

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

1441 KINGSHIGHWAY LLC,)	
)	
Petitioner,)	
v.)	PCB No. 2024-032
)	(LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
Respondent.)	

NOTICE OF FILING AND PROOF OF SERVICE

TO:	Carol Webb, Hearing Officer Illinois Pollution Control Board 1021 N. Grand Avenue East P.O. Box 19274 Springfield, IL 62794-9274 (carol.webb@illinois.gov)	Richard Kim Illinois Environmental Protection Agency Division of Legal Counsel 1021 North Grand Avenue East P.O. Box 19276 (richard.kim@illinois.gov)
-----	--	--

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board, pursuant to Board Procedural Rule 101.610 (k), PETITIONER'S POST-HEARING BRIEF, a copy of which is herewith served upon the attorneys of record in this cause.

The undersigned hereby certifies that a true and correct copy of this Notice of Filing, together with a copy of the document described above, was today served upon the Hearing Officer and Division of Legal Counsel by electronic-mail, this 1st day of May, 2024. The number of pages of this filing, other than exhibits, is 21 pages.

1441 KINGSHIGHWAY LLC,

BY: LAW OFFICE OF PATRICK D. SHAW

BY: /s/ Patrick D. Shaw

Patrick D. Shaw
Law Office of Patrick D. Shaw
80 Bellerive Road
Springfield, IL 62704
217-299-8484
pdshaw1law@gmail.com

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

1441 KINGSHIGHWAY LLC,)	
)	
Petitioner,)	
v.)	PCB No. 2024-032
)	(LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

PETITIONER’S POST-HEARING BRIEF

NOW COMES Petitioner, by its undersigned attorney, pursuant to Section 101.610 (k), of the Board’s Procedural Rules, 35 Ill. Adm. Code 101.610(k), for its post-hearing brief states as follows:

STATEMENT OF FACTS

I. ILLINOIS EPA RECORD

Petitioner owns a former self-service fueling station located at 1441 Kingshighway, Washington Park, County of St. Clair, Illinois. (A.R.104) Tamers, Inc. is the operator of the facility, and “Tamers” is also a name commonly used to identify the site. (A.R.018-A.R.019)

On July 27, 2022, Tamers reported a leak or spill from the three gasoline underground storage tanks at the site. (A.R.014) The Illinois Emergency Management listed a 20,000 gallon tank, a 12,000 gallon tank and an 8,000 gallon tank, and assigned the report Incident No. 2022-0668. (A.R.015) Previously, the 8,000 gallon tank had contained diesel fuel (A.R.002), which was changed to gasoline in 2016. (A.R.128)

On August 10, 2022, Petitioner’s consultant received approval from the Office of the

State Fire Marshal (“OSFM”) to remove the three tanks. (A.R.085) The tanks and all associated piping were removed from August 29, 2022 to September 1, 2022. (A.R.031) An OSFM Tank Specialist was present during the removal and helped determine that the release was the result of piping leaks from the three tanks. (A.R.025) Each of the tanks was inspected, all liquids were removed, and vapor levels repeatedly checked to ensure they remained below the Lower Explosive Limit. (A.R.025) The tanks were removed and cut while continuing to monitor vapor levels, and then cleaned to the satisfaction of the OSFM Tank Specialist. (A.R.025) Approximately 1,258.58 tons (839.05 cubic yards) of contaminated backfill was removed from the tank pit and taken to a landfill in East St. Louis. (A.R.026; see also A.R.049 (excavation map))

On September 21, 2022, Petitioner’s consultants filed a 45-Day Report with the Illinois EPA. (A.R.021) Analytical results taken from the early action excavation found several samples that exceeded clean-up objectives for several indicator contaminants. (A.R.031) It was not known whether groundwater was contaminated. (A.R.026) The 45-Day Report concluded that early action activities had not achieved compliance with applicable remediation objectives. (A.R.034) On October 18, 2022, the Illinois EPA approved the 45-Day Report, and further approved performance of Stage 1 Site Investigation. (A.R.102)

On December 6, 2022, Petitioner applied for an eligibility and deductible determination from the OSFM. (A.R.104) On December 13, 2022, the OSFM issued its determination that Petitioner owns or operates three underground storage tanks for which it is eligible to seek payment of corrective action costs in excess of \$5,000. (A.R.130)

On February 8, 2022, Petitioner’s consultant submitted a reimbursement claim for early action activities taking place between July 1, 2022 and October 31, 2022. (A.R.132) The total

amount requested was \$124,117.66, subject to the \$5,000 deductible. (A.R.138) The Illinois EPA made two cuts that are relevant to this appeal.

