

BEFORE THE POLLUTION CONTROL BOARD  
OF THE STATE OF ILLINOIS

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JUN 03 2005

STATE OF ILLINOIS  
Pollution Control Board

RICHARD KARLOCK,	)	
Petitioner,	)	
v.	)	PCB No. 05-127
ILLINOIS ENVIRONMENTAL	)	(LUST Appeal)
PROTECTION AGENCY,	)	
Respondent.	)	

NOTICE

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board  
James R. Thompson Center  
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Chicago, IL 60601

Jeffrey W. Tock  
Harrington & Tock  
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Carol Webb, Hearing Officer  
Illinois Pollution Control Board  
1021 North Grand Avenue East  
P.O. Box 19274  
Springfield, IL 62794-9274

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: June 1, 2005

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ILLINOIS ENVIRONMENTAL	)	(LUST Appeal)
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**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, 101.508 and 101.516, hereby responds to the Motion for Summary Judgment filed by the Petitioner, Richard Karlock ("Karlock"). The Illinois EPA respectfully requests that the Illinois Pollution Control Board ("Board") deny the Petitioner's motion for summary judgment and instead issue an order granting the Illinois EPA's own motion for summary judgment. In support of this response, the Illinois EPA states as follows:

**I. THE PETITIONER FAILED TO PROVIDE  
THE PROPER CERTIFICATION FORM**

In its motion, the Petitioner notes that the final decision under appeal contains the following explanation for the denial of the costs:

Item #	Description of Deductions
1.	\$26,245.05, deduction for costs lacking supporting documentation. An approved site investigation completion report has not been submitted. (Sections 57.7(a)(5) and 57.12(c) and (d) of the Act and 35 Ill. Adm. Code 732.100 and 732.105).

When the site investigation completion report has been approved, fax/send a copy of the Agency letter approving the site investigation completion report and request a re-review.

Also, the claim was missing the Owner/Operator Billing Certification Form. The form that was enclosed was for budget certification. I have enclosed a copy of the Billing Certification form.

Petitioner's motion, Petitioner's Exhibit 2, p. 3.

The Petitioner, in response to the second basis for denial of the costs in question, notes that on January 4, 2005, the Petitioner sent a letter to the Illinois EPA in which the requested Billing Certification Form for the Application for Reimbursement was provided. Petitioner's motion, p. 2. The certification itself was dated January 3, 2005. Petitioner's motion, Petitioner's Exhibit 3, p. 3.

However, the final decision under appeal is dated December 10, 2004. Therefore, the Petitioner provided the proper billing certification form to the Illinois EPA almost one month too late. Even if the Board were to find that the Illinois EPA's decision regarding the necessity of approval of the site investigation completion report ("SICR") before approval of related costs for reimbursement, the fact that the Petitioner failed to provide the necessary billing certification is more than enough justification for the Board to grant the Illinois EPA's motion for summary judgment and affirm the December 2004 decision.

To counter this argument, the Petitioner noted that the Illinois EPA referred to the application as being complete in one portion of the December 2004 final decision, yet later denied the costs in question in part due to the lack of a proper certification form. Petitioner's motion, pp. 3-5. The Illinois EPA's final decision does provide that the Illinois EPA received the Petitioner's "complete application for payment" of the claim. Petitioner's motion, Petitioner's Exhibit 2, p. 1. However, the final decision also clearly and specifically provides that the Petitioner failed to include the proper billing certification form. Petitioner's motion, Petitioner's Exhibit 2, p. 3. These two components of the final decision are not necessarily at odds with one another. Rather, the final decision could and

should be read to mean that the Illinois EPA received all the information that Petitioner provided in support of its claim, including what the Petitioner thought to be the correct certification of costs (i.e., a complete application), yet in fact the certification was incorrect.

