ILLINOIS POLLUTION CONTROL BOARD
September 2, 2010

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

S. KEITH COLLINS APPEARED ON BEHALF OF PETITIONER; and,

JAMES G. RICHARDSON APPEARED ON BEHALF OF THE RESPONDENT.

OPINION AND ORDER OF THE BOARD (by G.T. Girard):

Cancer Treatment Centers of America (petitioner) filed a petition seeking review of a determination by the Illinois Environmental Protection Agency (Agency). The determination involves an underground storage tank (UST) site at 2414 North Sheridan Road, Zion, Lake County. The Agency denied reimbursement for early action at the site because the remediation steps taken were performed beyond the time period allowed for early action. Petitioner challenged the Agency's decision to deny reimbursement of $354,395.09, claiming that the remediation activities were early action as defined by the Environmental Protection Act (Act) and the Board's regulations.

The Board is unconvinced by the arguments of petitioner that the actions taken to remediate the site were early action. The Board is also unpersuaded that the statements made by an inspector for the Office of State Fire Marshal (OSFM) are sufficient to warrant application of the doctrine of equitable estoppel. The Board therefore affirms the Agency's decision to deny reimbursement to petitioner for remediation costs.

The Board first summarizes the procedural background and then addresses a preliminary matter concerning offers of proof at the hearing. Next the Board sets forth the relevant facts and statutory and regulatory background. The Board then enunciates the standard of review and burden of proof before summarizing the arguments of petitioner and the Agency. The Board then discusses the findings and the Board's reasoning for those findings.

PROCEDURAL BACKGROUND

On November 12, 2009, petitioner filed an appeal (Pet.) of an October 9, 2009 determination by the Agency to deny reimbursement for site remediation at an underground

storage tank (UST) site. The Agency's determination concerns petitioner's UST site at 2414 North Sheridan Road, Zion, Lake County (site). The Board accepted the petition for hearing on November 19, 2009.

The Agency filed the record (R.) on February 17, 2010 and on April 22, 2010, a hearing was held before Board Hearing Officer Bradley P. Halloran in Libertyville, Lake County (Tr.). Alison Rosenberg from Benchmark Environmental Services Inc. (Benchmark) testified on behalf of petitioner. Brian Bauer testified on behalf of the Agency.

On June 8, 2010, petitioner filed an opening brief (Br.) and on July 8, 2010 the Agency filed an opening brief (ABr.). On August 2, 2010, petitioner filed a reply brief (Reply).

FACTS

Benchmark was retained by petitioner to perform a remedial site investigation at the site to investigate "subsurface impacts resulting from historical use" of the site as a gasoline station. R. at 24, 278. Benchmark performed a Phase II subsurface investigation and Magnetometer search. R. at 24. Ms. Rosenberg, who has performed at least 30 such projects, was brought on to work on the Phase II investigation. Tr. at 8. Based on the Phase I investigation, Benchmark was investigating the possibility that USTs from a former gas station had leaked before being removed; however no formal documentation could be found regarding USTs. Tr. at 8-9.

The Phase II investigation consisted of seven soil borings adjacent to the former pump island location and adjacent to the suspected location of the USTs that had been previously removed. *Id*. The Magnetometer search found no anomalies and was inconclusive. *Id*., Tr. at 10. Three groundwater monitoring wells were placed and exceedences of BTEX compounds above Tiered Approach to Corrective Action Objectives (TACO) Tier I clean-up objectives were found in two borings. *Id*.

On December 14, 2007, Benchmark personnel performed remedial site investigation activities to determine the scope of contamination. R. at 24, 278. Benchmark concluded that a release had occurred from the previously removed USTs and pump islands. R. at 24. The release was reported to the Illinois Emergency Management Agency (IEMA). *Id*., R. at 1-2.

The IEMA hazmat report indicates that the incident was reported on January 7, 2008. R. at 1-2. On January 10, 2008, the Agency sent to the petitioner a letter indicating that the Agency was notified of a release from a UST by IEMA and informing petitioner that "as a result of this release, the owner or operator" of the UST "is required to comply with the leaking underground storage tank program requirements." R. at 3. The letter goes on to provide links to web sites to down load forms including forms for reimbursement. *Id*. Also on April 1, 2008, petitioner was notified of the failure to provide a 20-day certification or 45-day report to the Agency. R. at 4.

Based on the remedial site investigation performed in 2007, petitioner elected to perform corrective action, consisting of removal of soil and disposal of the soil at a landfill. R. at 24-25; Tr. at 12. Between May 6, 2008 and May 15, 2008, 3,465 cubic yards of impacted soil were excavated and removed. *Id*. The soils were continuously monitored using a PID meter. *Id*.