First, Petitioner sought payment for underground storage tank removal costs:

Product Stored in UST	Size (gallons)	Abandoned or Removed	Cost (\$)	Did UST have a release?
Gasoline	20,000	Removed	4,884.62	Yes
Gasoline	12,000	Removed	4,884.62	Yes
Gasoline	8,000	Removed	4,884.62	Yes
Total UST Removal and Abandonment Costs:				\$14,653.86

(A.R.144)

The total costs are correct, but the costs for individual tanks was inadvertently averaged. Board regulations set different maximum payment amounts depending on the size of the tank. The maximum payment amounts in effect at the time were \$4,438.43 for the two smaller tanks and \$5,777 for the larger tank, which all together total \$14,653.86. (A.R.365 (Maximum Payment Amounts, July 1, 2022 through June 30, 2023)) On June 6, 2023, the Illinois EPA cut \$892.38 from the reimbursement application because the costs for the two smaller tanks exceeded the Subpart H Rates. (A.R.325) Petitioner later resubmitted the reimbursement form with the corrected costs for the Illinois EPA to re-review. (A.R.331)

Second, Petitioner sought reimbursement for excavation, transportation and disposal of contaminated backfill material:

Excavation, Transportation, and Disposal of contaminated soil and/or the 4-foot backfill material removed during early action activities:		
Number of Cubic Yards	Cost per Cubic Yard (\$)	Total Cost
837.00	68.92	\$57,685.52

(A.R.142)

These entries are correct, but Petitioner’s consultant had inadvertently omitted some of the supporting disposal tickets from the landfill. The Illinois EPA counted 488.38 cubic yards from the tickets in the package and accordingly cut the reimbursement by \$24,026.37. (A.R.142; A.R.324) It should be noted that the maximum payment amount for this work is \$80.31 per cubic yard. (A.R.365 (Maximum Payment Amounts, July 1, 2022 through June 30, 2023)) Petitioner will subsequently resubmit the reimbursement request with the omitted tickets in order to get the \$24,026.37 reimbursed. (A.R.331)

On June 6, 2023, the Illinois EPA issued its decision making the two cuts described above. (A.R.322) On June 8, 2023, Petitioner’s consultant contacted the Illinois EPA regarding the two cuts, including identifying information in the submittal that might have been overlooked by the Illinois EPA. (A.R.330) On June 13, 2023, Petitioner’s consultant asked for re-review of those cuts in light of a revised UST Removal form and an additional invoice from the landfill. (A.R.331) It is this submittal that would give rise to the Illinois EPA decision appealed herein.

On October 12, 2023, Becky Fielder of the Illinois EPA e-mailed James Malcom of the Illinois EPA:

Can you please request documentation/information from OSFM for facility 6041816 (Tamers in Washington Park)? I need to find out if two of the tanks is actually one compartmentalized tank.

(A.R.340)

Malcolm in turn asked Shelly Bradley of OSFM:

Can I get the removal log for facility #6041816? We need to determine if the 2 UST's removed were two separate UST's or 1 compartmentalized tank?

(A.R.340)

OSFM provided two removal logs, which are contained in the record. (A.R.342 -

A.R.348) Fielder then asked her supervisor, Brian Bauer:

Brian, this is what OSFM sent back. Is there any other information they would have that would confirm that T2 & T3 is a compartmentalized tank?

(A.R.340)

Bauer then e-mailed Deanne Lock and Shelly Bradley of OSFM:

Is there any documentation that the OSFM would have that an UST would be compartmentalized UST?

We believe the 2 USTs at this site are compartment UST and not 3 different USTs.

(A.R.339)

Shelly responded:

I spoke with the inspector (Travis Smith) who witnessed the removals and to the best of his recollection, tanks 2 & 3 were a 20,000 compartment tank. We don't identify tanks as being compartment tanks. All tanks are recorded separately. Hope this helps.

(A.R.339)

Sometime within the next week, the Illinois EPA's reviewer notes indicated:

re-review

Upon further review it was discovered that the smaller tanks are compartmentalized in one large tank.

Therefore, overpayment of tank pull and new limits on ET&D as well as backfill exist.

