ILLINOIS POLLUTION CONTROL BOARD
September 4, 2014

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| BRIMFIELD AUTO & TRUCK, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | PCB 12-134 |
| | ) | (UST Appeal) |
| ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, | ) | |
| | ) | |
| Respondent. | ) | |

ROBERT M. RIFFLE, LAW OFFICE ROBERT M. RIFFLE, APPEARED ON BEHALF OF PETITIONER; and

SCOTT B. SIEVERS, SPECIAL ASSISTANT ATTORNEY GENERAL, APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by J. D. O'Leary):

Petitioner Brimfield Auto & Truck (BA&T) appeals an April 30, 2012 determination of the Illinois Environmental Protection Agency (Agency or IEPA). The Agency modified BA&T's proposed Stage 1 Site Investigation Plan Budget for BA&T's leaking underground storage tank (UST) site located at 408 East Knoxville Road in Brimfield, Peoria County (site). For the reasons stated below, the Board today affirms the Agency's determination.

The Board's opinion and order begins with the procedural history and factual background of this case. Next, the Board summarizes BA&T's petition for review and post-hearing brief, the Agency's post-hearing brief, and BA&T's reply. The Board then provides legal and statutory authorities before discussing the issues presented and issuing its order.

## PROCEDURAL HISTORY

On September 4, 2012, BA&T timely filed a petition (Pet.) for review of the Agency's April 30, 2012 determination. In an order on September 20, 2012, the Board accepted the petition for hearing and directed the Agency to file the administrative record of its determination. On October 9, 2012, the Board received the Agency's administrative record (R.).

On April 17, 2014, the Agency moved for leave to supplement the administrative record with adjusted annual maximum payment amounts under the Board's UST regulations. *See* 35 Ill. Adm. Code 734.870 (Increase in Maximum Payment Amounts).

On April 22, 2014, a hearing took place before Board Hearing Officer Carol Webb, and the Board received the transcript (Tr.) on April 29, 2014. During the hearing, the hearing officer

granted the Agency's April 17, 2014 unopposed motion for leave to supplement the administrative record. Tr. at 5. The hearing officer also admitted eight exhibits into the record (Exh. A-H). *Id*. at 53-54.

On May 27, 2014, BA&T filed its post-hearing brief (BA&T Br.). On June 25, 2014, the Agency filed its post-hearing brief (Agency Br.). On July 18, 2014, BA&T filed its reply brief (Reply).

## FACTUAL BACKGROUND

### Incident No. 92-3484

On December 7, 1992, Mr. Tom Satterfield on behalf of BA&T reported a leak or spill of gasoline from underground tanks at the site to the Illinois Emergency Management Agency (IEMA). R. at 2. IEMA assigned Incident No. 92-3484 to the release. *Id*. The report listed four 560-gallon tanks and one 2,000-gallon tank at the site and attributed the release to corrosion. *Id*.

An Office of the State Fire Marshal (OSFM) Log of Underground Storage Tank Removal shows that GEM Equipment Company removed five USTs associated with Incident No. 92-3484 from the site on December 7, 1992. R. at 4. The log shows that another 560-gallon tank was found to be located beneath a structure and was to remain in the ground. *Id*. The log commented that there was a strong odor present in soil and moderate discoloration of soil. *Id*. As owner, Mr. Thomas R. Satterfield signed the 20-Day Certification for Incident No. 92-3484 on December 17, 1992. *Id*. at 3.

In an application dated February 9, 1993, Mr. Satterfield, as tank owner and operator, sought from the Agency a determination of UST Fund Reimbursement Eligibility and Deductible for Incident No. 92-3484 at the site. R. at 5-8. The application addressed six USTs at the site: 1) a 560-gallon kerosene tank located beneath a building to be abandoned in place; 2) a 560-gallon diesel tank; 3) a 560-gallon gasoline tank; 4) a 2,000-gallon gasoline tank; 5) a 300-gallon used oil tank; and 6) a second 560-gallon gasoline tank. *Id*. at 8.

By letter dated February 10, 1993, PDC Technical Services, Inc. submitted the 45-Day Report for BA&T for Incident No. 92-4384. R. at 9-19.

By letter to Mr. Satterfield dated June 18, 1993, the Agency determined that five tanks were eligible for reimbursement of costs in excess of $15,000 from the UST Fund: 1) a 560-gallon kerosene tank located beneath a building to be abandoned in place; 2) a 560-gallon diesel tank; 3) a 560-gallon gasoline tank; 4) a 2,000-gallon gasoline tank; and 5) a second 560-gallon gasoline tank. *Id*. at 21, 156. The Agency also determined that the 300-gallon used oil tank was not registered in accordance with the Gasoline Storage Act (430 ILCS 15/1 et seq.), and was therefore ineligible for payment of costs from the UST Fund. R. at 22-23, 157-58.

