BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

NORTH AURORA GAS STATION, (F/N/A INTERMART, INC.) Petitioner,	)	
v.	)	PCB 10-35 (UST Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

NOTICE

John Therriault, Acting Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

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

Eleonora "Lee" R. Holmes
Strohschein Law Group, LLC
2455 Dean Street, Suite G
St. Charles, Illinois 60175

Mr. Javed Arshed
Intermart, Inc. (former operator)
187 Timber Oaks
North Aurora, IL 60542

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

Melanie A. Jarvis
Assistant Counsel
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: January 20, 2010

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

NORTH AURORA GAS STATION, (F/N/A INTERMART, INC.) Petitioner,	)	
v.	)	PCB 10-35 (UST Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

MOTION FOR SUMMARY JUDGMENT

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, Melanie A. Jarvis, 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, North Aurora Gas Station/Intermart ("Intermart"), 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); McDonald's Corporation v. Illinois Environmental Protection Agency, PCB 04-14 (January 22, 2004), p. 2.

Section 57.8(i) of the Illinois Environmental Protection Act ("Act") (415 ILCS 5/57.8(i)) grants an individual the right to appeal a determination of the Illinois EPA to the Board pursuant to Section 40

of the Act (415 ILCS 5/40). Section 40 of the Act, the general appeal section for permits, has been used by the legislature as the basis for this type of appeal to the Board. Thus, when reviewing an Illinois EPA determination of ineligibility for reimbursement from the Underground Storage Tank Fund, the Board must decide whether or not the application as submitted demonstrates compliance with the Act and Board regulations. Rantoul Township High School District No. 193 v. Illinois EPA, PCB 03-42 (April 17, 2003), p. 3.

In deciding whether the Illinois EPA's decision under appeal here was appropriate, the Board must look to the documents within the Administrative Record ("Record" or "AR"). The Illinois EPA asserts that the Record 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. Accordingly, the Illinois EPA respectfully requests that the Board enter an order affirming the Illinois EPA's decision.

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. In reimbursement appeals, the burden is on the applicant for reimbursement to demonstrate that incurred costs are related to corrective action, properly accounted for, and reasonable. Rezmar Corporation v. Illinois EPA, PCB 02-91 (April 17, 2003), p. 9.

III. ISSUE

The issue before the Board in this matter is significant. It is not uncommon for facilities to install additional tanks on-site. When additional tanks are added, an issue relative to LUST Fund deductible occurs. In this case, a new deductibility determination was sought only after an initial application for deductibility has been made and specifically only after a reported release and the removal of all tanks associated with such release. Thus, the issue presented is, pursuant to 35 Ill. Adm. Code Section

732.603(b)(4), when more than one deductible determination is made, shall the higher deductible apply? Based upon the express language of this Section and the facts presented, the answer is YES.

IV. FACTS

The facts in the Illinois EPA record supporting this motion are as follows:

1. On January 21, 2000, the Office of the Illinois State Fire Marshal ("OSFM") received a Reimbursement Eligibility and Deductible application from J&S Enterprises regarding the Intermart facility and Incident Number 97-0184 ("Application I"). (AR, p.119)

2. On January 24, 2000, OSFM issued a Deductibility Determination that Tanks 1 through 5 were subject to a $100,000 deductible. (AR, p.119)

3. There is no indication on the Board's website that this OSFM determination was appealed.

4. Application I indicated that Tanks 1 through 4 were taken out of service in February of 1997 and that Tank 5 was taken out of service in 1989. On that form, all of the tanks were indicated to have had a release. One Incident Number was assigned to the releases from the existing tanks. (AR, p.126) These five reported tanks were removed from the site in January of 2000.