(A.R.356)

On October 18, 2023, the Illinois EPA issued its final determination in the matter, approving \$13,895.65 of the \$24,919.25 requested. (A.R.349) In relevant part, the decision stated:

Based on additional information received by the Illinois EPA, the 12,000-gallon tank (Tank 2) and 8,000-gallon tank (Tank 3) compromise one single 20,000-gallon compartment tank, not two separate tanks as was previously indic[a]ted in the reimbursement requests. Therefore, the maximum payment amounts are based on two 20,000-gallon USTs.

(A.R.351 & 352 (both deductions))

The difference between treating this incident as involving two tanks as opposed to three tanks is reflected in the following charts.

Product Stored in UST	Size (gallons)	Abandoned or Removed	Cost (\$)	Did UST have a release?
Gasoline	20,000	Removed	5,777.00	Yes
Gasoline	12,000	Removed	4,884.62	Yes
	20,000		5,777.00	
Gasoline	8,000	Removed	4,884.62	Yes
Total UST Removal and Abandonment Costs:				\$14,653.86
				\$11,554.00

(A.R.114)

According to the Illinois EPA's analysis, it had already paid \$13,761.48 in response to the initial reimbursement request (A.R.144), and therefore denied Petitioner's request for an additional \$892.38 on re-review was denied.

Excavation, Transportation, and Disposal of contaminated soil and/or the 4-foot backfill material removed during early action activities:		
Number of Cubic Yards	Cost per Cubic Yard (\$)	Total Cost
837.00	68.92	\$57,685.52
690.00		\$47,554.80

(A.R.352; see also 35 Ill. Adm. Part 734. APPENDIX C (maximum amount of backfill material to be removed and replaced in early action))

According to the Illinois EPA’s analysis, it had already paid \$33,659.15 for excavation, transportation and disposal (A.R.142), and therefore there was only \$13,895.65 unpaid for eligible costs. (A.R.352)¹

While the Illinois EPA decision letter references a possible additional deduction for “costs for the replacement of contaminated fill materials with clean fill materials,” (A.R.352) no deductions were made for placing clean fill materials in the excavation pit, presumably because the re-review letter only sought payment for two items.²

II. HEARING

A hearing was held on April 10, 2024 with one witness testifying for Petitioner and three

¹ This accounting is dependent on the Illinois EPA’s assumption that the \$68.92 rate is intractable without submitting a new form for re-review. Since an \$80.31 rate is the maximum payment rate under the Board’s regulations, \$54,413.90 would be reimbursable without exceeding the maximum payment amount for 690 cubic yards for contaminated backfill.

² Board regulations authorize 1,027 square feet of backfill for three tanks and 840 square feet of backfill for two tanks. (35 Ill. Adm. Code Section 734. Appendix C) Petitioner used 1,020.45 cubic yards of clean backfill at a cost of \$24,722.36. (A.R.142) If limited to 840 square feet of backfill, the maximum payment amount of \$28.18 per cubic yard of backfill would have limited eligible payment to \$23,671.20, an additional loss of \$1,051.16.

witnesses testifying for Respondent.

Goebel Tod Rowe testified on behalf of Petitioner. Rowe is a licensed professional geologist and a licensed tank remover. (Hrg. Trans. at p. 6) He was one of the original managers for the Illinois EPA's Leaking Underground Storage Tank unit and currently is a senior project manager for CW3M, Petitioner's consultant. (Id. at 7) His resume was entered into evidence. (Pet's Ex. 1) Rowe was not present during the tank removal herein. (Hrg. Trans. at p. 20)

Rowe testified that compartment tanks are essentially two tanks that have been glued together, which have all of the apparatus of two separate tanks, such as separate pumps, ports, vent lines, monitoring, and secondary containment. (Id. at pp. 10-11) The tanks can contain different products, such as diesel and gas, and can be piped to separate dispensing mechanisms. (Id. at 11) The Office of the State Fire Marshal records rarely document the presence of a compartment tank. (Id. at 12 - 13) One compartment may be abandoned in place while the adjoining compartment continues operating. (Id. at 15 - 16)

He also explained the specific problems with removing compartment tanks. (Id. at 14 - 19) Everything has to be done twice before they are removed from the ground, where work can be performed on them. (Id. at 14-15) The biggest issue is getting both of the compartments to an explosive level that makes them manageable. (Id. at 14) If the compartments have significantly different products, the compartment that can more quickly get to the desired explosive level limit still cannot be removed to the ground until the other compartment is also safe for removal. (Id. at 15)

