

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

CANCER TREATMENT CENTERS OF AMERICA, INC.,	)	
	)	
Petitioner,	)	
v.	)	PCB 10-33
	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent	)	

**POST-HEARING BRIEF**

NOW COMES Petitioner, Cancer Treatment Centers of America, Inc. (“**Cancer Treatment Centers**” or “**Petitioner**”), by its attorney, S. Keith Collins, and pursuant to the Hearing Report, dated April 22, 2010, submits its Post-Hearing Brief, and hereby states as follows:

I. **INTRODUCTION**

Cancer Treatment Centers leases the property at 2414 N. Sheridan Road, Zion, Illinois (“**Site**”). The Site was acquired by Northeast Illinois Medical Property, LLP, a limited liability partnership and leased to Cancer Treatment Centers. The purpose of the acquisition and lease was to build a facility to house patients and caregivers. Hearing Transcript, *Cancer Treatment Centers of America, Inc. v. Illinois Environmental Protection Agency*, PCB 10-33 at 34 (Ill.Pol.Control.Bd, April 22, 2010, hereinafter cited as “**Tr.**”) Before the acquisition, environmental assessment work was performed by Benchmark Environmental Services, Inc. (“**Benchmark**”), information available indicated previous use of the site as a service station, but the underground storage tanks

(“**UST**”) were thought to have all been removed decades earlier. After a Phase One report, Benchmark performed a Phase Two investigation. Tr. 8.

Magnetometer search results were inconclusive. Tr. 10. The Phase Two investigation and testing indicated that soil contamination remained. Tr. 10. Benchmark reported the site contamination to the Illinois Emergency Management Agency (“**IEMA**”) on or about January 7, 2008 and it was assigned IEMA Incident Number 08-0025. Administrative Record at 1. (hereinafter cited as “**R.**”); Tr. 10-11. In order to proceed with construction of its planned facility to house patients and caregivers of its Midwestern Regional Medical Center and obtain a no further remediation required (“**NFR**”) letter. Cancer Treatment Centers sought to remediate the contamination as soon as possible. Tr. 11. Later Cancer Treatment Centers obtained an NFR letter. R382; Tr. 22.

Initially, it appeared that the contamination was from the fuel tanks that were previously removed. R 446. At that time, nothing disclosed or indicated the existence of the remaining 2,000 gallon UST later discovered at the Site.

During remediation of the soil contamination, the previously unknown UST was discovered and determined to be a primary source of the previously reported contamination. Tr. 12. A permit was requested and both the permit and an amended permit for removal were approved and issued by the Office of the Illinois State Fire Marshall (“**OSFM**”) on or about June 3, 2008. On June 25, 2008, while Sue Dwyer representing the OSFM was present, the still actively leaking UST was removed. R. 443-446, Tr. 13-14.

The day the leaking UST was being removed, Alison Rosenberg, the Project Coordinator with Benchmark Environment Services (“**Benchmark**”),

asked Sue Dwyer if an additional filing number should be obtained from IEMA for the UST. Dwyer replied, no it was not necessary and that the UST could be associated with the existing January 8, 2008 incident. Tr. 17-18. The 2,000 gallon tank still contained diesel fuel and the tank continued to leak until it was pumped out and removed. Tr. 21.

Relying on OSFM's direction, Cancer Treatment Centers did not notify IEMA or request a new incident number. A certificate of removal for the UST and permits were issued by OSFM. R. 443.

Later, on August 28, 2008, the OSFM approved Cancer Treatment Centers' Reimbursement Eligibility and Deductibility Application, finding Cancer Treatment Centers "...eligible to seek payment of costs in excess of \$100,000.00..." from the Underground Storage Tank Fund ("**UST Fund**"). R. 436.

On October 9, 2009, the NFT Agency issued a letter ("**Agency Denial**"), denying Cancer Treatment Centers any payment from the UST Fund.