**Incident No. 2008-0373**

On March 21, 2008, Mr. Todd Birky of Midwest Environmental Consulting & Remediation Services, Inc. (MECRS) reported a leak or spill of kerosene from a 560-gallon underground tank at the site to IEMA. R. at 26-27. IEMA assigned Incident No. H-2008-0373 to the release. *Id*. at 26. In a letter to the Agency dated May 16, 2008, Mr. Green of MECRS referred to UST abandonment activities at the site. R. at 30. Mr. Green stated that "contamination resulting from the release associated with incident 923484 prompted the OSFM Representative, Mr. Bill Carl, to require a more recent incident number." *Id*. He characterized Incident No. 2008-0373 as a "re-reporting" of Incident No. 92-3484. *Id*. On May 29, 2008, the Agency issued a "Notice of Failure to File 20 Day Certification and/or 45 Day Report" regarding Incident No. 2008-0373 and requested immediate submission of these missing materials. *Id*. at 29.

By letter dated January 7, 2011, the Agency notified BA&T "that further corrective action is required in response to a release" at the site with Incident Nos. 92-3484 and 2008-0373. R. at 31. In a letter dated January 24, 2011, Mr. Green acknowledged receiving the Agency's letter and stated that MECRS

> has been contracted to handle the closure of the open incident numbers. We will be performing a Stage 1 investigation on the subject site within the next 30 days. The report of the investigation will be submitted to the IEPA within the next 60 days. A proposal to advance the investigation into Stage 2 will be included, if found to be required, along with actual costs for the Stage 1 investigation work. *Id*. at 33.

On February 1, 2011, the Agency received from BA&T a Stage 1 Site Investigation Certification for Incident Nos. 92-3484 and 2008-0373 at the site. R. at 35-36; *see id*. at 34. Based on that certification, the Agency approved BA&T's Stage 1 Site Investigation Plan and stated that BA&T "must proceed with the Stage 1 site investigation in accordance with 35 Ill. Adm. Code 734.315. *Id*. at 35.

**BA&T's Stage 1 Site Investigation Results and Stage 2 Site Investigation Plan and Budget**

In a letter dated May 12, 2011, MECRS submitted to the Agency the results and costs of the Stage 1 investigation and the Stage 2 Site Investigation Plan (SIP) and Budget for Incident Nos. 92-3484 and 2008-0373 at the site. R. at 39; *see id*. at 40-158. The Site Investigation Summary Form reports five soil borings converted to groundwater monitoring wells. *Id.* at 48; *see id*. at 72 (map of well locations). The depth to groundwater in the five wells ranges from 7.2 to 8.9 feet. *Id*. Stage 1 Investigation Results reported that "[c]ontamination above Tier 1 CUOs [clean up objectives] was observed at the property boundaries. The horizontal extent of soil and groundwater contamination has yet to be defined. Further investigation is needed to define the extents." *Id*. at 50; *see id*. at 63-64, 66 (analytical results).

Under the Stage 1 Actual Costs Summary, BA&T reported that its total drilling and monitoring costs equaled $6,317.20. R. at 140, 141. Drilling consisted of five wells, each

drilled to a depth of 25 feet, for a total of 125 feet of drilling. *Id*. at 141; *see id*. at 78-82 (boring logs). BA&T sought reimbursement at a rate of $31.09 per foot for a total amount of $3,886.25. *Id*. at 141. At each location, MW-1 through MW-5, BA&T's subcontractor performed 20 feet of monitoring well installation, for a total of 100 feet of wells installed. *Id*. at 141; *see id*. at 84-88 (well construction logs). BA&T sought reimbursement at a rate of $24.31 per foot for a total amount of $2,430.95. *Id*. at 141.

In the same Stage 1 Actual Costs Summary, BA&T reported that its analytical costs equaled $7,986.43. *Id*. at 140, 142-43. From the five monitoring wells, a total of 22 soil samples were collected and transported for laboratory testing. *Id*. at 48, 96; *see id*. at 97-118 (Laboratory Data Sheets). Of the 22 samples, ten were taken from soil above a depth of nine feet and twelve from below. *See id*. at 48, 97-118. Consulting personnel costs for three persons acting under six titles totaled $7,326.09, and consultants' materials cost $146.85. *Id*. at 140, 144-45. BA&T submitted total Stage 1 Site Investigation costs of $21,776.57. *Id*. at 140.

For a proposed Stage 2 Site Investigation, BA&T submitted a total budget of $16,595.57. R. at 149. As elements of that total budget, BA&T proposed $2,212.27 in drilling and monitoring well costs. *Id*. at 149, 150. BA&T also proposed analytical costs of $4,045.90. *Id*. at 149, 151-52. In addition, the budget proposed $10,074.90 in consulting personnel costs for four persons acting under eight titles and $262.50 for consultants' costs. *Id*. at 149, 153-54.

In a letter dated August 19, 2011, the Agency rejected the Stage 2 Site Investigation Plan and Budget for reasons including a failure to provide information required by Section 734.210(h), which addresses the location of soil contamination exposed by early action excavation. R. at 159-61; *see* 35 Ill. Adm. Code 734.210(h). In the absence of an approved plan, the Agency stated that it could not make a determination regarding the associated budget. *Id*. at 160. The Agency's denial also noted that "[t]he costs for soil samples collected, below the depth to water level, are not eligible for reimbursement. Collection of soil samples below this depth during site investigation is not required." *Id.*

In a letter dated March 28, 2012, Mr. Green requested that the Agency "re-review the Stage 1 related sections of the Stage 2 Site Investigation Plan and Budget dated May 12, 2011 that was rejected in an IEPA letter dated August 19, 2011. This re-review would include Section 2 and Appendix of the report that detailed Stage 1 Investigation Results and the Stage 1 Actual Costs Summary." R. at 165; *see id*. at 49-50 (Section 2), 77-155 (Appendices A-G).

