

ILLINOIS POLLUTION CONTROL BOARD

December 4, 2014

PAK-AGS, INC.,)	
)	
Petitioner,)	
)	
v.)	PCB 15-14
)	(UST Permit Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

PATRICK SHAW, MOHAN, ALEWELT, PRILLAMAN & ADAMI, APPEARED ON BEHALF OF PETITIONER, and

MELANIE JARVIS, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, APPEARED ON BEHALF OF RESPONDENT.

INTERIM OPINION AND ORDER OF THE BOARD (by C.K. Zalewski):

On July 25, 2014, PAK-AGS filed a petition (Pet.) asking the Board to review a June 23, 2014 determination of the Illinois Environmental Protection Agency (Agency). *See* 415 ILCS 5/40(a)(1) (2012); 35 Ill. Adm. Code 101.300(b), 105.402, 105.404. The Agency's determination concerns PAK-AGS' leaking underground storage tank (UST) site located at 2526 Nameoki Road, Granite City, Madison County (the Site). The Agency denied PAK-AGS' request for reimbursement from the UST Fund. PAK-AGS appealed on the grounds that it was not required to submit an eligibility and deductibility determination (E&D determination) for incident 20050545, which occurred sometime in 2005, to receive reimbursement for incident 20110945, which occurred on September 1, 2011. Pet. at 2-3.

In this order, the Board provides the uncontested facts, then summarizes PAK-AGS' petition for review, the transcript of the September 17, 2014 hearing, and the filings in this matter. Next the Board grants the Agency's Motion for Leave, and addresses the Agency's Motion to Strike, PAK-AGS' response, and all subsequent filings. The Board outlines PAK-AGS' burden with regard to the petition for review and the law with regard to leaking UST reimbursement. After analyzing the Agency's basis for denial and the parties' arguments, the Board reverses the Agency's determination and directs the Agency to reimburse PAK-AGS for incident 20110945 in the amount of \$16,595.90. The Board also orders the parties to file statements on legal costs.

PROCEDURAL HISTORY

On August 7, 2014, the Board accepted PAK-AGS' petition for review. PAK-AGS, Inc. v. IEPA, PCB 15-14 (Aug. 7, 2014). On August 28, 2014, the Board received the Agency's

record of decision (R.) in this matter. *See* 35 Ill. Adm. Code 105.410. Notice of the public hearing was published in the *Madison County Journal* on August 27, 2014. *See* 35 Ill. Adm. Code 101.602. The hearing was held on September 17, 2014 at the Illinois Pollution Control Board in Springfield, Illinois. On October 1, 2014, PAK-AGS filed a waiver of decision deadline to December 4, 2014. PAK-AGS filed its post-hearing brief (Br.) on October 8, 2014. The Agency filed its post-hearing brief (Agency Br.) on October 20, 2014. PAK-AGS filed its reply (Reply) on November 3, 2014.

The Agency filed a motion for leave to file reply, post-hearing reply brief, and motion to strike (Agency Mot.) on November 6, 2014. PAK-AGS filed a response to the Agency's motion for leave to file reply on November 17, 2014. (Resp. Mot.). Finally, on November 20, 2014, the Agency filed another motion for leave to file reply and Reply to Petitioner's Response Brief/Motion to Strike. (Agency Res. Mot.). Below, the Board briefly discusses these filings, rules on the motions for leave to file a reply and the Agency's motion to strike, before returning to the petition for review.

The Agency's Reply to PAK-AGS' Reply & Motion to Strike

On November 6, 2014, the Agency filed its motion for leave to reply along with its reply to PAK-AGS' reply brief and a motion to strike exhibits attached to PAK-AGS' reply brief. In the motion, the Agency argues that PAK-AGS attempted to add three new exhibits to the record along with arguments based on those exhibits with its reply brief filed on November 3, 2014. Agency Mot. at 2.¹

In the motion to strike, the Agency argues that the filing includes documents that were not before the Agency at the time of its decision in this matter and prevents the Agency from obtaining testimony on the documents. Agency Mot. at 4. The Agency argues that the documents attached to PAK-AGS' reply brief were in existence at the time the petition for review in this matter was filed but were never presented to the Agency. Therefore, the Agency asks the Board to rule that the documents "are not included within either the hearing exhibits or the record in this matter," and to strike the exhibits to PAK-AGS' reply brief from the record. *Id.* at 4-6.

PAK-AGS' Response to the Agency's Motion for Leave to File Reply

In its response to the Agency's motion for leave to file reply, PAK-AGS argues that the exhibits attached to its Reply were in response to the Agency's conclusions regarding the shear valve in the Agency's post-hearing brief. Resp. Mot. at 1. Referring to its Reply exhibits, PAK-AGS argues that, "there does not appear to be much controversy concerning official documents put on the internet by government agencies to advise the public." *Id.* at 2, citing People v. Young, 355 Ill. App. 3d 317, 321 (2nd Dist. 2005).

¹ The Agency consecutively numbered all documents included in the November 6, 2014 filing. Therefore, the Board refers to them collectively as "Agency Mot. at ___".

Agency's Motion for Leave and Reply to Petitioner's Response Brief

In its November 20, 2014 filing, the Agency asks the Board to strike PAK-AGS' Response to the Agency's Motion for Leave. Agency Res. Mot. at 4. The Agency argues that PAK-AGS' filing does not respond to the Agency's Motion for Leave to File or the Agency's Motion to Strike, but introduces new legal arguments. *Id.* at 4-7. The Agency states that PAK-AGS presented no testimony at hearing, but has raised unsupported issues in subsequent filings in an attempt to prevent the Agency from responding. *Id.* at 8.

Board Decision on Motions for Leave to File and the Agency's Motions to Strike

Section 101.500(e) of the Board's procedural rules provides that, "[t]he moving person will not have the right to reply, except as permitted by the Board or the hearing officer to prevent material prejudice. A motion for leave to file a reply must be filed with the Board within 14 days after service of the response." 35 Ill. Adm. Code 101.500(e).

In its timely filed motion for leave to reply, the Agency states that it would be prejudiced if the Board prevented it from filing a reply to PAK-AGS' post-hearing reply brief. Therefore, the Board grants the Agency's motion for leave to reply, and allows the subsequent filings by both parties.

Regarding the Agency's November 6, 2014 motion to strike and PAK-AGS' response, the Board finds it appropriate to note the nature of the documents at issue. As mentioned above, PAK-AGS attached three documents to its Reply. First, attached as Exhibit A to its Reply are select pages of the Code for Motor Fuel Dispensing Facilities and Repair Garages 2003 Edition published by the National Fire Protection Association. Reply Exh. A. Second, Exhibit B is an Office of the State Fire Marshall (OSFM) internet webpage printout entitled Division of Petroleum & Chemical Safety addressing questions regarding shear valves raised by contractors and dispensing facility owners and operators. Reply Exh. B. Third, PAK-AGS attached, as Exhibit C, an internet webpage printout from the Madison County, Illinois Assessment Office containing "information for parcel 22-2-20-17-15-402-001., Tax Year 2013 Payable 2014." Reply Exh. C.

Section 101.630 of the Board's procedural regulations, entitled "Official Notice" provides that "[o]fficial notice may be taken of all facts of which judicial notice may be taken and of other facts within the specialized knowledge and experience of the Board." 35 Ill. Adm. Code 101.630. Without commenting on the authority the documents may hold over the issues in this case, the Board finds that the documents attached to PAK-AGS' Reply all fall within the scope of the Board's official notice rule. Therefore, the Board denies the Agency's motion to strike.

In review of PAK-AGS' November 17, 2014 response to the Agency's motion for leave to file and motion to strike, the Board finds only explanation for the inclusion of Exhibits A, B, and C of PAK-AGS' Reply, *see supra*, and therefore denies the Agency's motions to strike PAK-AGS' filings and the arguments contained therein.