5. On June 9, 2003, OSFM received a Reimbursement Eligibility and Deductible application by the new owners Shahnaz Anjum and Rasheda Malik on behalf of Intermart ("Application II"). (AR, p.130)

6. Application II stated that Tanks 1 through 5 were never used by the new owner and that the new owner had installed 2 new fiberglass tanks. (AR, p.130)

7. Application II also stated that Tanks 1 through 5 were removed in January of 2000 and that the new tanks 6 and 7 were also installed in 2000. No new releases or incidents numbers are listed. However, Application II did note that Tank 4 did not have a release as was previously reported on Application I. (AR, p.133)

8. On July 25, 2003, OSFM issued a second Deductibility Determination that Tanks 1, 2, 3, and 5 were subject to a $15,000 deductible. This second determination also lists Tanks 4, 6, and 7 as additional tanks at the site. (AR, p.151)

9. On October 13, 2009, the Illinois EPA issued a determination letter informing Intermart that, pursuant to 35 Ill. Adm. Code 732.612(a), the Illinois EPA had approved an excess payment on October 8, 2008, for $85,000.00; which represented the remainder of the $100,000 deductible that had not been withheld from the facility's prior reimbursements. (AR p.1)

10. The October 13, 2009, letter also informed Intermart that, pursuant to 35 Ill. Adm. Code 732.603(b)(4), where more than one deductible determination had been made that the higher deductible shall apply. (AR p.1)

VII. APPLICABLE LAW

A. ENVIRONMENTAL PROTECTION ACT:

415 ILCS 5/57.9. Underground Storage Tank Fund; eligibility and deductibility, states, in part, as follows:

(a) The Underground Storage Tank Fund shall be accessible by owners and operators who have a confirmed release from an underground storage tank or related tank system of a substance listed in this Section. The owner or operator is eligible to access the Underground Storage Tank Fund if the eligibility requirements of this Title are satisfied and:

(1) Neither the owner nor the operator is the United States Government.

(2) The tank does not contain fuel which is exempt from the Motor Fuel Tax Law.

(3) The costs were incurred as a result of a confirmed release of any of the following substances:

(A) "Fuel", as defined in Section 1.19 of the Motor Fuel Tax Law.

(B) Aviation fuel.

(C) Heating oil.

(D) Kerosene.

(E) Used oil which has been refined from crude oil used in a motor vehicle, as defined in Section 1.3 of the Motor Fuel Tax Law.

(4) The owner or operator registered the tank and paid all fees in accordance with the statutory and regulatory requirements of the Gasoline Storage Act.

(5) The owner or operator notified the Illinois Emergency Management Agency of a confirmed release, the costs were incurred after the notification and the costs were a result of a release of a substance listed in this Section. Costs of corrective action or indemnification incurred before providing that notification shall not be eligible for payment.

(6) The costs have not already been paid to the owner or operator under a private insurance policy, other written agreement, or court order.

(7) The costs were associated with "corrective action" of this Act.

If the underground storage tank which experienced a release of a substance listed in this Section was installed after July 28, 1989, the owner or operator is eligible to access the Underground Storage Tank Fund if it is demonstrated to the Office of the State Fire Marshal the tank was installed and operated in accordance with Office of the State Fire Marshal regulatory requirements. Office of the State Fire Marshal certification is prima facie evidence the tank was installed pursuant to the Office of the State Fire Marshal regulatory requirements.

(b) An owner or operator may access the Underground Storage Tank Fund for costs associated with an Agency approved plan and the Agency shall approve the payment of costs associated with corrective action after the application of a $10,000 deductible, except in the following situations:

(1) ***A deductible of $100,000 shall apply when none of the underground storage tanks were registered prior to July 28, 1989, except in the case of underground storage tanks used exclusively to store heating oil for consumptive use on the premises where stored and which serve other than farms or residential units, a deductible of $100,000 shall apply when none of these tanks were registered prior to July 1, 1992.*** (Emphasis added)

(2) A deductible of $50,000 shall apply if any of the underground storage tanks were registered prior to July 28, 1989, and the State received notice of the confirmed release prior to July 28, 1989.

(3) ***A deductible of $15,000 shall apply when one or more, but not all, of the underground storage tanks were registered prior to July 28, 1989, and the State received notice of the confirmed release on or after July 28, 1989.***

A deductible shall apply annually for each site at which costs were incurred under a claim submitted pursuant to this Title, except that if corrective action in response to an occurrence takes place over a period of more than one year, in subsequent years, no deductible shall apply for costs incurred in response to such occurrence. (Emphasis added)

(c) Eligibility and deductibility determinations shall be made by the Office of the State Fire Marshal.