When compartment tanks are brought to the surface, two holes must be cut in each tank, with one on the end of the compartment and the other on the side, which takes a lot more effort to clean out than regular tanks. (Id. at 17) The Office of the State Fire Marshal requires a site

assessment for each tank. (Id. at 16) While these types of tanks have become more common in the last 25 years are so (Id. at 12), there have been some reduction of their use at bigger stations because the issues with removing tanks in response to a release likewise increase the maintenance costs during normal operations. (Id. at 18)

* * *

Carole Rowe is the President of CW3M and was called to testify for Respondent. (Hrg. Trans. at pp. 26-29)

Robert Mileur is a field project manager from the Illinois EPA's Marion office who inspects underground storage tank removals and remediation work. (Hrg. Trans. at p. 30) He was present at the tank removal and sponsored into evidence his field inspection report with photographs. (Id. at 31, Respondent's Exs. 3 & 4) He testified that one of the tanks was a compartment tank. (Hrg. Trans. at p. 32)

On cross-examination, Mileur indicated that his job is to inspect aspects of the remediation not covered by the Office of the State Fire Marshal. (Id. at 35) He has not specifically been directed to look for compartment tanks. (Id.) He sends his field notes to the Section Manager in Springfield, who currently is Brian Bauer. (Id. at 36) His first communications about compartment tanks at the site with anyone in the Illinois EPA came a couple of weeks before the hearing. (Id. at 37)

Brian Bauer is the Interim Section Manager of the Underground Storage Tank Section. (Hrg. Trans. at p. 39) He testified that a compartment tank was not identified in the 45-Day Report or the reimbursement claim submitted herein. (Id. at 40) He testified that the issue of a compartment tank was unknown until the reimbursement claim was submitted on re-review. (Id.) On re-review, he thought the claim might possibly be a compartmental tank, saying "I just

had a gut feeling.” (Id. at 41) He then contacted the Fire Marshal’s office and received confirmation that there was a compartment tank. (Id. at 41)

On cross-examination, he testified that he was not involved in the initial application for reimbursement, though he might have signed the letter. (Id. at 41 - 42) He testified that the reimbursement forms do not indicate that compartment tanks need to be identified. (Id. At 43) The Agency instructions for those forms do not mention identifying compartment tanks. (Id. at 43) He also testified that there is nothing in the Part 734 regulations that expressly mentions compartment tanks. (Id. at 43) He indicated that if he’s aware that a tank is a compartment tank, it is always a single tank for reimbursement. (Id. at 44)

LEGAL STANDARDS AND SCOPE OF REVIEW

The Illinois EPA's authorization of only a partial payment of the amount requested in an application for payment may be appealed to the Board. See 415 ILCS 5/57.8(I). If the Agency denies payment in full or in part, written notification must be given (1) identifying the specific type of information, if any, the Agency needs to complete the review, (2) explaining the Sections of the Act or regulations that may be violated if the application for payment is approved, and (3) providing a statement of specific reasons why those cited provisions may be violated if the application for payment is approved. (35 Ill. Adm. Code § 734.610(d)) On appeal to the Board, the Agency statements and explanation frame the issues. Abel Investments v. IEPA, PCB 16-108, slip op. at 3 (Dec. 15, 2016) Ultimately, the Board must decide whether Petitioner's submission to the Illinois EPA would not violate the Act and the Board's Rules. Parker's Gas & More v. IEPA, PCB 19-79, slip op. at 10 (May 4, 2023) "The Board does not review the IEPA's decision using a deferential manifest-weight of the evidence standard, but rather the Board reviews the entirety of the record to determine that the submission as presented to the IEPA demonstrates compliance with the Act." Id.

Petitioner has the burden of proof in these proceedings. Abel Investments v. IEPA, PCB 16-108, slip op. at 3 (Dec. 15, 2016). The standard of proof in UST appeals is a "preponderance of the evidence." Id. "A proposition is proved by a preponderance of the evidence when it is more probably true than not." Id. "The Board's review is generally limited to the record before IEPA at the time of its determination." Id. However, the purpose of this proceeding is to provide petitioners an opportunity to challenge the underlying decision pursuant to principles of fundamental fairness. EPA v. PCB, 138 Ill. App. 3d 550, 552 (3rd Dist. 1985) (the Board hearing "includes consideration of the record before the [Agency] together with receipt of

testimony and other proofs under the panoply of safeguards normally associated with a due process hearing").