FACTS

The record in this matter begins, chronologically, with the reporting that occurred in 2005 when “someone’s vehicle did strike a dispenser which caused a line to rupture at a shear valve” at the Site. R. at 517. An Illinois HazMat Report was issued for incident 20050545 with a discovery date of April 19, 2005, and an estimated amount released of 100 gallons. R. at 516. “Traffic accident” was entered as the cause of the release with Corner Liquor Store listed as the responsible party. *Id.* Following its receipt of the HazMat Report, the Agency sent the Corner Liquor Store a letter, dated April 25, 2005, indicating that as a result of the release, “the owner or operator of the [UST] is required to comply with the leaking Underground Storage Tank (UST) Program requirements.” R. at 515. Another Agency notice, dated June 28, 2005, indicates that no 20 day certification or 45 day report had been filed for the April 19, 2005 incident. R. at 514.

On September 1, 2011, a Hazardous Material Incident was reported at the Site and assigned IEMA incident number 20110945. R. at 421. This report indicated that a leak or spill of gasoline had occurred from three 10,000 gallon tanks at the Site. It was stated in this report that the amount of the release and the cause of the release were “unknown”. *Id.* This report indicated that “[t]he incident was reported based upon [sic] phase 2 site investigation.” R. at 422. On September 9, 2011, the Agency sent PAK-AGS a letter ordering compliance with the leaking UST program. R. at 420. On November 7, 2011, the Agency sent PAK-AGS a letter stating that the 45-day report for incident 20110945 was received by the Agency on October 20, 2011 and ordering PAK-AGS to proceed with the Stage 1 site investigation. An amended 45-day report was filed with the Agency on March 20, 2012. R. at 343.

OSFM issued its permit for removal of the USTs on September 14, 2011. R. at 337. The OSFM E&D determination for incident 20110945 followed on March 23, 2012. R. at 324. While the application materials submitted to OSFM by PAK-AGS referenced incident 20050545, the OSFM E&D determination does not mention the 2005 incident. R. at 324-25.

On March 28, 2012, Environmental Management, Inc. (EMI) submitted the leaking UST billing package for Early Action Activities at the Site to the Agency. R. at 220. Included in the billing package is a general information form that includes both incident numbers 20110945 and 20050545 as “incident numbers assigned to the site due to releases from USTs.” R. at 222. The Licensed Professional Engineer/Geologist Billing Certification Form included with the billing package lists only incident 20110945. R. at 237. The record also contains a “queue date tracking sheet” of the same date as the EMI billing package. The tracking sheet includes a handwritten note stating, “20050545 need to elect & get E&D. Assess higher of 2 deductibles.” R. at 219.

On April 30, 2012, the Agency sent PAK-AGS a 45-day report approval letter stating that, “the 45-day reporting requirements of Section 57.6 of the Act and 35 Ill. Adm. Code 734.210(d) have been satisfied.” R. at 319. Accompanying the 45-day report approval are Agency LUST Technical Review Notes. Those notes indicate, in part that, an Agency employee:

attached a note to the report indicating that a previous incident (20050545) was reported and that this recent incident may be re-reporting of the original incident.

Based on my research, this is not the case. The previous incident was reported when a shear valve failed to close after a dispenser was struck by a car. This prior incident also has a different owner/operator. I contacted Mike Keebler (EMI) [PAK-AGS' environmental consultant] who stated that the older release occurred when the site was owned by a different party and further, they have no specific knowledge of the previous incident and are not addressing it as part of site investigation or remediation. It appears that (sic) will not be able to co-reference incidents unless we receive a letter from the current owner/operator acknowledging that they have assumed liability for the older release. R. at 322-23.

On July 17, 2012, the Agency sent PAK-AGS a letter confirming receipt of the EMI billing package covering the period from September 1, 2011 to October 28, 2011, and requesting \$117,391.39. R. at 210. The letter indicates that the application for payment was complete and states that "a voucher for \$106,886.62 will be prepared . . . The deductible amount of \$5,000 was withheld from your payment." *Id.* The second page of the July 17 letter also provides:

NOTE: There is another open incident on this site, incident #20050545. Please address this incident and its eligibility with the Office of the State Fire Marshal before submitting any future applications for payment. R. at 211.

Attachment A to the July 17, 2012 letter includes the costs not being paid. Those unpaid costs include reductions in the groundwater removal and disposal rate, a deduction for paving costs, a deduction for consulting personnel costs, and an adjustment to handling charges "to reflect the deductions in groundwater removal costs and paving costs." R. at 212-13.

EMI submitted the Stage 3 Site Investigation Plan and Budget with the Stage 1 Site Investigation Actual Costs to the Agency on November 20, 2013. R. at 134. Agency LUST Technical Review Notes, dated January 16, 2014, do not include reference to incident 20050545, but indicate that the plan and budget, along with actual costs will be approved. R. at 130-32. On January 29, 2014, the Agency sent PAK-AGS a letter conditionally approving the Stage 3 Site Investigation Plan. R. at 37, 127-129. The same letter indicates that,

[t]he actual costs for Stage 1 are modified pursuant to Sections 57.7(a)(2) and 57.7(c) of the Act and 35 Ill. Adm. Code 734.505(b) and 734.510(b). Based on the modifications listed in Section 2 of Attachment A, the amounts listed in Section 1 of Attachment A are approved. Be aware that the amount of payment from the Fund may be limited by Sections 57.8(d), 57.8(e), and 57.8(g) of the Act, as well as 35 Ill. Adm. Code 734.630 and 734.655. R. at 37, 129.

The amounts approved in Section 1 of Attachment A of the January 29, 2014 letter total \$16,595.90 for drilling and monitoring well costs, analytical costs, consulting personnel costs, and consultant's materials costs. R. at 40. On February 24, 2014, EMI submitted the leaking UST billing package for Stage 1 Site Investigation Activities. R. at 15. With the February 24 billing package, EMI submitted a document that compared the Agency-approved budget of January 29, 2014, with the billing total. R. at 20. The budget/billing comparison acknowledged

that while the Agency had only approved \$16,595.90, EMI was requesting payment of \$17,562.48. *Id.* EMI's billing package included amounts exceeding the Agency's approval for analytical costs and consultant's materials costs, and handling charges. *Id.*

On April 3, 2014, Brian Bauer of the Agency's leaking UST Section e-mailed EMI, indicating that, "[i]n order to process the Stage 1 reimbursement package for 20110945 PAK-AGS, Inc. we will need a copy of the eligibility determination form [sic] the OSFM for the 20050545 incident at this site too. The claim is not due out until 6/24/2014 so we have some time to get this issue resolved." R. at 13. An Agency Title XVI document dated June 18, 2014 states that the Stage 1 site investigation costs "will be denied – No E&D for incident #20050545. Sent request 04/03/14 but have not received a reply and there is not an application at OSFM." R. at 8-9.

Finally, on June 23, 2014, the Agency sent PAK-AGS the denial letter, subject of this petition for review. R. at 2-5. In the denial letter, the Agency acknowledges the receipt of the billing package received on February 24, 2014 covering the period from August 1, 2012 to February 3, 2014, and requesting \$17,562.48. R. at 2. The denial letter states that a voucher for payment cannot be prepared and that this is "the Illinois EPA's final action with regard to the" application for payment. *Id.* The denial letter indicates that the costs not being paid are listed in Attachment A of the letter, along with reasons for non-payment. R. at 3. In a section of Attachment A entitled Description and Deductions, the Agency states that the entire amount requested in PAK-AGS' February 24, 2014 billing package is being deducted because it lacks supporting documentation. Attachment A provides that:

Since there is no supporting documentation of costs, the Illinois EPA cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act. Therefore, such costs are not approved pursuant to Section 57.7(c)(3) of the Act because they may be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of Title XVI of the Act.