In a letter dated April 30, 2012, the Agency stated that it had reviewed the Stage 1 Site Investigation Plan Budget dated March 28, 2012, and received on that date. R. at 176. The Agency modified the budget and approved total costs of $15,184.84 consisting of $3,360.75 for drilling and monitoring wells, $4,351.15 of analysis, $7,326.09 of consulting personnel, and $146.85 of consultants' materials. R. at 178.

From the costs of Stage 1 drilling and monitoring well construction, the Agency deducted $2,956.45 for the following reasons:

> The drilling rate has been reduced to $26.09 per foot. Only 75 foot of drilling was approved (5 X 15 foot per boring). The costs exceed the maximum payment amounts set forth in Subpart H, Appendix D, and/or Appendix E of 35 Ill. Adm. Code 734. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 734.630(zz). In addition, such costs are not approved pursuant to Section 57.7(c)(3) of the Act because they are not reasonable.
>
> The monitoring well rate has been reduced to $18.72 per foot. Only 75 foot of monitoring well was approved (5 X 15 foot per well). The costs exceed the maximum payment amounts set forth in Subpart H, Appendix D, and/or Appendix E of 35 Ill. Adm. Code 734. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 734.630(zz). In addition, such costs are not approved pursuant to Section 57.7(c)(3) of the Act because they are not reasonable. R. at 179; *see id*. at 167, 170, 172, 175.

The Agency also deducted "$3,635.28 for costs associated with improperly collected, transported, or analyzed laboratory samples." *Id*. at 179. The Agency stated that it deducted these costs on the following bases:

> [s]uch costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. 734.630(q). In addition such costs are not approved pursuant to Section 57.7(c)(3) of the Act because they are not site investigation or corrective action costs. These cost (sic) also exceed the minimum requirements necessary to comply with the Act. Costs associated with site investigation and corrective action activities and associated materials or service exceeding the minimum requirements necessary to comply with the Act are not eligible for payment from the Fund pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.630(o).
>
> Soil samples (12) collected from below the depth to water while drilling and the associated encore samplers are not eligible based on the above. R. at 179; *see id*. at 168, 170, 173, 175.

On April 17, 2014, the Agency moved for leave to supplement the administrative record with the pertinent figures for the maximum payment amounts under Section 734.870. 34 Ill. Adm. Code 734.870; *see* Exh. H. For drilling with a hollow stem auger, the maximum payment amount is $26.09 per foot. Exh. H. For monitoring well installation through hollow stem auger, the maximum payment amount is $18.72 per foot. *Id*.

## April 22, 2014 Hearing

As noted above under "Procedural History," the hearing officer granted the Agency's unopposed motion for leave to supplement the administrative record with maximum reimbursement rates under the UST Program for the period of July 1, 2010 through June 30, 2011. Tr. at 5. The hearing officer also admitted the same information into the record as Exhibit H. R. at 53-54. BA&T stipulated to the applicability of those reimbursement rates. Tr. at 5.

This stipulation rendered moot the portion of BA&T's appeal regarding the reasonableness of the rates used by the Agency in its April 30, 2012 determination. Tr. at 5; *see* R. at 179 (reducing reimbursement rates).

**Mr. Green's Testimony**

Mr. Green testified on behalf of BA&T that it sought reimbursement for 125 feet of total drilling costs and 100 feet of monitoring well installation costs. Tr. at 8. Mr. Green testified that the Agency reduced these depths based on the groundwater levels encountered at the site. *Id.* at 9-10; *see* R. at 179. Mr. Green stated that the requested depths were eligible for reimbursement as part of the Stage 1 investigation because groundwater levels may not be known until monitoring wells are installed. *Id*. at 10-11.

Mr. Green testified that field observations do not always reveal the depth to groundwater. Tr. at 44-45. He stated that the boring depths at the BA&T site are "a pretty standard depth in this area." *Id*. at 45; *see id*. at 53. He testified that, because the borings at a site are not far apart from one another, the first boring should reveal the geology of the site. *Id*. at 46. He further testified that drilling at the BA&T site took place in roughly three-foot stages, with the driller at each of those stages examining drilled samples for indications of groundwater. *Id*. at 49-51. Drillers typically review the water level after 24 hours after the drilling to confirm the groundwater level. *Id*. at 52-53; *see* R. at 78-82 (boring logs including groundwater depth after drilling). Mr. Green testified that, on this basis, 25 feet of drilling for each monitoring well site was appropriate for a Stage 1 investigation. *Id*. at 11.

