ILLINOIS POLLUTION CONTROL BOARD
January 20, 2011

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

INTERIM OPINION AND ORDER OF THE BOARD (by A.S. Moore):

Petitioner Zervos Three, Inc. (ZT or Petitioner) appeals a determination by the Illinois Environmental Protection Agency (Agency or IEPA or Respondent) to deny a request for reimbursement from the Illinois Underground Storage Tank Fund (UST Fund). ZT's request concerns a site known as the Schiller Park Clark Service Station 1516, located at 9999 West Irving Park Road, Schiller Park, Cook County (Site). The parties have filed cross-motions for summary judgment.

For the reasons described below, the Board today grants ZT's motion for summary judgment, denies the Agency's motion, for summary judgment, determines that ZT is entitled to deem its application from the UST Fund approved by operation of law, and also determines that ZT's election to proceed as owner of the Site did not prevent it from seeking reimbursement for costs of corrective action performed before June 8, 2009, the date on which its election took effect. In addition, responding to ZT's request for reimbursement of attorney fees, the Board directs ZT to file within 45 days a statement of fees that may be reimbursable.

Below, the Board first reviews the procedural history before providing the factual background of this proceeding. Next, the Board summarizes ZT's petition for review, the cross-motions for summary judgment, and the responses to those motions. After providing the legal and statutory background of this case, the Board discusses the issues presented and reaches its conclusion on them before issuing its order.

PROCEDURAL HISTORY

On January 25, 2010, ZT filed a petition for review (Pet.) of the Agency's December 21, 2009 determination to deny ZT's request for reimbursement of corrective action costs in the amount of $97,049.28 from the UST Fund. In an order dated February 4, 2010, the Board accepted the petition for hearing.

On March 4, 2010, ZT filed a "Motion for Default Judgment and, in the Alternative, for Sanctions." On March 25, 2010, the Agency filed the administrative record (R.). In an order

dated April 15, 2010, the Board denied ZT's motion for default judgment and, in the alternative, for sanctions.

On August 30, 2010, the parties jointly filed a stipulation of facts (Stip.). Also on August 30, 2010, the Board received a motion for summary judgment both from the Agency (Agency Mot.) and from ZT (ZT Mot.) On September 17, 2010, the Board received ZT's response to the Agency's motion for summary judgment (ZT Resp.) and the Agency's response to ZT's motion for summary judgment (Agency Resp.).

FACTUAL BACKGROUND

"On May 21, 1991, a petroleum release was reported at a site commonly known as Schiller Park Clark Service Station 1516, located at 9999 West Irving Park Road, Schiller Park, Cook County, Illinois. . . ." Stip. at 1 (¶1); *see* R. at 6 (Illinois Emergency Services and Disaster Agency report). The Illinois Emergency Services and Disaster Agency[1] assigned the May 21, 1991 release Incident Number 911366. Stip. at 1 (¶2); *see* R. at 5, 6. The Agency acknowledged receiving notice of the release and assigned it number 0312855092. Stip. at 1 (¶3); *see* R. at 5 (Agency UST Incident Oversight Transfer).

On June 25, 1991, Sheffield Tank Company removed three 7,500 gallon USTs from the Site, then owned by Clark Oil and Refining Company (Clark Oil). R. at 7 (Log of Underground Storage Tank Removal); *see* Stip. at 1, 2 (¶¶4, 7); *see also* R. at 10 (correspondence in 20-Day report), 49-51 (final report). Tank removal also involved the excavation and removal of 705 cubic yards of tainted soil. R. at 13, 55, 69, 153. In its final report on the Site submitted to the Agency by letter dated March 23, 1992, Prairie Environmental Services, Inc. (PES) stated that "[t]his soil volume removal was sufficient to allow safe installation of the new USTs into the prior cavity. Evidence from the soil borings and samples obtained during the soils excavation process indicates that hydrocarbon impacted soils extend outside the present excavation limits." R. at 55 (Installation of Remediation System); *see id*. at 153. PES "installed a venting/liquid recovery system to remediate any residual hydrocarbons in the UST cavity soils." *Id*. at 11; *see id*. at 55-59. In a letter dated December 3, 1992, reviewing PES's final report, the Agency stated that, "[s]ince additional excavation is not possible due to nearby structures and the cleanup objectives have not been achieved, it will be necessary to use another remedial option to address the remainder of the soil contamination." *Id*. at 153. The Agency requested a description of and cost estimate and technical justification for this additional corrective action. *Id*.

On August 27, 1993, the Agency notified Clark Oil that it had not received a corrective action plan for the Site and required Clark Oil to develop and submit one. R. at 155, citing 35 Ill. Adm. Code 731.166. In a letter to Clark Oil dated October 20, 1993, the Agency stated that it had received no response to its December 3, 1992 request for information and required a response within 30 calendar days. R. at 161. In a letter to Clark Oil dated March 7, 1994, the Agency stated that it had received no information in response to its August 27, 1993 requirement

[1] Section 16 of Public Act 87-168, effective August 22, 1991, among other actions renamed this agency the Illinois Emergency Management Agency. *See* 20 ILCS 3305/5 (2008) (Illinois Emergency Management Agency Act).

to submit a corrective action plan. *Id*. at 163. The Agency directed Clark Oil to submit one within 30 days. *Id*.

On April 26, 1994, the Agency provided to Clark Oil "findings of apparent non-compliance . . . based on a review of documents submitted to the Agency" regarding the Site. R. at 167-71 (compliance inquiry letter). In an Attachment A, the Agency made seven specific inquiries regarding apparent violations and plans to correct them. *See id*. at 169-70.

In a letter to the Agency dated June 3, 1994, Clark Refining & Marketing, Inc (Clark) stated that it had contracted with Handex of Illinois, Inc. (Handex) to prepare a corrective action plan for the Site. *Id*. at 173-74. Clark provided a report by Handex documenting groundwater monitoring and sampling performed at the Site on March 24, 1994. *Id*. at 175-92. Analytical results showed that benzene concentrations in monitoring well 4 exceeded clean-up objectives. *See id*. at 177, 185 (analytical results), 193-95 (Agency review notes). In a letter dated June 16, 1994, the Agency acknowledged receiving Handex's report and requested additional information including a Corrective Action Plan. *Id*. at 213-14.

In another letter to the Agency, Clark on June 9, 1994, responded to the Agency's compliance inquiry with a report prepared by Handex, which included responses to the inquiries made by the Agency on April 26, 1994 in Attachment A. R. at 197-212; *see id*. at 169-71. Handex noted that PES had proposed soil venting and water recovery to remediate groundwater at the Site. *Id*. at 200; *see id*. at 11, 55-59. Handex stated that it would address preparation of a corrective action plan after completing an investigation. *Id*. at 200, 203. In a letter dated June 29, 1994, the Agency acknowledged receiving Clark's compliance inquiry response. *Id*. at 217-18. The Agency characterized the proposed soil boring program as "adequate" but required additional groundwater investigation near monitoring well 4 due to benzene concentrations in its vicinity. *Id*. at 217; *see id*. at 215 (Agency review notes).

On October 8, 1994, Handex on behalf of Clark submitted to the Agency the results of groundwater monitoring and sampling conducted at the Site on June 15, 1994. R. at 219-38; *see id*. at 239-41 (Agency technical review). Specifically, Handex reported that "[b]enzene concentrations reported in ground water samples ranged between below detection limit (BDL) and 0.586 milligrams per liter (mg/l). Total BTEX concentrations reported in ground water samples ranged between BDL and 0.760 mg/l." *Id*. at 221-22; *see id*. at 229 (analytical results). The Agency's technical review of Handex's report (*id*. at 240-41) noted that benzene concentrations near monitoring well 4 continued to exceed clean-up objectives and that "Clark has not submitted any plan for defining the extent of groundwater contamination." *Id*. at 239. In a letter to Clark dated December 6, 1994, the Agency acknowledged receipt of the report and again requested additional groundwater investigation near monitoring well 4 to determine the extent of contamination. *Id*. at 243-44.

On January 6, 1995, Handex on behalf of Clark submitted to the Agency an assessment report addressing the Site, including the results of ground water sampling performed on September 20, 1994. R. at 245-90. Handex reported that "[b]enzene concentrations reported from the ground water samples range between BDL and 0.068 mg/l. Total BTEX concentrations reported from the ground water samples range between BDL and 0.112 mg/l. *Id*. at 249. The

report concluded that concentrations of dissolved hydrocarbons remained above Agency objectives in the vicinity of monitoring well 4. *Id*. at 250. Handex's report also stated that the area along the northern boundary of the Site contained residual petroleum hydrocarbons. *Id*. Because this area is situated near the service station building, an alley, and utilities located in the alley, soil was not excavated from it during the 1991 tank removal activities.[2] *Id*. The report "proposed to pursue right of entry agreements with the City of Schiller Park for the purpose of advancing soil borings in the alley located north of the site." *Id*. at 250-51; *see id*. at 258 (proposed locations). The report also proposed "to install one monitor well in the northeast corner of the site." *Id*. at 251; *see id*. at 258. In a letter dated January 20, 1995, the Agency acknowledged receiving the assessment report and approved Handex's plan for additional investigation. *Id*. at 291, 383.

On January 30, 1995, Handex on behalf of Clark submitted to the Agency a Ground Water Sampling Report presenting the results of monitoring and sampling conducted at the Site on November 16, 1994. R. at 293-310, 385-402. Handex reported that "[b]enzene concentrations reported in ground water samples ranged between below detection limit (BDL) and 0.180 milligrams per liter (mg/l). Total BTEX concentrations reported in the ground water samples ranged between BDL and 0.240 mg/l." *Id*. at 295-96, 303, 387-88, 395. Handex also reported that Clark "is continuing quarterly ground water sampling and laboratory analysis for BTEX." *Id*. at 296, 388.

On April 13, 1995, Handex on behalf of Clark submitted to the Agency a Site Assessment Report (R. 311-82, 404-70) "to present the results of soil borings, monitor well installation, slug tests and ground water sampling" (*id*. at 313, 405) at the Site. The report concluded on the basis of off-site investigations that "residual petroleum hydrocarbons are present in the soil above IEPA cleanup objectives." R. at 319, 411. The report proposed "to discontinue ground water sampling from MW-4." *Id.* at 320, 412. Handex argued that "MW-4 is located in the UST backfill and is therefore not indicative of ground water conditions at the site. In addition, MW-5 has been installed in the same general area as MW-4 (southwest corner of the site) but is located in the natural formation and will therefore reflect the true ground water conditions." *Id*. Addressing the possibility that residual hydrocarbons had migrated from an off-site source, the report proposed additional off-site investigation. *Id*. In a letter dated April 26, 1995, the Agency acknowledged receiving the Handex's report and responded that "[t]he plan for additional investigation is approved." *Id*. at 471.

On May 26, 1995, the Agency acknowledged receiving from Clark Oil Company a complete request for reimbursement of $11,009.12 in corrective action costs for the Site from the UST Fund. R. at 473-74; *see* Stip., Exh. A (record of reimbursements). The Agency noted that

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[2] The figures included with the January 6, 1995 report (R. at 252-58) appear to reverse the north-south orientation reflected in other reports. *See, e.g.*, R. at 180-82, 205, 224-26, 297-99, 323-26, 390-92, 415-18, 480-82, 516-18. The language of the January 6, 1995 report reflects this reversal. *See id*. at 250. However, the locations of the proposed additional soil borings and monitoring well are consistent with the undefined presence of residual hydrocarbons in areas that had not been excavated during UST removal in 1991 and that are in close proximity to the service station building and alley behind it.

the deductible of $10,000 applicable to this claim had been deducted from a voucher dated May 5, 1994. R. at 473; *see* Stip., Exh. A. Based upon its review of the claim, the Agency approved reimbursement of the full amount requested. R. at 473; *see* Stip. Exh. A.

On July 24, 1995, Handex on behalf of Clark submitted to the Agency a Ground Water Sampling Report (R. at 475-92) "to present the results of ground water monitoring and sampling conducted on June 19, 1995" (*id*. at 477) at the Site. *See id*. at 482, 485 (concentrations); *see also id*. at 533-50. Handex reported that "[b]enzene concentrations detected in ground water samples ranged from below detection limit (BDL) in MW-1 to 0.533 milligrams per liter (mg/l) in MW-5. Total BTEX concentrations detected in the ground water samples ranged from BDL in MW-1 to 1.501 mg/l in MW-5." *Id*. at 477-78; *see id*. at 485 (analytical results). As proposed in its April 13, 1995 report, Handex had discontinued sampling groundwater at MW-4. *See id.* at 485 (analytical results). Handex stated that Clark Oil would "continue to perform quarterly ground water monitoring. . . ." *Id*. at 478.