The statement in the final decision that the application was complete is not dispositive of a question of whether the proper certification was submitted, since the Illinois EPA clearly stated within the final decision that the proper certification was not provided. In essence, the Petitioner is asking the Board to ignore the stated reasons for denial and instead focus on the boilerplate language found within the final decision. While such language should not go totally unnoticed, it is much more reasonable to interpret the "complete application" language of the letter to mean that all of the Petitioner's documents, including those it felt were responsive to the statutory requirements, were received. The question as to whether those documents were sufficient or proper or correct or persuasive is another matter, and in this situation the certification document was found to be lacking. Given that the Illinois EPA clearly stated its reasons for denial, including the lack of a proper certification, the final decision's language was not inconsistent and the decision should be affirmed.

## **II. THE ILLINOIS EPA PROPERLY WITHHELD APPROVAL OF COSTS**

The other reason for denying the costs in question, as described by the Illinois EPA's final decision, was that the Petitioner has not yet received approval on a SICR. The costs in question are related to site investigation activities. Petitioner's motion, Petitioner's Exhibit 1, p. A-1. The Petitioner argues that there is no specific statutory or regulatory provision that prevents the approval of site investigation costs for reimbursement even if site investigation activities have not yet been completed. Rather, the Petitioner argues that the general language of Section 57.8 of the Act (415 ILCS 5/57.8) should control. That language states that an owner or operator may submit a complete

application for final or partial payment to the Illinois EPA for activities taken in response to a confirmed release.

Despite the Petitioner's reading, that language is not a blanket statement that an application may be made any time for any type of corrective action cost. There are situations in which a request for payment, whether final or partial in nature, must be preceded by a separate milestone. The easiest example is the requirement that costs other than for early action activities may not be approved for reimbursement until a related budget has been approved. There is no prohibition to an owner or operator beginning corrective action activities without the benefit of an approved plan or budget, although to do so does not provide a guarantee that the work and associated costs will ultimately be approved by the Illinois EPA. But pursuant to the Petitioner's interpretation of Section 57.8, an owner or operator could submit a request for reimbursement of costs that have been incurred prior to the approval of a plan or budget, since Section 57.8 does not have any restrictive language.

The Petitioner has to concede that Section 57.8 does not allow an owner or operator to submit an application for payment at any phase of a site's cleanup (e.g., before a related plan and budget has been approved) and expect that application to be acted upon. The only argument that the Petitioner could possibly make in response to the budget requirement is that such a requirement is set forth elsewhere in the LUST program's provisions. But, as noted by the Illinois EPA in its motion for summary judgment, the LUST program is currently operating in a vacuum in terms of regulations to "flesh out" the new provisions of the Act, including those related to site investigation. Just as the requirement existed in regulatory form that site classification be completed before site classification costs could be approved for reimbursed, so too will there likely be some regulation that discusses the similar situation involving site investigation activities and costs.


But until the pending rulemaking is complete, it is impossible to say with absolute certainty how that provision will read in final form. Therefore, as the Illinois EPA has argued, it is sensible to look to the previous regulatory stance on this topic (in the context of site classification activities and costs) for guidance. Since there was a regulation that prohibited approval of site classification costs until the site classification completion report was approved, so too should there be a prohibition (at least until the new regulations are final) on the approval of site investigation costs until a site investigation completion report has been approved. If the new regulation on this question is different than the regulation regarding site classification, a corresponding change in practice can then take place.

### III. CONCLUSION

For the reasons stated herein, the Illinois EPA respectfully requests that the Board deny the Petitioner's motion for summary judgment and instead grant the Illinois EPA's motion for summary judgment by affirming the Illinois EPA's December 10, 2004 decision to deny approval of reimbursement of the site investigation costs.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,  
Respondent



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217/782-5544  
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Dated: June 1, 2005

This filing submitted on recycled paper.

## CERTIFICATE OF SERVICE


I, the undersigned attorney at law, hereby certify that on June 1, 2005, I served true and correct copies of a RESPONSE TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT, by placing true and correct copies 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 Mail postage affixed thereto, upon the following named persons:

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board  
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Jeffrey W. Tock  
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