ARGUMENT

Introduction

This appeal presents a question of law as to whether the Illinois EPA's identification of something as a compartment tank mandates the payment cuts made herein. The first point of difficulty is that there is not an accepted definition of a "compartment tank." The word "compartment" appears nowhere in the Board's Part 734 regulations, nor in the Illinois Environmental Protection Act. The absence of the term in the statute and regulation is the strongest proof that the Illinois EPA's decision should be reversed.

However, Petitioner does not dispute the characterization by the OSFM Tank Specialist at the tank pull that tanks 2 and 3 were part of a compartment tank though OSFM does not identify tanks as such in the ordinary course of performing its legal responsibilities. (A.R.339) OSFM officially counts three tanks at the site. (A.R.130) The Illinois Emergency Management Act reported three tanks at the site for its own records and to multiple responsible entities. (A.R.014-015) The Illinois EPA counts three tanks in its technical review notes (A.R.100), and will most likely continue to count three tanks in its decisionmaking because none of this is at all confusing until the reimbursement staff started enforcing unpromulgated rules.

The tank count by OSFM is determinative in the UST Program, and nothing in the Act or Board regulations gives the Illinois EPA authority to adopt different tank counts.

I. THE ILLINOIS EPA IS BOUND BY OSFM'S ELIGIBILITY AND DEDUCTIBILITY DETERMINATION.

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.” (415 ILCS 5/57.9(a)) The owner or operate must have “registered the tank and paid all fees in accordance with the statutory and regulatory requirements of the Gasoline Storage Act.” (415 ILCS 5/57.9(a)(4); see also 430 ILCS 15/4(b)(3)(A)(“a registration fee of \$500 for each tank registered”)) “Eligibility and deductibility determinations shall be made by the Office of the State Fire Marshal.” (415 ILCS 5/57.9(c)) OSFM also oversees the removal of underground storage tanks (415 ILCS 5/57.5(c)) which must be performed pursuant to OSFM regulations. (415 ILCS 5/57.6(b)) OSFM determinations constitute “a final decision appealable to the Illinois Pollution Control Board” within 60 days of receipt. (415 ILCS 5/57.9(c)(2)) The Illinois EPA is without authority to disregard the eligibility and deductible determination of OSFM. Estate of Slightom v. Pollution Control Board, 2015IL App (4th) 140593 ¶ 26. While Estate of Slightom dealt with the “deductible” portion of the OSFM determination, the number of registered tanks counted by OSFM is also determinative in issues such as apportionment of costs. E.g., Freedom Oil v. IEPA, PCB 03-54, slip op. at 36 (Feb. 2, 2006) (“OSFM decisions on tank registration . . . are not reviewable by the Board”)

OSFM registered three tanks at the site and found all three tanks eligible for payment from the Underground Storage Tank Fund. (A.R.130) Pursuant to the aforementioned legal authorities, the Illinois EPA lacks authority to create its own tank count and the Board lacks authority to review the registration or eligibility of the three tanks. If there is any doubt about these conclusions, the undisputed facts in this appeal show that the Illinois EPA did not know

whether there was a “compartment tank” without asking OSFM, which does not identify or track tanks as being compartment tanks. (A.R.339) The Illinois EPA’s novel policy is at odds with the roles set forth by the Illinois General Assembly and the rules promulgated thereunder which form a cradle-to-grave system of regulation that identifies by registration the number of underground storage tanks, manages the operation of those tanks through inspections and operational rules promulgated by OSFM and ultimately ensures that tanks taken out of service are accounted for and closed pursuant to all applicable safety, health and environmental standards.

The underlying decision arose from a simple request for re-review of two payment cuts in light of documentation that was not contained in the original payment request. There appear to have been no objections to what was requested. However, the Illinois EPA decided based upon “additional information” obtained subsequently that payment must be cut because two of the smaller tanks compromise a single compartment tank. (A.R.351 & 352 (both deductions)) This is wrong as a matter of law because the OSFM counted three tanks and ultimately OSFM has the statutory responsibility to count the eligible tanks.