On September 20, 1995, the Agency acknowledged receiving from Clark a complete request for reimbursement of $10,053.36 in corrective action costs for the Site from the UST Fund. R. at 493-95; *see* Stip., Exh. A. The Agency noted that the deductible of $10,000 applicable to this claim had been deducted from a voucher dated May 5, 1994. R. at 493; *see* Stip., Exh. A. Although the Agency declined to reimburse $138.00 on the basis of a lack of supporting documentation (R. at 495), it approved reimbursement of $9,915.36. *Id*. at 493; *see* Stip., Exh. A.

On October 4, 1995, Handex on behalf of Clark notified the Agency that it had twice sought to obtain access to property south of the Site in order to perform soil borings. R. at 497-510; *see also id*. at 552-64. Handex sent both requests by certified mail and included in both the following language: "[p]lease advise us if this is acceptable by completing the enclosed Clark Access Agreement, and sending by return mail to the undersigned. If the signed authorization form is not returned within 30 days of receipt of this letter, Clark will assume that access has been denied." *Id*. at 498, 504. Handex stated that, because the owners of that property had not responded to either of the two requests, it "assumes access has been denied and no off-site investigation to the south of the site will be performed." *Id*. at 497.

On November 16, 1995, Handex on behalf of Clark submitted to the Agency a ground water sampling report presenting the results of monitoring and sampling conducted at the Site on September 7, 1995. R. 511-28; *see also id*. at 567-83. Handex reported that "[b]enzene concentrations detected in the ground water samples ranged from below detection limit (BDL) in MW-1 to 0.054 milligrams per liter (mg/l) in MW-5. Total BTEX concentrations detected in ground water samples ranged from BDL in MW-1 to 0.070 mg/l in MW-5." *Id*. at 5-13-14; *see id*. at 521 (analytical results). Clark committed to continue quarterly groundwater monitoring. *Id*. at 514.

On January 23, 1996, the Agency noted that it had on April 26, 1995, approved Clark's plan to perform additional soil and groundwater investigations. R. at 529; *see id*. at 471. The Agency stated, however, that it had not received results of these investigations. *Id*. at 529. The

Agency directed Clark to submit documentation regarding investigation activities performed since April 26, 1995, and a Corrective Action Plan by March 20, 1996. *Id*.

In a response dated February 1, 1996, Handex on behalf of Clark submitted to the Agency a summary of activities conducted at the Site. R. at 531-83; *see id*. at 475-92, 497-510, 511-28. Clark also requested an extension of the deadline to file a corrective action plan. *Id*. at 531. In a letter dated February 20, 1996, the Agency extended the deadline to April 20, 1996. *Id*. at 585. The Agency stated that "[t]his plan, once submitted, must address both the soil and groundwater contamination associated with this site." *Id*.

On August 9, 1996, Handex on behalf of Clark submitted to the Agency a "Ground Water Monitoring and Corrective Action Plan Report" for the Site. R. at 587-611. Based on sampling conducted on June 25, 1996, groundwater monitoring revealed a maximum benzene concentration of 0.123 mg/l (*id*. at 589, 593, 597, 606) in MW-5 and a maximum total BTEX concentration of 0.159 mg/l (*id*. at 589, 593, 597), also in MW-5. *See id*. at 590. Handex attributed concentrations exceeding Agency clean-up objectives to "impacted on-site soils." *Id*. Handex's report stated that, to address these impacts,

> Handex personnel have installed Oxygen Release Compounds (ORCs) into each of the four monitoring wells and one observation sump (formerly MW-4) at this site. The ORC material will increase dissolved oxygen (DO) in the ground water beneath the site. An increase in DO generally corresponds to an increase in natural occurring biologic activity, and a reduction in petroleum constituents through natural attenuation. *Id*. at 590.

Handex also proposed to perform semi-annual testing to monitor the effectiveness of the ORCs and to continue collecting groundwater samples to analyze BTEX constituents. *Id*. Handex committed to replace ORCs in each monitoring well in order "to maintain elevated DO concentrations." *Id*.

On March 13, 1997, the Agency requested additional information because it "does not approve ORC as an effective method for groundwater remediation." R. at 608; *see id*. at 615-16 (Agency technical review notes dated March 10, 1997). The Agency specified 15 elements that a corrective action plan based upon bioremediation must include. *Id*. at 609-11 (Attachment A). The Agency directed Clark to submit a corrective action plan within 60 days. *Id*. at 608. In a letter dated May 12, 1997, Handex requested a 60-day extension of the deadline to file a revised corrective action plan. *Id*. at 619. In a letter dated June 6, 1997, the Agency granted the request and extended the deadline to July 11, 1997. *Id*. at 625. In a letter to the Agency dated July 28, 1997, Handex stated that it "has not completed a Corrective Action Plan due to not yet received permits to complete an offsite investigation which is required to finish a CAP." *Id*. at 627. Handex requested that the Agency extend the deadline to file the plan by 120 days. *Id*.

On August 21, 1997, Handex on behalf of Clark submitted to the Agency a groundwater monitoring report. R. at 637-650. Based on sampling on July 1, 1997, groundwater monitoring revealed a maximum benzene concentration of 0.0031 mg/l (*id*. at 639, 642, 644, 647) at MW-5 and a maximum total BTEX concentration of 0.159 mg/l (*id*. at 639, 642, 644), also at MW-5.

On November 10, 1997, Handex on behalf of Clark responded to the Agency's March 13, 1997 request for additional information regarding the proposed bioremediation corrective action plan for the Site. R. at 651-59 (addressing 15 elements); *see id*. at 609-11 (Attachment A). In a letter dated October 12, 1999, Handex on behalf of Clark Retail Enterprises, Inc. (Clark Retail) requested that the Agency provide "the review status of the responses to IEPA comments submitted on November 10, 1997." *Id*. at 717; *see id*. at 651-716 (responses).

On May 17, 2000, Handex on behalf of Clark Retail submitted to the Agency a groundwater monitoring report based on semi-annual sampling conducted on March 17, 2000. R. at 719-737. The report noted that "MW-1 is destroyed." *Id*. at 721. The report further noted a maximum benzene concentration of 0.0016 in MW-5. *Id*. at 721, 723, 727. Handex also tested samples for DO. *See id*. at 721, 723.

On October 9, 2002, Handex on behalf of Clark Retail submitted to the Agency a Corrective Action Plan for the Site. The Administrative Record includes two copies of this plan, both of which the Agency has marked as "Received Oct 11 2002." R. at 743, 1019. The first copy is also marked "Releasable May 01 2003 Reviewer MM" (*id*. at 743), and the second marked "Releasable Feb 28 2007 Reviewer MD" (*id*. at 1019). To address concentrations of contaminants exceeding remediation objectives in the alley and on residential property to the south of the Site, the plan proposed additional soil excavation. *Id.* at 751, 1027; *see id*. at 1037 (proposed excavation area map). To address on-site contamination, the plan proposed site-specific remediation objectives such as institutional controls and engineered barriers. *Id*. at 747, 752, 1023, 1028, citing 35 Ill. Adm. Code 742. In a letter to Clark Retail dated May 19, 2004, the Agency stated that it had reviewed the plan dated October 9, 2002. R. at 1305. The Agency's review concluded that "[t]he activities proposed in the plan are appropriate to demonstrate compliance with 35 Illinois Administrative Code 731; therefore, the plan is approved." *Id*.; *see* 35 Ill. Adm. Code 731 (Underground Storage Tanks).

ZT "became the owner of the Site on November 24, 2003 pursuant to a Quitclaim Deed." Stip. at 2 (¶6); *see id*., Exh. B (deed and legal description of property). The parties stipulated that, "[f]rom sometime before November 24, 2003 through the date hereof, the Site is one that had contained one or more registered underground storage tanks, which had been removed, but for which corrective action had not yet resulted in the issuance of a 'No Further Remediation' letter" by the Agency. *Id*. at 2 (¶7). The parties also stipulated that, from November 24, 2003, through the date of the stipulation, ZT "has been and is the owner of the Site." *Id*. at 2 (¶10).

In a document dated January 30, 2008, the Illinois Emergency Management Agency (IEMA) reported a release of gasoline from an underground storage tank located at 9999 Irving Park Road, Schiller Park, the address of the Site. R. at 1309-10. The report lists George Zervos as both "Responsible Party" and "Contact Person." *Id*. at 1310. IEMA assigned the release incident number 2008-0126 and faxed the report to the Agency on January 30, 2008. *Id*. In a letter dated January 31, 2008, the Agency notified George Zervos that the Agency had received notification by IEMA of a release from an underground storage tank at 9999 Irving Park Road, Schiller Park, under incident number 20080126. Stip. at 2 (¶8); *see id*., Exh. C; *see also* R. at 1311. The Agency's letter states that, "[a]s a result of this release, the owner of operator of the

underground storage tank(s) is required to comply with the Leaking Underground Storage Tank (Leaking UST) Program requirements, including the submittal of applicable documentation on forms prescribed and provided by the Illinois EPA." Stip., Exh. C; R. at 1311. In a document dated March 31, 2008, the Agency notified ZT "of the reported failure to file a 20 Day Certification and a 45 Day Report." Stip. at 2 (¶9); *see id*., Exh D; *see also* R. at 1313 (notice of failure to file referring to 20080126)). "From September 1, 2006 through May 31, 2009, Petitioner [ZT] performed additional corrective action activities and incurred additional expense at the Site each related to Incident No. 911366." Stip. at 2 (¶11).

"Petitioner, as the owner of the Site, prepared and delivered to Respondent written notice dated June 1, 2009 therein electing to proceed as owner in the Underground Storage Tank Program pursuant to 415 ILCS 5/57.2." Stip. at 3 (¶12); *see id*., Exh. E; R. at 1315-16; *see also* 415 ICLS 5/57.2 (2008) (definitions). The election states in part that

> I understand that by making this election I become subject to all of the responsibilities and liabilities of an 'owner' under Title XVI of the Environmental Protection Act [Petroleum Underground Storage Tanks] and the Illinois Pollution Control Board's rules at 35 Ill. Adm. Code 734 [Petroleum Underground Storage Tanks (Releases Reported on or after June 24, 2002)]. I further understand that, once made, this election cannot be withdrawn." R. at 1316.

The Agency "received Petitioner's written election to proceed as owner on June 8, 2009, and forwarded Petitioner an Acceptance of Election to proceed as Owner on June 18, 2009." Stip. at 3 (¶13); *see id*., Exh. F; *see also* R. at 1317-20 (acceptance). The Agency's acceptance states in pertinent part that, "[a]s the new owner, you may be eligible to access the Underground Storage Tank Fund for payment of costs related to remediation of the release. For information regarding eligibility and the deductible amount to the paid, please contact the Office of the State Fire Marshal. . . ." *Id*. at 1317.

"On June 11, 2009, Petitioner identified and notified Respondent of the additional corrective action activities and expense Petitioner had performed and incurred at the Site related to Incident No. 911366 and sought reimbursement from the UST Fund for those expenses." Stip. at 3 (¶14); *see id*., Exh. G. Additional corrective action included removal and disposal of concrete canopy footings and asphalt and concrete pavement and excavation and disposal of contaminated soil. *Id*., Exh. G. ZT requested reimbursement in the amount of $97,049.28. *Id*.; *see* R. at 1349-1484 (reimbursement package).

"On September 3, 2009, the Illinois Office of the State Fire Marshal determined that Petitioner was eligible for reimbursement of reimbursable expenses in excess of $10,000 for expenses incurred in response to Incident No. 911366." Stip. at 3 (¶15); *see id*., Exh. H; *see also* R. at 1323-30 OSFM determination).