(1) When an owner or operator reports a confirmed release of a regulated substance, the Office of the State Fire Marshal shall provide the owner or operator with an "Eligibility and Deductibility Determination" form. The form shall either be provided on-site or within 15 days of the Office of the State Fire Marshal receipt of notice indicating a confirmed release. The form shall request sufficient information to enable the Office of the State Fire Marshal to make a final determination as to owner or operator eligibility to access the Underground Storage Tank Fund pursuant to this Title and the appropriate deductible. The form shall be promulgated as a rule or regulation pursuant to the Illinois Administrative Procedure Act by the Office of the State Fire Marshal. Until such form is promulgated, the Office of State Fire Marshal shall use a form which generally conforms with this Act.

(2) Within 60 days of receipt of the "Eligibility and Deductibility Determination" form, the Office of the State Fire Marshal shall issue one letter enunciating the final eligibility and deductibility determination, and such determination or failure to act within the time prescribed shall be a final decision appealable to the Illinois Pollution Control Board.

B: POLLUTION CONTROL BOARD REGULATIONS:

35 Ill. Adm. Code 732.603 Authorization for Payment; Priority List, states as follows:

a) Within 60 days after notification to an owner or operator that the application for payment or a portion thereof has been approved by the Agency or by operation of law, the Agency shall forward to the Office of the State Comptroller in accordance with subsection (d) or (e) of this Section a voucher in the amount approved. If the owner or operator has filed an appeal with the Board of the Agency's final decision on an application for payment, the Agency shall have 60 days after the final resolution of the appeal to forward to the Office of the State Comptroller a voucher in the amount ordered as a result of the appeal. Notwithstanding the time limits imposed by this Section, the Agency shall not forward vouchers to the Office of the State Comptroller until sufficient funds are available to issue payment.

b) The following rules shall apply regarding deductibles:

1) Any deductible, as determined by the OSFM or the Agency, shall be subtracted from any amount approved for payment by the Agency or by operation of law or ordered by the Board or courts;

2) Only one deductible shall apply per occurrence;

3) If multiple incident numbers are issued for a single site in the same calendar year, only one deductible shall apply for those incidents, even if the incidents relate to more than one occurrence; and

4) Where more than one deductible determination is made, the higher deductible shall apply. (Emphasis added)

c) The Agency shall instruct the Office of the State Comptroller to issue payment to the owner or operator at the address designated in accordance with Section 732.601(b)(8) or (c) of this Part. In no case shall the Agency authorize the Office of the State Comptroller to issue payment to an agent, designee, or entity that has conducted corrective action activities for the owner or operator.

d) For owners or operators who have deferred site classification or corrective action in accordance with Section 732.306 or 732.406 of this Part, payment shall be authorized from funds encumbered pursuant to Section 732.306(a)(6) or 732.406(a)(6) of this Part upon approval of the application for payment by the Agency or by operation of law.

e) For owners or operators not electing to defer site classification or corrective action in accordance with Section 732.306 or 732.406 of this Part, the Agency shall form a priority list for payment for the issuance of vouchers pursuant to subsection (a) of this Section.

1) All such applications for payment shall be assigned a date that is the date upon which the complete application for partial or final payment was received by the Agency. This date shall determine the owner's or operator's priority for payment in accordance with subsection (e)(2) of this Section, with the earliest dates receiving the highest priority.

2) Once payment is approved by the Agency or by operation of law or ordered by the Board or courts, the application for payment shall be assigned priority in accordance with subsection (e)(1) of this Section. The assigned date shall be the only factor determining the priority for payment for those applications approved for payment.

Section 732.612 Determination and Collection of Excess Payments

a) If, for any reason, the Agency determines that an excess payment has been paid from the Fund, the Agency may take steps to collect the excess amount pursuant to subsection (c) of this Section.

