

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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MAR 04 2010
STATE OF ILLINOIS
Pollution Control Board

ZERVOS THREE, INC.,)
)
Petitioner,)
)
v.)
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

PCB 10-54
(UST Fund Appeal)

NOTICE OF FILING

To: See Attached Service List.

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board, Petitioner's **Motion For Default Judgment and, in the Alternative, for Sanctions**, a copy of which is herewith served upon you.



Robert A. McKenzie

CERTIFICATE OF SERVICE

I, Robert A. McKenzie, certify that I served the foregoing Notice of Motion and Motion referred to therein upon the parties listed on the attached Service List, by the means listed on the attached Service List, before 5:00 p.m. on March 4, 2010.



Robert A. McKenzie

William J. Anaya
Robert A. McKenzie
Arnstein & Lehr LLP
120 South Riverside Plaza
Suite 1200
Chicago, IL 60606
Phone: 312/876-7100

Service List

VIA HAND DELIVERY

Pollution Control Board, Attn: Clerk
100 West Randolph Street
James R. Thompson Center, Suite 11-500
Chicago, Illinois 60601-3218

**VIA FIRST CLASS MAIL
AND CERTIFIED MAIL,
RETURN RECEIPT REQUESTED**

Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276

**VIA FIRST CLASS MAIL
AND CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

Illinois Environmental Protection Agency, Bureau of Land
Attn: Michael Piggush
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276

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STATE OF ILLINOIS
Pollution Control Board

ZERVOS THREE, INC.,)
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**MOTION FOR DEFAULT JUDGMENT
AND, IN THE ALTERNATIVE, FOR SANCTIONS**

NOW COMES Petitioner, Zervos Three, Inc., by counsel, Arnstein & Lehr LLP, and pursuant to 35 Ill. Adm. Code 101.800, moves the Illinois Pollution Control Board (the "Board") for entry of a default judgment in favor of Petitioner and against Illinois Environmental Protection Agency ("Respondent") or, in the alternative, for sanctions against Respondent. In support thereof, Petitioner states:

1. On January 25, 2010, Petitioner timely filed a "Petition for Review of Agency LUST Fund Decision" (the "Petition"), appealing Respondent's Final Decision dated December 21, 2009.
2. On February 4, 2010, the Board entered an Order accepting the Petition and Ordering Respondent to "file the entire record of its determination by February 24, 2010." A true and correct copy of the Board's February 4, 2010 Order is attached hereto as Exhibit A.
3. Pursuant to 35 Ill. Adm. Code 101.304, Petitioner served a copy of the Petition on Respondent by United States Postal Service First Class Mail on January 25, 2010. A true and correct copy of Petitioner's Notice of Filing and Certificate of Service of the Petition is attached hereto as Exhibit B.

4. As set forth in the Board's Order of February 4, 2010, the Petition satisfied the requirements of 35 Ill. Adm. Code 105.408 in that it contained a copy of Respondent's Final Decision, a statement specifying the date of service of the Respondent's Final Decision and a statement specifying the grounds of appeal.

5. Pursuant to the Board's February 4, 2010 Order and 35 Ill. Adm. Code 105.410, the Respondent was required to "file the entire record of its decision with the Board" within 30 days after the filing of the Petition. *See* Exhibit A.

6. Respondent has not filed the administrative record with the Board, nor has Respondent served a copy thereof on Petitioner. Respondent has made no filings with respect to the Petition. A true and correct copy of the Board's Clerk's online docket as of March 4, 2010 is attached hereto as Exhibit C.

7. 35 Ill. Adm. Code 101.800 provides for Sanctions for Failure to Comply with Procedural Rules, Board Orders or Hearing Officer Orders.

8. Respondent failed to comply with the Board's Procedural Rules including 35 Ill. Adm. Code 105.410 and failed to comply with the Board's Order of February 4, 2010.