When the soil levels registered less than one part per million, the excavation was stopped and sampling was performed. *Id.*

During soil excavation a 2,000 gallon diesel UST was discovered and on June 25, 2008, the tank was removed. R. at 25; Tr. at 12-14. The UST was discovered approximately 100 feet east of the initial site investigation. Tr. at 12. Upon discovery of the tank, Benchmark halted remediation and applied for permits to remove the tank. R. at 25; Tr. at 13. Petitioner opted to register the tank at that point. *Id.*

The tank contained product which was pumped out prior to removal of the tank. R. at 25. Holes were observed in the tank, resulting in a conclusion that the tank had leaked. R. at 25; Tr. at 17. Ms. Sue Dwyer from the OSFM was present during removal. *Id.* Ms. Rosenberg indicated that Ms. Dwyer informed Benchmark that a new IEMA incident number was not required and Ms. Dwyer used the IEMA number from the January 7, 2008 reporting on her documents . *Id.*. R. at 444-446

On June 30, 2008, Benchmark returned to the site and supervised the excavation and removal of approximately 330 cubic yards of contaminated soil. R. at 25. The soil was again monitored using a PID meter and when the soil registered less than one part per million, excavation was halted. *Id.* At that point, samples were taken to be analyzed for BTEX/PNA/Total lead compounds. *Id.* Ms. Rosenberg testified that the contamination was consistent well beyond four feet from the tank bed. Tr. at 32. Ms. Rosenberg further testified that she could not determine which contamination was from the 2,000 gallon tank and which was from the prior tank removals. Tr. at 33.

On August 25, 2008, the Agency received the petitioner's 20-day certification, 45-day report, and corrective action completion report. R. at 5-14. On July 6, 2009, petitioner filed a request for reimbursement. R. at 413. On October 9, 2009, the Agency denied reimbursement. R. at 401. The Agency's denial letter states that the entire $354,395.09 is denied as the costs were incurred from May 6, 2008 to June 30, 2008 and are not eligible for reimbursement. *Id.* The letter states that the costs were not incurred during the early action timeframe and are ineligible for reimbursement pursuant to Section 734.210(g) (35 Ill. Adm. Code 734.210(g) and Section 57.7(c)(3) of the Environmental Protection Act (Act) (415 ILCS 5/57.7(c)(3) (2008)). *Id.*

The Agency's letter provides a more detailed breakdown for denial as well. First, $28,357.42 represents costs that might have been eligible costs if the tank had been removed within the 45-day early action timeframe. R. at 403, Tr. at 83-84. Second, $302,659.75 would also be denied because the costs were for "removal, treatment, transportation, and disposal of more than four feet of fill material from the outside dimensions of the UST" contrary to Section 57.6 of the Act (415 ILCS 5/57.6 (2008)) and Section 734.630(a) of the Board's regulations (35 Ill. Adm. Code 734.630(a)). R. at 404. Third, $11,954.06 would be deducted because the request lacked supporting documentation. *Id.* Fourth, $11,423.86 would be deducted as an adjustment for ineligible handling charges. R. at 405.

STATUTORY AND REGULATORY BACKGROUND

Section 57.6 of the Act (415 ILCS 5/57.6 (2008)) sets forth requirements for early action at a leaking underground storage tank site and provides, in part:

> b) Notwithstanding any other corrective action taken, an owner or operator may, at a minimum, and prior to submission of any plans to the Agency, remove the tank system or abandon the underground storage tank in place, in accordance with the regulations promulgated by the Office of the State Fire Marshal. The owner or operator may also remove visibly contaminated fill material and any groundwater in the excavation which exhibits a sheen. For purposes of payment for 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) (2008).

Section 57.7 of the Act (415 ILCS 5/57.7 (2008)) sets forth the requirements for site investigation and corrective action at a site where a leaking underground storage tank has been removed. Section 57.7(c) of the Act (415 ILCS 5/57.7(c) (2008)) sets forth the provisions for Agency review and approval of plans submitted under the Act. Section 57.7(c)(3) of the Act provides:

> In approving any plan submitted pursuant to subsection (a) or (b) of this Section, the Agency shall determine, by a procedure promulgated by the Board under Section 57.14, that the costs associated with the plan are reasonable, will be incurred in the performance of site investigation or corrective action, and will not be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of this Title. 415 ILCS 5/57.7(c)(3) (2008).

Section 734.115 sets forth definitions to be used under the UST program and defines "fill material" and "free product" as follows:

> "Fill Material" *means non-native or disturbed materials used to bed and backfill around an underground storage tank* [415 ILCS 5/57.2].
>
> "Free Product" means a contaminant that is present as a non-aqueous phase liquid for chemicals whose melting point is less than 30° C (e.g., liquid not dissolved in water). 35 Ill. Adm. Code 734.115

Section 734.Subpart B delineates the requirements for early action. Section 734.210 sets forth the specific requirements for early action. Section 734.210 provides in relevant part:

> a) Upon confirmation of a release of petroleum from an UST system in accordance with regulations promulgated by the OSFM, the owner or

operator, or both, must perform the following initial response actions within 24 hours after the release:

1) Report the release to IEMA (e.g., by telephone or electronic mail);

2) Take immediate action to prevent any further release of the regulated substance to the environment; and

3) Identify and mitigate fire, explosion and vapor hazards.

