

JUN 03 2005

STATE OF ILLINOIS  
Pollution Control Board

RICHARD KARLOCK, )  
 )  
Petitioner, )  
 )  
vs. )  
 )  
ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY, )  
 )  
Respondent. )

PCB No. 05-127  
(UST Appeal)

**PETITIONER'S RESPONSE TO ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY'S MOTION FOR SUMMARY JUDGMENT**

COMES NOW the Petitioner, Richard Karlock (hereinafter "Petitioner"),  
by his attorneys, Harrington & Tock, and, for his response to the Illinois  
Environmental Protection Agency's Motion for Summary Judgment, states as  
follows:

The Illinois Environmental Protection Agency's ("IEPA") Motion for  
Summary Judgment sets forth two issues regarding its rejection of the  
Petitioner's Application for Reimbursement of Site Investigation Activities. Each  
of those two issues will be addressed separate by the Petitioner:

- (1) Is the IEPA correct in withholding approval of reimbursement  
of costs related to site investigation activities if a SICR has not yet been  
approved?

There is no factual dispute that the Petitioner had not completed a Site  
Investigation Completion Report ("SICR") at the time it made application for  
partial payment of site investigation work performed by the Petitioner.

Although partial payment is specifically authorized by statute (415 ILCS 5/57.8), the IEPA chose to not address that specific authorization in its Motion for Summary Judgment. Instead, the IEPA chose to rely upon a provision of the Illinois Administrative Code (35 Ill.Admin.Code 732.601(h)) that applies to only site classification, not site investigation. The IEPA acknowledged in its Motion that there is no specific provision in the Illinois Administrative Code that requires a SICR as a prerequisite to the IEPA reimbursing an owner for costs incurred in preparation of that SICR. ("...there is no doubt that Section 732.601(h) does not strictly apply, since the Petitioner performed site investigation activities, not site classification activities." IEPA Brief at page 5.)

The IEPA then made the remarkable conclusion that "In the absence of any corresponding or analogous regulation concerning approval of site investigation costs prior to the approval of a SICR, it is acceptable for the IEPA to handle such requests for payment in a manner consistent with the previously used method under site classification." (IEPA Brief at 5-6.) The IEPA failed to state any authorization to support its conclusion that it is "acceptable" for the IEPA to unilaterally expand the specific provisions of the Illinois Administrative Code applicable to site classifications to apply that same rule and restriction to site investigations. This is a particularly egregious justification for denying the Petitioner's Application for Reimbursement in light of the specific statutory authority found in Section 57.8 of the Act authorizing partial payment by the IEPA for such work. The IEPA has no authority to create its own rules and

thereby reject an application for partial payment of site investigation work. Only the Illinois Pollution Control Board, not the IEPA, is authorized to adopt such rules and regulations.

The IEPA's reliance upon Section 57.7(a)(5) of the Act (415 ILCS 5/57.7(a)(5)) provides no support for the IEPA's denial of the Petitioner's reimbursement request. Section 57.7(a)(5) simply states the requirement that a SICR must be submitted to the IEPA within 30 days of completing that report. There is absolutely nothing contained in the statute that requires the submission of a SICR prior to any reimbursement of site investigation expenses. Without a specific rule adopted by the Illinois Pollution Control Board authorizing or directing the IEPA to make no reimbursement of any site investigation expenses unless and until a SICR is submitted, the IEPA has no authority to deny a request for partial payment of those expenses incurred in the course of a site investigation.

(2) The Petitioner failed to timely provide the proper certification form.

In seeking summary judgment, the IEPA also relies upon the fact that the Petitioner failed to submit the proper owner/operator billing certification form when the Petition was filed on September 16, 2004. The Petitioner does not deny that it failed to originally file the proper certification form, but denies that such failure now provides the IEPA with grounds for summary judgment. It is clear from reading Attachment A to the IEPA's letter of December 10, 2004

(Petitioner's Exhibit 2) that the rejection of the Petitioner's reimbursement request was based solely upon the failure of the Petitioner to submit a SICR. Although Attachment A contains a reference to the fact that the claim was missing the Owner/Operator Billing Certification Form, it is stated in such a way as to indicate that the IEPA was simply bringing this fact to the attention of the Petitioner and even included a proper form for the Petitioner to complete.