WHEREFORE, Petitioner requests that the Illinois Pollution Control Board enter an Order:

FINDING that Respondent is in default of the Board's Order of February 4, 2010 and the Board's Procedural Rules, and

FINDING FURTHER that Respondent failed to produce an Administrative Record for review in this cause, and

[Continued on Following Page]

ENTERING JUDGMENT in favor of Petitioner and against Respondent as follows:

1. Reversing Respondent's Final Decision dated December 21, 2009 for the reasons stated in the Petition;
2. Ordering Respondent to reimburse Petitioner the sum of Ninety-Seven Thousand, Forty-Nine and 28/100 Dollars (\$97,049.28);
3. Ordering Respondent to reimburse Petitioner its reasonable attorney's fees and costs in this action;
4. In addition, or in the alternative, ordering such other and further relief as the Board deems proper, including sanctions pursuant to 35 Ill. Adm. Code 101.800 barring Respondent from filing any pleading or other document and barring Respondent from maintaining any claim, counterclaim, third-party claim or defense relating to its Final Decision; and barring Respondent from presenting testimony or other evidence concerning its Final Decision.

Respectfully submitted,
ZERVOS THREE, INC.



One of its Attorneys

William J. Anaya
Robert A. McKenzie
Arnstein & Lehr LLP
120 South Riverside Plaza
Suite 1200
Chicago, IL 60606
Phone: 312/876-7100

Exhibit A

ILLINOIS POLLUTION CONTROL BOARD
February 4, 2010

ZERVOS THREE, INC.,)	
)	
Petitioner,)	
)	
v.)	PCB 10-54
)	(UST Fund Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by G. T. Girard):

On January 25, 2010, Zervos Three, Inc. (Zervos Three) timely filed a petition asking the Board to review a December 21, 2009, determination of the Illinois Environmental Protection Agency (Agency). The Agency's determination concerns Zervos Three's underground storage tank (UST) site located at 9999 West Irving Park Road, Schiller Park, Cook County. For reasons below, the Board accepts Zervos Three's petition for hearing.

Under the Environmental Protection Act (Act) (415 ILCS 5 (2008))¹, the Agency decides whether to approve proposed cleanup plans and budgets for leaking UST sites, as well as requests for cleanup cost reimbursement from the State's UST Fund, which consists of UST fees and motor fuel taxes. If the Agency disapproves or modifies a submittal, the UST owner or operator may appeal the decision to the Board. *See* 415 ILCS 5/40(a)(1), 57-57.17 (2008); 35 Ill. Adm. Code 105.Subpart D. In this case, the Agency denied Zervos Three's requested claim for reimbursement and payment of \$97,049.28 from the Illinois Leaking Underground Storage Tank Fund (the "LUST FUND") for the Schiller Park UST site. Zervos Three appeals on the grounds that the decision was "erroneous, unlawful, arbitrary and capricious" because (1) Zervos Three is owner of the site and was the owner of the site prior to June 1, 2009; (2) Zervos Three properly documented the removal expenses that it incurred; (3) the Agency failed to approve or deny Zervos Three's application for reimbursement within the 120 day period mandated by 35 Ill. Adm. Code Section 734.610(d); and (4) the Agency lacked a statutory bases to deny reimbursement because Sections 22.18 and 22.18b of the Act were repealed in 1993 by Illinois Public Act 88-496. Zervos Three's petition meets the content requirements of 35 Ill. Adm. Code 105.408.

The Board accepts the petition for hearing. Zervos Three has the burden of proof. *See* 35 Ill. Adm. Code 105.112(a). Hearings will be based exclusively on the record before the Agency at the time the Agency issued its determination. *See* 35 Ill. Adm. Code 105.412. Accordingly, though the Board hearing affords petitioner the opportunity to challenge the Agency's reasons

¹ All citations to the Act will be to the 2008 compiled statutes, unless the provision at issue has been substantively amended in the 2008 compiled statutes.

for its decision, information developed after the Agency's decision typically is not admitted at hearing or considered by the Board. *See Alton Packaging Corp. v. PCB*, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987); *Community Landfill Co. & City of Morris v. IEPA*, PCB 01-170 (Dec. 6, 2001), *aff'd sub nom. Community Landfill Co. & City of Morris v. PCB & IEPA*, 331 Ill. App. 3d 1056, 772 N.E.2d 231 (3rd Dist. 2002).