**Mr. Chappel's Testimony**

Mr. Chappel testified on behalf of the Agency that the Agency did not consider BA&T's submission to be a Stage 1 submission because BA&T had not submitted a mandatory, 45-day early action report. Tr. at 23; *see id*. at 33-34. Mr. Chappel testified that, because a Stage 1 investigation is based upon the results of early action, the Agency denied BA&T's Stage 1 submission because BA&T had not complied with the early action requirements. Tr. at 24, 35; s*ee* R. at 159-161 (initial denial). Mr. Chappel testified that, in

> [m]any cases there are submissions very similar to this where the early action samples have not been collected so then we have to figure out a way to make the sampling requirements fit the conditions that exist at the site today, and in many cases we assume, okay, we didn't get the early action samples from the excavation. We'll, therefore, allow them to do the early action borings as if the tanks are still in place because that's the only thing you can do. Tr. at 37-38.

In those circumstances, he testified that, "íf the tanks are already gone and they didn't do the proper sampling and analysis, you have to bore around the tanks and lines to try to determine what were those early action conditions in order to determine now where do I look in Stage 1 to determine the extent of that impact." *Id*. at 40. He further testified that "we use information they submit to the extent we can to satisfy those early action requirements and then build upon that and say the following additional work needs to be done to finish up your early action before you

go to Stage 1. *Id*. at 41. He added that, if early action samples meet Tier 1 remediation objectives, "there's no further investigation required. There's no Stage 1." *Id*.

Mr. Chappel testified that early action typically allows soil borings only to the depth to groundwater. Tr. at 25, 28-29, 35. In reviewing BA&T's submission as early action (Tr. at 24-25, 38-41; *see* R. at 165), Mr. Chappel determined that the depth to water level for each of the five monitoring wells at the site was nine feet. Tr. at 18, 27; *see* R. at 83-88. He testified that each monitoring well is equipped with a ten-foot screen through which groundwater enters the well and samples are recovered. *Id*. at 22-23. To account for groundwater fluctuations, he stated that the Agency allows screens to extend five feet above and five feet below the depth to water. *Id*. at 22. Mr. Chappel extended the nine foot depth to water by six feet to arrive at an even 15 foot depth for each boring. *Id*. at 20, 22, 27. Based on five monitoring wells and that depth of 15 feet, he calculated 75 total feet of drilling and monitoring well costs. He then multiplied that length by the stipulated rates for drilling ($26.09 per foot) and monitoring well installation ($18.72 per foot) established in Exhibit H. *Id*. at 20, 27-28; *see* R. at 179; Exh. H at 1.

Mr. Chappel testified that, while the early action regulations allow for borings below the groundwater table if site specific conditions warrant, no such conditions appeared in BA&T's documentation. Tr. at 42-43.

Mr. Chappel testified that samples from early action soil borings indicate whether contaminated soil has come into contact with groundwater. Tr. at 25, 28-29, 35. BA&T used an EnCore device to collect three samples at each of the 22 sample points created at the five monitoring well borings. *Id*. at 30-31; *see* R. at 143. Mr. Chappel testified that he allowed reimbursement of three samples at each of the ten sampling points above the depth to groundwater. Tr. at 31-32; *see* R. at 168, 173. In addition, BA&T requested reimbursement for analysis of 22 samples for benzene, toluene, ethylbenzene, and xylene (BTEX) and polynuclear aromatics (PNA). *Id*. at 31-32; *see* R. at 96- 118, 142-143, 168, 173. Mr. Chappel testified that the Agency allowed reimbursement only for analysis of the 10 samples taken above the depth to groundwater. Tr. at 30; *see* R. at 168, 173.

## SUMMARY OF BA&T'S PETITION FOR REVIEW

BA&T states that it retained MECRS to remediate the site with regard to UST Incident Nos. 92-3484 and 2008-0373. Pet. at 1. BA&T further stated that, through a letter dated March 28, 2012, it "submitted a Stage 1 Site Investigation Plan Budget, seeking payment in the amount of $21,776.57, which was the amount reasonably and necessarily expended to complete work on the project." *Id*. at 1-2. BA&T added that, in a letter dated April 30, 2012, the Agency modified the budget and approved a budget in the amount of $15,184.84. *Id*. at 2; *see id*., Exh B (Agency letter).

BA&T disagreed with the Agency's April 30, 2012 determination. Pet. at 2. BA&T argued that "the reimbursement amounts expended were reasonable, customary, and necessary for the proper completion of the project and site closure." *Id.* BA&T added that the amounts the Agency deducted from its budget "were actually and legitimately expended and performed." *Id.* Finally, BA&T claimed that "the scope of the additional work performed was within the

guidelines pre-approved by the IEPA." *Id*. On these grounds, BA&T requested that the Board reverse or modify the Agency's April 30, 2012 determination by accepting the site investigation budget it had submitted to the Agency and allowing payment of the approved budget in the amount of $21,776.57. *Id*.

Because BA&T has stipulated to the reimbursement rates in Exhibit H, the remaining issues are: 1) reimbursement of drilling costs at the rate of $26.09 per foot, 2) reimbursement of monitoring well installation costs at $18.72 per foot, and 3) reimbursement for analysis of soil samples. BA&T seeks the application of the stipulated reimbursement rates to 125 feet of total drilling costs and 100 feet of monitoring wells installation costs. Tr. at 6, 8; *see* R. at 141. In addition, BA&T seeks reimbursement for analysis of 22 soil samples and associated 66 Encore samples. Pet. at 1-2; *see* R. at 142-143.

