction, which was a task clearly set apart from the actual placement of soil into the excavation (as noted by the invoices that clearly referenced compaction), clearly did not meet the two-prong test of whether an activity is corrective action. The Illinois EPA notes that costs

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with. If the costs to relate to corrective action, then the owner/operator must demonstrate that they are reasonable. If the costs are not related to corrective action, then the owner/operator has failed to make that demonstration.

[2] For example, see: Salyer v. Illinois EPA, PCB 98-156 (January 21, 1999); Miller v. Illinois EPA, PCB 92-49 (July 9, 1992); Warren's Service v. Illinois EPA, PCB 92-22 (June 4, 1992); Strube v. Illinois EPA, PCB 91-205 (May 21,

for backfilling of the material were not denied as part of the final decision, only those costs related to the compaction of that backfilled material.

For the reasons more fully set forth in the Illinois EPA's motion for summary judgment, the compaction here did not meet either prong of the test and therefore cannot be considered as corrective action. Not every component of work that is done during remediation at a site that has experienced a release from an UST is corrective action, though those components may be desirable or acceptable. That is the reason the Board has utilized the corrective action test, to allow for a distinction between what tasks are and are not corrective action. Here, factually speaking, the compaction was not corrective action.

The Petitioner also cites to the case of State Bank of Whittington v. Illinois EPA, PCB 92-152 (June 3, 1993), when making the statement that the Board has on at least one occasion allowed for reimbursement of costs associated with compaction of backfilling. Petitioner's motion, p. 14. But as the Petitioner itself concedes, the Board allowed for reimbursement in that instance since there was a demonstration by the owner/operator in State Bank that the compaction had a remedial purpose. Id. Here, to the contrary, the Petitioner has stated that the only reason for the compaction was to prevent voids and settlement of the soil. Those are laudable goals, but certainly not rising to the level of being a component of the site's remediation. Therefore, after examining all of the Petitioner's arguments, the Board should find that as a matter of fact the compaction was not corrective action.

II. THE PETITIONER DID NOT DEMONSTRATE THE COSTS FOR COMPACTION WERE REASONABLE

The Petitioner contends that the costs for compaction were demonstrated to be reasonable,

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1992); Platolene 500, Inc. v. Illinois EPA, PCB 92-9 (May 7, 1992).

but in doing so tries to impose upon the Illinois EPA two supposed rationales as to why the Illinois EPA's reached its determination. The Petitioner supposes that the Illinois EPA decided that either McDonald's should have backfilled the excavation with a different material or the soil should have been placed into the excavation without any compaction. Petitioner's motion, p. 15. Not only are these statements pure speculation on the part of the Petitioner, they are also entirely irrelevant to the decision at hand. Also, neither of the two suppositions by the Petitioner is based in any fact or is representative of any finding or decision by the Illinois EPA.

In attempting to portray the Illinois EPA's decision as falling into one of the two described scenarios, the Petitioner is moving the Board's focus away from the real issue. The question before the Board is not whether the Illinois EPA's mindset was one of the two imagined by the Petitioner, but rather whether the compaction itself is corrective action. In response to what it guesses are concerns of the Illinois EPA, the Petitioner states that a letter from MACTEC (McDonald's remediation contractor) to the Illinois EPA dated May 20, 2003 (Stipulation, Exhibit 5), satisfactorily addressed any questions.

If the Illinois EPA believed that the backfill material used at the site should have instead been replaced with crushed stone, the MACTEC letter explained that the backfill material was a better option. Or, if the Illinois EPA believed that the backfill should have been placed into the excavation without compaction, the MACTEC letter again spoke to the need of preventing voids and settling.

Unfortunately, none of those passages is relevant to the Board's review of the decision under appeal. The Illinois EPA obviously did not take the position that the crushed stone should have been used instead of the backfill material, since none of the costs related to the deposition of the backfill material were denied (only compaction was denied). Whether the crushed stone would have required

compaction is irrelevant, since the Illinois EPA's decision was based on whether the compaction of any material used for filling the excavation met the definition of corrective action. Put another way, backfilling the excavation was not the problem, compacting the material following the backfill was the problem.

Similarly, the Illinois EPA stipulated that the compaction of the soil was proper, in that it likely did serve the useful function of preventing voids and settlement of the soil. But as the Illinois EPA argued in its motion for summary judgment, the Petitioner never made the statement that compaction was needed to stop, minimize, eliminate or clean up the release of petroleum. Rather, the Petitioner's explanation for the compaction was one related more to restoration and maintenance of a level grade at the site, with a desire to reduce future costs for repairs stemming from voids and settling. As was stated earlier, the Illinois EPA agrees that compaction was not inappropriate for the purposes that the Petitioner provided, but those purposes do not meet the definition of corrective action and therefore are not reimbursable. The standards and implications of those two considerations (i.e., is something a good idea for long-term maintenance of a level grade versus is something corrective action) are separate and distinct. The Petitioner makes the mistake of confusing the two, and it seeks to draw the Board into the mistaken conclusion that one consideration is the same as the other.

III. CONCLUSION

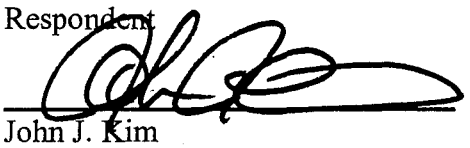
The Petitioner has failed to meet its burden in this appeal, and instead has offered misleading or erroneous arguments in an attempt to divert the Board's review from the relevant issues. The Illinois EPA's final decision in this matter was appropriate and sufficient, specifically meeting the standard set forth in the Rosman case. The Illinois EPA's arguments within its motion for summary

judgment are consistent with the final decision, and therefore consistent with the dictates of the Board's decision in Pulitzer. The Illinois EPA did not make any concession as argued by the Petitioner, and its arguments are in-line with the final decision and the statutory provisions of Section 22.18b(d)(4)(C) of the Act. As a matter of law and fact, the compaction at the McDonald's site was not corrective action. Based on the arguments set forth in the Illinois EPA's motion for summary judgment, and the Petitioner's failure to meet its burden by virtue of its attempt to misdirect the Board away from the real issue, the Illinois EPA respectfully requests that the Board grant summary judgment to the Illinois EPA and affirm the Illinois EPA's decision dated June 23, 2003.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent



John J. Kim
Assistant Counsel
Special Assistant Attorney General
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)
Dated: November 6, 2003

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on November 6, 2003, I served true and correct copies of a RESPONSE TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT, by placing true and correct copies thereof in properly sealed and addressed envelopes and by depositing said sealed envelopes in a U.S. mail drop box located within Springfield, Illinois, with sufficient First Class postage affixed thereto, upon the following named persons:

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
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