* * *

f) *Notwithstanding any other corrective action taken, an owner or operator may, at a minimum, and prior to submission of any plans to the Agency, remove the tank system, or abandon the underground storage tank in place, in accordance with the regulations promulgated by the Office of the State Fire Marshal* (see 41 Ill. Adm. Code 160, 170, 180, 200). *The owner may remove visibly contaminated fill material and any groundwater in the excavation which exhibits a sheen. 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)]. Early action may also include disposal in accordance with applicable regulations or ex-situ treatment of contaminated fill material removed from within 4 feet from the outside dimensions of the tank.

g) 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 special circumstances, approved by the Agency in writing, warrant continuing such activities beyond 45 days plus 14 days. The owner or operator must notify the Agency in writing of such circumstances within 45 days after initial notification to IEMA of a release plus 14 days. Costs incurred beyond 45 days plus 14 days must be eligible if the Agency determines that they are consistent with early action.

BOARD NOTE: Owners or operators seeking payment from the Fund are to first notify IEMA of a suspected release and then confirm the release within 14 days to IEMA pursuant to regulations promulgated by the OSFM. See 41 Ill. Adm. Code 170.560 and 170.580. The Board is setting the beginning of the payment period at subsection (g) to correspond to the notification and confirmation to IEMA. 35 Ill. Adm. Code 734.210(a), (f) and (g).

Section 734.220 provides:

> Owners or operators 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. 35 Ill. Adm. Code 734.220.

Section 734.630 sets forth specific costs which are ineligible for reimbursement and that includes "costs that lack supporting documentation." 35 Ill. Adm. Code 734.630(cc). Section 734.635 provides:

> Handling charges are eligible for payment only if they are equal to or less than the amount determined by the following table:
>
> | Subcontract or Field Purchase Cost: | Eligible Handling Charges as a Percentage of Cost: |
> |---|---|
> | $0 - $5,000 | 12% |
> | $5,001 - $15,000 | $600 + 10% of amt. over $5,000 |
> | $15,001 - $50,000 | $1,600 + 8% of amt. over $15,000 |
> | $50,001 - $100,000 | $4,400 + 5% of amt. over $50,000 |
> | $100,001 - $1,000,000 | $6,900 + 2% of amt. over $100,000 |

35 Ill. Adm. Code 734.635.

STANDARD OF REVIEW AND BURDEN OF PROOF

The Board must decide whether petitioner's submittal to the Agency demonstrated compliance with the Act and the Board's regulations. *See, e.g.*, Illinois Ayers Oil Co. v. IEPA PCB 03-214, slip op. at 8 (April 1, 2004); Kathe's Auto, PCB 96-102, slip op. at 13. The Board's review is generally limited to the record before the Agency at the time of its determination. *See, e.g.*, Freedom Oil, PCB 03-54, slip op. at 11; *see also* Illinois Ayers, PCB 03-214, slip op. at 15 ("the Board does not review the Agency's decision using a deferential manifest-weight of the evidence standard," but "[r]ather the Board reviews the entirety of the record to determine that the [submittal] as presented to the Agency demonstrates compliance with the Act").

Further, on appeal before the Board, the Agency's denial letter frames the issue (*see, e.g.*, Karlock v. IEPA, PCB 05-127, slip op. at 7 (July 21, 2005)) and the UST owner or operator has the burden of proof (*see, e.g.*, Ted Harrison Oil v. IEPA, PCB 99-127, slip op. at 5-6 (July 24, 2003); *see also* 35 Ill. Adm. Code 105.112). The standard of proof in UST appeals is the "preponderance of the evidence" standard. Freedom Oil, PCB 03-54, slip op. at 59; *see also* McHenry County Landfill, Inc. v. County Bd. of McHenry County, PCB 85-56, 85-61, 85-62,

85-63, 85-64, 85-65, 85-66 (consol.), slip op. at 3 (Sept. 20, 1985) ("A proposition is proved by a preponderance of the evidence when it is more probably true than not.").

PETITIONER'S ARGUMENTS

Petitioner argues that the petitioner relied on the OSFM's direction that a subsequent IEMA report was not necessary and that the petitioner's reliance was reasonable. Br. at 4. Petitioner notes that under the Act, the OSFM determines eligibility for reimbursement and deductable amounts to be applied. Br. at 10. In this instance OSFM determined that a second report regarding contamination at the site to IEMA was not necessary. *Id*. Petitioner asserts that the petitioner relied on the OSFM decision that a second report to IEMA was not necessary. *Id*. Therefore, petitioner opines equitable estoppel should apply. *Id*.