Discovery of the UST, notification of the OSFM, and removal of the UST all occurred more than 6 months after the IEMA notification. The Agency Denial cited the more than 59 day period (45 days plus 14 days) from the January 7, 2008 IEMA report to completion of removal and remediation as a fundamental basis for denying all aspects of the claim. Tr. 82-83; R. 403.

Here, a central issue is whether or not under the Agency's denial of Cancer Treatment Centers' claim for early action reimbursement should be affirmed. Cancer Treatment Centers relied on OSFM's direction (Tr. 17-18; and

29-30) and OSFM's subsequent claim approval. Cancer Treatment Centers submits that:

- (a) its reliance on OSFM's direction was reasonable under the circumstances;
- (b) the Agency should have deferred to OSFM's direction and eligibility decision; and
- (c) that the claim denial should therefore be reversed.

The Agency Denial was primarily based on a technicality that OSFM told Cancer Treatment Centers it did not need to satisfy. Because the Agency should have deferred to OSFM's direction and decision, and based on equitable estoppel, the Agency's Denial should be reversed.

A second rationale for the Agency Denial is the 4 foot fill excavation limitation for removal of a UST. The Agency Denial stated that the quantities of soil removed exceeded the 4 foot "fill" limitation. The Agency applied that fill limitation to exclude all but 480 cubic yards of heavily-contaminated soil from its claim amount calculation. Tr. 98-99.

It would make no sense to do so, unless the Agency is again applying its unpromulgated informal "rule" that contaminated soil for purposes of reimbursement will be presumed clean by the Agency unless it is tested by the laboratory methodology. That method delays remediation and increases the ultimate cost. Because of that, such testing is not generally utilized, except as a confirming test when clean soil below remediation requirement levels is reached. The Agency's witness, Brian Bauer ("**Bauer**"), testified that a tremendous amount of "clean soil was removed" because repetitive soil laboratory testing was not done throughout the remediation (Tr. 94-95c), and the Agency then relies on

what it concludes was excessive removal. Connecting the dots demonstrates that, contrary to the Board's decision in Dickerson Petroleum, Inc. the Illinois EPA, PCB Nos. 09-87,10-05 (Ill.Pol.Control.Bd. February 4, 2010) (hereafter cited as "**Dickerson**"), the Agency still arbitrarily and without justification rejects PID testing. PID testing as well as petroleum odor and visual soil discoloration observations reflect clear and widespread contamination of the site. The petroleum fumes could be smelled across the street throughout the remediation. Tr. 113. Cancer Treatment Centers confirmed the release and in accordance with the applicable OSFM regulations tested the contaminated soil in accordance with recognized and acceptable industry testing standards (Tr. 110-119), and followed the OSFM's direction in not creating an additional IEMA notification. IEMA was notified of the confirmed release long prior to discovery of the UST and that remediation was necessary. Accordingly, Cancer Treatment Centers submits that, for all of those reasons, the Agency denial should be reversed and the UST Fund claim should be paid.

## II. **BACKGROUND FACTS**

After performing an initial Phase One Environmental assessment, on August 7, 2007 Benchmark performed a Phase Two Subsurface Investigation and magnetometer search. Seven soil borings were done adjacent to the former pump island locations and former UST locations, as well as an adjacent suspected possible UST location. No magnetometer anomalies were found. Three groundwater wells were temporarily installed and sampled. No exceedences above the IEPA cleanup objectives were found. R. 24.

On December 14, 2007 Benchmark performed a remedial site investigation to determine the extent of any contamination. An additional twelve soil borings were done. Ten soil samples were taken for laboratory compound analysis. Four of the twelve sampling locations upon laboratory analysis showed concentrations above the IEPA Tier I soft remediation objectives. Benchmark concluded that a release had occurred from the previously removed USTs and pump islands. The release was reported to IEMA and assigned Incident Number 2008-0025.

Cancer Treatment Centers elected corrective action. On May 6 through 15, 2006 Benchmark supervised the excavation of approximately 3,465 cubic yards of "impacted soils." The soils were continuously monitored using a many ray light, PID meter equipped with a 10.5 EV lamp. R. 25. The protocol is detailed in the record at R.25 and in the testimony of Alison Rosenberg at Tr. 111-119.

