BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING AND PROOF OF SERVICE

To:

John T. Therriault Assistant Clerk Illinois Pollution Control Board State of Illinois Center 100 West Randolph, Suite 11-500 Chicago, Illinois 60601 312/814-3620	Bradley P. Halloran Hearing Officer Illinois Pollution Control Board State of Illinois Center, Suite 11-500 100 W. Randolph Street Chicago, Illinois 60601 312/814-8917	James G. Richardson Illinois Environmental Protection Agency Division of Legal Counsel 1021 North Grand Avenue East Post Office Box 19276 Springfield, Illinois 62794-8276 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) the REPLY TO THE ILLINOIS EPA's RESPONSE TO 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 August 2, 2010.

Respectfully submitted,

CANCER TREATMENT CENTERS OF AMERICA, INC., Petitioner

By: S/Keith Collins, its attorney

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REPLY TO THE ILLINOIS EPA'S
RESPONSE TO 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 in response to the Illinois Environmental Protection Agency' ("**Agency**") Response to Post-Hearing Brief ("**Response**"), Cancer Treatment Centers' Reply to the Agency's Response to Post-Hearing Brief ("**Reply**"), hereby stating as follows:

I. DENIAL OF REIMBURSEMENT TO CANCER TREATMENT CENTERS WOULD BE INCONSISTENT WITH THE PURPOSE OF THE REGULATIONS.

Cancer Treatment Centers is not "suggesting that the purpose and requirements of early action are just technicalities" Response, p. 11. However, determinations by the Agency in this and other recent cases suggest that the Agency's bureaucracy may have, at least in some situations, lost sight of the Agency's fundamental purposes. Cancer Treatment Centers submits that in this case the Agency focused on technicalities rather than its fundamental mission. That impedes, rather than facilitates, remediation.

Some librarians who come to view their mission as protecting books and library materials from students who seek to use and read them. Rather than facilitating and encouraging reading, such actions have the opposite effect. They instead discourage and deter reading. In much the same way, the Agency's efforts to limit early action reimbursement to "fill material" within four feet of the leaking UST and deny early action reimbursement pays no mind to the elephant in the soil.

II. THE AGENCY'S CRITICAL DATE DECISION SHOULD BE REVERSED.

The Agency's decision that the period for early action expired before the leaking UST was even discovered would exalt technicalities over logic and in this case, a failure to show appropriate deference to the OSFM. Bauer's testimony demonstrates the Agency's ongoing refusal to accept the value of PID testing, visual, olfactory, and field observations, despite its verification in the reports and photographs submitted to the Agency and reiterated in the testimony of Cancer Treatment Center's consultant. R. 25, Tr 111-119. Bauer's testimony, and the Agency's Response imply rejection of, and disdain for, PID testing. Moreover, they seem to connote an at least passive-aggressive rejection of the Board's Dickerson decision that the Agency's "unpromulgated rule" against consideration of PID testing was inappropriate.

Usually, but not always, the Board has affirmed the Agency's early action cutoff date decisions. However, the Board found in Broderick Teaming Company v. IEPA (April 5, 2001) PCB 00-187, that the regulation's time requirement was intended:

"...to avoid the situations that [the Agency has had] come up in the past couple of years where people are trying to be reimbursed for...early action costs A (sic)

year or two years after they have had their release and that is really not the intent of early action." Broderick, slip. op. at 5 [quoting November 18, 1996 testimony of Clay in regulatory hearings].

Alison Rosenberg reported on January 7, 2008 to IEMA that test results from analysis of soil boring samples indicated the likelihood of a release. R.1 Based on that date, the Agency arbitrarily decided that all work for which reimbursement was sought occurred too late. However, whether or not the report really confirmed the release for purposes of establishing the critical early action time line is drawn into question by Bauer's testimony that more extensive testing was needed.

Bauer testified that more soil borings and sampling should have been done prior to remediation. Tr, p. 76, 9, 97-98. It was wrong for the Agency to calculate the early action period based on the IEMA report date because, by the Agency's own testimony, at that juncture there was insufficient testing to confirm the release. Tr, Ibid.

Remediation began on May 6, 2008, effectively confirming the contamination. The leaking UST was not near the location where the removal, or continuing presence, of a cluster of tanks remained in question. R 443 at 446. As the remediation work moved toward the leaking UST, the concentration and severity of the contamination continually increased. T 30-31. That uncontroverted fact evidences that the hole-riddled, leaking UST, which still held hundreds of gallons of product, was the primary source of the contamination. Tr 17.

All remediation was performed between May 6, 2008 and June 28, 2008, including the June 3, 2008 discovery of the tank that was promptly reported to

the OSFM, and the hole-riddled tank's removal together with its petroleum contents, and the "fill material".