An eligibility determination for incident 20050545 has not been submitted to the Agency.

Costs associated with any corrective action activities, services, or materials that were not accompanied by a copy of the eligibility and deductibility decision(s) made for the above-referenced occurrence(s) (20050545 and 20110945) for accessing the Fund pursuant to Section 57.8 of the Act and 35 Ill. Adm. Code 734.135(a), 734.605(b)(3), and 734.630(s) are not eligible for payment from the Fund.

The application for reimbursement is not complete, a complete application for payment consists a [sic] copy of the OSFM or Agency eligibility determination 35 Ill. Adm. Code 734.605(b)(3). An eligibility determination for 20050545 has not been submitted to the Agency.

The Agency cannot make the applicable determination concerning deductibles applicable to this occurrence pursuant to 35 Ill. Adm. Code 734.615(b). R. at 4.

PETITION FOR REVIEW

PAK-AGS argues that, by denying its application for reimbursement, the Agency hopes to make a second deductible determination even though a \$5,000 deductible was already taken from its early action costs reimbursement. Pet. at 2. PAK-AGS argues that the Agency seeks to make a deductible determination on incident 20050545, thus withholding more than appropriate for PAK-AGS' Stage 1 Site Investigation Actual Costs. *Id.* Incident 20050545, however, "occurred when the property was owned by Corner Liquor Store, who sold the property to N and S Service, who sold the property to PAK-AGS, Inc.," it argues. *Id.* Further, it states that the 2005 release that gave rise to incident 20050545 was never confirmed and corrective action was not taken by Corner Liquor Store. *Id.*

PAK-AGS argues a number of reasons why it is not required to provide additional information with regard to incident 20050545. Pet. at 3. First, PAK-AGS states that it seeks reimbursement for "plan, budgets and actual costs approved by the Agency expressly for Incident 20110945." *Id.* It states that "[i]ncident 20050545 was never confirmed as a release and no corrective action was ever taken with respect to it, and therefore there is no relevance to this incident number under the Illinois Environmental Protection Agency (sic), or regulations promulgated thereunder." *Id.* PAK-AGS argues that it has submitted the only leaking UST E&D determinations made for the Site, and it cannot obtain the requested information for incident 20050545. *Id.* As an exhibit to its petition for review, PAK-AGS attached the Agency's June 23, 2014 denial letter. *See* 35 Ill. Adm. Code 105.210.

As relief, PAK-AGS requests that the Board: find that the Agency erred in its June 23, 2014 determination; direct the Agency to reimburse PAK-AGS at the full amount requested for Stage 1 Site Investigation; award payment of attorney's fees; and grant such other relief as it sees appropriate. Pet. at 3.

BOARD HEARING AND POST-HEARING BRIEFS

Board Hearing

The Board held its hearing in this matter on September 17, 2014, at the Illinois Environmental Protection Agency headquarters in Springfield and received the transcript (Tr.) on September 29, 2014. There were no members of the public present at the hearing. Tr. at 3. Neither party made an opening statement, any arguments on the petition for review, or a closing statement. *Id.* at 4-5, 14-15. Rather, PAK-AGS introduced a quitclaim deed, arguably "indicating that PAK-AGS deeded the subject property to a purchaser," for the purpose of showing that PAK-AGS no longer owns the Site. Tr. at 6. The Agency also introduced three exhibits, all of which were Illinois Secretary of State documents offered to support the Agency's arguments (in its post-hearing brief) regarding ownership of the property through time. Tr. at 7-8. The hearing officer admitted the exhibits offered by both PAK-AGS and the Agency as hearing exhibits. *Id.* at 13.

PAK-AGS' Post-Hearing Brief

PAK-AGS opens its post-hearing brief by stating that information available about incident 20050545 is very limited. PAK-AGS alleges that an Illinois HazMat Report shows that a Granite City Emergency Service and Disaster Agency representative reported a traffic accident that resulted in the release of approximately 100 gallons of gasoline at the Site. Br. at 1; R. at 516. According to PAK-AGS, the HazMat Report indicated that “an environmental services company was en route to perform the clean-up.”² *Id.* Other than the HazMat report, PAK-AGS alleges there is nothing else in the record regarding the 2005 incident. Br. at 1.

PAK-AGS states that the owner of the Site at the time of the 2005 incident did not report the release to the Illinois Emergency Management Agency (IEMA) or submit a 20-day report to the Agency. Br. at 1; *see* 35 Ill. Adm. Code 732.202(c). PAK-AGS argues that there is no indication in the record that the tanks were upgraded or repaired after the 2005 incident. Br. at 2. Following the 2005 incident, according to PAK-AGS, the property was purchased by N and S Service who sold it to PAK-AGS on March 1, 2007. *Id.*

During PAK-AGS' ownership of the Site, in August 23, 2011, “a phase-two environmental site assessment was performed in the vicinity of the three (gasoline) underground storage tanks.” Br. at 2. PAK-AGS breaks down its post-hearing brief into four alternative arguments about why the August 2011 assessment and the work that followed are reimbursable. PAK-AGS argues, first, that there was no release from an UST in 2005; second, that “the 2005 incident was not confirmed as a release;” third, there is no requirement that PAK-AGS submit an E&D determination for incident 20050545 as a prerequisite for reimbursement for incident 20110945; and fourth, that PAK-AGS no longer owns the property.

There was no release from a UST in 2005

PAK-AGS cites Township of Harlem v. EPA, 265 Ill. App. 3d 41 (2nd Dist. 1994) in support of the proposition that the shear valve, which according to PAK-AGS is a part of a gasoline dispensing pump, is not a part of an UST. If the dispensing pump is not part of the UST, PAK-AGS argues that the dispensing pump is not subject to the leaking UST Program. Br. at 5. PAK-AGS asserts that under the Act, “underground storage tank” is defined as having the same meaning given that term in the federal Resource Conservation and Recovery Act (RCRA). 415 ILCS 5/57.2 (2012); *see generally* 42 USCS 82; 40 CFR 280. PAK-AGS sets out the definition of “underground storage tank” or “UST” as

Any one or combination of tanks (including underground pipes connected thereto) that is used to contain an accumulation of regulated substances, and the volume of which (including the volume of underground pipes connected thereto) is 10 percent or more beneath the surface of the ground . . . UST system or Tank system means an underground storage tank, connected underground piping,

² The Board notes that the April 19, 2005 report simply indicates that “Hulcher Environmental Services is en route,” but does not indicate if any cleanup was intended or completed.

underground ancillary equipment, and containment system, if any. Br. at 5, citing 40 CFR 280.10.³

PAK-AGS applies the definition of “UST System” to argue that “the fuel pump and pump nozzle are ancillary equipment, they are not underground ancillary equipment . . . [n]or are the pump and pump nozzle part of the containment system.” Br. at 5, citing Harlem Township v. EPA, PCB 92-83, slip op. at 4-5 (Oct. 16, 1992). PAK-AGS continues to rely on Harlem Township for the proposition that above-ground gasoline releases are not regulated by the leaking UST program. Br. at 6, citing Harlem Township, at 6. PAK-AGS asserts that Harlem Township distinguished above-ground releases from those occurring underground. The appellate court found that while numerous, releases from above-ground dispensing equipment are usually small, and they are more readily detected and cleaned up. Br. at 6, citing Township of Harlem, 265 Ill. App. 3d at 45.