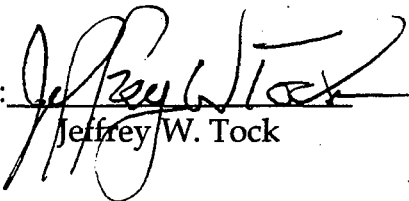
There is no indication whatsoever that the Petitioner's Application for Reimbursement would have been rejected by the IEPA solely for the reason of not having the proper certification form. This interpretation is supported by Petitioner's Exhibit 3 which consists of a cover letter from HDC Engineering LLC (Petitioner's engineers) to Nikki Weller of the IEPA dated January 4, 2005. That letter states as follows: "Per our conversation, enclosed is the billing certification for the reimbursement package for the referenced site." It is apparent from that cover letter that the IEPA had agreed to accept the completed Owner/Operator Billing Certification Form that had been sent by the IEPA to HDC with the IEPA's letter of December 10, 2004. (The December 10, 2004 letter shows that a copy was sent to HDC.) There is neither a statute nor a regulation that prohibited the IEPA from accepting from HDC the completed Owner/Operator Billing Certification Form after the IEPA sent its letter of December 10, 2004. If absence of the proper form were the only reason for the IEPA to reject the original application, the IEPA would have reversed that decision upon its approval of the Billing Certification Form. That Billing Certification Form and

the HDC cover letter dated January 4, 2005 are part of the Administrative Record and should be considered by the Illinois Pollution Control Board when ruling on the cross motions for summary judgment in this matter.

CONCLUSION:

For the foregoing reasons, the IEPA's Motion for Summary Judgment must be denied.

RICHARD KARLOCK,  
Petitioner,

By:   
Jeffrey W. Tock

Dated: June 1, 2005

Jeffrey W. Tock  
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Champaign, Illinois 61824-1550  
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

RICHARD KARLOCK,

Petitioner,

vs.

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY,

Respondent.

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PCB No. 05-127  
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NOTICE OF FILING

TO: John Kim, Esq.  
Division of Legal Counsel  
Illinois Environmental Protection Agency  
1021 N. Grand Avenue East  
P.O. Box 19276  
Springfield, IL 62764-9276

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board an original and ten copies of Petitioner's Response to Illinois Environmental Protection Agency's Motion for Summary Judgment, copies of which are herewith served upon you.

RICHARD KARLOCK,  
Petitioner,

By:   
Jeffrey W. Tock

Dated: June 1, 2005

Jeffrey W. Tock  
Harrington & Tock  
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Champaign, Illinois 61824-1550  
Telephone: (217) 352-4167

**CERTIFICATE OF SERVICE**

I, Jeffrey W. Tock, the undersigned, certify that I did on June 1, 2005, send via First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box a true and correct copy of the attached Petitioner's Response to Illinois Environmental Protection Agency's Motion for Summary Judgment upon:

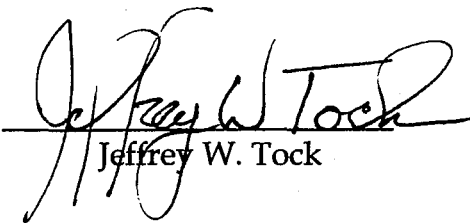
John Kim, Esq.  
Division of Legal Counsel  
Illinois Environmental Protection Agency  
1021 N. Grand Avenue East  
P.O. Box 19276  
Springfield, IL 62764-9276

and the original and ten copies by First Class Mail with postage thereon fully prepaid of the same foregoing instrument:

Ms. Dorothy Gunn  
Clerk of the Board  
Illinois Pollution Control Board  
100 W. Randolph Street  
Suite 11-500  
Chicago, IL 60601

A copy was also sent by First Class Mail with postage thereon fully prepaid

Carol Webb  
Hearing Officer  
Illinois Pollution Control Board  
1021 N. Grand Avenue  
P.O. Box 19274  
Springfield, IL 62794-9274

  
Jeffrey W. Tock