Petitioner further argues that the Agency should have deferred to OSFM's direction and eligibility determination and thus, the Agency's decision should be reversed. *Id*. Petitioner claims that the Agency's denial is primarily based on "a technicality that OSFM told" petitioner that the petitioner did not need to satisfy. *Id*. The petitioner maintains that the Agency "fundamentally rejects" petitioner's request for reimbursement because of the date of the IEMA report. Br. at 10. Petitioner claims that petitioner relied on OSFM's statements and petitioner should not be precluded from reimbursement because petitioner reasonably relied on those OSFM statements to petitioner's detriment. Pet. at 10. Petitioner argues that in deciding whether or not to apply equitable estoppel, all of the circumstances are to be considered and a government agency may be estopped. Br. at 10-11, citing Hickey v. Illinois Central Railroad Company, 35 Ill. 2d 427, 449 (1966).

Petitioner asserts that a second basis for the denial is that there is a four foot fill excavation limitation for removal of a UST and the Agency applied that limitation to exclude all but 480 cubic yards of soil. Br. at 4. Petitioner argues that the Agency is "again applying" an "unpromulgated rule" that contaminated soil is presumed clean unless tested by laboratory methodology. *Id*. Petitioner asserts that such testing is not generally utilized, except for confirmatory samples and that such methods delay remediation and increase costs. *Id*. Petitioner points to testimony by Mr. Bauer that indicates a substantial amount of clean soil was removed because laboratory lab sampling was not performed to support the argument. Br. at 4-5, citing Tr. at 94-95. Petitioner maintains that "connecting the dots" establishes that the Agency is "continuing" to reject PID testing, contrary to the Board's decision in Dickerson Petroleum, Inc. v. IEPA, PCB 9-87, 10-105 (consld.) (Feb. 4, 2010). Br. at 5.

Petitioner argues that PID testing, visual soil discoloration, and petroleum odor demonstrated widespread soil contamination at the site. Br. at 5. Petitioner asserts that the Agency has "chosen to reject the obvious existence of contamination" due to bias against the PID testing and the Agency ignores the language of Section 734.220 (35 Ill. Adm. Code 734.220). Br. at 11. Petitioner notes that Section 734.220 (35 Ill. Adm. Code 734.220) specifically allows removal of free product more than 45 days after confirmation of release as a part of early action. *Id*. Petitioner claims that over 800 gallons of free product was removed from the UST before the tank's removal. *Id*. Petitioner asserts that "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. at 12.

Petitioner asserts that based on the record, the Agency should have deferred to the OSFM's determination. Br. at 12. Petitioner opines that "it would be unjust and inequitable for the Agency's denial to stand." *Id*. Therefore, petitioner argues that Board should reverse the Agency's decision.

AGENCY'S ARGUMENTS

The Agency argues that to receive reimbursement from the UST fund, early action must be completed within 45 days of IEMA notification plus 14 days. ABr. at 3, citing 35 Ill. Adm. Code 734.210(g). In this case, the Agency notes that the release was reported on January 7, 2008 and no extensions were requested, thus the early action timeframe ended on March 6, 2008. *Id*. The Agency maintains that since petitioner's request for reimbursement was for activities beginning on May 6, 2008 until June 30, 2008, all $354,395.09 in costs are ineligible for reimbursement from the UST fund. ABr. at 3-4.

Furthermore, the Agency notes that additional analysis of the costs establishes that $28,357.42 might have been eligible costs if performed during early action; however, reimbursement would not have been made as petitioner is subject to a $100,000 deductible. ABr. at 4. The Agency maintains that denial of other funds was appropriate not only for being outside the early action timeframe but for other reasons. *Id*. For example, the Agency's denial of $302,639.75 was also appropriate because the excavation, transportation and disposal of backfill or clean backfill procurement was beyond the four foot rule. *Id*. Another example cited by the Agency is $11,954.06 that lacked supporting documentation. ABr. at 5. Finally, the requested reimbursement for handling charges would have been adjusted by $11,423.86 because proof of payment was not provided. *Id*. The Agency notes that petitioner has not challenged the last two deductions. *Id*.

The Agency argues that the statutory and regulatory requirements concerning early action timeframes and the four foot rule are clear and straightforward. ABr. at 5. The Agency maintains that with a January 7, 2008 reporting to IEMA, the early action timeframe expired on March 6, 2008, yet the activities petitioner sought reimbursement for did not begin until May 6, 2008 a full two months from the end of the early action timeframe. *Id*. The Agency notes that the Board has agreed with the Agency that allowing reimbursement for activities performed outside the early action timeframe would moot the requirement to extend the timeframe. *Id*., citing Broderick Teaming Company v. IEPA, PCB 00-187 (Apr. 5, 2001). The Agency notes that the unique facts in Broderick caused the Board to change the beginning date of the early action timeframe; however, the Board reiterated that the rules require early action to occur within 45 days of the reporting to IEMA. ABr. at 5-6.

The Agency points out that the Board has refused to extend Broderick when another petitioner sought to have the early action timeframe altered. ABr. at 6, citing Ozinga Transportation v. IEPA, PCB 00-188 (Dec. 20, 2001). The Agency also points out that the Board stated in Ozinga that altering the early action timeframe would frustrate the intent of early

action and the Board held that activities performed outside of the early action timeframe were not reimbursable as early action. *Id.*

The Agency asserts that the facts in this case are not compelling enough to warrant application of Broderick. Furthermore, the Agency maintains that the deduction of all of petitioner's costs is consistent with the Act, Board regulations and Board case law. ABr. at 6.

