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

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

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent,

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Dated: October 30, 2003

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)

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 respectfully moves the Illinois Pollution Control Board ("Board") to enter summary judgment in favor of the Illinois EPA and against the Petitioner, McDonald's Corporation ("McDonald's"), in that there exist herein no genuine issues of material fact, and that the Illinois EPA is entitled to judgment as a matter of law with respect to the following grounds. In support of said motion, the Illinois EPA states as follows:

I. STANDARD FOR ISSUANCE AND REVIEW

A motion for summary judgment should be granted where the pleadings, depositions, admissions on file, and affidavits disclose 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); Ozinga Transportation Services v. Illinois Environmental Protection Agency, PCB 00-188 (December 20, 2001), p. 2.

The Board's authority to review a determination by the Illinois EPA to deny in part or in full a request for reimbursement submitted pursuant to the Leaking Underground Storage Tank ("LUST")

Program arises from Section 22.18b(g) of the Environmental Protection Act ("Act") (415 ILCS 5/22.18b(g) (Repealed)). That section provides that an applicant may appeal an Illinois EPA decision denying reimbursement to the Board under the provisions of Section 40 of the Act (415 ILCS 5/40). Pursuant to Section 40 of the Act, the Board's standard of review is whether the application submitted to the Illinois EPA would not violate the Act and Board regulations. Ted Harrison Oil Company v. Illinois EPA, PCB 99-127 (July 24, 2003), p. 3.[1]

More specifically, in the situation of a party appealing a decision denying reimbursement from the Underground Storage Tank Fund ("UST Fund"), the standard is for the Board to apply the statutory definition of corrective action and determine whether the costs in question sought for reimbursement meet that definition. Salyer v. Illinois EPA, PCB 98-156 (January 21, 1999), p. 7; Graham v. Illinois EPA, PCB 95-98 (August 24, 1995), p. 8.

The parties have filed a Joint Stipulation Of Facts ("stipulation") in this matter, and the Administrative Record has not been filed. The Illinois EPA asserts that the stipulation and the arguments presented in this motion are sufficient for the Board to enter a dispositive order in favor of the Illinois EPA on all relevant issues. The applicable law is found in Section 22.18b of the Act, as the bases for denial as found in the decision letter are based upon Section 22.18b(d)(4)(C) of the Act (415 ILCS 5/22.18b(d)(4)(C)).[2] As the Board described in Ted Harrison, the law in Illinois regulating releases from underground storage tanks ("USTs") transitioned from that found in Section 22.18b of the Act to Section 57 of the Act. Ted Harrison, pp. 4-5.

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1 The Illinois EPA's citation to page numbers in Board decisions is sometimes based on pagination provided by Westlaw printouts of the decisions. It is thus possible that the page references may sometimes be inconsistent with the pages in the "official" Board. The Illinois EPA hopes any such inconsistencies are at a minimum and not too troublesome for Board staff.

2 The final decision, as found in Exhibit 6 of the stipulation, includes an erroneous reference to Section 57.8(i) of the Act as one of the statutory bases for appeal of the decision. The reference should not have been to a provision of Section 57, but rather to Section 22.18b. However, any such error is harmless as the Petitioner was obviously provided with ample

II. BURDEN OF PROOF

Pursuant to Section 105.112(a) of the Board's procedural rules (35 Ill. Adm. Code 105.112(a)), the burden of proof shall be on the petitioner. The burden of proving that challenged costs in a claim for reimbursement are reasonable and related to corrective action rests solely on the applicant for reimbursement. Salyer, p. 3; Ted Harrison, pp. 3-4 (the owner or operator bears the burden of proof to provide an accounting of all costs).

III. ISSUE

The issue before the Board is straightforward; namely, whether the costs for compaction of backfill material, as submitted by McDonald's for reimbursement from the UST Fund, are corrective action such that the costs may be reimbursed. The Illinois EPA's position is that the costs do not meet the two-prong test for corrective action, and therefore cannot be considered to be corrective action. Accordingly, the costs are not subject to reimbursement from the UST Fund.

IV. THE ILLINOIS EPA IS ENTITLED TO SUMMARY JUDGMENT BASED ON THE FACTS AND LAW

A. Relevant Facts

As set forth in the stipulation, McDonald's is the owner of a site located at 1120 West 22nd Street in Oak Brook, Illinois. Stipulation, pars. 3, 8. Following a release from a tank or tanks at the site, McDonald's undertook remediation of the resulting contamination. Stipulation, pars. 7, 8. As component of that remediation, McDonald's decided to use clean fill soil that was owned by the Village of Oak Brook as backfill material. Stipulation, par. 11, 12.