"On December 21, 2009, Respondent denied Petitioner's Application for Reimbursement." Stip. at 3 (¶16); *see id*., Exh. I; *see also* R. at 1331-33. "Respondent's letter dated December 21, 2009 was served on Petitioner by Certified Mail on December 24, 2009." Stip. at 4 (¶16); *see id*., Exh. J (tracing and confirmation); *see also* R. at 1334-35 (certified mail

receipts). "Respondent's letter dated December 21, 2009 denying Petitioner's Application for Reimbursement is final agency action." Stip. at 4 (¶17). "Respondent denied Petitioner's Application for Reimbursement from the UST Fund because

> [i]t appears that all of the bills in this package were billed to Zervos Three. However, it does not appear that Zervos Three was the owner/operator of the 3 - 7,500 gallon gasoline underground storage tank systems (which were removed in June 1991) during the billing period (September 2006 - May 2009). Based upon the Election to Proceed as Owner form dated June 1, 2009, Zervos Three was not the owner/operator of the underground storage tank systems until June 1, 2009. Therefore, the entire bill package is not reimbursable. Section 22.18b(a)(3) of the Illinois Environmental Protection Act. Stip. at 4 (¶17); *see* Stip., Exh. I; *see also* R. at 1333.

"Respondent also denied Petitioner's Application for Reimbursement from the UST Fund for specific charges as follows:

> [p]lease refer to RW Collins Invoice 486, dated September 30, 2007. This invoice includes costs associated with removal and disposal of all the pavement from the Site. The Illinois EPA will not reimburse costs associated with the removal and disposal of pavement which are beyond what was associated with the 705 cubic yards (1,008 tons) of contaminated soil which was excavated and disposed of in June 1991. Information submitted to the Illinois EPA does not indicate the amount of the pavement which was associated with the 705 cubic yards (1,008 tons) of contaminated soil which was excavated and disposed of in June 1991. Therefore, the entire invoice is not reimbursable. Section 22.18(e)(1)(c), 22.18b(a)(3) and 22.18b(d)(4)(c) of the Illinois Environmental Protection Act. Stip. at 4 (¶18); *see* Stip. Exh. I; *see also* R. at 1333.

In an electronic mail message dated December 23, 2009, to Mr. Michael Pigush, Mr. Tom Dishno of Superior Environmental Corp. acknowledged receiving the Agency's December 21, 2009 denial of reimbursement for corrective action at the Site. R. at 1485 (noting incident number 91-1366); *see id*. at 1331-33, 1486-88. Mr. Dishno stated that he attached an "eligibility and deductible letter from the OSFM dated 9/3/09 that includes past and current USTs as part of the eligibility for reimbursement." *Id*. at 1485; *see id*. at 1492-94. He also attached "a download from the website of the OSFM that clearly states that Zervos Three, Inc. purchased the facility on August 1, 2003." *Id*. at 1485; *see id*. at 1489-91 (noting IEMA Number 91-1366 in Facility Details for Schiller Park Shell). Mr. Dishno also stated that "[t]he reimbursement package contained documentation that should have made for easy segregation of expenses associated with the disposal of contaminated soil and the costs associated with disposal of concrete cover." *Id*. at 1495.

Mr. Dishno also noted that ZT had filed the reimbursement package on June 11, 2009, and inquired why the Agency had not responded within 120 days by October 11, 2009. R. at 1485. He requested reconsideration of the Agency's rejection of the reimbursement package. *Id*. In an electronic mail message dated December 28, 2009, to Mr. Piggush, Mr. Dishno cited Part

734 of the Board's UST regulations to claim that, "[b]ased on the recognized date of 6/11/09 for a submittal date, the response from the Agency was required to be submitted by 10/11/09." *Id*. at 1495, citing 35 Ill. Adm. Code 734.610(d).

In an electronic mail message dated January 8, 2010, Mr. Piggush offered comments after reviewing Mr. Dishno's electronic mail messages of December 23, 2009, and December 28, 2009. R. at 1487; *see id*. at 1485, 1495. Mr. Piggush stated that

> [t]he 3 - 7,500 gallon gasoline underground storage tank systems in question were removed in June 1991. Zervos Three did not purchase the site property until August 2003. Zervos Three did not elect to proceed as owner of the 3 - 7,500 gallon gasoline underground storage tank systems in question until June 2009. There is not any way that Zervos Three can be considered to be the owner of the 3 - 7,500 gallon gasoline underground storage tank systems in question prior to June 2009. All of the costs were incurred prior to June 2009. *Id*. at 1497.

Mr. Piggush added that he "had tried to find information about how to prorate the costs associated with the replacement of the pavement. However, I was not able to find any information with which to do this." *Id*. He also directed Mr. Dishno to "[p]lease note that this particular bill package is regulated in accordance with 35 Illinois Administrative Code 731, not 35 Illinois Administrative Code 734." *Id*.

In an electronic mail message dated January 8, 2010, Mr. Dishno responded on behalf of ZT to Mr. Piggush's January 8, 2010 message. R. at 1499-1500 (addressing Incident No. 911366). Regarding the timing of the Agency's determinations, Mr. Dishno claimed that "[t]he database show[s] that this site is regulated under 734 and has been prior to the time of the submission of this reimbursement package. Because the package was submitted after the site was under the 734 regulations, the 120 day rules would apply to this application." *Id*. at 1499; *see* 35 Ill. Adm. Code 734. He added that "I have provided evidence of the prior ownership of the site by Zervos 3, Inc. regardless of when the election to proceed was filed." R. at 1499.

In an electronic mail message dated January 11, 2010, Mr. Piggush responded on behalf of the Agency to Mr. Dishno's January 8, 2010 message. R. at 1502-02 (addressing Incident No. 911366). Mr. Piggush's response states that

> [t]he LUST Incident was originally regulated in accordance with 35 Illinois Administrative Code 731 beginning in May 1991, based upon the original notification of the release. The tanks in question were removed in June 1991. The fact that Zervos Three purchased the site property in August 2003 does not make Zervos Three the owner of the tanks in question. It does not matter. This LUST incident was then regulated in accordance with 35 Illinois Administrative Code 734 beginning in June 2009, based upon the election to proceed as owner form submitted by Zervos Three. These are separate time frames & they do not mix together. The applicability of 35 Illinois Administrative Code 734, as well as the applicability of Zervos Three being the owner of the tanks (for the tanks in question), is not retroactive. The applicability of 35 Illinois Administrative Code

> 734, as well as the applicability of Zervos Three being the owner of the tanks (for the tanks in question), begins in June 2009, and goes forward in time from there. It is not retroactive. When the costs in question were incurred (which was prior to June 2009), this LUST incident was regulated in accordance with 35 Illinois Administrative Code 731, and Zervos Three was not the owner of the tanks (for the tanks in questions). Therefore, this particular bill package is regulated in accordance with 35 Illinois Administrative Code 731, and the costs in question were not incurred by the owner of the tanks (for the tanks in question). R. at 1501.

SUMMARY OF PETITION FOR REVIEW

ZT alleges that, "[o]n May 21, 1991, a release was reported at a site commonly known as Schiller Park Clark Service Station 1516, located at 9999 West Irving Park Road, Schiller Park, Cook County. . . ." Pet. at 1 (¶1). ZT further alleges that the Illinois Emergency Management Agency (IEMA) assigned this release Incident No. 911366. *Id*. ZT claims that the Agency has "acknowledged receipt of the notice of the release and assigned LPC #0312855092 to the Site." *Id*. ZT further claims that "[e]arlier appropriate and reimbursable corrective action had been undertaken in response to Incident No. 911366." *Id*. (¶2). ZT alleges that corrective action stemming from Incident No. 911366 has resulted in reimbursement from the UST Fund. *Id*. at 1-2 (¶2); *see id*., Exh. A (listing amounts paid).

ZT claims that it "took title and possession to the Site on November 24, 2003 pursuant to a Quitclaim Deed. . . ." Pet. at 2 (¶3); *see id*., Exh. B (deed and legal description). ZT claims that, "[s]ince November 24, 2003 through the date hereof, Petitioner has been, and is, the owner of the Site." *Id*. (¶5).

ZT alleges that, from before November 24, 2003 through the filing of its petition, the Site "had one or more registered tanks that had been removed and on which corrective action has not yet resulted in the issuance of a 'no further remediation' letter" by the Agency. Pet. at 2 (¶4). ZT further alleges that, from September 1, 2006 to May 31, 2009, it "performed additional and appropriate corrective action activities at the Site related to Incident No. 911366. . . ." *Id*. (¶6).

ZT asserts that, as owner of the Site, it provided the Agency written notice dated June 1, 2009, electing to proceed in the UST program as owner of the Site. Pet. at 2 (¶7), citing 415 ILCS 5/57.2 (2008) (Definitions). ZT further alleges that the Agency received the written election on June 8, 2009. Pet. at 2 (¶7); *see id*., Exh. C. ZT also alleges that, in a letter dated June 18, 2009, the Agency accepted the election. Pet. at 2 (¶7); *see id*., Exh. C. ZT argues that it satisfies the statutory definition of "owner" and "is therefore entitled to reimbursement for reimbursable expenses under the LUST FUND for costs incurred in performing a corrective action at the Site related to Incident 911366." *Id*. (¶8), citing 415 ILCS 5/57.2 (2008).

ZT alleges that, on June 11, 2009, it delivered and the Agency received an "application and claim for reimbursement from the LUST Fund in the amount of $97,049.28, for additional, appropriate and reimbursable corrective action expenses incurred in performing corrective action activities at the Site related to Incident No. 911366 from September 1, 2006 to May 31, 2009."

Pet. at 3 (¶9); *see id*., Exh. D. ZT alleges that the expenses in its application and claim are "lawful, proper and necessary corrective action expenses" incurred by ZT in remediating Incident No. 911366 and are properly reimbursable from the UST Fund. *Id*. (¶10).

ZT maintains that, "[o]n September 3, 2009, the Illinois Office of the State Fire Marshal determined that Petitioner was eligible for reimbursement of reimbursable expenses in excess of $10,000 for those expenses incurred in response to Incident No. 911366." Pet. at 3 (¶11); *see id*., Exh. E (determination).

ZT alleges that, on December 21, 2009, the Agency denied the application and claim on the following grounds:

1. It appears that all of the bills in this bill package were billed to Zervos Three. However, it does not appear that Zervos Three was the owner/operator of the 3-7,500 gallon gasoline underground storage tank systems (which were removed in June 1991) during the billing period (September 2006 —> May 2009). Based upon the Election To Proceed As Owner Form dated June 1, 2009, Zervos Three was not the owner/operator of the underground storage tank systems until June 1, 2009. Therefore, the entire bill package is not reimbursable. Section 22.l8b(a)(3) of the Illinois Environmental Protection Act.

2. Please refer to RW Collins Invoice 486, dated September 30, 2007. This invoice includes costs associated with the removal & disposal of all of the pavement from the site. The Illinois EPA will not reimburse costs associated with the removal & disposal of pavement which are beyond what was associated with the 705 cubic yards (1,008 tons) of contaminated soil which were excavated & disposed of in June 1991. Information submitted to the Illinois EPA does not indicate the amount of pavement which was associated with the 705 cubic yards (1,008) tons of contaminated soil which were excavated & disposed of in June 1991. Therefore, the entire invoice is not reimbursable. Sections 22.18(e)(1)(C), 22.18b(a)(3) & 22.18b(d)(4)(C) of the Illinois Environmental Protection Act. Pet. at 3-4 (¶12); *see id*., Exh. F

ZT alleges that the Agency's letter dated December 21, 2009 "is final agency action." *Id*. (¶13). ZT further alleges that this letter was served upon it by the United States Postal Service on December 24, 2009. *Id*. (¶14); *see id*., Exh. G (tracking and confirmation).

ZT claims that the Agency's December 21, 2009 determination is "erroneous, unlawful, arbitrary and capricious" on various grounds. Pet. at 4 (¶15). ZT first claims that it "is the owner of the Site entitled to reimbursement from the LUST Program (Title XVI of the Act) pursuant to 415 ILCS 5/57.2 and the regulations promulgated thereunder." *Id*. ZT argues that the Agency's determination is "contrary to the law, and is an arbitrary and capricious interpretation of the law." *Id*. Second, ZT claims that it "properly documented that the concrete removal expenses were incurred by Petitioner as part of corrective action activities related to

Incident No. 911366" and that the expenses are both proper and reimbursable." *Id*. Third, ZT alleges that, "[f]rom and after receipt of the written notice to proceed under 35 Ill. Adm. Code 734 on June 8, 2009 as described above, Respondent was required to review Petitioner's application and claim for reimbursement within 120 days pursuant to 35 Ill. Adm. Code Section 734.610(d)." *Id*. at 5. ZT claims that, because the Agency did not approve or deny the application and claim by October 6, 2009, the "application and claim for reimbursement was deemed approved by operation of law." *Id*. Fourth, ZT alleges that the Agency's "final decision denying Petitioner's application and claim for reimbursement lacks foundation or statutory bases to the extent that Sections 22.18 and 22.18b were repealed in 1993 by Illinois Public Act 88-496." *Id*.