Concerning the four foot rule, the Agency notes that in Rezmar Corporation v. IEPA, PCB 02-91 (Apr. 17, 2003), the Board agreed that removal of more than four feet of fill material is more appropriately characterized as corrective action, not early action. ABr. at 6-7. The Agency maintains that the application of the four foot rule in this case, as an additional denial reason, is consistent with the regulations and the Board's interpretation of the regulations. ABr. at 7.

The Agency notes that after soil samples that indicated exceedences of the TACO Tier 1 objectives were taken in 2007, a release was reported to IEMA. However, the Agency opines that at this point, the petitioner does not appear to have been planning on entering the UST program. ABr. at 7. The Agency points to a January 2008 Remedial Site Investigation report that recommended submittal of a site remediation report to the Agency's Site Remediation Program to support this theory. *Id.*, citing R. at 286. The Agency argues that 61 days after the release was reported petitioner began excavating the site and by May 15, 2008, approximately 3,465 cubic yard of soil had been removed and a 2,000 gallon UST was discovered. ABr. at 8.

The Agency acknowledges that an OSFM permit was issued for removal of the tank and that OSFM's Ms. Dwyer determined that a new incident number was not required. ABr. at 8. However, the Agency argues that petitioner "neither explains what requirements of the UST Program Agency deference to the OSFM's direction would have satisfied nor identifies the exact costs such deference would have made eligible for reimbursement." *Id.* The Agency asserts that this line of argument should not prevail. The Agency points out that the Board in Weeke Oil Company v. IEPA, PCB 10-1 (May 20, 2010) explained that several state agencies have roles in the UST program. ABr. at 8. The Agency argues that by statutory design, the OSFM has no role or authority in determining what costs will be reimbursed. ABr. at 9.

The Agency also takes issue with petitioner's reliance on Hickey, noting that the Hickey case is generally cited for the principle that estoppel does not apply to public bodies under usual circumstances. ABr. at 9. The Agency maintains that petitioner has made no effort to demonstrate that the six elements requisite for the imposition of estoppel exist in this case. *Id.*, citing Willowbrook Development Corporation v. IPCB and IEPA, 416 N.E. 2d 385. The Agency asserts that petitioner's attempt to invoke estoppel is defeated by the fact that estoppel only extends to and operates between parties and their privies, and the statements of an OSFM employee are not attributable to the Agency. *Id.*

The Agency opines that petitioner is responsible for the "predicament it is in" due to decisions and actions regarding the site. ABr. at 9. The Agency claims that petitioner was in a hurry to remediate the site and obtain an NFR letter to develop the property. ABr. at 10. The Agency asserts that Ms. Rosenberg's testimony indicates that the petitioner viewed early action

as a quick and immediate way to address all contamination at the site, instead of viewing early action as the first step in the UST program remediation process. *Id*. Furthermore, the Agency asserts that petitioner attempts to portray the conditions at the site as being dire; however, the Agency argues none of the conditions noted are unusual for a site where leaking UST's have been removed. *Id*. Also, the Agency argues that petition fails to "substantiate" that the 2,000 gallon tank was the source of all contamination. *Id*.

The Agency takes issue with petitioner's reliance on the decision in Dickerson as the Agency notes that Dickerson made no ruling on PID testing. ABr. at 12. The Agency also maintains that the definitions of free product and fill material are clear. *Id*. Furthermore, the petitioner checked on the form that free product was not encountered, according to the Agency. *Id*., citing R. at 7, 24. Therefore, the Agency maintains that petitioner's argument about free product must fail. ABr. at 13.

PETITIONER'S REPLY

Petitioner agrees that early action requirements are not mere technicalities; however, petitioner opines that the Agency's recent decisions suggest that the Agency has "lost sight of the Agency's fundamental purposes." Reply at 1. Petitioner asserts that the Agency has focused on technicalities rather than the Agency fundamental mission in this instance. *Id*. Specifically, petitioner maintains that the Agency's decision that the early action period expired before the leaking UST was discovered raises technicality over logic and is a failure to show the OSFM the proper deference. Reply at 2.

Petitioner concedes that the Board usually affirms the early action cut-off date decisions by the Agency, but notes one exception in Broderick. Reply at 2. Petitioner notes that in that case the cut-off date was extended. Reply at 2-3. Petitioner points out that the IEMA report occurred on January 7, 2008, however, petitioner challenges whether that date establishes the early action time line due to Mr. Bauer's testimony. Reply at 3. Specifically, petitioner notes that Mr. Bauer testified that more soil borings and sampling should be done prior to remediation and petitioner claims that the Agency cannot calculate early action on the IEMA report date because by the Agency's own testimony there was not enough testing to confirm a release. *Id*.

