BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE

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PLEASE TAKE NOTICE that I have today caused to be filed a RESPONSE TO POST-HEARING BRIEF with the Illinois Pollution Control Board, copies of which are served upon you.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

/s/ James G. Richardson
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Dated: July 8, 2010
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THIS FILING SUBMITTED ON RECYCLED PAPER

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RESPONSE TO POST-HEARING BRIEF

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, James G. Richardson, Assistant Counsel, and hereby submits to the Illinois Pollution Control Board ("Board") its Response to Post-Hearing Brief.

I. STANDARD OF REVIEW

Sections 57.7(c) and 57.8(i) of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/57.7(c),57.8(i), grant an individual the right to appeal a determination of the Illinois EPA to the Board pursuant to Section 40 of the Act, 415 ILCS 5/40. Section 40 is the general appeal section for permits and has been used by the legislature as the basis for this type of appeal to the Board. Therefore when reviewing an Illinois EPA determination of ineligibility for reimbursement from the Underground Storage Tank Fund ("UST Fund"), the Board must decide whether or not the application, as submitted to the Illinois EPA, demonstrates compliance with the Act and Board regulations. Broderick Teaming Company v. Illinois EPA, PCB 00-187 (December 7, 2000), p. 2.

Pursuant to 35 Ill. Adm. Code 105.112(a), the Petitioner, Cancer Treatment Centers of America, Inc. ("CTCA"), has the burden of proof in this case. In reimbursement appeals, the burden

is on the applicant for reimbursement to demonstrate that incurred costs are related to corrective action, properly accounted for, and reasonable. Rezmar Corporation v. Illinois EPA, PCB 02-91 (April 17, 2003), p. 9. Consideration of the administrative record as well as hearing cross-examination and testimony challenging the information relied on by the Illinois EPA for its determination is appropriate, but petitioners cannot introduce new matters outside of the administrative record. Freedom Oil Company v. IEPA, PCB 03-54, 03-56, 03-105, 03-179, and 04-02 (consld) (February 2, 2006), p. 11. Thus CTCA must demonstrate to the Board with appropriate information that it has satisfied its burden before the Board can enter an order reversing or modifying the Illinois EPA decision under review.

II. RELEVANT FACTS

Benchmark Environmental Services, Inc. performed a Phase II Subsurface Investigation and Magnetometer Search at this property in August 2007. Administrative Record ("AR") p. 24. Seven soil borings were made and three temporary groundwater monitoring wells were installed in areas where former pump islands and USTs had been located. Laboratory analytical results indicated that the Tier I Cleanup Objectives were exceeded only at borings B-4 and B-7, and no groundwater impacts were detected. AR pp. 24, 304. Remedial Site Investigation activities were conducted in December 2007 to determine the extent of contamination. AR p. 24. Ten soil samples were obtained from 12 borings. The laboratory analysis of these samples revealed exceedances of the Tier I Cleanup Objectives at C-1 and C-3 (Note – The narrative on Page 24 of the Administrative Record reporting four exceedances appears to be a misprint.) AR pp. 278, 304. Based upon this information, Benchmark concluded that a release had occurred from the previously removed USTs and pump islands and reported a release to the Illinois Emergency Management Agency ("IEMA")

on January 7, 2008. AR p. 24.

Between May 6 and May 15, 2008, approximately 3,465 cubic yards of soil were excavated and removed for disposal. AR p. 25. During this excavation, a previously unknown 2000-gallon diesel UST was discovered. The UST was removed on June 25, 2008 in the presence of Storage Tank Safety Specialist Sue Dwyer with the Office of the Illinois State Fire Marshal ("OSFM"). AR pp. 25, 444-446. Evidence that the UST had leaked was noted. Dwyer determined that a new incident number was not needed for this UST and release. An additional 330 cubic yards was removed for disposal from the vicinity of the diesel UST on June 30, 2008. AR p. 25.

A Corrective Action Completion Report ("CACR"), accompanied by 20- and 45-Day Reports, was received by the Illinois EPA on August 25, 2008. AR p. 5. A No Further Remediation ("NFR") Letter was issued to CTCA on September 10, 2008. AR p. 396. An application for reimbursement of $354,395.09 in costs was received by the Illinois EPA on July 6, 2009. AR p. 413. This application was denied in its entirety on October 9, 2009. AR p. 401.