ZT requests that the Board "enter an order reversing Respondent's final decision dated December 21, 2009 and order Respondent to reimburse Petitioner for the expenses described in Petitioner's application and claim for reimbursement from the LUST FUND in the amount of $97,049.28, plus attorneys fees and costs, and for such other and further relief as the Illinois Pollution Control Board deems just." Pet. at 5.

ZT MOTION FOR SUMMARY JUDGMENT

ZT argues that "[t]here are no genuine issues of material fact, at least as to the question concerning Petitioner's eligibility for reimbursement from the Underground Storage Tank Fund." ZT Mot. at 1. In the following subsections, the Board summarizes arguments made by ZT in its motion for summary judgment.

Statutory and Regulatory Factors

ZT argues that the statutory definition of "owner" and provisions relating to eligibility for reimbursement from the UST Fund are "not ambiguous." ZT Mot. at 20, citing 415 ILCS 5/57.2, 57.9 (2008). ZT notes that the Agency often cites repealed Section 22.18b of the Act but characterizes this repealed language as similar to the current statute. ZT Mot. at 21.

ZT states that the OSFM is the agency responsible to determine the eligibility of owners for reimbursement from the UST Fund. ZT Mot. at 22, citing 415 ILCS 5/57.8(a)(1), 57.9(c) (2008). ZT argues that, "once the OFSM determines that an Owner is eligible, that Owner may apply to the Underground Storage Tank Fund for reimbursement of reimbursable expenses." ZT Mot. at 22. ZT further argues that the Agency cannot use its review of costs submitted for reimbursement to veto the OSFM's determination of eligibility. *Id*. ZT claims that the Agency's "analysis is limited to the propriety and reasonableness of costs reportedly incurred in pursuing a proper corrective action, and can never be used as a back door means to effectively deny eligibility to the Underground Storage Tank Fund." *Id*. at 22-23, citing 415 ILCS 5/57.8(a)(1).

ZT argues that it "purchased the Site, performed a responsible corrective action at the Site, and notified Respondent that Petitioner elected to proceed as 'Owner' under Title XVI" of the Act. ZT Mot. at 22. ZT further argues that the Agency accepted its election to proceed as owner on June 18, 2009, subject to OSFM's determination of eligibility. *Id*. ZT also argues that, on September 3, 2009, OSFM determined that Petitioner was eligible for reimbursement. *Id*. at

23. ZT claims that, under clear and unambiguous statutory language, it is eligible for reimbursement from the UST Fund. *Id*.

ZT argues that the Agency's December 21, 2009 determination denied its claim for reimbursement because

> it does not appear that Zervos Three was the owner/operator of the 3 - 7,500 gallon gasoline underground storage tank systems (which were removed in June 1991) during the billing period (September 2006 → May 2009). Based upon the Election To Proceed As Owner Form dated June 1, 2009, Zervos Three was not the owner / operator of the underground storage tank systems until June 1, 2009. Therefore, the entire bill package is not reimbursable. ZT Mot. at 24; *see* Pet., Exh. F (Agency decision letter).

ZT argues that the Agency's position "simply ignores" a recent statutory amendment "expanding the definition of 'Owners' to include new owners." ZT Mot. at 24, 25; *see* Public Act 94-274, eff. Jan. 1, 2006. ZT likens the Agency's determination to "vetoing the Illinois General Assembly's action." ZT Mot. at 25. ZT suggests that this statutory revision allows it to be considered the owner of the tanks removed 12 years before it acquired title to the Site. *See id*. at 24.

ZT argues that the Agency "is just wrong to conclude that Petitioner became the owner of the underground storage tank systems on June 1, 2009." ZT Mot. at 25. Although ZT acknowledges that its election to proceed as owner bears that date, it claims that "it is not a deed to the Site, nor is it a deed or assignment available to provide 'retroactive' ownership in tanks that had been removed 18 years earlier as Respondent implies." *Id*. ZT characterizes that document as notice to the Agency to treat ZT "as an Owner of a *site* (not as the owner of tanks which no longer exist because they were removed 18 years earlier) for corrective action and reimbursement purposes." *Id*. (emphasis in original). ZT claims that, in the absence of an election to proceed as owner, the Agency "has no authority to demand corrective action from a new Owner for historic contamination." *Id*. at 25-26, citing 415 ILCS 5/22.2b, 58.9. ZT further claims that, after a new owner files an election to proceed as owner and completes corrective action, "that same new Owner is eligible for reimbursement for appropriate and reasonable reimbursable expenses." ZT Mot. at 26. ZT argues that "[t]he presence of the notice is jurisdictional, but not the timing." *Id*. ZT concludes that, "[i]n the final analysis, Respondent's only proper authority is to audit the propriety and the reasonableness of the expenses incurred in pursuing corrective action pursuant to 415 ILCS 5/57.8(a)(1)," regardless of whether that corrective action took place before or after the date of the notice of election to proceed as owner. *Id*. ZT argues that the Agency is clearly "not prejudiced at all by the date of the notice of election." *Id*.

ZT claims that the Agency "places a great deal of significance as to whether or not this is a matter 'regulated' under 35 Ill. Adm. Code Sections 731 or 734." ZT Mot. at 26 (citation omitted). ZT argues that, "[f]or eligibility purposes, it simply does not matter whether or not this site is regulated under Sections 731 or 734." *Id*. at 27. ZT claims that the Agency's consideration of this issue "misses the point, because eligibility is determined by OSFM

analyzing an unambiguous statute, and not by Respondent analyzing the timing of the notice with reference to code sections." *Id*. at 26. ZT argues that, whether Part 731 or 734 applies, the Act and the Board's regulations both provide new owners with access to the UST Fund "no matter when the notice is prepared." *Id*. at 27, citing 415 ILCS 5/57.2, 35 Ill. Adm. Code 734.100(b).

> ZT cites Section 57.13(b) of the Act:
>
> [i]f a release is reported to the proper State authority prior to June 24, 2002, the owner or operator of an underground storage tank may elect to proceed in accordance with the requirements of this Title by submitting a written statement to the Agency of such election. If the owner or operator elects to proceed under the requirements of this Title all costs incurred in connection with the incident prior to notification *shall be reimbursable* in the same manner as was allowable under the then existing law. *Completion of corrective action shall then follow the provisions of this Title*. ZT Mot. at 27 (emphasis in original), citing 415 ILCS 5/57.13(b).[3]

ZT interprets this statutory language to provide that, "whether Respondent's technical review is under new or former regulations, Petitioner is eligible for reimbursement." ZT Mot. at 27. ZT also cites Part 734 of the Board's UST regulations:

> [i]f the owner or operator elects to proceed pursuant to this Part, corrective action costs incurred in connection with the release and prior to the notification of election *must be payable* from the Underground Storage Tank Fund in the same manner as was allowable under the law applicable to the owner or operator prior to the notification of election. Corrective action costs incurred after the notification of election *must be payable* from the Fund in accordance with this Part. *Id*. (emphasis in original), citing 35 Ill. Adm. Code 734.105(d).

ZT claims that, under this regulation, "[t]he timing of the election does not qualify or disqualify an Owner from accessing the Underground Storage Tank Fund. . . ." ZT Mot. at 28. ZT further

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[3] The Board notes that Public Act 96-908, effective June 8, 2010, struck the language cited by ZT and replaced it with a new Section 57.13 providing in its entirety that

> [t]his Title [XVI] applies to all underground storage tank releases for which a No Further Remediation Letter is issued on or after the effective date of this amendatory act of the 96th General Assembly [June 8, 2010], provided that (i) costs incurred prior to the effective date of this amendatory Act shall be payable from the UST Fund in the same manner as allowed under the law in effect at the time the costs were incurred and (ii) releases for which corrective action was completed prior to the effective date of this amendatory Act shall be eligible for a No Further Remediation Letter in the same manner as allowed under the law in effect at the time the corrective action was completed. Public Act 96-908, eff. June 8, 2010 (Senate Bill 3220).

claims that the regulation gives the Agency no "authority to determine or void eligibility." *Id*. ZT concludes that the Agency's denial on the basis that it "was not the owner/operator of the underground storage systems" is contrary to the statute and should be reversed. . . ." *Id*.

Deference to Agency

ZT acknowledges that, "[o]rdinarily, where an administrative agency is charged with the administration of a statute, courts may defer to the agency's interpretation of statutory ambiguities." ZT Mot. at 29, citing Hadley v. Ill. Dept. of Corr., 224 Ill.2d 365, 370, 864 N.E.2d 162, 165 (2007). ZT claims that the Agency lacks authority to determine eligibility for reimbursement from the UST Fund and that the Act is not ambiguous. ZT Mot. at 29. ZT argues that, even if the Act presented an ambiguity and the Agency possessed authority to determine eligibility, "the Board will not defer to an Agency's interpretation that is contrary to the plain language of the statute." *Id*. (citations omitted). ZT further argues that the General Assembly has not acquiesced in the Agency's interpretation. *Id*. at 29-30 (citations omitted). ZT concludes that the Agency's interpretation is not entitled to deference because that interpretation is "unconstitutional, arbitrary, capricious, and contrary to the statute's plain language." *Id*. at 30.

Agency Decision Deadline

ZT notes that the Agency received its reimbursement package on June 11, 2009. ZT Mot at 30. ZT further notes that the Agency reached its determination on December 21, 2009, more than 120 days later. *Id*. ZT cites Section 57.8(a)(1) of the Act , which provides in pertinent part that,

> [i]n the case of any approved plan and budget for which payment is being sought, the Agency shall make a payment determination within 120 days of receipt of the application. . . . If the Agency fails to approve the payment application within 120 days, such application shall be deemed approved by operation of law and the Agency shall proceed to reimburse the owner or operator the amount requested in the payment application. However, in no event shall the Agency reimburse the owner or operator an amount greater than the amount approved in the plan. 415 ILCS 5/57.8(a)(1) (2008); *see* ZT Mot. at 30.

ZT concludes that it "is entitled to reimbursement of $97,049.28 by operation of law." ZT Mot. at 30.

Policy Considerations

ZT characterizes itself as "a hero" because it is a closely-held corporation that has spent $97,049.28 of its own funds to clean up contamination dating back at least to 1993 and caused by Clark Oil, a large multi-national oil company. ZT Mot. at 16. ZT claims that, "[a]fter removing three underground storage tanks, and replacing three new tanks in the excavated pit, Clark Oil merely monitored the Site." *Id*. ZT argues that Clark Oil "refused to investigate the Site or prepare a Corrective Action Plan, much less complete a proper corrective action at the Site." *Id*.

ZT describes as remarkable the Agency's approval of more than $150,000 in reimbursement for "mere incidental corrective action expenses." *Id*.

ZT acknowledges that implementing a corrective action plan does not constitute "pure altruism." ZT Mot. at 17. ZT states that it "accepted the burden of cleaning this Site based on Petitioner's commercial interest in the site, and the Illinois General Assembly's assurance that new owners with historic hydrocarbon contamination from registered underground storage tanks were eligible for reimbursement for 'reimbursable expenses.'" *Id*. ZT argues that its signed election to proceed as owner "willingly accepted the responsibility to perform corrective action at a site where the mess had been created by someone else, because the Illinois General Assembly had intentionally expanded the universe of eligible owner -- beyond the eligibility provided under the old law -- to encourage just such responsible action." *Id*. ZT further argues that the OSFM determined that it was eligible for reimbursement from the UST Fund. *Id*.