1) Upon identifying an excess payment, the Agency shall notify the owner or operator receiving the excess payment by certified or registered mail, return receipt requested.

2) The notification letter shall state the amount of the excess payment and the

basis for the Agency's determination that the payment is in error.

3) The Agency's determination of an excess payment shall be subject to appeal to the Board in the manner provided for the review of permit decisions in Section 40 of the Act.

b) An excess payment from the Fund includes, but is not limited to:

1) Payment for a non-corrective action cost;

2) Payment in excess of the limitations on payments set forth in Sections 732.604 and 732.607 and Subpart H of this Part;

3) Payment received through fraudulent means;

4) Payment calculated on the basis of an arithmetic error;

5) Payment calculated by the Agency in reliance on incorrect information; or

6) Payment of costs that are not eligible for payment.

c) Excess payments may be collected using any of the following procedures:

1) Upon notification of the determination of an excess payment in accordance with subsection (a) of this Section or pursuant to a Board order affirming such determination upon appeal, the Agency may attempt to negotiate a payment schedule with the owner or operator. Nothing in this subsection (c)(1) of this Section shall prohibit the Agency from exercising at any time its options at subsection (c)(2) or (c)(3) of this Section or any other collection methods available to the Agency by law.

2) If an owner or operator submits a subsequent claim for payment after previously receiving an excess payment from the Fund, the Agency may deduct the excess payment amount from any subsequently approved payment amount. If the amount subsequently approved is insufficient to recover the entire amount of the excess payment, the Agency may use the procedures in this Section or any other collection methods available to the Agency by law to collect the remainder.

3) The Agency may deem an excess payment amount to be a claim or debt owed the Agency, and the Agency may use the Comptroller's Setoff System for collection of the claim or debt in accordance with Section 10.5 of the "State Comptroller Act." [15 ILCS 405/10.05].

VIII. ARGUMENT AND ANALYSIS

There exists no genuine issue of material fact. The regulations recognize that at times, for various reasons, facilities install additional tanks on-site. When additional tanks are added, an issue relative to what reimbursement deductible occurs. Pursuant to Section 415 ILCS 5/57.9(b), one deductible of $10,000 applies to the Underground Storage Tank Fund costs, except in three situations. When no tanks are registered prior to July 28, 1989, such tanks have a deductible of $100,000. (*See*: 415 ILCS 5/57.9(b) (1)). If any underground storage tanks were registered prior to July 28, 1989, and the State received notice of the confirmed release prior to that date, a deductible of $50,000 is assessed. (*See*: 415 ILCS 5/57(b) (2)) When one or more, but not all, of the underground storage tanks were registered prior to July 28, 1989, and the State received notice of the confirmed release on or after that date, a deductible of $15,000 applies.

In this matter, all tanks (and the only release identified at this site) had been assigned a deductible of $100,000, under Application I. Since "none" of the 5 underground storage tanks identified were registered prior to July 28, 1989, the deductable in Subsection (b) (1) applied. Application II attempted to reduce the Application I deductible of $100,000 to $15,000 with the addition of two new tanks to the site. As provided for within subsection (b) (3), if one or more tanks are registered prior to July 28, 1989, and the State received notice of a release on or after that date, the lowest exemption deductible of $15,000 applies. In this case, the $100,000 remains applicable for a number of reasons.

Initially, Section (b) (1) is specific in noting that if none of tanks were registered prior to July 28, 1989, whether there was a confirmed release or not[1], a deductible of $100,000 applies. All tanks within

[1] It is important to note that the General Assembly drafted Subsection (b) (1) without use of the phrase "… and the State received notice of the confirmed release prior to (*on or after*) July 28, 1989." This would suggest that, unlike Subsections (b) (2) and (3), for purposes of Subsection (b) (1) it is not important when the release occurs if there were no registered tanks prior to ("before") the date of July 28, 1989. As such, in this matter, the date of the release may be irrelevant to this review.

Application I were not registered prior to that date for this deductable to apply.

Thus, the question becomes, since two additional tanks were added in 2000, does a new deductible apply to the tanks already assigned a deductible under Application I? The answer is NO.