An OSFM representative, Sue Dwyer, was present at the removal of the tank on June 25, 2008, OSFM having been notified by Benchmark when the tank was discovered. Alison Rosenberg from Benchmark asked Dwyer if an additional call and for an addition IEMA incident number should be made. Dwyer advised that as there were holes in the bottom of the tank no call was needed and that she would just notify the office that the tank will be added to the original IEMA number. Tr. 17.

The tank had multiple corrosion holes. Tr. 17. Some were as large as a fist while others were the size of a half-dollar or smaller. The soil had an obvious

petroleum odor of diesel fuel and was petroleum stained with characteristic gray to green color. Tr. 17-18.

The tank was the source of much of the contamination and had obviously been leaking for a long time. It was impossible to differentiate that tank's contamination from any of the material which could have been left after the previous tank removals. Tr. 18. Also see Petitioner's Exhibit Number 3, which are color prints of the original color photographs from the report. Only black and white illegible copies of those photographs appear in the record.

Rosenberg testified "there was really no way to just remediate the 4 foot area around the tank that we pulled out and then leave the surrounding area, because contamination would still be onsite, and therefore the site would not have been remediated." Tr. 25. It was:

...only through the progressive removal across the site of soil contamination that the tank was discovered. It could not have been reported at the time of the initial incident report because its existence was not known. And it was nowhere near the vicinity of the suspect tank locations previously located. Tr. 26.

The 45 days for initial notification and the 14 day period expired long before the tank was suspected to exist. Tr. 28. Benchmark's report addressed the issue of why no separate incident report was made based on what OSFM's representative, Sue Dwyer, told Rosenberg at the time of the tank removal. Tr. 29-30.

The contamination was consistent well beyond 4 feet from the UST. Tr. 32. It was impossible to determine what portions of the contamination may have remained from the prior tank removals, but the removal of the contamination was necessary. Tr. 33.

As they dug, smell from the fuel vapors and coloration of the contamination were consistently present. However, the petroleum odor and vapors became progressively stronger the further they progressed with the remediation. Because of that, Benchmark began to anticipate the possibility of a source other than the previously removed tanks. Tr. 30-31.

The 20 day certification report was received by the Agency on August 15, 2008. R. 5. The 20/45 day correction action completion report appears at R. 20. The total material contaminated on the site and remediated was 3,795 cubic yards, as reported in the corrective action completion report. R. 11. The OSFM issued its reimbursement eligibility approval letter on August 28, 2008. R. 436-437.

In its second paragraph, the OSFM letter stated:

it has been determined that you are eligible to seek payment of costs in excess of \$100,000.00. The cost must be in response to the occurrence referenced above and associated with the following tanks: Eligible Tanks Tank 1 2,000 gallon Diesel Fuel. R. 436.

The occurrence referenced above was identified as IEMA Incident Number 08-0025.

The OSFM's June 25, 2008 report included Dwyer's signature and confirmation that "The UST was found during remediation of the site." An IEMA number was secured (H-2008-0025). Rosenberg testified regarding the procedures and testing followed during the remediation and removal of contaminated materials at the Site. Tr. 110-117. Rosenberg's testimony also included discussion of how PID tests during remediation of contamination soil demonstrate with more reliability than soil core samplings the degree of



contamination, because soil borings may due to geology or other factors miss significant contamination. Tr. 118-119.

The Agency's witness, Bauer, testified that the Site had been "you over-excavated that soil base on the PID." Tr. 106. Salient parts of the OSFM report include:

"Continued from Removal Log-6/25/08: Benchmark was doing a site assessment of this location. The UST was found during remediation of the site. An IEMA number was secured (H-2008-0025) while Benchmark was doing a site assessment at this location. This facility was an old gas station in the 1970's-to mid 1980's, then it became a roofing company until the current owners acquired the property. Over the years, this had tried to document what happened to the USTs at this location, but could only rely on "hearsay" stories of the previous station operator, various fire department personnel and other community people. I could never verify the actual removal of the USTs, but felt confident that the USTs were gone. Therefore, when the IEMA # came thru, I returned it to OSFM with a comment that the tanks were removed. The same IEMA # will be used for this tank. [Emphasis added.]