ZT claims that this case reflects the policy underlying this statutory revision. ZT Mot. at 17. ZT claims that, prior to the revision, prospective purchasers avoided properties such as the Site, "largely because cleanup liability presented a major disincentive to new ownership, and because new owners were not eligible for reimbursement from the Underground Storage Tank Fund." *Id*. at 18. ZT claims that the General Assembly removed the disincentive, encouraged ZT to purchase the Site, and obtained ZT's commitment to perform cleanup that Clark Oil had not performed "for well over a decade." *Id*. ZT suggests that the Agency's determination in this case jeopardizes cleanup of many other sites with historic contamination. *See id*.

Summary

ZT moves the Board for summary judgment and requests that the Board reverse the Agency's December 21, 2009 determination, find that ZT is an "owner" under Section 57.2 of the Act, and find that ZT is eligible to seek reimbursement from the UST Fund. ZT Mot. at 1, 31. ZT also requests that the Board order the Agency "to reimburse its attorneys' and experts' fees, and costs associated with this appeal." *Id*. at 31.

AGENCY MOTION FOR SUMMARY JUDGEMENT

The Agency argues that this case presents no genuine issues of material fact and that it is entitled to judgment as a matter of law and requests that the Board enter summary judgment in its favor. Agency Mot. at 1, 2; *see id*. at 4 ("The question in this case is not one of fact, but rather of law."). Specifically, the Agency requests that the Board affirm its conclusion that ZT is not an "owner" under the Act, its decision to "deny approval of reimbursement of the costs incurred prior to the submittal of the election to proceed," and its determination that ZT "did not submit enough supporting information to allow for the payment for concrete replacement." *Id*. at 6.

The Agency argues that the issue in this case is whether ZT "was an 'owner' under the Act when they performed the work for which they want reimbursement." Agency Mot. at 4, citing 415 ILCS 5/57.2 (2008). The Agency acknowledges that ZT clearly "had an ownership interest in the property starting on November 23, 2003." Agency Mot. at 4; *see* Stip. at 2 (¶6),

citing Stip., Exh. B (quit claim deed). The Agency further acknowledges that ZT had an ownership interest in the property between September 1, 2006, and May 31, 2009, the period during which work was performed there. Agency Mot. at 4. The Agency claims however, that did not submit a written election to proceed as owner until June 9, 2009, one month after performance of the work that is the subject of this case. *Id*. at 4-5, citing 415 ILCS 5/57.2 (2008).

The Agency argues that the Act requires this election to be considered an "owner" for reimbursement from the UST Fund. Agency Mot. at 5. The Agency claims that, "[i]f a person could become an owner without the election to proceed, there would be no need for such an election in the Act." *Id*. The Agency further claims that ZT's position would render the election "meaningless," overriding both the plain meaning of Section 57.2 and the General Assembly's intent. *Id*.

The Agency suggests that requiring an election to proceed as owner averts an administrative burden. *See* Agency Mot. at 5. The Agency states that "[t]he election to proceed is a clear indication for the Illinois EPA that the person is taking responsibility for the site and can be paid from the fund." *Id*. The Agency argues that, in the absence of such an election, it would be necessary to seek evidence of ownership to determine the identity of the owner eligible to request and receive reimbursement. *Id*. The Agency further argues that "[i]t is common for these properties to change hands multiple times during a remediation[,] and determining the correct owner to reimburse would become an arduous process." *Id*. The Agency states that ZT did not submit an election until it had completed work at the Site. *Id*.; *see* Stip., Exh. E. The Agency argues that ZT was thus "not an 'owner' as defined by the Act and cannot be reimbursed from the Fund." Agency Mot. at 5.

The Agency also addresses the issue of requested reimbursement for costs related to pavement. Agency Mot. at 5; *see* Stip., Exh. I (Dec. 21, 2009 determination). The Agency states that it "already reimbursed the prior owner for costs associated with the removal and disposal of pavement associated with the 705 cubic yards (1,008 tons) of contaminated soil which was excavated and disposed of in June 1991." Agency Mot. at 5. The Agency claims that it lacked information sufficient to determine whether "the concrete put into replace the concrete removed was the same amount." *Id*. The Agency argues that, without such information, it "could not determine if the replacement of concrete complied with the Act." *Id*. at 5-6, citing 415 ILCS 5/22.18(e)(1)(C), 22.18b(a)(3), 22.18b(d)(4)(C) (2008).

ZT RESPONSE TO AGENCY'S MOTION FOR SUMMARY JUDGMENT

ZT renews its request that the Board reverse the Agency's determination, direct the Agency to reimburse it from the UST Fund in the amount of $97,049.28, and award ZT "its attorneys' and experts' fees, and costs associated with this appeal." ZT Resp. at 19. In the following subsections, the Board summarizes the arguments made by ZT in its response to the Agency's motion for summary judgment.

ZT's Motion for Summary Judgment

ZT refers to the administrative record in support of its August 30, 2010, motion for summary judgment. *See generally* ZT Mot., R. ZT argues on the basis of these facts that the Board should grant its motion for summary judgment and deny the Agency's motion for summary judgment. ZT Resp. at 9.

ZT argues that the Agency concedes that, on and after November 24, 2003, ZT "had an ownership interest in an otherwise eligible site. . . ." ZT Resp. at 7; *see* Stip. at 2 (¶¶6, 10), Stip., Exh. B. (Quit Claim Deed). ZT further argues that it "performed otherwise appropriate Corrective Action work at the Site from September 1, 2006 through May 31, 2009, while Petitioner maintained its ownership interest in the Site." ZT Resp. at 7-8; *see* Stip. at 2 (¶11). ZT states that it submitted a written notice to proceed as owner to the Agency before seeking reimbursement from the UST Fund. ZT Resp. at 8, citing Agency Mot. at 4-5.; *see* R. at 1315-16, Stip. at 3 (¶12), Stip., Exh. F (election); *see also* 415 ILCS 5/57.2 (2008) (definitions); 35 Ill. Adm. Code 734.105 (Election to Proceed under Part 734), 734.115 (definitions).

ZT suggests that Agency has overlooked other undisputed facts reflected in the administrative record. ZT Resp. at 8. ZT states that, on October 9, 2002, the Site's previous owner submitted a Corrective Action Plan for the Site. *Id*., *see* R. at 743-1018. ZT further states that the Agency approved that plan on May 19, 2004. ZT Resp. at 8; *see* R. at 1305-07. ZT argues that the Agency recognized ZT as the Site's owner in correspondence dated January 31, 2008, and March 31, 2008. ZT Resp. at 8; *see* R. at 1311, 1313. ZT further argues that, on June 18, 2009, the Agency "acknowledged receipt and *acceptance* of Petitioner's "Notice of Intent to Proceed as Owner." ZT Resp. at 8 (emphasis in original); *see* R. at 1317-20, Stip. at 3 (¶13), Stip., Exh. F (acceptance of election). ZT claims that the Agency accepted this election before ZT "submitted its otherwise complete Reimbursement Package describing the corrective action activities performed by Petitioner consistent with the Corrective Action Plan submitted by the prior owner and approved by Respondent." ZT Resp. at 8; *see* Stip., Exh. G (package dated June 9, 2009).

ZT claims that the OSFM on September 3, 2009, determined that ZT was eligible to gain access to the UST Fund. ZT Resp. at 8; *see* R. at 1323-30, Stip. at 3 (¶15), Stip., Exh. H (OSFM letter). ZT further claims that, on June 9, 2009, it submitted to the Agency a complete reimbursement package reflecting corrective action consistent with the approved plan. ZT Resp. at 8; *see* Stip., Exh. G. ZT argues that the Agency made its determination about that package on December 21, 2009, more than 120 days after ZT had submitted it. ZT Resp. at 8-9; *see* R. at 1331-35; Stip. at 3-4 (¶¶16, 17).

Timing of Agency Determination

ZT argues that the administrative record clearly shows that its reimbursement package was dated June 9, 2009, and received by the Agency on June 11, 2009. ZT Resp. at 17; *see* Stip. at 3 (¶14); Stip., Exh. G. ZT claims that the Agency issued its final determination on the request for reimbursement on December 21, 2009, "more than 120 days after acknowledging receipt of the request. ZT Resp. at 17; *see* R. at 1331-35; Stip. at 3 (¶16); Stip., Exh. I. ZT cites Section

57.8(a)(1) of the Act providing that, "[i]f the Agency fails to approve the payment application within 120 days, such application shall be deemed to be approved by operation of law and the Agency shall proceed to reimburse the owner or operator the amount requested in the payment application." ZT Resp. at 17, citing 415 ILCS 5/57.8(a)(1). ZT concludes that it "is entitled to reimbursement from the Underground Storage Tank Fund in the amount of $97,049.28, by operation of law." ZT Resp. at 17.

Agency and OSFM Authority

ZT argues that the Act prescribes specific roles for the Agency and the OSFM in administering the UST program. ZT Resp. at 1, citing 415 ILCS 5/57.3, 57.4 (2008). ZT claims that "the OSFM is the only state agency with the authority to determine if any applicant is eligible to seek reimbursement" from the UST Fund. ZT Resp. at 2, citing 415 ILCS 5/57.8, 58.9 (2008). ZT states that, under the Act, "[e]ligibility and deductibility determinations shall be made by the Office of the State Fire Marshal." ZT Resp. at 2, citing 415 ILCS 5/57.9(c). ZT claims that both the Appellate Court and the Board have held that OSFM has authority to determine eligibility to seek reimbursement from the UST Fund and the amount of the deductible to be applied to applications for reimbursement. ZT Resp. at 2, citing R.P. Lumber Co. v. OSFM, 293 Ill. App. 3d 402, 688 N.E.2d 379 (5th Dist. 1997); Stroh Oil Co. v. OSFM, OCB 94-215 (July 20, 1995), *aff'd*. 281 Ill. App. 3d 121, 665 N.E.2d 540 (4th Dist. 1996). ZT claims that the Agency "has no authority to determine or veto the eligibility of any applicant" to seek reimbursement. ZT Resp. at 1-2.

ZT claims that the Act and Board regulations give the Agency authority only "to review the technical and financial aspects of Petitioner's application to the Underground Storage Tank Fund, and in the process, determine if the activities performed were necessary . . . and the costs incurred were reasonable. . . ." ZT Resp. at 6, citing 415 ILCS 5/58 (2008); 35 Ill. Adm. Code 734. ZT acknowledges that the Board must find that an application for reimbursement complies with the Act and UST regulations. ZT Resp. at 7, citing 415 ILCS 5/57.8(a)(6)(A-E) (2008); 35 Ill. Adm. Code 734.605(b)(1-10); Agency Mot. at 2. ZT argues that these authorities list information that comprises a complete application for reimbursement. ZT Resp. at 7. ZT contends that its June 9, 2009 reimbursement package meets all of these informational requirements. *Id*.

ZT claims that the Agency's own Website recognizes the OSFM's authority. ZT Resp. at 2. ZT states that, at a page entitled "An Introduction to Leaking Underground Storage Tanks," the Agency's Website states that "[t]he OSFM is authorized to . . . [d]etermine whether tank owners and operators meet eligibility requirements and, if so, the appropriate deductible amount for payment from the UST Fund." *Id*, *see id*., Exh A at 1 (www.epa.state.il.us/land/lust/introduction.html dated Sept. 13, 2010). ZT further argues that the same page describes the Agency's authority under the UST program without referring to determinations of this nature. *Id*. at 3. In addition, ZT notes that the Agency directs owners and operators to address to the OSFM questions concerning "eligibility and deductible determinations for the UST Fund." *Id*. at 4 n.1; *see id*. Exh. A at 4. ZT also claims that the same page indicates that "[t]he IEPA is authorized to . . . [r]eview and evaluate tank owners' and operators' budgets and claims for payment from the UST Fund." *Id*., Exh. A at 1-2. ZT

contends on the basis of this information that the Agency has admitted that, under the UST program its "authority is limited." ZT Resp. at 4, citing 415 ILCS 5/57.8; 35 Ill. Adm. Code Parts E, F[4].

ZT argues that, considering these authorities and statements, it is "wholly inappropriate" for the Agency to deny ZT's application reimbursement because it is not an "owner." ZT Resp. at 4. ZT stresses that the OSFM has "unequivocally determined" that ZT is an eligible owner. *Id*. ZT contends that the Agency lacks the authority it exercised "in this case to veto OSFM's determination. . . ." *Id*.