Hearings will be scheduled and completed in a timely manner, consistent with the decision deadline (*see* 415 ILCS 5/40(a)(2) (2008)), which only Zervos Three may extend by waiver (*see* 35 Ill. Adm. Code 101.308). If the Board fails to take final action by the decision deadline, Zervos Three may deem its request granted. *See* 415 ILCS 5/40(a)(2) (2008). Currently, the decision deadline is May 25, 2010, which is the 120th day after the date on which the Board received the petition, January 25, 2010. *See* 35 Ill. Adm. Code 105.114. The Board meeting immediately before the decision deadline is scheduled for May 20, 2010.

Unless the Board or the hearing officer orders otherwise, the Agency must file the entire record of its determination by February 24, 2010, which is 30 days after the Board received Zervos Three's petition. *See* 35 Ill. Adm. Code 105.410(a). If the Agency wishes to seek additional time to file the record, it must file a request for extension before the date on which the record is due to be filed. *See* 35 Ill. Adm. Code 105.116. The record must comply with the content requirements of 35 Ill. Adm. Code 105.410(b).

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on February 4, 2010, by a vote of 5-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board

Exhibit B

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

RECEIVED
CLERK'S OFFICE
JAN 25 2010
STATE OF ILLINOIS
Pollution Control Board

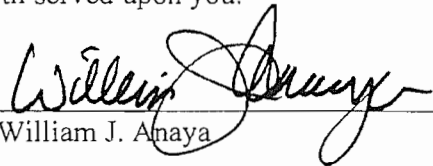
ZERVOS THREE, INC.,)
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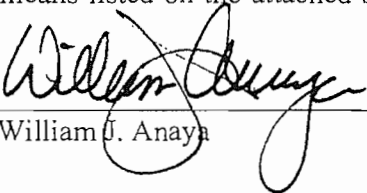
PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board, the PETITION FOR REVIEW OF THE AGENCY LUST DECISION of Zervos Three, Inc., a copy of which is herewith served upon you.



William J. Anaya

CERTIFICATE OF SERVICE

I, William J. Anaya, certify that I served the foregoing Notice of Filing and Appearance upon the parties listed on the attached Service List, by the means listed on the attached Service List, before 5:00 p.m. on January 25, 2010.



William J. Anaya

William J. Anaya
Robert A. McKenzie
Arnstein & Lehr LLP
120 South Riverside Plaza
Suite 1200
Chicago, IL 60606
Phone: 312/876-7100

Service List

VIA HAND DELIVERY

Pollution Control Board, Attn: Clerk
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James R. Thompson Center, Suite 11-500
Chicago, Illinois 60601-3218

VIA FIRST CLASS MAIL

Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue East
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Springfield, IL 62794-9276

VIA FIRST CLASS MAIL

Illinois Environmental Protection Agency, Bureau of Land
Attn: Michael Piggush
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276

Exhibit C



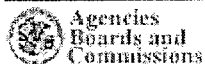
Pat Quinn

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View Case Details

GENERAL INFORMATION			
Case No:	PCB 2010-054	Case Name:	Zervos Three Inc. v. IEPA
Case Type:	Permit Appeal	Media Type:	Land
County:	Cook	Board Member:	Clerk
Status:	Board Order	Hearing Officer:	

[Notify Me when this case is updated](#)
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Case Activity

Date	Activity Type	Activity Notes	View File
2/4/2010	Order	Order of the Board by G. T. Girard: Board accepts petition for hearing; Agency must file entire record of its determination by February 24, 2010	
1/25/2010	Initial Filing	Petition for Review Exhibits (14.1 MB)	
1/25/2010	Initial Filing	Appearance of William J. Anaya and Robert A. McKenzie for Petitioner	
1/25/2010	Initial Filing	Petition for Review of the Agency LUST Decision	

Service List

Party Name	Address	City/State/Zip	Phone/Fax
IEPA Respondent	1021 North	Springfield IL 62794-9276	217/782-5544

<ul style="list-style-type: none"> * Division of Legal Counsel 	Grand Avenue East P.O. Box 19276	217/782-9807
Arnstein & Lehr Petitioner	120 South Riverside Plaza Suite 1200	Chicago IL 60606-3910 312/876-7100 312/876-0288
<ul style="list-style-type: none"> Robert A. McKenzie William J. Anaya 		

Total number of participants: 2

Notice List

No participants found.

Total number of participants: 0

Scheduled Hearings

Appeals on File

No appeals on file