Petitioner argues that remediation began on May 6, 2008, "effectively confirming contamination" and the 2,000 gallon diesel tank was not near the location where the prior tanks had been removed. Reply at 3. As remediation work began, the contamination increased as the digging moved toward the 2,000 gallon tank. *Id*. Petitioner asserts that this "uncontroverted fact" establishes that the 2,000 gallon tank was the primary source of the contamination. *Id*.

Petitioner points out that in Broderick the Board reversed the Agency and determined that the critical date was the day the OSFM inspector was on site and confirmed a release. Reply at 4. Petitioner maintains that in this case the critical date is May 6, 2008, the date remediation began and a release was confirmed. Petitioner distinguishes this case from Ozinga arguing that in Ozinga remediation occurred four months after the deadline. *Id*. Petitioner asserts that the unusual and special factual circumstances here support a decision by the Board changing the early action date. Reply at 5.

Petitioner argues that the public policy purpose for early action in remediation of a leaking UST is to encourage prompt clean-up by providing a funding mechanism for reimbursement. Reply at 5. Petitioner claims that the Agency is penalizing petitioner for taking early action to remediate a site and that is contrary to the underlying principles of the Act and the creation of the Agency. *Id*. Petitioner also claims that denying the reimbursement claim "sends a negative message to anyone considering and early action cleanup." Reply at 6.

Petitioner maintains that the Agency's response concerning removal of 480 cubic yards of soil and the assertion that the record is unclear as why the soil was removed, "demonstrates that the Agency has strayed too far from its fundamental purpose." Reply at 6. Petitioner argues that like the Dickerson case, here the Agency has "rejected commonly utilized and recognized, pragmatic field observations, PID testing" and photographic evidence to deny the petitioner's claim. *Id*. Petitioner asserts that the claim was denied because petitioner sought to remediate the site and the consultant relied on PID testing. *Id*.

Petitioner argues that the Agency's staff seeks to move away from early action to a more costly slow review and approval process. Reply at 6. Petitioner charges that such action frustrates the Agency's real purpose. *Id*.

Petitioner argues that inconsistent decisions of state agencies can be the basis of equitable estoppel and cites Hickey and Wachta v. IPCB, 8 Ill. App. 3d 436, 289 N.E.2d 484. Reply at 8. Petitioner argues that in this case a single situation involves multiple state agencies and deference and equitable estoppel should apply to keep the Agency from ignoring the OSFM's decisions. *Id*. Petitioner maintains that petitioner followed the direction of the OSFM and the Agency should have deferred to the OSFM in this case. *Id*.

Petitioner asserts that "free product" is a commonly used environmental term and the definition in the UST regulations is far more precise. Reply at 9. Petitioner argues that notwithstanding the decision in Rezmar, the non-aqueous liquid diesel contaminant meets the definition of "free product" in this case. Reply at 10.

DISCUSSION

Petitioner's arguments can be generally grouped into three issues categories. The first issue the Board will discuss is whether or not the requested reimbursement costs were associated with early action activities. Next, the Board will discuss the issue of soil removal. Finally, the Board will discuss the issue of policy arguments raised by petitioner.

Early Action

Section 57.6(a) of the Act (415 ILCS 5/57.6(a) (2008)) requires owners and operators of USTs to comply with all applicable statutory and regulatory reporting and response requirements in responding to all confirmed releases. Section 57.6(b) of the Act (415 ILCS 5/57.6(b) (2008)) allows the owner or operator to remove the tank, visibly contaminated fill material and any groundwater in the excavation that exhibits a sheen, prior to submission of plans to the Agency.

In addition, in order for the remedial actions to be reimbursed as early action, the Board's regulations require that the activities delineated in Section 57.6 of the Act (415 ILCS 5/57.6 (2008)), and repeated in the Board's regulations at Section 734.210(f), must be completed within 45 days, plus 14 days, unless the Agency extends the early action timeframe. *See* 35 Ill. Adm. Code 734.210(g).

In this case, a report was made to IEMA on January 7, 2008, when petitioner's consultants determined a release occurred from previously removed USTs. *See* R. at 24. No remedial action was taken until May 6, 2008 over two months after the report to IEMA. R. at 25. Thus even before discovery of the 2,000 gallon diesel tank, the remedial action was beyond the timeframe for early action. Further, no reports were made to the Agency during that timeframe, even though the Agency informed petitioner of the obligations for reporting under the UST statutes and regulations on January 10, 2008. *See* R. at 3. The Agency even notified petitioner of the failure to provide a 20-day certification or 45-day report on April 1, 2008. *See* R. at 4.

When remedial action began on May 6, 2008, the remedial action involved removal of 3,465 cubic yards of soil. During the soil removal a 2,000 gallon diesel tank was discovered. R. at 25. Upon discovery of the 2,000 gallon diesel tank, petitioner registered the tank with OSFM. R. at 25.

