BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

PAK-AGS, INC.,	)	
Petitioner,	)	
v.	)	PCB 15-14
	)	(UST Appeal)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
Respondent.	)	

NOTICE OF FILING AND PROOF OF SERVICE

TO: John T. Therriault, Clerk
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PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board, pursuant to Board Procedural Rule 101.302 (d), **Petitioner's Post-Hearing Brief**, a copy of which is herewith served upon the hearing officer and upon the attorneys of record in this cause.

The undersigned hereby certifies that a true and correct copy of this Notice of Filing, together with a copy of the document described above, were today served upon the hearing officer and counsel of record of all parties to this cause by enclosing same in envelopes addressed to such attorneys and to said hearing officer with postage fully prepaid, and by depositing said envelopes in a U.S. Post Office mailbox in Springfield, Illinois on the 8th day of October, 2014.

Respectfully submitted,
PAK-AGS, INC., Petitioner

BY: MOHAN, ALEWELT, PRILLAMAN & ADAMI

BY: /s/ Patrick D. Shaw

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PETITIONER'S POST-HEARING BRIEF

NOW COMES Petitioner, PAK-AGS, INC., by its undersigned attorney, pursuant to Section 101.610(k) of the Board's Procedural Rules, 35 Ill. Adm. Code 101.610(k), and the Hearing Officer's Scheduling Order, submit its Post-Hearing Brief in this matter.

STATEMENT OF FACTS

On April 19, 2005, a representative of the Granite City Emergency Service and Disaster Agency reported a traffic accident in which a vehicle struck a dispenser, causing a gasoline release of approximately 100 gallons of gasoline. (A.R. at pp 516-517)[1] The report initially lacked contact information for the service station, but did indicate that an environmental services company was en route to perform the clean-up. (Id.) There is no further information in the record concerning this incident, which was assigned Incident Number 2005-0545. (Id.)

The owner at that time, T.C.L.S., Inc., doing business as "The Corner Liquor Store," did not report any release to the Illinois Emergency Management Agency ("IEMA"), nor did it submit a 20-day report to the Illinois Environmental Protection Agency ("IEPA"). (A.R. at pp.

[1] The Agency Record is cited as (A.R., at p. _____), while the Board Record is cited as (B.R., Ex. ___). Petitioner has submitted a chronological table of contents to the Agency Record as an Appendix hereto.

514-515) While the owner had given notice to the Office of the State Fire Marshal ("OSFM") of tank upgrades and repairs performed in 2000 (A.R. at p. 503), there is no indication that tanks were upgraded or repaired in response to the 2005 incident.

The property was purchased by N and S Service, Inc. on or about December 21, 2005. (A.R. at p. 508) PAK-AGS, Inc. purchased the property on March 1, 2007. (A.R. at p. 326) On August 23, 2011, a phase-two environmental site assessment was performed in the vicinity of the three (gasoline) underground storage tanks. (A.R. at p. 436) When the soil analytical results confirmed that a release had occurred, (A.R. at pp. 330-336), the IEMA was notified and incident 2011-0945 was assigned. (A.R. at p. 421) Thereafter, on October 5, 2011, the tanks were removed in the presence of a representative of the OSFM, who also confirmed the presence of contamination. (A.R. at pp. 338-342) The OSFM would subsequently issue a determination that PAK-AGS, Inc. was eligible for reimbursement for corrective action from the UST Fund for the 2011 incident, subject to a $5,000 deductible. (A.R. at p. 324)

On October 4, 2011, PAK-AGS, Inc. filed a 20-Day Certification for the 2011 incident. (A.R. at pp. 425-428) On October 11, 2011, PAK-AGS, Inc. filed a 45-Day Report for the same incident, (A.R. at p. 429), which was amended with additional information on March 19, 2011. (A.R. at p. 343)

It was during the approval of the Amended 45-Day Report that the issue of the 2005 incident was first raised. According to the IEPA technical reviewer's notes:

> **Mike Lowder attached a note to the report indicating that a previous incident (20050545) was reported and that this recent incident may be a re-reporting of the original incident. Based on my research, this is not the case. The previous incident was reported when a shear valve failed to close after a**

dispenser was struck by a car. This prior incident also has a different owner/operator. I contacted Mike Keebler (EMI) [the consultant] who stated that the older release occurred when the site was owned by a different party and further, they have no specific knowledge of the previous incident and are not addressing it as part of site investigation or remediation. It appears that will not be able to co-reference incidents unless we receive a letter from the current owner/operator acknowledging that they have assumed liability for the older release.

(A.R. at pp. 322-323)

The IEPA subsequently approved the Amended 45-Day Report and Stage 1 Site Investigation Plan and Budget for the 2011 incident, with the expectation that additional information regarding the location of subsurface sewers by provided. (A.R. at p. 319) There is no reference to the 2005 incident in this approval. (Id.)