Using the Agency's logic from Bauer's testimony, the sampling was too limited to confirm a release. Therefore, confirmation of the release did not actually occur until the remediation began on May 6, 2008. As that remediation progressed, tons of petroleum contaminated soil were confirmed by PID testing and field observations of Alison Rosenberg. Evidence, in addition to the PID results, included vapors, odor, and soil discoloration. R 443-446, and T 17-18.

In Broderick, the Board reversed the Agency, and determined that the critical date was the day OSFM's inspector was on-site and confirmed the presence of the tank, not the earlier date decided by the Agency. Here, the critical date should be May 6, 2008, the date Cancer Treatment Centers began the remediation, thereby immediately confirming the release and contamination previously suspected, but not confirmed, based on the lab analysis of borings that triggered the earlier report to IEMA.

The critical facts on which the Board denied reimbursement in Ozinga Transportation Services v. Illinois Environmental Protection Agency (December 20, 2001), PCB-00188, are inopposite from both the instant case and Broderick. In Ozinga, the early action remediation occurred four months after the deadline. Unlike Broderick, in Ozinga, the facts did ..."not mandate a similar extension of the confirmation period." Ozinga, p. 9.

Here, the start of the actual remediation and soil removal confirmed the release. The proof was in the digging. When the tank was later discovered, OSFM directed, and confirmed in its report, that there would not be a second

IEMA report. The unusual circumstance here was OSFM's own confusion and uncertainty regarding the status or prior removal of other tanks from the Site that OSFM explained as the basis for OSFM's decision that there would not be a second IEMA report. In Broderick, the unusual circumstance was the delayed response of OSFM to the report. The facts in Ozinga did not include such special circumstances, and the time lapse from the IEMA report to remediation in Ozinga was longer.

Here, Cancer Treatment Centers submits that, as in Broderick, the unusual and special factual circumstances establish a basis for the Board making a similar change in calculating confirmation and cutoff dates, and that under these circumstances, the Agency should have deferred to the OSFM's decision and report. R 436, 443-446.

III. THE AGENCY FAILED TO SERVE ITS ESSENTIAL PURPOSE.

The public policy purpose for UST reimbursement of early action is to encourage prompt remediation by providing a funding mechanism for its reimbursement. Here, the Agency wants to sound the buzzer because Cancer Treatment Centers promptly and properly reported sampling results to IEMA. Later remediation confirmed the Site's contamination, during the course of which the leaking UST was discovered and, at OSFM's direction, a second IEMA incident report was not created.

Penalizing Cancer Treatment Center for taking early action to remediate the Site before the remediating began, and contamination was confirmed, violates the fundamental public policy purpose underlying the Illinois Environmental Protection Act, and the creation of the Agency. Moreover, denial

of Cancer Treatment Centers' reimbursement claim sends a negative message to anyone considering an early action cleanup about how the Agency is likely to view their claim.

The Agency's Response states "It is not clear why more than 480 cubic yards of soil was removed." Response, p.8. The inaccuracy of that statement echoes, and the testimony of Bauer on behalf of the Agency demonstrates, that the Agency has strayed too far from its fundamental purpose. Rather than focus on fulfilling its public charge, here the Agency has, as in Dickerson, rejected commonly utilized and recognized, pragmatic field observations, PID testing, and the Record's photographic evidence in order to deny Cancer Treatment Centers reimbursement for early action because:

(a) it sought to promptly remediate the Site, and

(b) its consultant relied on uncontroverted PID testing and visual and olfactory field observations.

Bauer's testimony confirms that the Agency would prefer the slower, more protracted and expensive approach of: (a) First Swiss-cheesing the site for laboratory samples, and (b) preparing and submitting a proposed plan of action to the Agency for its review and approval (or rejection), while letting the Site remain fallow and unremediated in the meantime. It was only after following that Agency-preferred such an approach, and repeated denials over a period of years, that Dickerson Oil saw no alternative but to remediate, and the Board reversed the Agency's reimbursement denial for the remediation.

The Agency's staff, seek to channel remediation away from early action into its costly and slow review and approval process. That burdens the public and frustrates the Agency's real purpose by discouraging and delaying

remediation. Whether or not intentional, the Agency's focus here appears to be on finding ways to deny or limit early action remediation reimbursement and direct the remediation process into a slower and more costly Agency model. Delays are inherent in corrective action plan submissions, reviews, and frequently Agency rejections. That led to the Board's recent reversal of the Agency in Dickerson, and what Cancer Treatment Centers submits to the Board, should lead to the Board's reversal of the Agency's decision in this case.

Both here, and in Dickerson, the Agency's decisions were geared to a functional goal of channeling reimbursement claims beyond four feet of "fill material" through the Agency's planning and preapproval process. The Agency's actions directly conflict with an important public purpose that it was established to serve. The Agency should be encouraging and facilitating prompt remediation, rather than delaying, discouraging and denying reimbursement for, prompt remediation of environmentally contaminated sites.