II. THE AGENCY COMPARTMENT TANK POLICY IS AN ILLEGAL RULE.

The Illinois EPA did not make these decisions based upon site specific or owner-operator specific facts. This much was made clear by the Section Manager when he testified that the Illinois EPA “always” view such tanks as a single tank if they are aware of it. (Hrg. Trans. at p. 44)

The Administrative Procedure Act defines a rule as “each agency statement of general applicability that implements, applies, interprets or prescribes law or policy,” (5 ILCS 100/1-70)

and as such must be promulgated pursuant to its rulemaking requirements. (5 ILCS 100/5-5) The imposition of a requirement of general applicability that was never promulgated is an invalid rule. See Ackerman v. Department of Public Aid, 128 Ill. App. 3d 982, 983 (3rd Dist. 1984) (holding that agency requiring party to participate in hearing by telephone conference call was an invalid rule though never promulgated as a rule)

The function of rulemaking is to make sure government mandates are good, well-informed policies that are also comprehensible and transparent. It is clear that the Administrative Procedure Act “is intended to give interested persons the opportunity to submit their views and comments on intended rule changes, in that section 5.01 specifies that the ‘agency shall consider all submissions received.’” Senn Park Nursing Center v. Miller, 104 Ill. 2d 169, 179 (1984).

Petitioner presented at hearing, through the testimony of Tod Rowe, the type of information that would be useful to consider in adopting a general rule of applicability. While these compartment tanks appear to be a single tank, they are manufactured as separate units that are attached. (Hrg. Trans. at pp. 10-11) A compartment can be closed while the attached compartment remains operational, and a compartment can contain gasoline while the attached compartment contains diesel. (Id. at 11, 15-16) Many of the complications with removal of compartment tanks are from complying with OSFM regulations, particularly those in 41 Ill. Adm. Code 175.830 (Removal of USTs), but diesel and gasoline are substances of environmental concern that raise different issues in cleanups. For example, Pollution Control Board regulations require a minimum number of samples to be collected “for each UST that is removed.” (35 Ill. Adm. Code 734.210(h)(1)(B) (“two samples must be collected from the excavation floor below each UST)) The Illinois EPA’s policy would appear to be less protective of human health and the environment than was envisioned in the rules that were actually promulgated, particularly where

different fuels are contained in each compartment.

Moreover, promulgated rules are publicly known rules, that notify people so they can voluntarily comply and regulators can uniformly implement. The bulk of Respondent's evidence at hearing involved how they may have discovered there was a compartment tank. Given that the OSFM does not track compartment tanks, and the Underground Storage Tank forms, instructions and regulations don't require it to be identified, enforcement in this case boiled down to a "gut feeling" of Brian Bauer to reach out to OSFM, which again does not track it, but asked their field inspector for his recollection. A secret rule is an arbitrary rule.

Ultimately the question presented is whether the submittal violated any statute or regulation. If special treatment for compartmentalized tanks was never adopted as a rule, then it was illegal for the Illinois EPA to impose that rule herein and the decision should be reversed outright.

III. THE SUBPART H RATES DO NOT AUTHORIZE DIFFERENT TANK COUNTS

The fiscal importance of the tank count rests in the fact that the number and size of tanks are the basis of setting maximum payment amounts in the Board's Subpart H rates. (35 Ill. Adm. Code 734.800 et seq.) There is no definition section in Subpart H that indicates terms have different meaning in Subpart H than in the Part 734 Underground Storage Tank regulations. The regulations require a copy of the OSFM eligibility and deductibility determination to be included in all applications for payment, indicating that the OSFM determination is required for fiscal review of the request. (35 Ill. Adm. Code 734.605(b)(3)) All in all, Part 734 contains no reference to "compartment tanks."

A. UST Removal Maximum Payment Amount

The reimbursable costs for tank removal is in Section 734.810:

Payment for costs associated with removal of each UST must not exceed the amounts set forth in this Section. Such costs must include, but not be limited to, those associated with the excavation, removal, and disposal of UST systems.