PAK-AGS goes on to argue that, while the focus of the leaking UST program is underground releases that are difficult to detect, all information about incident 20050545 indicates that it was small, the result of a collision, and immediately detected and cleaned. Br. at 6. PAK-AGS also asserts that, while one goal of the leaking UST program is to insure owners and operators have the funds to remediate a release, a release that resulted from a vehicle collision would likely be covered by the auto insurance of the person responsible for the collision. *Id.* PAK-AGS concludes this argument by citing to Evergreen FS v. IEPA, PCB 11-51, slip op. at 20 (June 21, 2012) for the proposition that “[a]ny number of incidents can occur at a service station that are not relevant to the treatment of subsequent confirmed releases from underground storage tanks.” Br. at 6-7. PAK-AGS characterizes the 2005 release as “not a release from an underground storage tank,” and therefore concludes that the leaking UST program should not apply. Br. at 7.

The 2005 Release was not Confirmed

Next, PAK-AGS argues that the 2005 release was never confirmed by an owner/operator at the Site, and therefore statutory obligations that follow release confirmation do not flow to PAK-AGS. Br. at 7. PAK-AGS asserts that confirmation of a release must come before an owner/operator can get an E&D determination or access the UST Fund. *Id.*, citing 415 ILCS 57.6(a), 57.9(a), (a)(5), 57.9(c)(1) (2012). PAK-AGS asserts that “the Board’s LUST regulations reference OSFM regulations . . . as the proper methodology to confirm release.” *Id.*, citing 35 Ill. Adm. Code 734.115. PAK-AGS argues that the owner/operator must confirm a release, and that in the case of the 2005 incident, the incident reported by a local emergency agency does not qualify as a “release confirmation.” Br. at 7-8, citing Broderick Teaming Company v. IEPA, PCB 00-187 (Dec. 7, 2000).

PAK-AGS reiterates its argument that legal requirements flow only from a confirmed release. Br. at 8. PAK-AGS asserts that confirmation procedures are intended to identify whether a leak exists. It argues that leaking UST regulations were not intended to demand a confirmation of a release resulting from a vehicle collision because damage above ground does

³ The Board notes that the correct citation for the definitions of “UST” and “UST System” is 40 CFR 280.12.

not mean that the underground tanks were damaged. *Id.* PAK-AGS distinguishes the 2005 incident from a spill or an overflow event, both of which require reporting to the OSFM (*see* 41 Ill. Adm. Code 170.590(a)(3)). Br. at 8-9. PAK-AGS cites to Weeke Oil Co. v. IEPA, PCB 10-1, slip op. at 23 (May 20, 2010) in support of its argument that the approximate quantity of the 2005 release is insufficient to trigger OSFM reporting requirements. Br. at 9.

An E&D Determination for Incident 20050545 is not Required

PAK-AGS next argues that the authorities relied on by the Agency in the Agency's demand for an E&D determination for incident 20050545 are inapposite. Br. at 9-10. While PAK-AGS acknowledges that Section 734.630(cc) requires supporting documentation for reimbursement, PAK-AGS asserts that an E&D determination for incident 20050545 is not required under that section when PAK-AGS is not seeking reimbursement for remediation of incident 20050545. *Id.* PAK-AGS refers to the Agency technical reviewer's notes, stating that only incident 20110945 was being cleaned up. Br. at 10. PAK-AGS also acknowledges that Section 734.605(b)(3) of the Board's leaking UST regulations demands that "[a] copy of the OSFM or Agency E&D determination" be included in a complete application for payment. However, PAK-AGS argues that the only relevant E&D determination, for incident 20110945, was included in the application for payment. *Id.* Indeed, asserts PAK-AGS, the E&D determination for incident 20110945 is the only E&D determination that exists for the Site, and it cannot be compelled to produce a non-existing E&D determination or take responsibility for incident 20050545.

PAK-AGS asserts that the Agency's citation to 35 Ill. Adm. Code 734.615(b) "addresses the real issue motivating the denial, which is the deductible." Br. at 10. PAK-AGS argues that, despite the lack of requirement for another E&D determination, "at the payment stage, the nontechnical reviewer wanted to assess a higher deductible" of \$10,000 (that would be applicable to incident 20050545) as opposed to the \$5,000 deductible determined appropriate by OSFM for incident 20110945. *Id.* PAK-AGS argues that the Agency's attempt at extracting a higher deductible is misplaced for at least two reasons. First, PAK-AGS reasserts that incident 20050545 was not a confirmed release, and therefore is ineligible for leaking UST fund reimbursement. Second, PAK-AGS states that, in order to assess a higher deductible, the Agency would have to show that incident 20110945 was a "re-reporting of the 2005 incident, a position," as argued by PAK-AGS, "disputed by the IEPA's own technical reviewer." *Id.* PAK-AGS concludes this argument by stating that it "submitted an application for payment for work and costs approved in the cleanup of the 2011 incident, and there is no requirement in the Act or the regulations that would require it to elect to cleanup the 2005 incident in order to be paid for that work." Br. at 10.

PAK-AGS No Longer Owns the Site

PAK-AGS asserts that the Agency would like PAK-AGS to proceed as "owner of the 2005 incident." Br. at 11. Citing the definition of "owner" found at Section 57.2 of the Act, PAK-AGS argues that the phrase "election to proceed" within that definition indicates that proceeding as an owner/operator pursuant to the leaking UST regulations is a "voluntary, not compulsory" action. *Id.*, citing 415 ILCS 5/57.2 (2012). Further, PAK-AGS states that it is no

longer the owner of the Site because it “conveyed its ownership interest in the site, subsequent to the removal of all tanks.” *Id.* Therefore, it would be impossible, PAK-AGS argues, for it to elect to proceed as owner of the Site. *Id.*

At the conclusion of its post-hearing brief, PAK-AGS renews its request that the Board “authorize the Petitioner to submit application and proofs of litigation expenses incurred in this appeal pursuant to 415 ILCS 5/57.8(l).” Br. at 11, citing 415 ILCS 5/57.8(l) (2012).

The Agency’s Post-Hearing Brief

The Agency opens its post-hearing brief urging the Board to focus on the adequacy of PAK-AGS’ site investigation plan reimbursement package. Agency Br. at 1. The Agency asserts that the Board must decide whether the reimbursement proposals demonstrate compliance with the Act, but in doing so, the Board may not consider new information not before the Agency before its determination was made. *Id.* at 3. After giving a brief accounting of the facts, the Agency states the issue in this case as “[w]hether the Petitioner’s application was incomplete for lacking supporting documentation or information relative to incident 20050545.” Agency Br. at 7.

The Agency argues that PAK-AGS acknowledges and was aware of the 2005 release from the time when it purchased the Site to when it requested reimbursement for remediation costs. Agency Br. at 7-8. The Agency states that the OSFM included incident 20050545 on documentation in response to PAK-AGS’ application for an E&D determination for incident 20110945. *Id.* at 8. Therefore, the Agency asserts that, pursuant to regulations, without an E&D determination on incident 20050545, the Agency “is unable to determine if the scope of work completed for the 2011 incident included the area of the prior LUST release.” *Id.* The Agency argues that the missing information prevents it from determining if the work exceeds the minimum remediation requirements of the Act and assessing the correct deductible. *Id.*

In the remainder of its brief, the Agency addresses the arguments presented in PAK-AGS’ post-hearing brief. First, the Agency addresses PAK-AGS’ argument that there was no release from an UST in 2005. Agency Br. at 10; *see supra* at 4-5. The Agency states that it “has determined that the shear valve is part of the UST system and eligible [for leaking UST fund reimbursement].” *Id.* The Agency also argues that regardless of the cause of the release, “there still is a requirement to provide the technical documentation to Illinois EPA.” Agency Br. at 11.