The metal tank was located near the north center of the property ...The tank had multiple corrosion holes through-out, some were as large as my fist while others were the size of a half dollar or smaller. The soil has an obvious petroleum odor like that of diesel fuel and was petroleum stained with the characteristic gray-to-green color." R. 443 at 446.

### **III. STANDARD OF REVIEW**

This appeal from the Agency's decision is brought before the Illinois Pollution Control Board ("Board") in accordance with 415ILCS 5/40(a)(i), 57-57.17 (2008), 35 Ill.Admin Code 105, Subpart D, the Board has jurisdiction over this appeal. Cancer Treatment Centers has the burden of proof under 35 Ill.Admin. Code 105.112(a), and the hearings and testimony were based exclusively on the record before the Agency at the time the Agency made its final determination. 35 Ill.Admin. Code 105, 412. Cancer Treatment Centers made

Limited The Certain Waivers of the 120-day Decision Deadline (each a "Limited Waiver"). The Second Limited Waiver given on February 18, 2010 extended the statutory 120-day decision deadline to September 2, 2010.

**IV. OFSM's ELIGIBILITY DETERMINATION WAS PROPER**

Under the statute, primary responsibility for the determination of eligibility and any deductible applicable is placed with the OFSM and it was OFSM that determined a second report regarding the same contamination that was previously reported to IEMA was unnecessary. The Incident Report went on to explain why it was unnecessary. R. 446.

**V. CANCER TREATMENT CENTER RELIED ON OFSM**

Sue Dwyer from OSFM made the decision that a second IEMA notification was unnecessary. Cancer Treatment Center reasonably relied upon that decision, which is confirmed by the Incident Report. R.446.

**VI. EQUITABLE ESTOPPEL SHOULD APPLY**

The Agency fundamentally rejects the claim because it rejects the adequacy of the initial report to IEMA, but relies upon that date to deny the reimbursement claim. The Incident Report was of contamination thought to be remaining from one or more UST tanks. The source of the contamination was in fact a fifth UST, not previously discovered that was continuing to leak.

Relying on that initial report to contend that the total number of days elapsed from the report to the remediation's completion, the Agency contends the claim is barred. Having relied on OSFM, Cancer Treatment Center's claim should not be precluded because it reasonably relied upon OFSM. In deciding

whether or not to apply estoppel, all of the circumstances are to be considered and a governmental agency may be estopped. Hickey v. Illinois Central Railroad Company, 35 Ill.2nd 427, 449 (Ill. S. Ct. 1966).

While the Agency has chosen to reject the obvious existence of contamination because of its bias against the PID testing and decision not to defer to the OFSM's determination, it has chosen to ignore, in Section 734.220 of Title 35 of the Illinois Administrative Code ("**Title 35**"), a concluding sentence.

SECTION 734.220 APPLICATION FOR PAYMENT OF EARLY ACTION COSTS

Section 734.220 Application for Payment of Early Action Costs

Owners or operator intending to seek payment for early action activities, excluding free product removal activities conducted more than 45 days after confirmation of the presence of free product, are not required to submit a corresponding budget plan. The application for payment may be submitted to the Agency upon completion of the early action activities in accordance with the requirements at Subpart F of this Part, excluding free product removal activities conducted more than 45 days after confirmation of the presence of free product. Applications for payment of free product removal activities conducted more than 45 days after confirmation of the presence of free product may be submitted upon completion of the free product removal activities. [Emphasis added.]