ZT characterizes the Agency's position as a claim "that it has proper authority to make technical and fiscal determinations of eligible activities and costs." ZT Resp. at 4. Although ZT acknowledges that the Board must determine whether an Agency determination complies with the Act and applicable regulations, ZT argues that "it is wrong to imply that the Board must ignore Respondents' usurpation of authority under the guise of performing a technical review. . . ." *Id.*, citing Rantoul Township High Sch. Dist. No. 193 v. IEPA, PCB 03-42 (Apr. 17, 2003) (Rantoul); Agency Mot. at 2. ZT contends that, instead of reviewing costs and activities in its application for reimbursement, the Agency failed to reach a determination within 120 days. ZT further contends that the Agency then reviewed only the written election to proceed and then denied the application "on unauthorized procedural grounds." ZT Resp. at 5.

ZT seeks to distinguish itself from the petitioner in Rantoul. ZT claims that, in that case, the Agency found specified costs "ineligible for reimbursement because the activities which gave rise to those costs were not appropriate corrective action activities." ZT Resp. at 5. ZT acknowledges that the Agency in that case possessed authority to determine whether costs such as underground utility relocation, backfill compaction, and density testing were eligible for reimbursement. *Id*. at 5-6. However, ZT claims that "nothing in the Board's decision in Rantoul supports Respondent's purported authority to determine or veto an 'owner's' eligibility." *Id*. at 6. ZT also cites Rezmar Corp. v. IEPA, in which the petitioner appealed the Agency's determination "that $118,877.28 of costs reportedly incurred by that petitioner were ineligible 'Early Action' costs." ZT Resp. at 6, citing Rezmar Corp. v. IEPA, PCB 02-116, 02-91 (cons.) (Apr. 17, 2003) (affirming Agency). ZT argues that Rezmar provides no support for the Agency's position that ZT "bears the burden of proof on the issue of Respondent's purported exercise of extra-jurisdictional authority to make or veto an eligibility determination. . . ."ZT Resp. at 6.

ZT disputes the Agency's argument that the issue presented in this appeal is whether ZT is an "owner" eligible for reimbursement from the UST Fund. ZT Resp. at 7, citing Agency Mot. at 2-5. ZT frames the issue as whether the Agency "has the authority to make or veto a determination of Petitioner's eligibility after the OSFM has specifically found Petitioner eligible

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[4] he Board construes this, based on its context, as a citation to Part 732 of its UST regulations, which addresses releases reported between September 23, 1994, and June 23, 2002. Subparts E and F of Part 732 address "Review of Plans, Budget Plans, and Reports," and "Payment or Reimbursement," respectively.

to access" the UST Fund. ZT Resp. at 7. Claiming that the Agency lacks authority of this nature, ZT argues that the Board should deny the Agency's motion for summary judgment. *Id*.

Administrative Efficiency

ZT argues that the Agency's claim regarding administrative efficiency reflects a "gross misunderstanding" of its limited role in the UST program. ZT Resp. at 9; *see* Agency Mot. at 5. ZT states that "[e]ligibility of an 'owner' is determined by the OSFM" and argues that the Agency's position seeks to usurp this role. ZT Resp. at 9. ZT argues that, "[b]ecause the OSFM makes the determination of who is eligible to access the Underground Storage Tank Fund, it only matters that the new owner's election to proceed was received by Respondent, and that the new owner agreed to be bound by the requirements of Title XVI." *Id*. at 10.

ZT argues that that Agency's position also misunderstands "the scope and purpose of the written election to proceed." ZT Resp. at 9. ZT characterizes the Agency's claim of administrative convenience as "a red herring." *Id*. at 10. ZT claims that the Agency "places too much significance on the timing and the effect of the new owner's election to proceed." *Id*. at 9. ZT stresses the Agency's June 18, 2009 letter accepting ZT's election to proceed as owner of the Site, which "merely accepted Petitioner's word that Petitioner has 'acquired an ownership interest' in the Site." *Id*. at 10; *see* R. at 1317-18; Stip., Exh. F. ZT argues that the election "is not a deed, and it does not create ownership interests. . . ." *Id*. at 9.

Noting the Agency's apparent position that administrative convenience requires election to proceed as owner before corrective action is complete, ZT argues that the date on which the Agency receives the election "is not jurisdictional for purposes or accessing the Underground Storage Tank Fund." ZT Resp. at 9-10. ZT discounts the Agency's claim that filing an election before completing corrective action would avoid the burden of further investigation into ownership. *Id*. at 10. ZT claims that "[c]urrently and historically, Respondent performs no further investigation into ownership because OSFM makes the determination of an 'Owner's' eligibility." *Id*. ZT argues that, whether the Agency receives the election before or after corrective action is performed, "the notice is the same and does not provide any corroboration or fact beyond the new owner's certificate of ownership." ZT Resp. at 10. ZT stresses that, when the Agency receives a request for reimbursement, it can seek additional information about that request whether it received the election before or after corrective action is performed. *Id*. ZT argues that the Agency makes no claim that ZT has failed "to provide additional information to corroborate Petitioner's ownership interest in this case." *Id*. ZT claims that the Agency needs only to receive an election "before reimbursement in order to protect the public fisc from an improper distribution form the Underground Storage Tank Fund." *Id*.

ZT adds that, if the Agency received a timely election from a total stranger to a property, that election would give the Agency no indication that the stranger lacked an ownership interest. ZT Resp. at 11. ZT elaborates that, if the Agency has genuine questions about the eligibility of an entity filing an election to proceed as owner, it "can demand that the putative 'owner' supply Respondent with additional information in the same manner that Respondent currently seeks additional technical information from an applicant." ZT Resp. at 11. ZT discounts as "highly unlikely" the possibility that the Agency would receive a request for reimbursement from an

applicant who performed corrective action while lacking any ownership interest in a property. *Id*. In that event, however, ZT argues that the Agency can challenge "a payment to a total stranger based on real evidence and not an arbitrary, capricious, and unlawful usurpation of authority involving a tortured interpretation of the statute and late notice." *Id*.

ZT claims that,

> [b]ecause the new owner has no regulatory responsibility for contamination associated with historic underground storage tanks *under Title XVI, and Respondent has no authority under Title XVI to demand that the new owner follow Title XVI*, whenever a new owner submits an election to proceed as owner, the new owner accepts additional responsibility, and waives every right to revoke acceptance of that new responsibility. ZT Resp. at 12 (emphasis in original).

ZT further claims that, when a new owner elects to proceed as owner, the Agency "gains a responsible person (*where none existed previously*), who is willing to perform a corrective action under Title XVI . . .*which includes access to the Underground storage Tank Fund established in Illinois just so that owners of underground storage tank systems can satisfy the stringent financial responsibility requirements of federal law*." *Id*. (emphasis in original), citing 42 U.S.C. 6991b(d), 6991(c). ZT argues that, in return for access to the UST Fund, it has accepted "the responsibility to clean someone else's mess - a responsibility that will not otherwise attach to the new owner because the new owner was not the owner of the underground storage tank system at the time of the release." ZT Resp. at 12.

ZT claims that it relied on the prospect of reimbursement from the UST Fund to complete corrective action at a site contaminated for more than a decade by a previous owner and incurred $97,049.28 in reimbursable expenses. ZT Resp. at 11, 13. ZT argues that the Agency's position in this appeal is a "bait and switch" tactic that is "unlawful, arbitrary, and capricious." *Id*. at 13. ZT further argues that the Agency's position would "discourage cleanups and [] punish a new owner for no good reason." *Id*. at 11-12.

Reimbursement to Prior Owner of Site

ZT notes that the Agency denied its request for reimbursement of expenses related to removal of concrete that had covered contaminated soil. ZT Resp. at 13; *see* Stip., Exh. I at 3 (denial letter). ZT specifically notes the Agency's claim that

> Illinois EPA already reimbursed the prior owner for costs associated with the removal and disposal of pavement associated with the 705 cubic yards (1,008 tons) of contaminated soil which was excavated and disposed of in 1991. The information submitted to the Illinois EPA did not indicate the amount of the pavement which was associated with the 705 cubic yards (1,008 tons) of contaminated soil which was excavated and disposed of in June 1991. Therefore, the Illinois EPA did not have enough information to determine if the concrete put into replace the concrete removed was the same amount. Without this additional information the Illinois EPA could not determine if the replacement of concrete

> complied with the Act. ZT Resp. at 14, citing Agency Mot. at 5-6 (citations omitted); *see* R. at 1333.

ZT stresses that it did not perform the 1991 excavation and argues that it does not have the additional information the Agency professes to need. ZT Resp. at 14. ZT argues, however, that the record includes clearly indicates "that not all of the contamination had been removed or addressed by the previous owner, and that the previous owner left the Site and the tank pit contaminated under the area where the concrete had been removed." *Id.* at 15; *see* R. at 55 (Prairie Environmental Specialists report).

ZT describes the Agency's reimbursement of the previous owner as "a mystery." ZT Resp. at 16. ZT acknowledges that it may have removed concrete "in the same area where the prior owner had removed concrete in 1991." *Id*. ZT argues that "the concrete described in Petitioner's Reimbursement Package dated June 9, 2009 had to be removed in order to perform a complete and proper corrective action because the soil beneath it was contaminated." *Id*. ZT further argues that it should be reimbursed for costs incurred in performing appropriate corrective action at the site. *Id*.

In addition, ZT claims that the Agency's denial of its request for reimbursement of expenses related to concrete removal concedes that ZT is eligible to gain access to the UST Fund. ZT Resp. at 13. ZT suggests that, because the Agency "did not merely seek an explanation from Petitioner before denying Petitioner's request for reimbursement out of hand," the Agency's review of the request was "arbitrary, capricious, and unlawful." *Id*. at 13-14, 16.

Agency Decision Deadline

ZT argues that the Agency received ZT's reimbursement package on June 11, 2009. ZT Resp. at 17; *see* R. at 1351. ZT further argues that the Agency made its final determination on that package on December 21, 2009. ZT Resp. at 17. ZT cites the act to claim that, "[i]f the Agency fails to approve the payment application within 120 days, such application shall be deemed to be approved by operation of law and the Agency shall proceed to reimburse the owner or operator the amount requested in the payment application." ZT Resp. at 17, citing 415 ILCS 5/57.8(a)(1) (2008). ZT argues that the Agency made a decision more than 120 days after receiving ZT's request and that ZT is therefore "entitled to reimbursement from the Underground Storage Tank Fund in the amount of $97,049.28, by operation of law." ZT Resp. at 17.

Request for Reimbursement of Attorneys' Fees

ZT claims that, under Section 57.8(l) of the Act, it is entitled in this case to recover its attorneys' fees and costs from the UST Fund. ZT Resp. at 17, citing 415 ILCS 5/57.8(l) (2008), 35 Ill. Adm. Code 734.630(g). ZT notes that the Board has awarded attorney fees to parties appealing Agency determinations under the UST program. ZT Resp. at 18 (citations omitted). ZT argues that an owner or operator "need not prevail on all of its claims to be entitled to reimbursement of its legal fees." *Id*., citing Webb & Sons, Inc. v. IEPA, PCB 07-24 (May 3, 2007). ZT claims that, because it has challenged the Agency's authority to determine eligibility

to gain access to the UST Fund and the Agency's denial of its claim for reimbursement, it "requests leave to introduce evidence in support of its attorneys' fees and costs." ZT Resp. at 18.

Summary

On the basis of the arguments summarized in the preceding subsections, ZT argues that "the Board should reverse Respondent's final decision, award Petitioner reimbursement from the Underground Storage Tank Fund in the amount of $97,049.28, and order Respondent to reimburse Petitioner its attorneys' and experts' fees, and costs associated with this appeal." ZT Resp. at 19.

AGENCY RESPONSE TO ZT'S MOTION FOR SUMMARY JUDGMENT

Indicating that it can take no position on whether ZT is a "hero," the Agency dismisses ZT's argument in its motion for summary judgment as "a classic mythological legend." Agency Resp. at 3; *see* ZT Mot. at 16. The Agency argues that this is not a case involving the OSFM's eligibility determination and that the Agency's position does not override the OSFM's authority. Agency Resp. at 1. The Agency claims that this case involves only the statutory definition of "owner" and whether ZT falls within that definition. *Id*.; *see* 415 ILCS 5/57.2 (2008).