III. ARGUMENT

A. The Illinois EPA's October 9, 2009 Decision

For purposes of payment from the UST Fund, early action activities must be performed within 45 days after IEMA release notification plus 14 days. 35 Ill. Adm. Code 734.210(g). As the release here was reported on January 7, 2008 and no extension of the early action time period was requested, the early action time period for purposes of reimbursement ended on March 6, 2008. AR p. 411. CTCA's application for payment was for early action costs incurred from May 6, 2008 to June 30, 2008 (Note – References to June 30, 2009 on the first page of the Illinois EPA's October 9, 2009 Attachment A are misprints.) AR pp. 401-406, 410, 413, Petitioner's Exhibit ("Pet. Exh.") 4.

Therefore all of the $354,395.09 in costs CTCA sought to have reimbursed were denied in the Illinois EPA's October 9, 2009 determination letter because they were not incurred during the early action time period for this site and were not site investigation or corrective action costs.

Further analysis of CTCA's application for payment was performed by the Illinois EPA. First, the October 9, 2009 determination letter identified $28,357.42 in costs for activities typically performed during the early action time period. Hearing Transcript ("TR") pp. 83-84. This amount consists of $2,100.00 for the tank pull and $9,479.00 of costs "within the 4 ft. rule" including the excavation, transportation and disposal of 112 cubic yards of contaminated backfill at $60.00 per cubic yard and the acquisition, transportation and placement of 124 cubic yards of clean backfill at $22.25 per cubic yard. AR p. 403. Also included in this amount were consultant oversight personnel costs of $10,778.42 and consultant oversight materials costs of $6,000.00. But even if these typical early action activities had been performed within a legitimate early action time period, CTCA would not have been reimbursed for them since OSFM had assigned the site a deductible of $100,000.00 and CTCA had not yet incurred over $100,000.00 in eligible costs at this site. AR pp. 436-437, TR p. 84.

Second, $302,659.75 in costs for the excavation, transportation and disposal of contaminated backfill and/or clean backfill procurement, transportation and placement were deducted as they were beyond the four-foot rule requirements of Section 57.6(b) of the Act and 35 Ill. Adm. Code 734.210(f), 734.630(a), and 734 Appendix C. AR p. 404. 3,465 cubic yards of soil were excavated, transported and disposed between May 6 and May 15, 2008, and an additional 330 cubic yards was removed for disposal from the vicinity of the diesel UST on June 30, 2008. AR p. 25. Pursuant to the four-foot rule, only 112 cubic yards of contaminated backfill was eligible for reimbursement.

Third, a deduction of $11,954.06 concerned costs lacking supporting documentation for analysis costs, contaminated water transport and disposal, contaminated and clean backfill, and the consultant's personnel oversight costs. AR pp. 404-405. Lastly, there was an adjustment in handling charges of $11,423.86 as the consultant failed to provide proof of payment for certain subcontractor costs. AR p. 405. To date, CTCA has not specifically challenged these last two deductions. The four amounts just identified, namely $28,357.42, $302,659.75, $11,954 and $11,423.86, add up to the total amount sought by CTCA's application for payment, $354,395.09.

The statutory and regulatory requirements pertaining to the early action time period and the four-foot rule are clear and straightforward. "For purposes of payment from the Fund, the activities set forth in subsection (f) of this Section must be performed within 45 days after initial notification to IEMA of a release plus 14 days" unless an extension of time is approved by the Illinois EPA. 35 Ill. Adm. Code 734.210(g). "For purposes of payment of early action costs, however, fill material shall not be removed in an amount in excess of 4 feet from the outside dimensions of the tank." 415 ILCS 5/57.6(b), 35 Ill. Adm. Code 734.210(f). With an IEMA notification date of January 7, 2008, 45 days plus 14 days after the notification date was March 6, 2008. But activities at the site for which CTCA sought reimbursement did not commence until May 6, 2008, 61 days beyond the 59-day early action time period. In a previous case where the early action time period under 35 Ill. Adm. Code Part 732 was at issue, the Board agreed with the Illinois EPA's position that allowing reimbursement for activities performed outside the early action time period would moot the obligation to seek an extension of time. Broderick Teaming Company v. Illinois EPA, PCB 00-187 (April 5, 2001), p.3. Although the unique facts in Broderick caused the Board to change the beginning date of the early action time period, the decision still stated that "the Board today clearly states that Section