Straining the Agency's limited staffing and budget resources by overregulation and excessive demands on the Agency's limited staff resources makes no sense. Bauer refused to acknowledge either the appropriateness of using the PID process in the field or the significant cost increases and delays that would result if his preference for lots of lab samples had instead been the approach taken. Rosenberg testified to the obvious delays and additional costs for remediation that the Agency's preferences would serve to create.

The Agency's decision discourages and deters early action remediation. The Board's decisions in Dickerson, and in this case, both demonstrate that the

Agency increasingly focuses on adherence to its growing bureaucratic process, rather than the better purposes that it was established to serve.

IV. INCONSISTENT DECISIONS OF STATE AGENCIES WITHIN ILLINOIS CAN BE THE BASIS FOR EQUITABLE ESTOPPEL.

Environmental protection here involves several state agencies and instrumentalities in the State of Illinois. Citing Hickey v. Ill. Central R.R. Co. 35 Ill.2d 427, 220 N.E.2d 415, at 439, the decision in Wachta v. Pollution Control Board, 8 Ill.App.3d 436 at 440, 289 N.E. 2d 484 stated:

"The principles governing the application of estoppel have been summarized in *Hickey v. Ill. Central R.R. Co.* 35 Ill.2d 427, 447-449, 220 N.E.2d 415, at where it is seen that it may also be applied against the State even when it is acting in its governmental capacity....In *Hickey*, the State of Illinois was estopped from asserting its claim to ownership of real estate because of the "extraordinary circumstances" present in that case. [Citations omitted.]"

Here, a single situation involves multiple instrumentalities of the State, and Cancer Treatment Centers submits that appropriate deference and equitable estoppel should apply to prevent the Agency from ignoring and thwarting the actions of, and decision made, by OSFM.

OSFM, the Agency, and the Board are all instrumentalities of Illinois' state government and each is charged with environmental responsibilities. Cancer Treatment Centers followed the directions and decision of OSFM, and submits that under the facts of this case, the Agency should have deferred to the OSFM's direction. Because of that, Cancer Treatment Centers further submits that the Agency, which shares environmental responsibilities with both IEMA and OSFM, should be equitably estopped from doing otherwise. Wachta v. Pollution Control Board, following Hickey v. Illinois Central R.R. Co., 35 Ill.2d 427, reversing the Board, Wachta held that equitable estoppel applied:

"We perceive no unique exception to the application of the principle of estoppel, in the proper case, to the Pollution Control Board or the Environmental Protection Agency. They are subordinate agencies of the State with broad powers which may not be arbitrarily exercised and with responsibilities which must be carried out in a manner consistent with right and justice. Should the officials of these agencies by their authorized, positive acts create a situation where it would be inequitable to permit them to retract what they have done, the doctrine of estoppel may be applied against them wherever the circumstances require it. *Wachta*, 289 N.E.2d at 487."

V. NOTWITHSTANDING REZMAR, THE REMEDIATED SOIL CONTAINED FREE PRODUCT PROPERLY WITHIN THE SCOPE OF EARLY ACTION REIMBURSEMENT.

"Free product" is a commonly used environmental term. However, its definition under the regulations is far more precise than its common usage and common usage should not eviscerate or vitiate the precise regulatory definition. Here, the soil had an obvious diesel odor of the material contained in the UST in question, unlike the gasoline odor that would have existed from the previously removed tanks. R. 443-446, Tr 17-18. "...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...it was highly contaminated. Tr.113.

Fumes occur when the non-aqueous liquid chemical contaminant in the soil is exposed by excavation to the atmosphere and that contaminant forms vapor in the air. Liquids vaporizing upon exposure to air is a commonly recognized scientific phenomenon. Here that establishes that when the soil contaminated with the non-aqueous liquid was exposed to air, the liquid "free product" changed its state, becoming a vapor in the air.

Therefore, notwithstanding the Board's decision in Rezmar Corporation v. Illinois Environmental Protection Agency (April 17, 2003), PCB 02-91, Cancer

Treatment Centers respectfully submits that the non-aqueous liquid diesel contaminant contained in the soil, turning to vapor during remediation excavation directly meets the applicable definition of "free product" and that Cancer Treatment Centers' remediation of that free product was both within the scope of early action and eligible for reimbursement

VI. **CONCLUSION**

For the foregoing reasons, Cancer Treatment Centers respectfully requests that the Illinois Pollution Control Board reverse the Agency's determination, and grant to Cancer Treatment Centers reimbursement for the remediation, together with 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 Board.

Respectfully submitted,

CANCER TREATMENT CENTERS OF AMERICA, INC., Petitioner

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