The Agency acknowledges that, when ZT performed work at the Site between September 1, 2006, and May 31, 2009, ZT had an ownership interest in the Site. Agency Resp. at 2. The Agency argues that ZT did not file an election to proceed as owner until June 9, 2009. *Id*. at 2-3. The Agency further argues that this election is required in order to be considered an "owner" for reimbursement from the UST Fund. *Id*. at 2-3, citing 415 ILCS 5/57.2 (2008). The Agency claims that ZT "did not comply with the law." Agency Resp. at 3. The Agency restates its position that, because of this failure, ZT "cannot receive reimbursement from the Fund for work performed prior to the submittal of the election to proceed." *Id*. at 4.

The Agency argues that legislature's intent in requiring an election to proceed is clear. Agency Resp. at 3. The Agency characterizes the election as "a clear indication for the Illinois EPA that the person is taking responsibility for the site and can be paid under the fund." *Id*. The Agency claims that, without an election, it would have to seek deeds and other evidence of ownership at the time work was completed in order to determine the owner who should be reimbursed. *Id*. The Agency restates that, because sites may change hands during remediation, more than one entity could request reimbursement for the same work. *Id*. at 3-4. The Agency claims that establishing ownership under such circumstances would be "an administrative burden" and "an arduous process." *Id*. at 3. The Agency states that "[t]he election to proceed was the solution for this problem and should not be disregarded lightly." *Id*. at 4.

The Agency stresses that it is a creature of statute that can act only according to the Ac and the Board's regulations. Agency Resp. at 2, 3. The Agency further states that it "can only approve payment pursuant to the laws it must follow." *Id*. at 2. The Agency argues that, if a person could become the owner of a site without having filed an election to proceed as owner, "there would be no need for such an election." *Id*. at 3. The Agency suggests that ZT's position would require it to ignore the election and render it "meaningless." *Id*. The Agency claims that

ZT's position "would controvert the clear meaning of the statue and the legislature's intent. *Id*. The Agency states that "[i]t would require a change in law by the Legislature to cure any inequities perceived by the Petitioner." *Id*. at 2.

The Agency concludes by requesting that the Board affirm its determination that ZT is not an "owner" under the Act and its denial of reimbursement of costs incurred before submitting an election to proceed as owner. Agency Resp. at 4. The Agency also requests that "the Board affirm the Illinois EPA's decision determining that the Petitioner did not submit enough supporting information to allow for the payment for concrete replacement." *Id*.

LEGAL AND STATUTORY BACKGROUND

Because this matter is before the Board on motions for summary judgment, this section of the Board's opinion will set forth the legal background of summary judgment. The section will then discuss the standard of review and burden of proof to be applied in reviewing an appeal of an underground storage tank reimbursement before citing applicable statutory and regulatory authorities.

Summary Judgment

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is 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). In ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." *Id*. Summary judgment "is a drastic means of disposing of litigation," and therefore it should be granted only when the movant's right to the relief "is clear and free from doubt." *Id.*, *citing* Purtill v. Hess, 111 Ill. 2d 299, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must "present a factual basis which would arguably entitle [it] to a judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2d Dist. 1994).

Standard of Review and Burden of Proof

Section 57.8(i) of the Act, addressing the UST Fund, allows an owner or operator to appeal Agency determinations pursuant to Section 40 of the Act. 415 ILCS 5/40, 57.8(i) (2008). The standard of review under Section 40 of the Act (415 ILCS 5/40 (2006)) is whether the application, as submitted to the Agency, would not violate the Act and Board regulations. Ted Harrison Oil Co. v. IEPA, PCB 99-127, slip op. at 5 (July 24, 2003); citing Browning Ferris Industries of Illinois v. PCB, 534 N.E.2d 616 (2nd Dist. 1989). The Board will not consider new information that was not before the Agency prior to its final determination regarding the issues on appeal. Kathe's Auto Service Center v. IEPA, PCB 95-43, slip op. at 14 (May 18, 1995). The Agency's denial letter frames the issues on appeal. Pulitzer Community Newspapers, Inc. v. IEPA, PCB 90-142 (Dec. 20, 1990).

The Board's procedural rules provide that, in appeals of final Agency determinations, "[t]he burden of proof shall be on the petitioner. . . ." 35 Ill. Adm. Code 105.112(a), citing 415 ILCS 5/40(a)(1), 40(b), 40(e)(3), 40.2(a).

Statutory and Regulatory Authorities

Section 57.2 of the Act provides in pertinent part that,

> [w]hen used in connection with, or when otherwise relating to, underground storage tanks, the terms "facility", "owner", "operator", "underground storage tank", "(UST)", "petroleum" and "regulated substance" shall have the meanings ascribed to them in Subtitle I of the Hazardous and Solid Waste Amendments of 1984 (P.L. 98-616), of the Resource Conservation and Recovery Act of 1976 (P.L. 94-580); . . . provided further however that the term "owner" shall also mean any person who has submitted to the Agency a written election to proceed under this Title and has acquired an ownership interest in a site on which one or more registered tanks have been removed, but on which corrective action has not yet resulted in the issuance of a "no further remediation letter" by the Agency pursuant to this Title. 415 ILCS 5/57.2 (2008).

Section 57.9(a) of the Act, addressing UST Fund eligibility and deductibility, provides in pertinent part that

> (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 satisfies 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 Tax Fuel 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. 415 ILCS 5/57.9(a) (2008).

Section 734.105 of the Board's UST regulations, which addresses elections to proceed under Part, provides in pertinent part that

a) Owners or operators of any underground storage tank system used to contain petroleum and for which a release was reported to the proper State authority prior to June 24, 2002, may elect to proceed in accordance with this Part by submitting to the Agency a written statement of such election signed by the owner or operator. Such election must be submitted on forms prescribed and provided by the Agency and, if specified by the Agency in writing, in an electronic format. Corrective action must then follow the requirements of this Part. The election must be effective upon receipt by the Agency and must not be withdrawn once made.

* * *

d) If the owner or operator elects to proceed pursuant to this Part, corrective action costs incurred in connection with the release and prior to the notification of election must be payable from the Underground Storage Tank Fund in the same manner as was allowable under the law applicable to the owner or operator prior to the notification of election. Corrective action costs incurred after the notification of election must be payable from the Fund in accordance with this Part. 35 Ill. Adm. Code 734.105.

Section 734.610 of the Board's UST regulations, addressing Agency review of applications for payment from the UST Fund, provides in pertinent part that

* * *

(d) . . . [t]he Agency must notify the owner or operator in writing of its final action on any such application for payment. Except as provided in subsection (e) of this Section, if the Agency fails to notify the owner or operator of its final action on an application for payment within 120 days after the receipt of a complete application for payment, the owner or operator may deem the application for payment approved by operation of law.

* * *

e) An owner or operator may waive the right to a final decision within 120 days after the submittal of a complete application for payment by submitting written notice to the Agency prior to the applicable deadline. Any waiver must be for a minimum of 30 days.

BOARD DISCUSSION

In its motion for summary judgment, ZT states that "[t]here are no genuine issues of material fact, at least as to those facts involving the question concerning Petitioner's eligibility for reimbursement from the Underground Storage Tank Fund." ZT Mot. at 1. The Agency's motion concurs that the case presents "no genuine issues of material fact." Agency Mot. at 1. The Agency elaborates that the administrative record and its arguments suffice "for the Board to enter a dispositive order in favor of the Illinois EPA on all relevant issues. In this regard, the Board notes that the parties have stipulated to a substantial body of facts. *See generally* Stip.

The parties agree that the material facts in this proceeding are not in genuine dispute and that summary judgment is appropriate. Mot. at 2-3; Resp. at 3. The issues involve only questions of law (*see* ZT Mot. at 20, Agency Mot. at 4) pertaining to the definition of "owner" at Section 57.2 of the Act (415 ILCS 5/57.2 (2008)). Having reviewed the administrative record and the parties' filings, the Board agrees with the parties that there are no issues of material fact and that summary judgment is appropriate.

Agency Decision Deadline

The administrative record in this case demonstrates that ZT submitted to the Agency a written election to proceed as owner dated June 1, 2009. Stip. at 3 (¶12); *id*., Exh. E; R. at 1315-16; *see* 415 ILCS 5/ 57.2 (2008); 35 Ill. Adm. Code 734.105. The record further demonstrates that the Agency received that election on June 8, 2009. Stip. at 3 (¶13), R. at 1317. The Board's regulations provide that "[t]he election must be effective upon receipt by the Agency and must not be withdrawn once made." 35 Ill. Adm. Code 734.105(a). The record also shows that the Agency in a letter dated June 18, 2009, accepted ZT's election. Stip. at 3 (¶13); *id*., Exh. F; R. at 1317, citing 415 ICLS 5/57.13 (2008); 35 Ill. Adm. Code 734.105.

In the form prescribed by the Agency (*see* 35 Ill. Adm. Code 734.105(a)), an election to proceed as owner states in pertinent part: "I understand that by making this election I become subject to all of the responsibilities and liabilities of an 'owner' under Title XVI of the Environmental Protection Act and the Illinois Pollution Control Board's rules at 35 Ill. Adm. Code 734. I further understand that, once made, this election cannot be withdrawn." R. at 1316. With this election, ZT irrevocably committed to regulation of the release under Title XVI and Part 734, which generally applies to releases from USTs reported on or after June 24, 2002. 35 Ill. Adm. Code 734. This conclusion finds clear support in the administrative record. An Agency incident tracking document dated September 23, 2009, indicates that Incident No. 911366 is subject to Part 734. R. at 1339. The document also provides the following comments: "[s]ite originally under 731, now under 734 due to receipt of Elect to Proceed as Owner Form." *Id*.

Among the provisions of Part 734, Section 610 addresses the Agency's review of applications for payment from the UST Fund. *See* 35 Ill. Adm. Code 734.610. Subsection (d) provides, in pertinent part, that

> [t]he Agency must notify the owner or operator in writing of its final action on any such application for payment. Except as provided in subsection (e) of this Section, if the Agency fails to notify the owner or operator of its final action on an application for payment within 120 days after the receipt of a complete application for payment, the owner or operator may deem the application for payment approved by operation of law. 35 Ill. Adm. Code 734.610(d); *see* 415 ILCS 5/57.8(a)(1).

Subsection (e) allows an owner or operator to waive the right to a final decision within 120 days after submitting a complete application for payment (35 Ill. Adm. Code 734.610(e)), but the administrative record does not include a waiver of this nature by ZT.

The parties have stipulated that, "[o]n June 11, 2009, Petitioner identified and notified Respondent of the additional corrective action activities and expenses Petitioner had performed an incurred at the Site related to Incident No. 911366, and sought reimbursement from the UST FUND for those expenses." Stip. at 3 (¶14); *id*., Exh. G; *see* R. at 1349. Accordingly, the Agency's decision on ZT"s application was due Friday, October 9, 2009. The parties have further stipulated that, "[o]n December 21, 2009, Respondent denied Petitioner's Application for Reimbursement." Stip. at 3 (¶16); *id*., Exh. I; R. at 1331-1484. ZT throughout this proceeding has argued on this basis that its application is deemed approved by operation of law. Pet. at 5, ZT Mot. at 30, ZT Resp. at 17. The Agency has not squarely addressed this claim. *See* Agency Mot. at 4-6, Agency Resp. at 2-4.

In the absence of any waiver under Section 734.610(e), the Board can conclude only that the Agency has failed to notify ZT of its final action on the application for payment within 120 days and that ZT is entitled to deem its application approved by operation of law. In its order below, the Board will direct the Agency to reimburse ZT $97,049.28, the amount of its June 11, 2009, request for reimbursement.

Definition of "Owner"

While the Board in the preceding subsection of this opinion has concluded that ZT's application for reimbursement from the UST Fund is deemed approved by operation of law, the Board notes that corrective action at the Site has not yet culminated in the issuance of an NFR letter. Stip. at 2 (¶7). As a reimbursement application may be submitted as late as one year after issuance of the NFR letter (35 Ill. Adm. Code 734.605(j)), ZT may submit one or more additional applications for payment from the UST Fund for corrective action at the Site. The issue of ZT's ownership may conceivably confront the Board again in any appeal of an Agency determination on reimbursement at this Site. Accordingly, the Board in the interests of administrative efficiency and economy will proceed to address the issue of ownership.