732.202(g) requires that early action activities must be performed within 45 days from the date of confirmation" unless an extension of time is approved by the Illinois EPA. Broderick, p. 7. When another Petitioner attempted to apply Broderick to support its early action reimbursement application for activities performed approximately six months after the release was reported, the Board noted that it "limited the applicability of Broderick to the unique facts therein." Ozinga Transportation Services v. IEPA, PCB 00-188 (December 20, 2001), p. 9. In ruling against Ozinga, the Board held that altering the early action time period "would frustrate the intent of early action." Ozinga, p. 10. As the early action activities were required to be performed by July 13, 1998 but were not completed until November 20, 1998, the Board ruled that "the activities are not reimbursable as early action." Id. In the instant case, the facts are not sufficiently compelling to apply Broderick and CTCA has not invoked Broderick in its arguments. The deduction of all of CTCA's costs for not being incurred during the early action time period is consistent with the regulations and Board precedent. CTCA has not cited any legal authority that would have required or allowed a different determination to be made.

Another case interpreting 35 Ill. Adm. Code Part 732 is relevant concerning the four-foot rule. In Rezmar Corporation v. Illinois EPA, PCB 02-91 (April 17, 2003), the petitioner removed 2,375 cubic yards of contaminated soil from its site during the early action time period. The Illinois EPA denied reimbursement of these costs as they were associated with the removal of more than four feet of material. The Illinois EPA argued that beyond the four feet of fill material from the outside of the dimensions of the tank, any other reimbursement requests for soil removal are more properly characterized as reimbursement requests for corrective action costs. Otherwise, "an owner or operator of a leaking UST would have no limitations on how much material could be removed

during early action." Rezmar, p. 7. The Board agreed with the Illinois EPA, stating as follows:

> "As a result of this statute [then 415 ILCS 5/57.6(a)(1)(B)], the Agency is limited to approving only up to four feet of fill material from the outside dimensions of the UST. Any other requests for reimbursement of costs associated with removal of soil, even during the period for early action activities, are more properly characterized as a request for reimbursement of corrective action costs. As the Agency points out, if this were not the case, then an owner or operator of a leaking UST would have no limitations on how much material could be removed during early action. This would be contrary to the controls and limitations imposed by the regulation."

Rezmar, p.9. CTCA sought reimbursement for the removal of 3,795 cubic yards of material from its site. If there had been a typical and legitimate early action time period, only the costs associated with 112 cubic yards would have been eligible for reimbursement. The Illinois EPA's application of the four-foot rule was consistent with the controls and limitations imposed by the regulation and Board interpretation of the regulation. CTCA has not cited any legal authority that would have required or allowed a different determination to be made.

B. CTCA's Arguments

After four soil samples, two from an August 2007 Phase II Subsurface Investigation and two from a December 2007 Remedial Site Investigation, had exceedances of the Tier I Cleanup Objectives for some contaminants, CTCA reported a release to IEMA on January 7, 2008. At this point in time, it does not appear that CTCA planned on entering the UST program since it was believed that all of the USTs once at the site had been removed many years earlier. A January 2008 Remedial Site Investigation Report recommended submittal of a Site Remediation Report to the Illinois EPA's Site Remediation Program involving the excavation/treatment of 480 cubic yards of impacted soils and the use of institutional controls, or the performance of a TACO Risk Based Assessment, and an investigation of off-site soil impacts. AR p. 286. On May 6, 2008, 61 days after

the release was reported, CTCA commenced excavations at the site. By May 15, 2008, approximately 3,465 cubic yards of soil had been removed and a previously unknown 2000-gallon diesel UST discovered. It is not clear why more than 480 cubic yards of soil was removed. CTCA's consultant could not explain this, but did state that CTCA wanted "a clean piece of property." TR pp.12, 114.

An OSFM permit for removal of the UST was issued around June 3, 2008. Post-Hearing Brief ("BR") p. 2. The UST was pulled on June 25, 2008 and an additional 330 cubic yards of soil were removed from the UST's vicinity on June 30, 2008. The basis for one of CTCA's primary arguments occurs at this time when OSFM Tank Safety Specialist Sue Dwyer determined that a new incident number was not needed for this UST and release. CTCA argues that it relied upon this direction by OSFM, "the Agency should have deferred to OSFM's direction and eligibility decision," and "[T]he Agency Denial was primarily based on a technicality that OSFM told Cancer Treatment Centers it did not need to satisfy." BR pp. 3-4. CTCA claims that the doctrine of equitable estoppel should be applied here to reverse the Illinois EPA's decision. BR p. 10. But CTCA neither explains what requirements of the UST Program Illinois EPA deference to OSFM's direction would have satisfied nor identifies the exact costs such deference would have made eligible for reimbursement. Is CTCA suggesting that OSFM can revive or expand an early action time period? Does this expansion include retrospective as well as prospective costs, since CTCA sought reimbursement for costs it incurred before it ever had a UST to gain access to the UST Program?