Again, Subsection (b) of the Act states that the deductible for a release is $10,000; unless you have tanks on-site prior to the date of July 28, 1989. Regarding the date of July 28, 1989, you can either have: (1) no tanks registered prior to that date, (2) any tanks registered prior to that date, or (3) a tank or more, but not all, registered prior to that date. Thus, it would not be possible to be within subsection (b) (1) and (b) (3).

Subsection (b) (1) of the regulations applies when NO tanks are registered prior to July 28, 1989. Subsection (b) (3) applies when ONE OR MORE, but note all, tanks were registered prior to July 28, 1989. You would not be able to have no tanks registered prior to the date and then one or more registered PRIOR TO that date later. And, looking at the facts of this matter, registering two new tanks to this site in the year 2000 does not mean that ONE OR MORE was/were registered prior to July 28, 1989. Again, NONE of the 5 prior tanks were registered prior to July 28, 1989. As such, Subsection (b) (3) can not apply. Of the two new tanks (without a designated deductible), each was placed in-ground in 2000, and as such the $10,000 deductable of Subsection (b) would apply without even a review of the exceptions.

Finally, the Board has specifically spoken on this very issue and could not have spoken more expressly and clearer on the outcome of multiple deductible determinations. Section 732.603(b) (4) of the Board's regulations states:

"Where more than one deductible determination is made, the higher deductible shall apply."

When acting on the submittal of Application I, OSFM made a deductible determination of $100,000.

(AR, p.119) Again, this provision applies when no tanks on-site had been registered prior to a date certain. Section 57.9 of the Act states as follows:

> ***"A deductible of $100,000 shall apply when none of the underground storage tanks were registered prior to July 28, 1989, except in the case of underground storage tanks used exclusively to store heating oil for consumptive use on the premises where stored and which serve other than farms or residential units, a deductible of $100,000 shall apply when none of these tanks were registered prior to July 1, 1992." (Emphasis added)***

Following Application I, which found the above provision applicable, the new owners of the site sought yet another eligibility and deductibility determination from OSFM. (AR, p.130) The key additional information within this second application was that: (1) two tanks had been added; (2) that the pre-existing tanks had been removed and (3) the new tanks had not been associated with the prior reported release and costs there from. Even assuming that Application II is somehow sound and based upon a finding that would allow OSFM to reach a second lower deductible determination applicable to a prior reported release (which the Illinois EPA does not concede and distinguishes above), Section 732.603(b)(4) of the regulations would control the outcome of the Illinois EPA's actions on review of costs associated with a release (attributable to tanks already removed) since this regulation is specific in stating that the larger of the two deductibles shall control.

IX. SUMMARY

On October 13, 2009, the Illinois EPA issued a determination letter informing Intermart that, pursuant to 35 Ill. Adm. Code 732.612(a), the Illinois EPA had approved an excess payment on October 8, 2008, for $85,000.00 which was the remainder of the $100,000 deductible that was not withheld from prior reimbursements. (AR p.1) It is clear that under the provisions within the Act as well as the express

language of Section 732.612(a) of the regulations that the Illinois EPA acted with authority to notify Intermart of an excess payment under these circumstances.

X. CONCLUSION

For the reasons stated herein, the Illinois EPA respectfully requests that the Board grant summary judgment in favor of the Illinois EPA and affirm the Illinois EPA's decisions to apply the higher deductible and reclaim the excess payment as detailed in the October 13, 2009, final decision.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent

_____

Melanie A. Jarvis
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: January 20, 2010

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on January 20, 2010, I served true and correct copies of a MOTION FOR SUMMARY JUDGMENT via the Board's COOL system and 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:

John Therriault, Acting Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

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

Eleonora "Lee" R. Holmes
Strohschein Law Group, LLC
2455 Dean Street, Suite G
St. Charles, Illinois 60175

Mr. Javed Arshed
Intermart, Inc. (former operator)
187 Timber Oaks
North Aurora, IL 60542

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

_____

Melanie A. Jarvis
Assistant Counsel
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)