The Agency acknowledges that releases from the shear valve and fuel dispenser are not necessarily considered a part of the UST. Agency Br. at 11-12. However, the Agency asserts, that the UST system includes one or more tanks and “ancillary equipment . . . connected thereto.” *Id.* at 12. The Agency asserts that OSFM regulations support this position because those regulations, in part, “require a shear valve to be installed in the supply line at the base of each dispenser.” *Id.* The Agency cites to Section 170.400 of Title 41 of the Illinois Administrative Code⁴ as defining “the underground pipes connected to a UST as ‘including

⁴ 41 Ill. Adm. Code 170.400 was repealed, effective Sept. 2, 2010. *See* 34 Ill. Reg. 13312. The new cite to OSFM regulations is 41 Ill. Adm. Code 175.100, entitled “Definitions.” 41 Ill. Adm. Code 175.100. That section states that “[u]nless otherwise provided by the text in this Part, all

valves, elbows, joints, flanges and flexible connectors attached to a tank system through which regulated substances flow.” *Id.* The Agency concludes that, “the shear valve is ancillary equipment affixed to the UST supply line, thus making it a part of the UST system.” *Id.*

Next, the Agency addresses PAK-AGS’ argument that incident 20050545 was not a confirmed release. Agency Br. at 12; *see supra* at 5-6. The Agency states that, “Illinois EPA considers a release to have been confirmed when the incident report is created, i.e., the release is called in to IEMA.” Agency Br. at 12-13. However, the Agency argues that it must defer to OSFM’s regulations and OSFM’s determination on how a release is confirmed. *Id.* at 13. The Agency reminds that the 2005 release was assigned an incident number and a release number, “and is documented at OSFM, IEPA, and within Petitioner’s own submittals to the Illinois EPA.” *Id.* The Agency characterizes PAK-AGS’ claim that incident 20050545 is unrelated as “unreasonable.”

The Agency counters PAK-AGS’ third argument, by stating “there are several reasons why the Illinois EPA requires the eligibility determination for all incidents at a site.” Agency Br. at 13. First, the Agency cites Section 57.8 of the Act (415 ICLS 5/57.8 (2012) and Section 734.605(b)(3) of the Board’s UST regulations (35 Ill. Adm. Code 734.605(b)(3)) for the proposition that “all releases at the site” must be submitted. *Id.* at 13-14. The Agency states that an application for reimbursement is incomplete without them. The Agency argues that, “OSFM has not made a determination as to what, if any, deductible should be assessed,” and the Agency will not usurp OSFM’s authority to do so in this case. Agency Br. at 14.

Finally, the Agency addresses PAK-AGS’ fourth argument that it is no longer owner of the Site. Agency Br. at 14; *see supra* at 7. The Agency asserts that “[i]t is the ownership and operation of the tanks that matters,” rather than ownership of the Site. Agency Br. at 9, 14. Further, the Agency argues that the record makes it clear that PAK-AGS is owner/operator of the tanks subject to incidents 20050545 and 20110945. *Id.* The Agency refers to the OSFM permit to remove the tanks in support of this argument because that permit includes both the 2005 and the 2011 incident numbers. Agency Br. at 14-15.

PAK-AGS’ Reply

PAK-AGS opens its reply to the Agency’s brief by stating that it, “submitted complete applications of payment which included the eligibility and deductibility determination for the 2011 incident that was the subject of the approved work and budget.” Reply at 1. In its reply, PAK-AGS follows the same line of arguments it set out in its post-hearing brief: that the shear valve is not a part of the UST; the 2005 release was not confirmed; there is no requirement that all incidents receive an eligibility and deductibility determination; and PAK-AGS no longer owns the Site. *Id.* at 1-6.

terms in this Part shall be as defined in 41 Ill. Adm. Code 174.100. *Id.* That Section defines “pipe” or “piping” as “any hollow cylinder or tubular conduit that is constructed of non-earthen materials. Such piping includes any elbows, couplings, unions, valves or other in-line fixtures that contain and convey regulated substances from the underground tanks to the dispensers.” 41 Ill. Adm. Code 174.100.

In furtherance of its first argument, PAK-AGS states that “it is not sufficient for the release to come from ancillary equipment, but it must come from ‘underground ancillary equipment’.” Reply at 2, citing Township of Harlem, 265 Ill. App. 3d at 44 (2nd Dist. 1994). PAK-AGS suggests that the Agency left out the term ‘underground’ from its discussion on this issue in the post-hearing brief. *Id.*, see Agency Br. at 12. PAK-AGS also asserts that the Agency never argues that the shear valve is underground. PAK-AGS argues that the shear valve is ancillary equipment, which also includes the dispenser and other things that all occur above ground. *Id.* at 3-4. PAK-AGS states that the shear valve is also distinguishable from the USTs because it is “readily accessible, and subject to regulatory oversight by the OSFM as part of the dispensing system,” rather than the underground storage tanks. Reply at 4-5. In support of its argument, PAK-AGS attached a portion of the “Code for Motor Fuel Dispensing Facilities and Repair Garages” to its reply as Exhibit A. *Id.* at 3; citing 41 Ill. Adm. Code 170.410(a).⁵ PAK-AGS asserts that dispensing equipment is not subject to the leaking UST program, consistent with the Board’s prior findings in Harlem Township, PCB No. 92-83 (Oct. 16, 1992). *Id.* PAK-AGS attached informal guidance from OSFM’s website as Exhibit B to its reply in support of its position that the shear valve, as part of a fuel dispenser, is mounted at or near grade.

PAK-AGS argues that the Board has never found a third-party informing IEMA of a suspected petroleum release sufficient to confirm a release. Reply at 5, citing Broderick Teaming Company v. IEPA, PCB 00-187 (Dec. 7, 2000). PAK-AGS asserts that the Agency’s position that the release was confirmed by a third party is akin to an unauthorized rulemaking. *Id.* PAK-AGS argues that while the Agency suggests that PAK-AGS must submit an E&D application to OSFM, OSFM may only make an E&D determination “when an owner or operator reports a confirmed release of a regulated substance.” *Id.*, citing 415 ILCS 5/57.9(c)(1). Therefore, argues PAK-AGS, the act of submitting an application for an E&D determination is not appropriate when the release is not confirmed. Further, it argues, the act of submitting such an application may serve to confirm the release several years after the incident was reported. PAK-AGS argues that applying for an E&D determination from OSFM to fulfill the Agency’s inquiry regarding confirmation of incident 20050545 would result in confirmation of the incident rather than an answer to the Agency’s confirmation question. PAK-AGS asserts that there is insufficient information available to confirm the release at this time for a few reasons, specifically because the contamination may have all been removed.

Next, PAK-AGS revisits its post-hearing brief argument that there is no statutory or regulatory authority requiring that an E&D determination must be submitted for all incidents at a site in order to be reimbursed for a single incident. Reply at 6. PAK-AGS asserts that, “[t]he Illinois EPA points to two provisions, without specific quotations, it claims require that all releases must receive an eligibility and deductibility determination. None of these provisions require that all incidents be confirmed and receive an eligibility and deductibility determination, since they all expressly refer to a single determination.” *Id.*, citing 415 ILCS 5/57.8; 35 Ill. Adm. Code 734.605(b)(3). PAK-AGS argues that it submitted an E&D determination for the only incident being remediated and that “[t]here were no technical problems with addressing only the 2011 incident.” *Id.*

⁵ See *supra*, footnote 3. Title 170 of the Illinois Administrative Code has been repealed in its entirety.

Finally, PAK-AGS argues that the quick claim deed submitted to the Board during the September 17th hearing was simply to make the Board aware that PAK-AGS is no longer owner of the property. Reply at 7. PAK-AGS maintains that, because it is not owner of the property, it may not elect to take responsibility and proceed as owner for purposes of remediating incident 20050545.⁶ *Id.*, see *supra* at 6-7. Again, at the close of its reply brief, PAK-AGS renews its request for legal fees. *Id.* at 7.