The language of the Board's rule is clear; early action takes place during the period 45 days, plus 14 days, from initial reporting of a release to IEMA. Furthermore, the steps which may be taken during early action are defined in both the Board's rules and the statute. *See* 415 ILCS 5/57.6 (2008) and 35 Ill. Adm. Code 734.210. In this case, the tank pull did not occur until June 25, 2008 and the tank bed was not excavated until June 30, 2008. The Board finds that these actions clearly took place well beyond the timeframe for early action as that term is used in the Act and Board regulations based on the initial report to IEMA on January 7, 2008.

Remedial Action at the Site Should be Considered Early Action

Petitioner presents several arguments to explain why reimbursement should be granted for the remedial activities at the site as early action activities, even though the plain language of the statute and rule seem to indicate that the activities are not early action. Those arguments are discussed below

Petitioner argues that the Board should find that equitable estoppel applies because the OSFM told the petitioner's consultant that a new report to IEMA was not necessary and petitioner relied on that statement to petitioner's detriment. Petitioner believes that the Agency should be bound by that decision. The Board has held that "the doctrine of estoppel may be applied when a party reasonably and detrimentally relies on the words or conduct of another." County of Sangamon v. Everett Daily, AC 01-16, slip op. at 14-15 (Jan. 10, 2002); People v. John Crane, Inc., PCB 01-76, slip op. at 9 (May 17, 2001). "[T]he application of equitable estoppel against a public body is generally disfavored and should not be invoked except in rare and unusual circumstances, but the doctrine may be applied where, under all facts and circumstances, . . . it would be inequitable or unjust to permit [the public body] to negate what it has done or permitted to be done. In the Matter of: Pielet Brothers' Trading Inc., AC 88-51, slip

op. at 16 (Jul. 13, 1989), citing Ponton v. Illinois State Board of Education, 62 Ill. App. 3d 907, 909, 379 N.E.2d 1277, 1278 (1st Dist. 1978). In Crane, the Board held that, "parties seeking to estop the government must demonstrate that their reliance was reasonable and that they incurred some detriment as a result . . . [a] party seeking to estop the government also must show that the government made a misrepresentation with knowledge that the misrepresentation was untrue." Crane, PCB 01-76, slip op. at 9.

The Board is not convinced that petitioner reasonably and detrimentally relied on the statements of the OSFM. The Board notes that the rules on reimbursement for early action clearly and unequivocally state that in order to be reimbursed, the activities must be conducted within 45 days plus 14 days of the report to IEMA. *See* 35 Ill. Adm. Code 734.210(g). Furthermore, the Board's rules require that the release be reported to IEMA within 24 hours. *See* 35 Ill. Adm. Code 734.210(a)(1). Thus, the Board's rules make clear that early action remediation activities must be performed within 45 days plus 14 days in order to be reimbursed. Petitioner's consultant, who "relied" on the statements by the OSFM, was well aware that the initial IEMA report had been submitted on January 7, 2008. Furthermore, petitioner's consultant testified that she had worked on over 30 projects (*see* Tr. at 8), so a familiarity with the Act and Board's rules could reasonably be expected. Finally, OSFM's comments directly contradict the Board's rules and OSFM misstatements cannot be used to circumvent a properly adopted Board rule. Thus, the Board finds that there was not a reasonable reliance on the statements by the OSFM and equitable estoppel does not apply in this case.

As to petitioner's arguments that the Agency should be bound by OSFM's decision, the Board is not convinced that the Agency should defer to the OSFM on issues of reimbursement beyond a eligibility and deductibility determination by OSFM. As the Board stated in Weeke Oil:

> Under the Act, the leaking underground storage tank program has roles for several state agencies. IEMA is the state agency that receives notification of a release within 24 hours of the discovery of the release. *See* 415 ILCS 5/57.5(c) (2008). 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). The Board adopts rules setting remediation objectives, reimbursement levels, and reviews decisions by the Agency and OSFM. *See* 415 ILCS 5/57.7, 57.8, 57.9, 57.14A (2008). The Act does not allow the Agency to review or reverse a finding by OSFM of eligibility; only the Board may reverse OSFM's eligibility determinations. *Id*. Weeke Oil Company v. IEPA, PCB 10-1 (May 20, 2010), slip op at 20-21.

Nothing in the Act (*see e.g.* 415 ILCS 5/57.5(c), 57.9 (2008)) gives the OSFM the authority to make decisions regarding reimbursement of costs beyond the eligibility and deductibility determinations. Furthermore, as previously discussed, the Board's rules regarding reimbursement of early action activities are clear and unequivocal. Therefore, the Board finds

that petitioner's argument that the Agency should defer to the OSFM in this case is without merit and not supported by the plain language of the Act or Board regulations.

The petitioner next argues that the Board should reset the timeframe for early action by finding that early action began on May 6, 2008, similar to the Board's decision in Broderick. The Board finds Broderick inapplicable and distinguishable. In Broderick, the OSFM designee did not inspect the site and confirm a release for several weeks after the report was made to IEMA. Broderick, slip op at 5. In this case, the reporting of a release to IEMA occurred prior to the discovery of the UST. The report of release at the time of the initial reporting to IEMA on January 7, 2008, is clearly not linked to the diesel tank for which reimbursement is being sought because the diesel tank had not been discovered (*see* R. at R at 25). Furthermore, the Board clearly limited the scope of Broderick to the facts of that case and in Ozinga reiterated the limited applicability of Broderick.