At about the same time, the IEPA was also reviewing an application for payment for early action costs. (A.R. at p. 220) In assigning the claim, the supervisor noted:

2005045

NEED TO ELECT & GET

E&D. ASSESS HIGHER OF

2 DEDUCTIBLES

(A.R. at p. 219)

On July 17, 2012, the IEPA approved payment of the early action work that had been performed, subject to the $5,000 deductible. (A.R. at p. 210) The approval letter stated:

NOTE: There is another open incident on this site, incident #200050545.

Please address this incident and its eligibility with the Office of the State Fire Marshal before submitting any future applications for payment.

(A.R. at p. 210-211)

By the time this letter was issued, PAK-AGS, Inc. had sold the property to Gasa Wash, Inc. (H.R., Ex 1 (Quick-Claim Deed (April 10, 2012)) PAK-AGS, Inc. continued to perform the Stage 1 Site Investigation, and reported the results on November 20, 2013, as well as submitted a Stage 3 Site Investigation Plan and Budget, as well as the Stage 1 Site Investigation Actual Costs. (A.R. at p. 134)[2] This submittal was approved on January 29, 2014, without reference to the 2005 incident. (A.R. at pp. 129 & 37-42) The technical review notes make no reference to the 2005 incident. (A.R. at pp. 130-133)

On February 24, 2014, PAK-AGS, Inc. submitted the Billing Package for the Stage 1 Actual Costs approved. (A.R. at p. 15) On April 3, 2014, Brian Bauer of the IEPA asked the consultant for a copy of the eligibility determination form for the 2005 incident. (A.R. at p. 13) Having received no response, Bauer or another employee of the IEPA, contacted the OSFM and found no application on file. (A.R. at p. 14) On June 23, 2014, the IEPA denied the application for payment, for the reason that "[a]n eligibility determination for incident 20050545 has not been submitted to the Agency." (A.R. at pp. 2-6) It is from this denial, that Petitioner appeals.

[2] The plan was stamped received by the IEPA on November 21, 2013 (A.R. at p. 134), but appears to have been misplaced, and an additional copy was hand-delivered on January 3, 2014 (A.R. at p. 50)

ARGUMENT

I. There was no Release in 2005 from an Underground Storage Tank.

The record indicates that in 2005 there was a vehicular accident in which the dispensing pump was damaged, causing a relatively minor release of gasoline, which was being cleaned-up by an environmental remediation firm. In Township of Harlem v. EPA, 265 Ill. App. 3d 41 (2nd Dist. 1994), the Illinois Appellate Court affirmed the Board's ruling that the dispensing pump and pump nozzle are not a part of the "underground storage tank," and thus are not subject to the LUST Program.

Under the Illinois Environmental Protection Act, an "underground storage tank" is defined as having the same meaning as under RCRA. (415 ILCS 5/57.2) The RCRA regulations, in turn, contain the following definitions:

> **Underground storage tank or UST means any one or combination of tanks (including underground pipes connected thereto) that is used to contain an accumulation of regulated substances, and the volume of which (including the volume of underground pipes connected thereto) is 10 percent or more beneath the surface of the ground. . . .**
>
> **. . .**
>
> **UST system or Tank system means an underground storage tank, connected underground piping, underground ancillary equipment, and containment system, if any.**

(40 CFR 280.10; see also 35 Ill. Adm. Code § 734.115 (identical in substance definitions))

Assuming the applicable term is the broader "UST system," the Board found that while the fuel pump and pump nozzle are ancillary equipment, they are not *underground* ancillary equipment. Harlem Township, PCB No. 92-83, at pp. 4-5 (Oct. 16, 1992). Nor are the pump and pump nozzle part of the containment system. Id.

In response to the argument that there is no material difference between gasoline released aboveground and belowground, the Board noted that there are numerous environmental harms that may occur at a service station that are not covered by the LUST Program. Id. at p. 6. Furthermore, the dispensing equipment is separately and distinctly regulated by OSFM, but was not intended to be regulated by the LUST Program. Id. at pp. 7. In affirming the Board's decision, the Appellate Court also found that the purpose of the LUST Program would not be compromised by excluding releases from the dispensing equipment because "[s]uch spills, while numerous, are usually small and . . . can be readily detected and cleaned up quickly." 265 Ill. App. 3d at p. 45.

The primary concern of the LUST Program is "leaking" tanks, and the pernicious impacts from slow, constant, invisible releases into the environment. (415 ILCS 5/57(2)) Here, the incident reported was not from the tank, but from a collision that released a relatively small amount of gasoline to the surface, where it was readily detected and could be cleaned-up quickly. Moreover, one of the purposes of the LUST Program is to ensure that owners and operators have the financial resources to remediate releases. (415 ILCS 5/57(3)) In the case of a vehicular accident, however, the most likely funding source will be the party responsible for driving the vehicle into the gas station. In 2005, all Illinois drivers were required to carry automobile insurance, including a minimum of $15,000 for destruction of property, (625 ILCS 5/7-601; 5/7-203), and any costs paid by such insurance would not be eligible for payment from the UST Fund. (415 ILCS 5/57.7(e)) Therefore, the incentives created by the LUST Program encourage handling such an accident by tendering any claims for corrective action to the driver of the vehicle, and not through the LUST Program.