Here, approximately 800 gallons of free product was removed from the UST before the tank's removal. However, the vapors, fumes and odor reflected in the record and in the testimony of Rosenberg, establish that the contaminated soil removed following the IEMA report also contained "free product" as defined in Section 734.115 of Title 35. "Free Product" means contaminant that is present as a non-aqueous phase liquid for chemicals ... (e.g., liquid not dissolved in water." As Rosenberg testified,

...on this particular site, you could smell the petroleum from across the street. Our client actually came out to visit us on site and he smelled it

before he even pulled in to the property. So it was highly contaminated.  
Tr.113

The PID testing, petroleum fumes, vapors and odors, meet the definition of "free product" and accordingly, removal of the contaminated soil should be reimbursable, notwithstanding the fact that commonly the term is used to describe a pool of liquid.

Furthermore, the fill limitation of four feet surrounding the UST should not be applied to the contaminated soil, which is not within the definition of "Fill Material" a definition that is italicized in Section 734.115 of Title 35, apparently because it is drawn from the statute at 415 ILCS 5/57.2.

#### **IV. CONCLUSION**

Based on the facts and materials known to the Agency from the Record, Cancer Treatment Centers respectfully submits, that the Agency should have deferred to the OSFM's determination. The Agency should not second guess or catch-22 Cancer Treatment Centers' claim after the fact, or use the reimbursement claim to again, without appropriate disclosing it to the applicant, impugn and disregard appropriate PID testing and site observations. Finally, and most importantly, it would be unjust and inequitable for the Agency's denial to stand, where Cancer Treatment Centers reasonably relied upon OFSM, promptly remediated the Site, obtained an NFR letter, and only afterwards had its reimbursement claim totally rejected by the Agency.

For all of the foregoing reasons, Cancer Treatment Centers respectfully requests that the Illinois Pollution Control Board reverse the Agency's

determination and denial of reimbursement, and grant to Cancer Treatment Centers such other and further relief as it deems proper, including, if appropriate, remand to the Agency for further action consistent with the decision of the Illinois Pollution Control Board.

Respectfully submitted,

CANCER TREATMENT CENTERS OF  
AMERICA, INC. Petitioner

By: 

S. Keith Collins, its attorney

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**NOTICE OF FILING AND PROOF OF SERVICE**

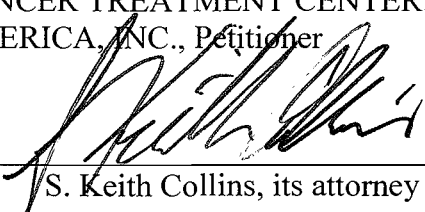
To: John T. Therriault	Bradley P. Halloran	James G. Richardson
Assistant Clerk	Hearing Officer	Illinois Environmental Protection Agency
Illinois Pollution Control Board	Illinois Pollution Control Board	Division of Legal Counsel
State of Illinois Center	State of Illinois Center, Suite 11-500	1021 North Grand Avenue East
100 West Randolph, Suite 11-500	100 W. Randolph Street	Post Office Box 19276
Chicago, Illinois 60601	Chicago, Illinois 60601	Springfield, Illinois 62794-8276
312/814-3620	312/814-8917	217/782-5544

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 101.302(d) a[n] **POST-HEARING BRIEF** directed to the Illinois Pollution Control Board, a copy of which is herewith served upon the Clerk of the Illinois Pollution Control Board and upon James G. Richardson, Division of Legal Counsel, Illinois Environmental Protection Agency.

The undersigned hereby certifies that a true and correct copy of this Notice of Filing and Proof of Service, together with a copy of the document described above, were today served upon the persons and entities identified above: to John T. Therriault via electronic mail; and upon Bradley P. Halloran and James G. Richardson by enclosing same in envelopes addressed to such persons and entities, with postage fully prepaid, by depositing said envelopes in a local U.S. Post Office Mailbox at 1033 Skokie Boulevard, Northbrook, Illinois on June 7, 2010.

Respectfully submitted,

CANCER TREATMENT CENTERS OF AMERICA, INC., Petitioner

By:   
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