With Public Act 94-274, effective January 1, 2006, the General Assembly amended the definition of "owner" at Section 57.2 of the Act to provide in pertinent part that, in addition to the existing definition,

> the term "owner" shall also mean any person who has submitted to the Agency a written election to proceed under this Title and has acquired an ownership interest in a site on which one or more registered tanks have been removed, but on which corrective action has not yet resulted in the issuance of a "no further remediation letter" by the Agency pursuant to this Title. P.A. 94-274 (eff. Jan. 1, 2006); *see* 415 ILCS 5/57.2 (2008).

Generally, this amendment established this election as a mechanism for entities who have acquired property at which a release has occurred and from which a tank or tanks have been removed to participate in the UST Program and seek reimbursement from the UST Fund. Without this revision, the definition generally limited participation in the UST Program and reimbursement to the owner or operator of the removed leaking USTs, even if that owner or operator had abandoned the property or transferred it to another entity. Without this access to the Fund, a new owner or operator of a contaminated property would presumably be required to bear the costs of remediating contamination originating with the previous owner. The burden of these costs plainly would discourage prospective buyers from acquiring property at which corrective action had not yet resulted in an NFR letter or from performing corrective action after acquiring it. The Board concludes that the General Assembly intended in Public Act 94-274 to provide an incentive to purchase and remediate properties of this nature.

The administrative record in this case demonstrates that ZT submitted a written election to proceed as owner under the Act and Board regulations after acquiring an ownership interest in a site in which one or more registered tanks had been removed but on which corrective action had not yet culminated in issuance of an NFR letter by the Agency. Stip. at 3 (¶12); *id*., Exh. E; R. at 1315-16; *see* 415 ILCS 5/57.2 (2008); 35 Ill. Adm. Code 734. The Board's regulations provide that "[t]he election must be effective upon receipt by the Agency and must not be withdrawn once made." 35 Ill. Adm. Code 734.105(a). In its letter acknowledging and accepting ZT's election, the Agency informed ZT that, "[a]s the new owner, you may be eligible to access the Underground Storage Tank Fund for payment of costs related to remediation of the release. For information regarding eligibility and the deductible amount to be paid, please contact the Office of the State Fire Marshal. . . ." R. at 1317.

"On September 3, 2009, the Illinois Office of the State Fire Marshal determined that Petitioner was eligible for reimbursement of reimbursable expenses in excess of $10,000 for expenses incurred in response to Incident No. 911366." Stip. at 3 (¶15); *id*., Exh. H; R. at 1323-30. The OSFM specifically noted that the Agency had accepted ZT's election to proceed as owner. R. at 1323.

In its determination denying ZT's request for reimbursement, the Agency stated that

> [i]t appears that all of the bills in this package were billed to Zervos Three. However, it does not appear that Zervos Three was the owner/operator of the 3 -

> 7,500 gallon gasoline underground storage tank systems (which were removed in June 1991) during the billing period (September 2006 - May 2009). Based upon the Election to Proceed as Owner form dated June 1, 2009, Zervos Three was not the owner/operator of the underground storage tank systems until June 1, 2009. Therefore, the entire bill package is not reimbursable. Section 22.18b(a)(3) of the Illinois Environmental Protection Act. Stip. at 4 (¶17); *see* Stip., Exh. I; *see also* R. at 1333.

The Agency effectively determined that, because ZT performed corrective action before it elected to proceed as owner of the Site, ZT was not an owner when it performed that corrective action and cannot be reimbursed from the UST Fund for it. *See* Agency Mot. at 4-5. The Agency faults ZT for failing to "submit its election to proceed prior to completing work on the [S]ite." Agency Resp. at 3. This position finds no support in the Act or in the Board's UST regulations.

> As noted above, Section 57.2 of the Act provides in pertinent part that
>
> the term "owner" shall also mean any person who has submitted to the Agency a written election to proceed under this Title and has acquired an ownership interest in a site on which one or more registered tanks have been removed, but on which corrective action has not yet resulted in the issuance of a "no further remediation letter" by the Agency pursuant to this Title. 415 ILCS 5/57.2 (2008); *see* Public Act 94-274 (eff. Jan. 1, 2006).

The parties have stipulated that since November 24, 2003, ZT has owned the Site, "one that had contained one or more registered undergrounds storage tanks, which had been removed, but for which corrective action had not yet resulted in the issuance of a 'No Further Remediation' letter. . . ." Stip. at 2 (¶¶6, 7); *id*., Exh. B. The parties have also stipulated that ZT has filed and the Agency has accepted a written election to proceed as owner of the Site. *Id*. at 3 (¶¶12, 13), *id*., Exhs. E, F. The definition above does not refer to the extent to which a prospective owner has performed corrective action. Presuming that the prospective owner satisfies the other elements, the definition does not plainly exclude an election filed by an entity that has performed no corrective action at all, an entity that has begun but not completed corrective action, or an entity that has completed corrective action but has not received an NFR letter. The definition did not prevent ZT from performing some or even all of the corrective action at the Site before filing its election to proceed as owner. Furthermore, the Board's UST regulations specifically contemplate the reimbursement of corrective action performed before election to proceed as owner. *See* 734 Ill. Adm. Code 105(d) (referring to reimbursement of corrective action costs incurred in connection with the release and prior to the notification of election).

Contrary to the Agency's position, ZT was not required to "submit its election to proceed prior to completing work on the [S]ite," and the Board declines to read this requirement into Section 57.2 of the Act. *See* Alternate Fuels, Inc. v. EPA, 215 Ill. 2d 219, 238, 830 N.E.2d 444, 455 ("We must not depart from the plain language of the Act by reading into it exceptions, limitations, or conditions that conflict with the express legislative intent.") Consequently, the Board finds that, under the facts and circumstances of this case, the statutory definition of

"owner" does not prevent ZT from seeking reimbursement from the UST Fund for corrective action performed before it elected to proceed as owner of the Site.

This finding is consistent with the legislative intent of Public Act 94-274 to provide an incentive to purchase and remediate properties of this nature. The parties have stipulated that ZT purchased property from which USTs had been removed but corrective action had not culminated in the issuance of an NFR letter. Stip. at 2 (¶7). The parties have also stipulated that ZT between 2006 and 2009 has performed and incurred expenses associated with additional corrective action at the Site. *Id*. (¶11). ZT has filed its irrevocable election to proceed as owner and has sought reimbursement from the UST Fund. The Board can only conclude that the prospect of reimbursement provided a significant incentive for ZT to purchase the Site and undertake additional corrective action.

While the Agency cites Section 22.18b(a)(3), addressing eligibility to receive money from the UST, and the parties have stipulated to its provisions (Stip. at 5-6 (¶20), the General Assembly has repealed Section 22.18b(a)(3). Public Act 88-496 (eff. Sept. 13, 1993) (Section 95). Public Act 88-496 added a new Section 57.9 of the Act, entitled "Underground Storage Tank Fund; eligibility and deductibility." Public Act 88-496 (eff. Sept. 13, 1993) (Section 15). Section 57.9(a) of the Act provides in pertinent part that "[t]he owner or operator is eligible to access the Underground Storage Tank Fund if the eligibility requirements of this Title are satisfied and" if seven conditions are met. The record does not persuasively show that ZT has failed to meet any of these conditions. Furthermore, "[o]n September 3, 2009, the Illinois Office of the State Fire Marshal determined that Petitioner was eligible for reimbursement of reimbursable expenses in excess of $10,000 for expenses incurred in response to Incident No. 911366." Stip. at 3 (¶15); *id*., Exh. H; R. at 1323-30. The Board finds that, under the facts and circumstances of this case, the requirements of Section 57.9 of the Act do not now bar ZT from seeking reimbursement from the UST Fund for corrective action performed before it elected to proceed as owner of the Site.

The language of repealed Section 22.18b(a)(3) leads to the same conclusion. That provision established that

> (a) An owner or operator is eligible to receive money from the Underground Storage Tank Fund for costs of corrective action or indemnification only if all of the following requirements are satisfied:
>
> * * *
>
> (3) The costs of corrective action or indemnification were incurred by an owner or operator as a result of a release of petroleum, but not including any hazardous substance, from an underground storage tank. Stip. at 5 (¶20); 415 ILCS 5/22.18b (1992).

This provision requires that costs are incurred by an owner or operator but would not have required incurring them after becoming owner or operator. This repealed provision would not have prevented ZT from seeking reimbursement from the UST Fund for corrective action performed before it elected to proceed as owner of the Site.

Although the Board concluded above that ZT is entitled to deem its application for reimbursement from the UST Fund approved by operation of law, the Board has in the interests of administrative efficiency and economy addressed the issue of ownership raised in the Agency's decision letter and briefed extensively by the parties. The Board is not persuaded by the Agency's position that the Act and regulations require ZT to submit its election to proceed as owner before completing corrective action at the site in order to seek reimbursement from the UST Fund for the costs of that corrective action. The Board finds that, under the facts and circumstances of this case, ZT's election to proceed as owner of the Site did not prevent it from seeking reimbursement for costs of corrective action performed before June 8, 2009, the date on which its election took effect. ZT has met its burden of demonstrating that its application for reimbursement, as submitted to the Agency, would not have violated the Act's definition of "owner." Consequently, if it had not found that the Agency failed to meet its 120-day decision deadline, the Board would have remanded this case to the Agency and directed it to review ZT's application for reimbursement according to the findings and conclusions in this opinion and order.

Request for Reimbursement of Attorneys' Fees

Section 57.8(l) of the Act provides that corrective action excludes "legal defense costs," which include "legal costs for seeking payment . . . unless the owner or operator prevails before the Board in which case the Board may authorize payment of legal fees." 415 ILCS 5/57.8(l) (2008). The Board has required the reimbursement of legal fees from the UST Fund where a petitioner has prevailed in appealing the Agency's denial of payment from the UST Fund. *See, e.g.*, Dickerson Petroleum, Inc v. IEPA, PCB 9-87, 105 (cons.) (Dec. 2, 2010). ZT has throughout this proceeding requested reimbursement of attorney fees and costs. Pet. at 5; ZT Mot. at 31, ZT Resp. at 19 at 9.

Having granted ZT's motion for summary judgment and determined that ZT's request for reimbursement from the UST Fund is deemed approved by operation of law, the Board concludes that ZT has prevailed before the Board for the purposes of Section 57.8(l) of the Act (415 ILCS 5/57.8(l) (2008). Illinois Ayers Oil Co. v. IEPA, PCB 03-214, slip op. at 7 (Aug. 5, 2004). However, the record does not now include any amount of "legal costs for seeking payment" incurred by ZT in this proceeding. *See* 415 ILCS 57.8(l) (2008). Consequently, the Board today reserves ruling on whether to exercise its discretion to award attorney fees and, if it should exercise that discretion, the amount of reimbursement.

In its order below, the Board directs ZT to file a statement of its legal costs that may be eligible for reimbursement. *See* 415 ILCS 5/57.8(l) (2008); 35 Ill. Adm. Code 734.630(g). In this regard, the Board notes that ZT "requests leave to introduce evidence in support of its attorneys' fees and costs." ZT Resp. at 18. The order provides an opportunity for the Agency to respond to ZT's statement.

CONCLUSION

For the reasons stated above, the Board today grants ZT's motion for summary judgment, denies the Agency's motion for summary judgment, determines that ZT is entitled to deem its

application from the UST Fund approved by operation of law, and also determines that ZT's election to proceed as owner of the Site did not prevent it from seeking reimbursement for costs of corrective action performed before June 8, 2009, the date on which its election took effect. In addition, responding to ZT's request for reimbursement of attorney fees, the Board directs ZT to file within 45 days a statement of fees that may be reimbursable.

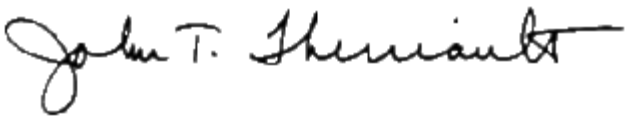
ORDER

1) Having concluded that ZT is entitled to deem its application for reimbursement from the UST Fund approved by operation of law, the Board directs the Agency to reimburse ZT in the amount of $97,049.28.

2) ZT is directed to file on or before Tuesday, March 8, 2011, 45 days from the date of this order, a statement of its legal costs that may be eligible for reimbursement. The Agency may respond to ZT's statement by filing its response with the Board on or before within 14 days after service of ZT's statement.

IT IS SO ORDERED.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on January 20, 2011, by a vote of 5-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board