The Board notes that in addition to the limiting of the application of Broderick in Ozinga, the Board's rules were amended to remove any potential ambiguity. *See*, Regulation of Petroleum Leaking Underground Storage Tanks; Amendments to 35 Ill. Adm. Code 732, R01-26 (Apr. 18, 2002); Proposed Amendments to Regulation of Petroleum Leaking Underground Storage Tanks (35 Ill. Adm. Code 732) and Proposed Amendments to Regulation of Petroleum Leaking Underground Storage Tanks (35 Ill. Adm. Code 734), R01-22(A) and R01-23(A) (consld.) (Feb. 16, 2005). In R01-26, the Board changed the language of the rule that was at issue in Broderick at Section 732.202(g) to provide that early action encompasses the activities performed "within 45 days after initial notification to IEMA of a release plus 7 days". *See* R01-26, slip op. at 18. In R04-22 and R04-23, the Board amended the language form 7 days to 14 days and added the identical language to Section 734.210(g). Therefore, the Board finds that Broderick is inapplicable and distinguishable and the petitioner's argument must fail.

Conclusion on Early Action

Based on the record, the Board finds that the remediation activities for which petitioner seeks reimbursement occurred beyond the timeframe established in Board regulations for early action. Further, the Board finds that equitable estoppel does not apply as petitioner could not reasonably have relied on the statements by the OSFM regarding reporting of a release to IEMA. Finally, the Board finds that the facts of this case do not warrant a change in the date upon which the early action timeframe began. Therefore, the Board affirms the Agency's denial of reimbursement for the entire $354,395.09 requested by petitioner.

Soil Removal

Having found that the remedial activities petitioner seeks reimbursement for fall outside the early action timeframes, the Board need not address the remaining arguments. However, the Board will do so to prevent any confusion on the issues in the future. The first issue involves petitioner's argument that the removal of over 3,000 cubic yards of impacted soil was eligible for reimbursement. Petitioner argues that the contamination was widespread and PID testing was performed to insure the removal of all contaminated soil.

Section 57.6(b) of the Act (415 ILCS 5/57.6(b) (2008)) specifically states that for purposes of early action fill material "shall not be removed in an amount in excess of 4 feet from the outside dimensions of the tank." The petitioner is seeking reimbursement arguing that the remediation was early action and under the statute the amount of material that can be removed is limited to four feet from the outside dimensions of the tank. Petitioner argues that the Agency's decision demonstrates a disregard for the Board's decision in Dickerson; however, petitioner overstates the Board's finding in Dickerson. In Dickerson, the Board found that the Agency's denial letters were insufficient to meet the requirements of the Act and Board regulations and remanded the case to the Agency. Further, the facts of Dickerson involved the use of PID testing to establish that a release had occurred, while here petitioner is seeking to use PID testing for support in removing contaminated soil.

Petitioner also attempts to argue that the removal of impacted soil should be reimbursable because the soil meets the definition of "free product". However, the petitioner indicated on the forms provided to the Agency that there was no "free product" present and the Board finds that the facts of this case do not support the petitioner's position. Therefore, the Board finds that the $302,659.75 in reimbursement costs was also appropriately denied because the soil removal extended beyond the four feet allowed under Section 57.6(b) of the Act (415 ILCS 5/57.6(b) (2008)).

Agency's Decision

The petitioner also makes arguments concerning the Agency's decision being against good public policy and is an attempt to force petitioner into a slower type of remediation. The Board cannot comment on the Agency's intent, but the Board does note that the Agency's decision is supported by both the record and the statutory and regulatory provisions implementing the UST program. Early action is only one step in the UST process, if a site needs additional remediation beyond that defined as early action, then the site proceeds to site investigation and corrective action. *See* 35 Ill. Adm. Code 734.Subpart C. Proceeding with remediation under those regulatory provisions does require additional reporting and planning with the Agency and will extend beyond the timeframes for early action. However, those remedial activities may be eligible for reimbursement.

CONCLUSION

Based on the record, the Board finds that the remediation activities for which petitioner seeks reimbursement occurred beyond the timeframe established in Board regulations for early action. Further, the Board finds that equitable estoppel does not apply as petitioner could not reasonably have relied on the statements by the OSFM regarding reporting of a release. Finally, the Board finds that the facts of this case do not warrant a change in the date upon which the early action timeframe began. Therefore, the Board affirms the Agency's denial of reimbursement for the entire $354,395.09 requested by petitioner.

This opinion constitutes the Board's findings of fact and conclusions of law.

ORDER

The Illinois Environmental Protection Agency's denial of Cancer Treatment Centers of America's request for reimbursement for early action at an underground storage tank (UST) site at 2414 North Sheridan Road, Zion, Lake County is affirmed.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2008); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on September 2, 2010, by a vote of 4-0.

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board