LEGAL BACKGROUND, STANDARD OF REVIEW, AND BURDEN OF PROOF

Title XVI of the Act provides for the administration and oversight of the Leaking Underground Storage Tank Program, which includes the UST Fund and requirements for reimbursement from the Fund. 415 ILCS 5/57-57.18 (2012). Section 57.1(a) of the Act provides that “[a]n owner or operator of an underground storage tank who meets the definition of this Title [XVI] shall be required to conduct tank removal, abandonment and repair, site investigation, and corrective action in accordance with the requirements of the Leaking Underground Storage Tank Program.” 415 ILCS 5/57.1(a) (2012).

The Fund was created under the Act and may be accessed by eligible tank owners and operators to pay for the environmental cleanup of leaking tanks. 415 ILCS 5/57 (2012). Under Title XVI, concerning the “Leaking Underground Storage Tank Program,” the Agency determines whether to approve proposed cleanup plans and budgets for tank sites. 415 ILCS 5/57.7, 57.8 (2012). Section 57.7(c)(3) of the Act addresses the Agency’s review of site investigation and provides that, in approving any plan submitted under this Section, “the Agency shall determine . . . that the costs associated with the plan are reasonable, will be incurred in the performance of site investigation or corrective action, and will not be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of” Title XVI. 415 ILCS 5/57.7(c)(3) (2012). Sections 734.625 and 734.630 of the Board’s Petroleum Underground Storage Tanks regulations, respectively, list eligible and ineligible corrective action costs. 35 Ill. Adm. Code 734.625, 734.630.

Section 57.8 of the Act provides that, “[i]f an owner or operator is eligible to access the Underground Storage Tank Fund pursuant to an Office of State Fire Marshal eligibility/deductible final determination letter issued in accordance with Section 57.9, the owner or operator may submit a complete application for final or partial payment to the Agency for activities taken in response to a confirmed release.” 415 ILCS 5/57.8 (2012). A tank owner or operator may appeal the resulting Agency determination to the Board under Section 40 of the Act, which governs Board review of Agency permit decisions. 415 ILCS 5/40(a)(1), 57.7(c)(4), 57.8(i) (2012); 35 Ill. Adm. Code 105.Subpart D.

PAK-AGS brings this appeal pursuant to Section 57.8(i) of the Act. 415 ILCS 5/57.8(i) (2012). Section 57.8(i) of the Act provides that:

If the Agency refuses to pay or authorizes only a partial payment, the affected owner or operator may petition the Board for a hearing in the manner provided for

⁶ In further support of its ownership argument, PAK-AGS attached a document from the Madison County Tax Assessor’s Office regarding ownership of the Site for the 2013 tax year.

the review of permit decisions in Section 40 of this Act. 415 ILCS 5/57.8(i) (2012).

Section 40 of the Act provides:

If the Agency refuses to grant or grants with conditions a permit under Section 39 of this Act, the applicant may, within 35 days after the date on which the Agency served its decision on the applicant, petition for a hearing before the Board to contest the decision of the Agency. 415 ICLS 5/40(a)(1) (2012).

The standard of review under Section 40 of the Act (415 ILCS 5/40 (2012)) is whether PAK-AGS' request for reimbursement would 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 Indus. Of Ill. 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 Serv. Ctr. v. IEPA, PCB 95-43, slip op. at 14 (May 18, 1995). The Agency's denial letter frames the issues on appeal. Pulitzer Cmty. 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). The standard of proof in UST appeals is the "preponderance of the evidence." Freedom Oil Co. v. IEPA, PCB 03-54, 03-56, 03-105, 03-179, 04-04 (cons.), slip op. at 59 (Feb. 2, 2006), citing McHenry County Landfill, Inc. v. County Bd. Of McHenry County, PCB 85-56, 85-61, 85-62, 85-63, 85-64, 85-65, 85-66 (consol.), slip op. at 3 (Sept. 20, 1985) ("A proposition is proved by a preponderance of the evidence when it is more probably true than not.").

BOARD DISCUSSION

PAK-AGS challenges the Agency's determination that supporting documentation must be submitted for incident 20050545 before PAK-AGS may be reimbursed for the cleanup of incident 20110945. As stated above, the Agency's denial letter shapes the Board's review upon appeal. That letter sets out the issue as whether PAK-AGS' application for reimbursement pursuant to the leaking UST fund for incident 20110945 was incomplete because the application lacked information pertaining to incident 20050545.

Attachment A to the Agency's June 23, 2014 denial letter provides "the costs that are not being paid and the reasons these costs are not being paid." R. at 3, *see supra* at 4. Attachment A cites a number of statutory and regulatory provisions as basis for the Agency's denial. Below, the Board addresses the Agency's reasons for denial, considers the parties' arguments, and finds that PAK-AGS has submitted the necessary documentation for reimbursement with regard to incident 20110945. The Board finds it helpful to note that the key communications in deciding this petition for review include:

PAK-AGS' November 20, 2013 Stage 1 Site Investigation Actual Costs;

The Agency's January 29, 2014 Modified Approval of Stage 1 Site Investigation Actual Costs;

PAK-AGS' February 24, 2014 Stage 1 Site Investigation Actual Costs Billing Package or Application for Payment; and

The Agency's June 23, 2014 Denial Letter.

An Eligibility and Deductibility Determination for Incident 20050545 is not required pursuant to Section 57.8 and Sections 734.135(a), 734.605(b)(3), and 734.630(s) of the Board's UST Regulations.

The Agency's June 23, 2014 denial letter partially hinges on the authority of Section 57.8 of the Act (415 ILCS 5/57.8 (2012)) and Section 734.630(cc) of the Board's UST regulations (35 Ill. Adm. Code 734.630(cc)). Section 57.8 of the Act provides that

In the case of any approved plan and budget for which payment is being sought, the Agency shall make a payment determination . . . The Agency's review shall be limited to generally accepted auditing and accounting practices. In no case shall the Agency conduct additional review of any plan which was completed within the budget, beyond auditing for adherence to the corrective action measures in the proposal. 415 ILCS 5/57.8(a)(1) (2012).

That section goes on to list what is included in a complete application for reimbursement. The only item on that list that is subject of PAK-AGS' appeal is "[a] copy of *the* Office of the State Fire Marshal's eligibility and deductibility determination." 415 ILCS 5/57.8(a)(6)(C) (2012) (emphasis added).

Section 57.7(c)(1) of the Act provides that "Agency approval of any plan and associated budget . . . shall be considered final approval for purposes of seeking and obtaining payment from the [UST] Fund if the costs associated with the completion of any such plan are less than or equal to the amounts approved in such budgets." 415 ICLS 5/57.7(c)(1) (2012). Section 57.7(c)(3) further provides that "[i]n approving any plan . . . the Agency shall determine . . . that the costs associated with the plan are reasonable, will be incurred in the performance of site investigation or corrective action, and will not be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of this Title." 415 ILCS 5/57.7(c)(3) (2012).

PAK-AGS' Stage 1 Site Investigation Actual Costs submission dated November 20, 2013⁷ is an application for payment of costs associated with the remediation of incident 20110945. Reference to incident 20050545 is included in this application and, more generally in the record of this matter, on budget and billing forms in the submissions for both Stage 1 and Stage 3. R. at 102, 103, 114. In response to the November 20, 2013 Stage 1 submission from PAK-AGS, however, the Agency does not include reference to incident 20050545 in the January

⁷ This document is marked, in hand writing "hand delivered 1/3/14." R. at 50.