Following successful sampling to ensure that the clean fill material was appropriate for use as back fill, McDonald's followed through and used the backfill material at the excavation at the site.

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and sufficient notice that it could file an appeal of the decision.

As part of the process of using the backfill material, McDonald's employed a sheepsfoot roller to compact the backfill material. Stipuation, pars. 18, 19. McDonald's described the use of the roller for compaction as necessary to prevent later voids and severe settlement of the backfill material. Stipulation, pars. 20-23, 32. There were other reasons given for use of the backfill material by McDonald's, including to assist Oak Brook in the disposal of the unwanted soil, and to save in remediation costs. Stipulation, pars. 33, 34. McDonald's did not conduct any in-place density testing of the backfill soil, and did not intend the compaction to be later utilized as part of a base for later construction at the site. Stipulation, par. 26.

Following a request by McDonald's that the compaction costs be reimbursed from the UST Fund, the Illinois EPA issued a decision on June 23, 2003, denying the costs for reimbursement on the basis that the owner/operator failed to demonstrate that the costs were reasonable. Stipulation, pars. 35, 36; Exhibit 6. This appeal then followed.

B. No Genuine Issues Of Material Fact Exist

As evidenced by the submission of the stipulation, the parties are in agreement with all relevant facts needed for the Board to consider while determining whether summary judgment is appropriate. The question in this case is not one of fact, but rather of law. Specifically, the question is whether the underlying facts surrounding the use of a compaction device, and the costs related thereto, when placing the backfill material warrant the Board deciding that the compaction was or was not corrective action. For that reason, there is no genuine issue of material fact.

V. THE COMPACTION COSTS HERE ARE NOT REIMBURSABLE

In appeals involving a challenge of a denial for costs associated with compaction of soil, the Board has followed the long line of related and directly analogous cases involving appeals of denials

of reimbursement of costs for replacement of concrete at sites in which USTs have been excavated. The principles, applicable law and rationale in soil compaction and concrete replacement cases are the same. Since the costs for soil compaction here are not corrective action by definition, the costs are not reimbursable.

A. The Board Employs A Two-Prong Test And Looks To The "Main Intent"

To determine whether request for reimbursement of a cost should have been approved for payment, the Board looks first to determine whether the cost is associated with an activity or task that meets the definition of corrective action. Beginning with the case of Enterprise Leasing Company v. Illinois EPA, PCB 91-174 (April 9, 1992), the Board noted that the proper inquiry to be made in determining reimbursability is whether the activity meets both parts of the statutory definition of corrective action. The first prong of the corrective action definition is whether the costs were incurred as a result of action to stop, minimize, eliminate, or clean up a release of petroleum. The second prong is whether the costs were the result of such activities as tank removal, soil remediation and free product removal. See also, Platolene 500, Inc. v. Illinois EPA, PCB 92-9 (May 7, 1992), p. 4.

If the activity in question does not meet both prongs of the definitional standard, then the activity is not corrective action. Accordingly, the activity is not subject to reimbursement from the UST Fund.

A further consideration or component of the Board's review process was elucidated in the case of Southern Food Park, Inc. v. Illinois EPA, PCB 92-88 (December 17, 1992). There, the Board reiterated the test of whether an activity was defined as corrective action. But the Board went on to also consider the main intent behind the activity in question. There, the Board decided that the main

intent in replacing the concrete at the site was to restore the area to its previous condition in order to continue operation as a gas station. Southern Food Park, p. 4.

Therefore, taking into account the specific facts of the case, the Board applies the two-prong definition test to, and also considers the main intent behind, the activity in question.

B. The Soil Compaction Here Does Not Meet The Corrective Action Definition

The first step is to apply the two-prong test to the soil compaction activity at the McDonald's site. The question is whether the soil compaction costs were incurred as a result of action to stop, minimize, eliminate, or clean up a release of petroleum. Clearly, in this instance, the answer is "No." The soil compaction here was done for the purposes of preventing voids and settlement at the site, so that McDonald's would not have to later add additional fill material to bring the backfill to grade. However, that has nothing to do with stopping, minimizing, eliminating or cleaning up the release of petroleum. There is no claim or fact before the Board that the soil compaction was in any way related to the remediation of the contamination at the site. Rather, McDonald's did not want to have to expend additional costs later to address any voids or settlements of the backfill material. That goal was perfectly logical and reasonable, but not rising to the standard set forth in the definition test.

Put another way, had McDonald's not employed the soil compaction for which it is now seeking reimbursement, was there any claim made by McDonald's that the release of petroleum would not be stopped, minimized, eliminated or cleaned up? Of course not, as the compaction had nothing to do with remediation of the petroleum release, but everything to do with restoring the site back to a level grade. It is not that the act of compaction was unreasonable in conjunction with the use of the backfill material. However, that is not the same as saying that the compaction was also a component of corrective action.