This line of argument by CTCA should not prevail. First, the Board has noted that several state agencies have roles in the leaking underground storage tank program. Weeke Oil Company v. IEPA, PCB 10-1 (May 20, 2010), p.20. Concerning OSFM and the Illinois EPA, "OSFM adopts

rules regarding tank removal and makes determinations regarding the eligibility of an owner or operator to access the UST fund. *See* 415 ILCS 5/57.5(c), 57.9 (2008). The Agency reviews plans and reports and determines the appropriate reimbursement amounts. *See* 415 ILCS 5/57.7, 57.8, 57.14A (2008)." Id., p.21. By statutory design, OSFM has no role or authority in determining what costs will be reimbursed.

Second, it is ironic that the doctrine of equitable estoppel case advanced by CTCA, Hickey v. Illinois Central R.R. Co., 220 N.E.2d 415 (1966), is usually referenced for the principle that estoppel does not "apply to public bodies under usual circumstances." Hickey, p. 425. Estoppel is found against public bodies only in rare and unusual circumstances. County of Cook v. Patka, 405 N.E.2d 1376 (1980), p. 1381. CTCA makes no effort to demonstrate that the six elements requisite for the imposition of estoppel exist in this case. Willowbrook Development Corporation v. IPCB and IEPA, 416 N.E.2d 385 (1981), pp. 389-390. CTCA's attempt to invoke equitable estoppel is ultimately thwarted by the fact that "estoppel only extends to and operates between parties and their privies." Id., p. 391. OSFM representations are not attributable to the Illinois EPA. As the Illinois EPA had no involvement with the making of the representation at issue here, it cannot now be estopped for that representation.

It is the Illinois EPA's position that CTCA decisions and actions regarding this site are responsible for the predicament it is in. Identifying the actual fact sequence as Scenario 1, two hypothetical factual scenarios deserve examination. For Scenario 2, what if a new release had been reported at the time of the June 25, 2008 tank pull , which the consultant said she would now do with the benefit of hindsight. TR, p. 29. The outcome is not much better than CTCA's current situation. All pre-June 25, 2008 corrective action costs would have been denied pursuant to 35 Ill. Adm. Code

734.630(n) and the tank pull costs, since the OSFM removal permit was obtained prior to the tank pull, would have been denied pursuant to 35 Ill. Adm. Code 734.630(k). Scenario 3 avoids some of the consequences of Scenario 2. What if CTCA had stopped all work at the site when another contamination source was suspected, as CTCA's consultant testified, and conducted further investigation for a tank and, when discovered, investigated the tank's condition? TR p.31. A new release could have been reported and then a removal permit obtained from OSFM. This would have made the subsequent tank pull and other typical early action costs eligible for reimbursement. Other activities and costs could have been pursued through site investigation and corrective action activities. Even under Scenario 1, CTCA could have improved its reimbursement prospects by undertaking site investigation and corrective action activities approved by the Illinois EPA rather than performing all of the measures it did and presenting them as being consistent with early action. Of course, eligible costs under any scenario would still be subject to the $100,000.00 deductible.

But CTCA was in a hurry to remediate the site, obtain an NFR Letter, and develop the property. TR p. 33. It wanted the consultant to "remediate the property as soon as possible." TR p. 11. When the amount of contaminated soil exceeded expectations, CTCA instructed the consultant to proceed with the remediation as it "wanted a clean piece of property." TR p. 12. The consultant's testimony suggests that CTCA viewed early action as a quick and immediate way to address all contamination at the site instead of early action being the first step in the UST Program remediation process where only certain limited activities are authorized to limit additional releases to the environment. TR p. 65. By performing a 3,795 cubic yard dig-and-haul, CTCA achieved its goal of obtaining a NFR Letter. As the letter was issued by the UST Program, CTCA avoided the fees associated with obtaining a NFR Letter from the Site Remediation Program.