## SUMMARY OF BA&T's POST-HEARING BRIEF

BA&T states that MECRS performed soil boring and installed monitoring wells at the site. BA&T Br. at 1. BA&T argues that the "issue in this appeal is the depth to which the initial borings on this site should have been drilled." *Id*.

BA&T claims that there is no dispute as to the actual depth drilled or that costs for that work have been incurred and paid. BA&T Br. at 1. The Agency allowed reimbursement of those costs only to the Agency's calculated depth of fifteen feet. BA&T argues that this reduction reflects a "20/20 hindsight approach." BA&T Br. at 4. BA&T further argues that the depths drilled were "standard practice." *Id*. BA&T claims that this work was performed in good faith by an experienced drilling company and remediation contractor and that those actual expenses should be reimbursed. *Id*.

BA&T stresses Mr. Chappel's testimony that steps leading from early action to Stage 1 site investigation are not always followed. BA&T Br. at 4; *see* Tr. at 40-41. BA&T argues that field conditions do not always fit into precise categories. BA&T Br. at 4. BA&T further argues that this uncertainty should not prevent parties acting in good faith from being reimbursed for their actual expenditures. *Id*.

BA&T argues that "it has been difficult for small remediation contractors to survive over the past decade in this economic environment with the Illinois Leaking Underground Storage Tank Fund's well-known solvency problems." BA&T Br. at 4. BA&T states that the Agency's denial of reimbursement for incurred costs "is a source of great frustration." *Id*. BA&T concludes that the denied costs of $2,241 in drilling and $3,635.28 in sampling "were reasonably and necessarily expended, and should be paid." *Id*. at 5.

## SUMMARY OF AGENCY'S POST-HEARING BRIEF

### Drilling Depth

The Agency argues that the Board's early action regulations limit drilling to a specific depth or until bedrock or groundwater is encountered, whichever is less. Agency Br. at 7, citing

35 Ill. Adm. Code 734.210(h)(2). Drilling below groundwater is permissible if site-specific conditions warrant. Agency Br. At 7, citing 35 Ill. Adm. Code 734.210(h)(2). The Agency argues that the Board's Stage 1 site investigation regulations provide that drillings "must be drilled below the groundwater table only if site-specific conditions warrant." Agency Br. at 7, citing 35 Ill. Adm. Code 734.315(a)(1). The Agency claims that, whether BA&T's drilling was classified as early action or Stage 1, they could not go below the groundwater table unless justified by site-specific conditions. Agency Br. at 7. The Agency notes Mr. Chappel's testimony that BA&T's submissions did not provide site-specific conditions and that no conditions of this kind were brought to his attention. *Id*. at 9, citing Tr. at 42.

While BA&T sought reimbursement for 125 feet of borings, the Agency claims that BA&T's own boring logs show that it drilled a total depth of 110 feet: two wells to a depth of 20 feet, two wells to a depth of 22 feet, and one well to a depth of 26 feet. Agency Br. at 7-8, citing R. at 78-82. The Agency argues that, even after accounting for placement of a 10-foot screen and then rounding up by one foot, Mr. Chappel allowed a drilling depth of 15 feet in each of five wells. Agency Br. at 8, citing Tr. at 22, R. at 172. The Agency stresses that both BA&T's actual drilling depth of 110 feet and its request for reimbursement of 125 feet exceed Mr. Chappel's calculation. Agency Br. at 8.

The Agency discounts BA&T's claim it is not always possible to determine when drilling has reached groundwater. The Agency notes that BA&T had "either a geologist or an environmental tech on site during the drilling." Agency Br. at 8, citing Tr. at 51. The Agency also notes that boring logs submitted by BA&T report depth to groundwater of nine feet at each of five monitoring wells. Agency Br. at 8, citing R. at 78-82.

The Agency also discounts BA&T's argument that its drilling costs should be reimbursed because the work "was actually performed" and costs "were actually incurred." Agency Br. at 9. The Agency argues that the Board has held that acknowledging performance of the work "does not show that the work was necessary to meet the minimum requirements." *Id*., citing Beverly Powers, f/d/b/a Dick's Super Service v. IEPA, PCB 11-63, slip op. at 19 (Aug. 8, 2013).

The Agency argues that BA&T's submission "violated Board regulations by seeking payment both for 15 feet of drilling not actually performed as well as for drilling that exceeded the regulatory limits by boring below the depth to the groundwater table without identifying site-specific conditions warranting it." Agency Br. at 9. The Agency concludes that it correctly modified BA&T's submission to limit reimbursement for drilling to the nine feet reported in BA&T's own logs and the six feet to accommodate screening for a total of 75 feet.