Although the compaction does not meet the first prong of the definition test, and thus does not qualify as corrective action, the second prong should nonetheless be examined as well. The second prong of the test is whether the costs were the result of such activities as tank removal, soil remediation and free product removal. Again, the compaction had nothing to do with tank removal, nothing to do with soil remediation, and nothing to do with free product removal. It was an activity solely related to the manner in which the backfill was deposited at the site. Therefore, the soil compaction activity meets neither of the two prongs of the corrective action definition test.

C. The Main Intent For Compaction Was To Restore The Site

As stated in a letter from the consultant retained by McDonald's to the Illinois EPA, the reason behind soil compaction was to prevent voids and settlements of the backfill, which would necessitate additional cost and labor to McDonald's. The intent was not to assist in the exercise of remediation at the site, and no statement was ever made that the soil compaction was a component of any corrective action taken at the site. Rather, it was simply done to restore the site back to a level and firm grade. The soil compaction therefore was not intended as corrective action.

D. The Illinois EPA's Decision Here Is Consistent With Past Cases

There are numerous cases that have been decided by the Board involving claims for reimbursement of concrete replacement or soil compaction costs.[3] Those cases all employ the two-prong test for corrective action in considering whether the activity in question was or was not corrective action.[4]

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3 For example, see: Salyer; Bernard 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, 1992); and Platolene.

4 One case in which the Board did find that roller/compaction costs related to soil compaction were corrective action and therefore reimbursable was State Bank of Whittington v. Illinois EPA, PCB 92-152 (June 3, 1993). However, that case is clearly distinguishable from the case at hand, since there the Petitioner made an argument that the soil compaction was a necessary component of the corrective action at the site. Also, the Petitioner there also employed nuclear density testing of the soil. Here, as McDonald's notes, no such in-place density testing took place, since the compaction was not

As discussed earlier, the Southern Food Park case also introduced the factor of the "main intent" in undertaking the activity in question. In Southern Food Park, the Board also stated that the general rule (subject to exception) was that actions that occurred prior to backfilling would be considered corrective action, and actions that occurred after backfilling would be considered restoration. The Board noted that the specific facts of each case should be the deciding factor. Southern Food Park, p. 4.

Another observation by the Board that should be considered here is that the purposes of the UST Fund are narrow. The Act limits reimbursement from the UST Fund to those actions which remediate or stop, eliminate or minimize the contamination. The UST Fund was not developed to reimburse operators for the costs of restoration as a result of remediation at the site. Accordingly, the Board did not believe that any or all actions that may contribute to cleaning up or containing a petroleum release constitute corrective action. Graham, p. 9, citing, Strube v. Illinois Pollution Control Board, 242 Ill. App. 3d 822, 610 N.E.2d 717 (3rd Dist. 1993).

Even if McDonald's had in some way made a claim that the soil compaction did play a role in the corrective action, such a claim is not enough in and of itself to justify a finding that the compaction is corrective action. Again, McDonald's made no such claim here, and rightly so since the compaction was not related to corrective action. However, the Board when reaching its decision should consider the narrow purpose of the UST Fund.

VI. CONCLUSION

For the reasons stated herein, the Illinois EPA respectfully requests that the Board affirm the Illinois EPA's decision to deny approval of reimbursement of the costs associated with soil

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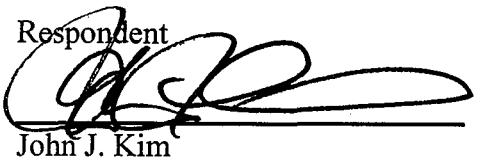
considered as a component in the corrective action. The compaction was done purely to try to avoid later voids and settlement of the backfill material, which would be akin to using concrete to cover backfill to prevent later voids or

compaction. There was no demonstration by McDonald's that the costs associated with the soil compaction were reasonable, given that the costs were not associated with a task that is corrective action. Since activities that are not corrective action cannot be reimbursed from the UST Fund, the Illinois EPA's decision to deny reimbursement here was appropriate, correct and consistent with applicable law. The Illinois EPA respectfully requests that the Board enter an order in favor of the Illinois EPA, affirming the June 23, 2003 decision under appeal.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent



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Dated: October 30, 2003

settlement.

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on October 30, 2003, I served true and correct copies of a 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:

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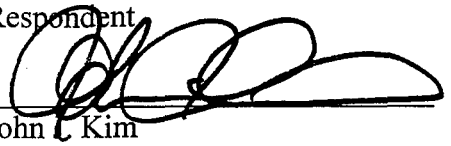

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