UST Volume	Maximum Total Amount Per UST
110-999 gallons	\$2,958.95
1,000 - 14,999 gallons	\$4,438.43
15,000 or more gallons	\$5,777.00

(35 Ill. Adm. Code 734.810 (amounts updated to reflect inflation adjustment at A.R.365))

If anything, the word “each” emphasizes the importance of every tank being counted, which are not to be combined in a single total. Moreover, the simplicity of this rule stands out. The same maximum payment applies no matter the circumstances that might differ between a 1,000 gallon tank and a 14,999 gallon tank. It does not matter if the site has twelve tanks or one, nor how much piping must be removed. It does not differentiate between local labor costs, including the prevailing wage. This is a simplified maximum amount that favors simplicity over details and there is no implication in the language that compartment tanks should be treated any differently than any of these other differences.

B. Excavation, Transportation, and Disposal of Visibly Contaminated Fill Material.

During early action, the Illinois Environmental Protection Act authorizes the owner or operate to “remove visibly contaminated fill material,” but not “in an amount in excess of 4 feet from the outside dimensions of the tank.” (415 ILCS 5/57.6(b)) “Fill material” is defined as “non-native or disturbed materials used to bed and backfill around an underground storage tank.”

(415 ILCS 5/57.2) Thus, there are three layers of limitations on removal: the material must be the kind of material installed around the tanks when they were placed in the ground, the material must be visibly contaminated, and the material must be within 4 feet from a tank.

The Board's implementing regulations convert the linear distance limit to cubic yards:

Volume of Tank in Gallons	Maximum Amount of backfill material to be removed Cubic yards
----------------------------------	--

* * *

7500 to 8299	206
8300 to 9999	219
10,000 to 11,999	252
12,000 to 14,999	286
>15,000	345

A conversion factor of 1.5 tons per cubic yard must be used to convert tons to cubic yards.

(35 Ill. Adm. Code 734.APPENDIX C (only listing 7500 gallons and up))

In practice, however, it is neither linear measurements or volume that determine the maximum payment amount, it is the tonnage derived from landfill disposal tickets. For example, the Illinois EPA partially rejected the initial payment application herein because one of the tickets did not have the tons listed. (A.R.330) The total tonnage is then converted to cubic yards to make sure it is equal to or less than the maximum amount of contaminated fill material that can be removed under Appendix C. In short, this body of regulations involves the employment of two models: one that converts the distance of four linear feet from tanks to cubic yards and another that convert tons of fill material to cubic yards.

The provision containing the maximum payment amount states:

Payment for costs associated with the removal, transportation, and disposal of . . . visibly contaminated fill removed pursuant to Section 734.210(f) of this Part must not exceed a total of [\$80.31] per cubic yard.

. . .

- 2) The volume of backfill material used to replace soil removed from within four feet of the outside dimension of the UST and disposed of pursuant to Section 734.210(f) of this Part must be determined in accordance with Appendix C of this Part.**

35 Ill. Adm. Code ¶ 734.825(b)(2) (amount updated to reflect inflation adjustment at A.R.365)

Within these models, a number of assumptions are being made that trade precision for simplicity, making it easier for the Illinois EPA to make sure not too much contaminated soil is removed by reliance on landfill tickets. For example, the conversion factor ignores the reality that the material removed may differ in terms of “density, water content, air content, and compaction ratio.” Parker’s Gas & More v. IEPA, PCB 19-79, slip op. at 5 (May 4, 2023) (witness testimony) Moreover, the maximum payment amount is a total unit rate for all activities involved in excavating, transporting and disposing of the contaminated fill. Different locations are closer or farther from a landfill, landfills charge different rates, transportation costs are impacted by distance to the landfill and labor costs differ from location to location, including prevailing wage requirements. Consultants are expected to keep the total cost of all of these variables under the maximum payment amount with little control over conditions at the site. See Parker’s Gas & More v. IEPA, PCB 19-79, slip op. at 14-15 (May 4, 2023)

None of these maximum payment amounts expressly or implicitly authorize different treatment for any compartment tanks and in fact they subsume many differences that may be relevant for the benefit of a simple maximum payment amount.

WHEREFORE, Petitioner, 1441 KINGSHIGHWAY LLC, prays that the Board find the Agency erred in its decision, direct the Agency to approve the payment as submitted, award payment of attorney's fees and grant Petitioner such other and further relief as it deems meet and just.

1441 KINGSHIGHWAY LLC,
Petitioner

By its attorneys,
LAW OFFICE OF PATRICK D. SHAW

By: /s/ Patrick D. Shaw

Patrick D. Shaw
LAW OFFICE OF PATRICK D. SHAW
80 Bellerive Road
Springfield, IL 62704
217-299-8484
pdshaw1law@gmail.com