## **Sampling**

The Agency notes that BA&T sought reimbursement for 22 BTEX samples, 22 PNA samples, and 66 EnCore samples. Agency Br. at 10. The Agency claims that, because BA&T did not identify site-specific conditions warranting drilling below the groundwater table, "soil samples taken below the groundwater table likewise are not authorized by the regulations." *Id*., citing 35 Ill. Adm. Code 734.210(h)(2)(D). The Agency argues that BA&T's own boring logs support Mr. Chappel's determination that "only 10 of the BTEX and PNA samples were taken

above the depth to water. *Id*., citing R. at 78-82, 171, 175. Mr. Chappel also determined that, "[w]ith three EnCore samples allowed at each sampling point in most cases and with only 10 of the sampling points above the depth to water," only 30 EnCore samples could be reimbursed. Agency Br. at 10. The Agency claims that BA&T sought reimbursement for samples that were not authorized by the Board's regulation. *Id*. The Agency argues that the Board should affirm its decision to reimburse only the 10 BTEX, 10 PNA, and 30 EnCore samples taken above the groundwater level. *Id*.

## SUMMARY OF BA&T's REPLY

BA&T's reply re-states its argument that "[t]he work at issue was performed, and the amounts paid to third parties for that work." Reply at 1. BA&T emphasizes Mr. Green's testimony that "it is often difficult to determine when groundwater is encountered." *Id*. BA&T argues that the Agency would replace the judgment of an experienced contractor at the site with the judgment of someone lacking firsthand knowledge of the site. *Id*. BA&T requests approval of reimbursement for costs incurred and paid in the remediation of the site. *Id*.

## LEGAL BACKGROUND

### Title XVI of Act and Part 734 UST Regulations

Title XVI of the Act provides for administration and oversight of the Leaking Underground Storage Tank Program, which includes the UST Fund. 415 ILCS 5/57 (2012). Title XVI also establishes requirements for eligible owners to seek reimbursement from the UST Fund. *Id*.

Section 57.5(a) of the Act provides in its entirety that,

> [n]otwithstanding the eligibility or the level of deductibility of an owner or operator under the Underground Storage Tank Fund, any owner or operator of an Underground Storage Tank may seek to remove or abandon such tank under the provisions of this Title. In order to be reimbursed under Section 57.8, the owner or operator must comply with the provisions of this Title. In no event will an owner or operator be reimbursed for any costs which exceed the minimum requirements necessary to comply with this Title [XVI Petroleum Underground Storage Tanks]. 415 ILCS 5/57.5(a) (2012).

Section 57.5(c) of the Act addresses removal and abandonment and provides in pertinent part that, "[i]n the event the owner or operator confirms the presence of a release, the owner or operator shall comply with Section 57.6 [early action]." 415 ILCS 5/57.5(c) (2012). Section 57.6(a) of the Act provides in its entirety that "[o]wners and operators of underground storage tanks shall, in response to all confirmed releases, comply with all applicable statutory and regulatory reporting and response requirements." 415 ILCS 5.57.6(a) (2012).

Section 734.210(h) of the Board's UST regulations addresses early action activities and provides in pertinent part that

> h) The owner or operator must determine whether the areas or locations of soil contamination exposed as a result of early action excavation (e.g., excavation boundaries, piping runs) or surrounding USTs that remain in place meet the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants.

Subsection (h)(1) provides sampling requirements for USTs that are removed, and subsection (h)(2) provides sampling requirements for USTs that remain in place. 35 Ill. Adm. Code 734.210(h).

Section 57.7(a)(2) of the Act provides in its entirety that "[a]ny owner or operator intending to seek payment from the Fund shall submit to the Agency for approval a site investigation budget that includes, but is not limited to, an accounting of all costs associated with the implementation and completion of the site investigation plan." 415 ILCS 5/57.7(a)(2) (2012). Section 734.310(b) of the Board's UST rules provides in part that

> [a]ny owner or operator intending to seek payment from the Fund must, prior to conducting any site investigation activities, submit to the Agency a site investigation budget with the corresponding site investigation plan. . . . Site investigation budgets should be consistent with the eligible and ineligible costs listed at Sections 734.625 and 734.630 of this Part and the maximum payment amounts set forth in Subpart H of this Part. 35 Ill. Adm. Code 734.310(b).

Section 57.8(i) of the Act provides that, "[i]f the Agency refuses to pay or authorizes only a partial payment, the affected owner or operator may petition the Board for a hearing in the manner provided for the review of permit decisions in Section 40 of this Act." 415 ILCS 5/57.8(i) (2012); *see* 35 Ill. Adm. Code 734.610(g).

## Standard of Review and Burden of Proof

The standard of review under Section 40 of the Act (415 ILCS 5/40 (2012)) is whether BA&T's submission to the Agency would not violate the Act and Board regulations. Ted Harrison Oil Co. v. IEPA, PCB 99-127, slip op. at 5 (July 24, 2003); citing Browning Ferris Indus. of Ill. v. PCB, 534 N.E.2d 616 (2nd Dist. 1989). The Board will not consider new information that was not before the Agency prior to its final determination regarding the issues on appeal. Kathe's Auto Serv. Ctr. v. IEPA, PCB 95-43, slip op. at 14 (May 18, 1995). The Agency's denial letter frames the issues on appeal. Pulitzer Cmty. Newspapers, Inc. v. IEPA, PCB 90-142 (Dec. 20, 1990).