Now CTCA argues that the Illinois EPA erred in denying reimbursement of $354,395.09 in costs, and takes some extreme positions to this end. CTCA argues that "The Agency Denial was primarily based on a technicality that OSFM told Cancer Treatment Centers it did not need to satisfy." BR p. 4. Since all of the costs were denied as being incurred outside of the early action time period, is CTCA suggesting that the purpose and requirements of early action are just technicalities? As previously noted, CTCA never explains how or identifies what costs would be eligible for reimbursement due to OSFM's statement.

Concerning the four-foot rule, CTCA attempts to portray contamination conditions at the site as being dire. The consultant testified that "there was really no way to just remediate the four-foot area around the tank that we pulled out and then leave the surrounding area, because contamination would have still been on site, and therefore the site would hot have been remediated." TR p. 25. She also noted the corrosion holes in the tank, petroleum odors, and stained soil in the UST pit. TR pp. 17-20, 113. First, none of these conditions are unusual for a site where a gas station was once located. Second, CTCA fails to substantiate its suggestion that the 2000-gallon diesel UST was the primary source of contamination. BR p. 7. The UST had not been used or re-filled in many years and 800-gallons of liquid still remained in the tank, having to be pumped out before the pull could occur. BR. pp. 2,7, AR p. 32. Third, and most important concerning contamination at the site, is Respondent's Exhibit 2 that consists of enlargements of Pages 59, 304, and 306 of the Administrative Record. The four soil borings where contamination above the remediation objectives was encountered, two from the Phase II Subsurface Investigation (B-4 and B-7) and two from the Remedial Site Investigation (C-1 and C-3), are depicted on Page 304. TR. pp. 88-89. Page 306 presents the January 2008 Remedial Site Investigation Report's boundaries for the 480 cubic yards of

impacted soil it recommended for removal, while Page 59 depicts the actual final excavation footprint of CTCA's site. Based upon his experience as a project manager and the only scientific and objective data provided to the Illinois EPA aside from the confirmatory wall and floor samples from the final excavation footprint, Brian Bauer concluded that CTCA over-excavated the site. TR pp. 91, 97-98. Although CTCA attempts to assail this conclusion with Dickerson Petroleum, Inc. v. IEPA, PCB 9-87 & 10-5 (consld) (February 4, 2010), this case is inapplicable since its issue was whether a site was subject to the UST requirements and the decision made no rulings regarding PID measurements. Certainly this information calls into question whether all of CTCA's excavation costs were necessary to achieve compliance with the requirements of the UST Program. As Bauer noted, "You can always excavate more soil than we will pay for." TR p. 76.

Lastly, in an effort to have the last sentence of 35 Ill. Adm. Code 734.220 apply to some of its costs, CTCA makes the circular argument as follows:

> "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."

BR. p. 12. It also claims that the four-foot rule applies only to contaminated fill material and not contaminated soil. It is the Illinois EPA's position that the definitions of free product and fill material at 35 Ill. Adm. Code 734.115 are clear and straightforward. It must also be noted that no groundwater impacts were detected at the site and in response to the "Was free product encountered?" item on the 45-Day Report, CTCA checked the "No" box. AR p. 7, 24. Interestingly the Petitioner in the aforementioned Rezmar case, another early action reimbursement case but one where free product was encountered, also attempted to make distinctions between fill material and

native soil or free product impacted soils. Rezmar, p. 6. Further, it argued that soil contaminated with free product is basically the same as free product. Id. pp. 6, 8. Both of these assertions failed. As previously quoted from the Board, reimbursement requests for costs associated with soil removal beyond four feet of fill material from the outside dimensions of the UST, even if they occurred during early action, must be corrective action reimbursement requests. Id. p. 9. It also found that the contaminated soil at the site was not free product. Id. CTCA's contentions on these matters deserve the same fate as those in Rezmar.

IV. CONCLUSION

Early in its efforts at this site, when the site did not appear to be a candidate for the UST Program, CTCA did not have to focus on the requirements of the UST Program. When the opportunity to enter the UST Program occurred, it is unfortunate that CTCA's focus on the purpose and limitations of early action did not intensify. CTCA has the burden of proof in this case, and because it has trampled upon key provisions of early action, this burden appears to be insurmountable. CTCA has clearly not met its burden. For all of the reasons and arguments presented herein, the Illinois EPA respectively requests that the Board affirm it October 9, 2009 decision.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

/s/ James G. Richardson
James G. Richardson
Assistant Counsel

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on July 8, 2010 I served true and correct copies of a RESPONSE TO POST-HEARING BRIEF upon the persons and by the methods as follows:

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