29, 2014 modified approval. Incident 20050545 is not mentioned in the Agency's modified approval of the actual costs for Stage 1 Site Investigation, nor is incident 20050545 cited in the portion of Attachment A containing the rationale for reduction in line item amounts. R. at 37-41.

Section 57.7(c) demands that the January 29, 2014 approval letter includes the Agency's "final approval" with regard to PAK-AGS Stage 1 Site Investigation Actual Costs. *See* 415 ICLS 5/57.7(c)(1) (2012). The Agency's January 29, 2014 letter states that, "[t]he actual costs for Stage 1 are modified pursuant to Sections 57.7(a)(2) and 57.7(c) of the Act." *Id.* The modification resulted in an approval of \$16,595.90. R. at 40. The Agency, therefore, does not have authority to review the \$16,595.90 figure approved in the January 29, 2014 letter through the statutory lens of Section 57.7(c).

The Agency's review of the February 24, 2014 application for payment is governed by Section 57.8 of the Act. 415 ILCS 5/57.8 (2012). Section 57.8 of the Act limits the Agency's review of PAK-AGS' February 24, 2014 application for payment. *See* 415 ILCS 5/57.8 (2012). When interpreting a statute, it is well established that the Board must follow the plain language of the statutory provision unless ambiguity is apparent. *See e.g. Vicencio v. Lincoln-Way Builders, Inc.*, 204 Ill. 2d 295, 301, 789 N.E.2d 290, 294 (2003); *Krohe v. City of Bloomington*, 204 Ill. 2d 392, 395, 789 N.E.2d 1211, 1212 (2003). The Board finds that the plain language of Section 57.8 of the Act narrows the Agency's review of reimbursement applications after the requirements of Sections 57.6 and 57.7 have been completed—in this case, with the modified approval of PAK-AGS' Stage 1 Site Investigation Actual Costs on January 29, 2014.

The plain language of Section 57.8 limits the Agency's review to "any approved plan and budget *for which payment is being sought.*" 415 ILCS 5/57.8 (2012) (emphasis added). The record in this case makes it clear to the Board that PAK-AGS is seeking payment for remediation activities associated with incident 20110945. PAK-AGS' submissions to the Agency throughout the UST Fund reimbursement process have consistently addressed only incident 20110945. The record indicates that the Agency explored this question with PAK-AGS in 2012. R. at 321-23. In the early stages of PAK-AGS' work to obtain reimbursement, the Agency inquired about incident 20050545. An exchange with PAK-AGS' environmental consultant (EMI) led the Agency to conclude that incident 20050545 occurred while the Site was under different ownership, resulted from different circumstances than that of incident 20110945, and most importantly, PAK-AGS was not addressing incident 20050545 as part of the Site investigation or remediation. R. at 322-23.

As PAK-AGS argues in its post-hearing brief, the Agency's reliance on statutory provisions that require supporting documentation and E&D determinations is misplaced. Br. at 10. PAK-AGS asserts that "[a] copy of the only eligibility determination made at the Site was attached" to its Stage 1 Site Investigation Actual Costs billing package. The same E&D determination was the only one included in PAK-AGS' November 20, 2013 Stage 1 Site Investigation Actual Costs budget, which was modified, but approved by the Agency on January 29, 2014. The Board finds PAK-AGS' argument persuasive that in pursuing reimbursement for incident 20110945—a confirmed release with an E&D determination and all the other regulatory requirements in place—it cannot be compelled to produce a document that does not exist about an incident PAK-AGS is not remediating.

In its counter to PAK-AGS' post-hearing argument on this issue, the Agency relies on Section 57.8 of the Act and Section 734.605(b)(3) of the Board's UST regulations. *See* Agency Br. at 13-14, citing 415 ILCS 57.8 (2012); 35 Ill. Adm. Code 734.605(b)(3). As stated above, both of those provisions require that a complete application for reimbursement must consist of the E&D determination. Neither provision demands that *all* E&D determinations for a Site be submitted to the Agency as a prerequisite to reimbursement. The Agency asserts that PAK-AGS' application is incomplete without an OSFM E&D determination and "OSFM has not made a determination as to what, if any, deductible should be assessed." Agency Br. at 14. The Board finds the Agency's argument misplaced, however, when the record is clear that PAK-AGS is applying for reimbursement for incident 20110945 and has included an OSFM E&D determination for incident 20110945 in its application package. Consistent with the plain language of the Section 57.8 of the Act, PAK-AGS has submitted the E&D determination necessary for reimbursement. The Agency cites to no authority on which to base an alternative reading of the statute. This Board finding is also supported by the fact that the Agency's January 29, 2014 modified approval of the Stage 1 Site Investigation Actual Costs budget does not mention incident 20050545 as a basis for modification of the line items or for any other purpose.

Neither party argues that PAK-AGS is attempting to remediate the 2005 incident under a \$5,000 E&D determination made for incident 20110945. PAK-AGS has not included details of incident 20050545 in its reimbursement application materials other than including the incident number on budgeting forms and in fields where it is clear that all incident numbers associated with a site should be included. *See e.g.* R. at 16, 102, and 103. The Agency argues that incident 20110945 may be a re-reporting of 20050545. However, the 2012 leaking UST Technical Review Notes indicate that the Agency asked EMI (PAK-AGS' environmental consultant) that specific question, and EMI stated that it had no specific knowledge of incident 20050545 and was not addressing it as part of the remediation of the incident 20110945. R. 321-22. Further in that same document the Agency reviewer concludes that, based on his research, incident 20110945 is not a re-reporting of incident 20050545. R. at 322.

Section 57.9(c) of the Act provides that "[e]ligibility and deductibility determinations shall be made by the Office of the State Fire Marshal," and not by the Agency.⁸ The OSFM made an E&D determination on March 23, 2012 that PAK-AGS is eligible for reimbursement for remediation of incident 20110945 at the deductible of \$5,000. The plain language of Section 57.8 of the Act states that the Agency does not have the authority to reach outside of PAK-AGS' application for payment on incident 20110945 to incident 20050545 in order to reassess PAK-AGS' eligibility for reimbursement.

PAK-AGS' Application for Payment was Complete Pursuant to Section 57.7(c)(3) of the Act and Section 734.630(cc) of the Board's UST Regulations.

Attachment A of the Agency's denial letter cites to Section 57.7(c)(3) of the Act and Section 734.630(cc) of the Board's UST regulations in support of its statement that "there is no supporting documentation of costs," and, therefore, the Agency must deny payment to PAK-AGS. R. at 4. Section 734.630(cc) of the Board's UST regulations provides that "[c]osts that

⁸ The Board notes that the Agency used to have authority to make E&D determinations. *See* P.A. 88-496, eff. Sept. 13, 1993.

lack supporting documentation,” are ineligible for payment from the UST Fund. 35 Ill. Adm. Code 734.630(cc). The Agency denial letter states that the documentation lacking from PAK-AGS application prevents it from making the necessary determination, pursuant to Section 57.7(c)(3) of the Act, of whether the costs associated with PAK-AGS’ plan are reasonable and “will not be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements” of Title XVI. 415 ILCS 5/57.7(c)(3) (2012).

As discussed above, the Agency’s review of reimbursement application materials is carefully set out in the Act. The review process is governed, in part by Sections 57.6, 57.7, and 57.8 of the Act. *See supra* at 15. The Agency’s January 29, 2014 modified approval letter and June 23, 2014 denial letter echo the statutory review requirements. The January 29 letter states, for example, that the Agency modified the Stage 1 Site Investigation Actual Costs pursuant to Section 57.7 of the Act. The January 29 letter also provides a number of statutory cites under which the “amount of payment from the Fund may be limited” or “[t]he amount of allowable handling charges will be determined.” R. at 37, 40. The January 29 letter does not, however, state that the Agency may further limit reimbursement pursuant to Section 57.7 after its modified approval. The Agency’s letters are consistent with the Board’s reading of the leaking UST reimbursement review process set out in the Act. The Agency’s denial of PAK-AGS’ application for payment, however, is not.