The Board's procedural rules provide that, in appeals of final Agency determinations, "[t]he burden of proof shall be on the petitioner. . . ." 35 Ill. Adm. Code 105.112(a), citing 415 ILCS 5/40(a)(1), 40(b), 40(e)(3), 40.2(a). The standard of proof in UST appeals is the "preponderance of the evidence." Freedom Oil Co. v. IEPA, PCB 03-54, 03-56, 03-105, 03-179,

04-04 (cons.), slip op. at 59 (Feb. 2, 2006), citing 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.").

## BOARD DISCUSSION

The Board notes Mr. Chappel's testimony that no early action report had been submitted for the releases at the site. *See* Tr. at 23, 34. The Agency originally rejected BA&T's May 12, 2011 submission in part because BA&T had not submitted information required by early action requirements. R. at 159; Tr. at 24. Those requirements include determining whether soil contamination exposed by excavation or near USTs remaining in place meets applicable clean-up objectives. 35 Ill. Adm. Code 734.210(h).

Mr. Chappel testified that, in the absence of results from early action, the Agency may use the results of later sampling and analysis to meet the early action requirements. Tr. at 41. He suggested the importance of early action by noting that, if those samples meet applicable clean-up objectives, then no further site investigation is required. In this case, the Agency effectively re-reviewed BA&T's May 12, 2011 submission for compliance with the early action requirements. *Id*. at 24-25, 40-41; *see* R. at 165. That re-review resulted in the deduction of $2,956.45 from drilling and monitoring well construction costs and $3,635.28 in sampling costs. R. at 179. The Board reviews these modifications in the following subsections of this opinion.

### Drilling Depth

As noted above under "Factual Background," BA&T sought reimbursement for five wells, each drilled to a depth of 25 feet, at a rate of $31.09 per foot, for a total of $3,886.25. R. at 141; *see id*. at 78-82 (boring logs). BA&T also sought reimbursement for 20 feet of monitoring well installation in each of the five borings, at a rate of $24.31 per foot, for a total amount of $2,430.95. *Id*. at 141; *see id*. at 84-88 (well construction logs). However, BA&T has stipulated to the applicability of the maximum payment rates in Exhibit H as determined and adjusted under 35 Ill. Adm. Code 734.870. Tr. at 5. Those rates are $26.09 per foot of hollow-stem auger drilling and $18.72 per foot for monitoring well installation costs. The Board proceeds below to address the issue of the depth to which that drilling and installation should be reimbursed.

The Agency cited the Board's early action regulations that allow drilling either to a specific depth or until bedrock or groundwater is encountered, whichever is less. Drilling below the groundwater table is permissible if site-specific conditions warrant. Agency Br. at 7, citing 35 Ill. Adm. Code 734.210(h). The Agency also cited the Board's Stage 1 site investigation regulations, which provide that drillings "must be drilled below the groundwater table only if site-specific conditions warrant." Agency Br. at 7, citing 35 Ill. Adm. Code 734.315(a)(1). Mr. Chappel testified that BA&T's submissions did not provide site-specific conditions and that no conditions of this kind were brought to his attention. Tr. at 42. Whether BA&T's drillings are classified as early action or Stage 1, nothing in the record supports drilling them below the depth to groundwater.

The Board first notes that BA&T's own boring logs show that it drilled a total of 110 feet: two wells to a depth of 20 feet, two wells to a depth of 22 feet, and one well to a depth of 26 feet. R. at 78-82. This justifies a reduction in reimbursement for drilling from the 125 feet requested at least to the 110 feet actually reported.

In addition, BA&T's submissions consistently report that the depth to groundwater at the site is no greater than nine feet. In its site investigation summary, BA&T's summary of borings converted to monitoring wells states that the depth to groundwater at the five wells ranged from 7.2 to 8.9 feet. R. at 48. Boring logs report groundwater depth of nine feet. Depth measured after drilling ranges from 7.21 to 8.94 feet. R. at 78-82. Monitoring well construction logs show static depth to water also ranging from 7.21 to 8.94 feet. R. at 84-88. BA&T's reported monitoring well sampling information reports the same depths. R. at 90-94. Mr. Chappel testified that he allowed a drilling depth of 15 feet after accounting for placement of a 10-foot screen centered at this nine-foot depth and then rounding up by one foot. Tr. at 22, R. at 170, 172. The Board recognizes BA&T's argument that it may be difficult to determine the depth to groundwater. However, the record clearly indicates that that the depth at the site was no greater than nine feet. Nothing in the record persuasively establishes a greater depth or warrants drilling any of the five borings below 15 feet.

The Board finds that BA&T has failed to meet its burden of proving that its submitted request for reimbursement for drilling a total of 125 feet would not violate the Act and the Board's regulations. The Board affirms the Agency's reduction in these costs from the requested $3,886.25 to 75 feet at a rate of $26.09 per foot or a total of $1,956.75.

The Board notes that BA&T's well construction logs show each of the five wells installed to depth of 18 feet. R. at 84-88. BA&T requested reimbursement for installation of five wells to a depth of 20 feet, for a total of 100 feet. *Id*. at 141. This justifies a reduction in reimbursement for installation from the 100 feet requested at least to the 90 feet actually reported. In addition, the Board determined above that the record indicates that the depth to groundwater at the site was no greater than nine feet. Nothing in the record persuasively establishes a greater depth to groundwater or site-specific conditions warranting installation of a monitoring well below 15 feet.

The Board finds that BA&T has failed to meet its burden of proving that its submitted request for reimbursement for monitoring well installation to a total depth of 100 feet would not violate the Act and the Board's regulations. The Board affirms the Agency's reduction in these costs from the requested $2,430.95 to 75 feet at a rate of $18.72 per foot or a total of $1,404.00.

## **Sampling**

The Board's early action regulations address the collection and analysis of soil samples to determine the location of soil contamination exposed as a result of early action activities. 35 Ill. Adm. Code 734.210(h). Subsection (h)(1) addresses USTs that have been removed and requires samples from points including excavation walls and floor, piping run excavations, and backfill returned to an excavation. While the record is silent on this point, the Board can only conclude

that reliable samples can no longer be obtained at a site from which USTs were removed more than 21 years ago. Neither the Agency's denial letter nor its reviewer's notes show that the Agency determined not to apply subsection (h)(1) requirements to BA&T's proposed Stage 1 site investigation for this reason. However, the infeasibility of sampling a 21-year old excavation would support such a determination. The Board notes, however, that subsection (h)(1) does not explicitly limit sampling to points above the groundwater. *See* 35 Ill. Adm. Code 734.210(h)(1).

Subsection (h)(2) addresses collection and analysis of samples where USTs remain in place. The record indicates that one UST remains beneath a building at the site. *See* R. at 8, 72. Subsection (h)(2) requires at least one boring along the center point of each side of a UST or along each side of a cluster of multiple USTs. BA&T's boring and monitoring well locations generally reflect these requirements. *See* R. at 72 (Boring and Monitoring Well Location Map). The rules allow an alternate location if drilling in a specified location is impracticable, and the location of Monitoring Well 4 appears to reflect the impracticability of boring beneath the garage at the site. 35 Ill. Adm. Code 734.210(h). Neither the Agency's denial letter nor its reviewer's notes show that the Agency determined to apply subsection (h)(2) to the BA&T's submission. However, the circumstances shown in the record support such a determination where the Agency has attempted to apply Stage 1 Site Investigation results to early action requirements. *See* Tr. at 39-40. In addition, the Agency's post-hearing brief cites subsection (h)(2). Agency Br. at 10. Accordingly, the Board will apply the requirements of subsection (h)(2) to BA&T's submission.

The Board notes that subsection (h)(2)(A) provides in pertinent part that "[e]ach boring must be drilled to a depth of 30 feet below grade, or until groundwater or bedrock is encountered, whichever is less. Borings may be drilled below the groundwater table if site specific conditions warrant, but no more than 30 feet below grade." 35 Ill. Adm. Code 734(h)(2)(A). Subsection (h)(2)(D) requires collection of soil samples at five-foot intervals from each boring and the "soil samples must not be collected from soil below the groundwater table." 35 Ill. Adm. Code 734.210(h)(2)(D).

The Board determined above that the record clearly indicates that the depth to groundwater at the site was no greater than nine feet. BA&T sought reimbursement for 22 BTEX samples, 22 PNA samples, and 66 EnCore samples. R. at 142-43. BA&T's boring logs show that only 10 of the samples for BTEX and PNA were taken at or above that level. R. at 78-82; *see id*. at 171, 175. Mr. Chappel testified that most cases allow three EnCore samples at each sampling point. Tr. at 31. With 10 sampling points at or above the depth to groundwater, he approved reimbursement of 30 EnCore samples. *Id*. at 31; *see* R. at 173. The Agency claims that, because BA&T did not identify site-specific conditions justifying drilling or sampling below nine feet, samples taken below that level are not authorized for reimbursement by the regulations.

The Board finds that BA&T has failed to meet its burden of proving that its submitted request for reimbursement for sampling below a depth of nine feet would not violate the Act and the Board's regulations. The Board affirms the Agency's reduction in these costs from the requested $7,986.43 to $4,351.15.

## BA&T Arguments

The Board notes BA&T's argument that expenses actually incurred should be reimbursed. BA&T Br. at 4. The Board has recently addressed this argument: "that the work was performed does not show that the work was necessary to meet the minimum requirements of the Act's UST provisions. . . ." Beverly Powers, f/d/b/a Dick's Super Service v. IEPA, PCB 11-63, slip op. at 19 (Aug. 8, 2013). BA&T has the burden of showing that its submitted costs complied with the Act and the Board's regulations. Above, the Board has found that it has not met that burden.

The Board also notes BA&T's reference to the economic difficulties facing remediation contractors. BA&T Brief at 4. The Board does not doubt that those difficulties are genuine, but it cannot reverse the Agency and approve reimbursement of costs that are inconsistent with the Act and regulations. *See* Freedom Oil Company v. IEPA, PCB 10-46, slip op. at 14 (Aug. 9, 2012).

## ORDER

The Board affirms the Agency's April 30, 2012 determination to modify BA&T's proposed Stage 1 Site Investigation Plan Budget.

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) (2012); *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, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on September 4, 2014, by a vote of 4-0.

John T. Therriault, Clerk
Illinois Pollution Control Board