The January 29, 2014 letter embodies the Agency’s review under Section 57.7 and is intended, by the statute, to communicate the Agency’s final decision on approval. Budget review pursuant to Section 57.7 of the Act was the appropriate time for the Agency to determine if documentation supporting PAK-AGS’ Stage 1 Site Investigation Actual Costs was sufficient for plan and budget approval. Section 57.8 of the Act does expressly reserve some points of review for the Agency upon submittal of the billing package. In this case, the Board finds that Section 57.8 does not authorize the Agency to deny PAK-AGS’ application for payment on incident 20110945 based on the lack of supporting documentation regarding incident 20050545.

The Board finds the record instructive on the question of whether PAK-AGS submitted appropriate documentation in support of its reimbursement request. Throughout the record, the engineer certifications of remediation work are clear that only incident 20110945 is being addressed with the remediation activities. *See e.g.* R. at 19, 237. As mentioned, above, the Agency confirmed with EMI during Stage 1 Plan/Budget certification that EMI had “no specific knowledge of the previous incident” and was “not addressing it as part of the site investigation or remediation.” R. at 322-23.

Again, the Agency’s January 29, 2014 letter did not cite a lack of supporting documentation in approving reimbursement of \$16,595.90. R. at 37, 40. Section 57.8 of the Act provides that “in the case of any approved plan and budget for which payment is being sought . . . [t]he Agency’s review shall be limited to generally accepted auditing and accounting practices.” 415 ILCS 5/57.8(a)(1) (2012). The Board has interpreted this language in the case of Evergreen FS v. IEPA, PCB 11-51, 12-61 (cons.) (June 21, 2012). In that case, the Board stated that “Section 57.8(a)(1) of the Act specifically limits the Agency’s review when payment is sought for an approved plan or budget to ‘auditing for adherence to the corrective action measures in the proposal.’” *Id.* at 20-21. In Evergreen, the Agency reviewed a previously approved budget and determined that apportionment was required. *Id.* at 21. The Board found that “[a]ny Agency

apportionment determination would be appropriate at the time of approval of the plan and budget, not at the payment stage.” *Id.*

As in Evergreen, the Board in this case finds that the appropriate time for the Agency to determine that PAK-AGS’ proposal needed an E&D for incident 20050545 was at the approval of the Stage 1 Site Investigation Actual Costs budget rather than in review of the billing package.

**No Eligibility and Deductibility Determination Exists for Incident 20050545,
Therefore Section 734.615(b) of the Board’s UST Regulations Demands Reimbursement
with a \$5,000 Deductible.**

Finally, the Agency cites Section 734.615(b) of the Board’s UST Regulations as the final authority under which it denies PAK-AGS’ application for payment. R. at 4. Section 734.615(b) sets out the rules for application of the deductible determined by either OSFM or the Agency. Subsections (a) and (b) of that section dictate how the deductible is to be subtracted from the amount approved for payment and that “[o]nly one deductible must apply per occurrence,” but reference to this section of the Board’s regulations is misplaced in this case. Section 734.615(b)(3) addresses the situation where “multiple incident numbers are issued for a single site *in the same calendar year.*” 35 Ill. Adm. Code 734.615(b)(3) (emphasis added). The Board finds that provision inapplicable to this case because the two incident numbers that are subject of this case were issued in different years. Finally, Section 734.615(b)(4) provides that “[w]here more than one deductible determination is made, the higher deductible must apply.” 35 Ill. Adm. Code 734.615(b). The Board finds this provision inapplicable as well because only one deductible determination has been made in this case.

The Agency provides no statutory support for the position that documentation for previous incident numbers must be provided by a UST reimbursement applicant. Instead, the Agency cites to provisions stating that the application lacks an eligibility determination, which it does not—PAK-AGS submitted the E&D determination that it has for the Site and that eligibility determination matches the incident number for which PAK-AGS seeks reimbursement. This result is especially clear after the Agency’s modified approval letter was issued for the only incident number under which PAK-AGS seeks reimbursement in this case.

The Board does not reach the issues of whether incident 20050545 was a release from a UST, whether a leak from a shear valve falls under leaking UST regulations, or who owned the Site or tanks at the time when incident 20050545 occurred. As stated above, the Board finds support in the record that PAK-AGS’ application for payment reflects work done in remediation of only incident 20110945 and adequate documentation has been submitted in support of its application for payment for incident 20110945.

Reimbursement Amount

Section 57.8 of the Act provides that, “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) (2012). The Board, therefore, orders reimbursement in the amount of \$16,595.90—the amount approved by the Agency on January 29, 2014.

Attorney's 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) (2012); 35 Ill. Adm. Code 734.630(g). The Board has required the reimbursement of legal fees from the UST Fund where a petitioner prevailed in appealing the Agency’s modification of a plan and budget. Illinois Ayers Oil Co. v. IEPA, PCB 03-214, slip op. at 7-9 (Aug. 5, 2004). PAK-AGS has requested reimbursement of legal fees and costs, pursuant to Section 57.8(l). Pet. at 3; Br. at 11; Reply at 7.

Having conducted a hearing and reversed the Agency’s determination to deny PAK-AGS’ application for payment for its Stage 1 Site Investigation Actual Costs, the Board concludes that PAK-AGS has prevailed before the Board for the purposes of Section 57.8(l) of the Act. 415 ILCS 5/57.8(l) (2012). However, the record does not now include any amount of “legal costs for seeking payment” incurred by PAK-AGS in this proceeding. *See* 415 ILCS 57.8(l) (2012). Consequently, the Board today reserves ruling on whether to exercise its discretion to award attorney fees and, if it chooses to exercise that discretion, the amount of reimbursement.

In its order below, the Board directs PAK-AGS to file a statement of its legal costs that may be eligible for reimbursement if the Board determines to exercise its discretion to reimburse legal fees. *See* 415 ILCS 5/57.8(l) (2012); 35 Ill. Adm. Code 734.630(g). The order provides an opportunity for the Agency to respond to PAK-AGS’ statement.

CONCLUSION

For the reasons above, the Board reverses the Agency’s denial of PAK-AGS’ Stage 1 Site Investigation Actual Costs billing package. The Board finds that PAK-AGS’ Stage 1 Site Investigation Actual Costs billing package did not violate the Act. Rather, the record in this case supports the Board’s finding that PAK-AGS seeks reimbursement for only incident 20110945 and has submitted a complete application for reimbursement in the amount of \$16,595.90. Therefore, the Board reverses the Agency’s denial, and orders the Agency to reimburse PAK-AGS pursuant to the Agency’s modified approval dated January 29, 2014.

ORDER

1. The Board grants the Illinois Environmental Protection Agency’s (Agency) Motions for Leave to Reply.
2. The Board denies the Agency’s Motions to Strike.
3. The Board reverses the Agency’s June 23, 2014 determination regarding PAK-AGS application for payment on Stage 1 Site Investigation Actual Costs.

4. The Board orders the Agency to pay \$16,595.90 in reimbursement for Stage 1 Site Investigation Actual Costs to PAK-AGS.
5. The Board allows PAK-AGS to file a statement of its legal costs that may be eligible for reimbursement no later than January 5, 2015, the first business day after 30 days from the date of this order. The Agency may file a response within 30 days of service of PAK-AGS' statement.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above interim opinion and order on December 4, 2014, by a vote of 4 to 0.



John T. Therriault, Clerk
Illinois Pollution Control Board