Any number of incidents can occur at a service station that are not relevant to the

treatment of subsequent confirmed releases from underground storage tanks. E.g., Evergreen FS v. IEPA, PCB No. 11-51, at p. 20 (June 21, 2012) (overfill from pumping fuel into monitoring well not an underground storage tank incident). The 2005 incident was not a release from an underground storage tank and therefore the LUST Program does not apply to it.

II. In the alternative, the 2005 incident was not confirmed as a release.

Section 57.6(a) of the Act requires 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 57.6(a)) The concept of release confirmation runs throughout the statute. The UST Fund is only accessible to "owners and operators who have a confirmed release from an underground storage tank or related tank system.," (415 ILCS 5/57.9(a)), and who have "notified the Illinois Emergency Management Agency of a confirmed release." (415 ILCS 5/57.9(a)(5)) The OSFM will only issue an eligibility and deductibility determination once "an owner or operator reports a confirmed release of a regulated substance." (415 ILCS 5/57.9(c)(1))

To be clear, Petitioner does not believe any of these provisions are relevant since they all either expressly or indirectly presume an underground storage tank release, whereas any release in 2005 occurred from above-ground ancillary equipment. But assuming the Board disagrees at least in part with the previous analysis, without confirmation of a release, there are no obligations under the LUST Program. The Board's LUST regulations reference OSFM regulations in 41 Ill. Adm. Code 170, as the proper methodology to confirm a release. (35 Ill. Adm. Code § 734.115 (definitions of "confirmation of a release" and "confirmed release").

The prior owner and operator in 2005 never confirmed a release, nor even reported a

suspected release. The Board has previously found as a matter of law that only the owner or operator may confirm a release. Broderick Teaming Company v. IEPA, PCB No. 00-187 (Dec. 7, 2000)[3] The incident reported by the local emergency agency to the IEMA is not a reporting that constitutes a release confirmation.

Because there is no confirmed release for this incident, there are no legal requirements associated with this incident. (415 ILCS 5/ 57.6(a)) It may be argued that the prior owner should have confirmed a release, but this is simply speculation. OSFM regulations governing release confirmation at time were found in 41 Ill. Adm.Code § 170.580, but their application is made ambiguous by the use of the same definition of "underground storage tank system," which the Board held does not apply to dispensing pumps. (41 Ill. Adm. Code § 170.400 (definition of "underground storage tank system"). Moreover, confirmation procedures are expressly intended to identify "whether a leak exists," and employs the types of release detection steps used to identify leaks, such as monthly inventory controls, tank gauging and tank tightness testing. (41 Ill. Adm. Code § 170.530) Not only do the regulations raise a strong inference that they were not intended to address the vehicular-accident scenario, but that any investigation might conclude that the tanks are tight or not losing product, notwithstanding the obvious damage above the surface.

Furthermore, OSFM regulations require reporting only for "a spill or overflow of petroleum that results in a release to the environment that exceeds 25 gallons or that causes a sheen on nearby surface water." (41 Ill. Adm. Code § 170.590(a)(3)) This requirement creates

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[3] In a subsequent ruling on motions for reconsideration, the Board in Broderick extended the period of time in which the owner or operator could perform early action based upon the equities of the situation, i.e., its activities would have been timely had it simply requested an extension of the 45-day period.

additional ambiguities, because spills and overflows don't occur when a dispensing unit is struck by a vehicle. (41 Ill. Adm. Code § 170.400) An "overfill release" is one that "occurs when a tank is filled beyond its capacity . . ." (Id.) A "spill release" is one that "usually occurs at the fill pipe opening of a tank when a delivery truck's hose is disconnected from the fill pipe, while product continues to exit the hose." (Id.) Even assuming a spill or overfill, it is not certain that more than 25 gallons was released to the environment, though the person that reported a release opined that there had been 100 gallons released. Such visual observation are at best approximations of quantity (and may have included vehicular emissions) and are insufficient to confirm a release on their own. See Weeke Oil Co. v. IEPA, PCB No. 10-1, at p. 23 (May 20, 2010) (finding that consultant and OSFM visual and olfactory observations insufficient to show that a release had occurred).

Ultimately, all that can be said is no confirmation of a release stemming from the 2005 incident in the record, and the passage of time and the presumptive clean-up of any gasoline on the hard surface preclude such confirmation now. Whether or not their could or should have been a release confirmed at the time is speculative, made ambiguous by the focus of the regulatory requirements on leaks from tanks, not from aboveground features.

III. In the Alternative, There is No Requirement to Submit an Eligibility Determination for the 2005 Incident In Order to Precess Payment for Work on the 2011 Incident.

There are several regulations referenced in the denial letter that purport to justify requiring Petitioner to submit an eligibility determination for incident 2005. None of these actually require such a submittal, which is presumably why a few different provisions are cited. Section 734.630(cc) simply requires "supporting documentation," but an eligibility determination

for the 2005 incident is not relevant to the clean-up of the 2011 incident. As recognized by the IEPA's technical reviewer, only the confirmed release from 2011 was being cleaned-up. (A.R. at pp. 322-323) Also, the IEPA denial letter references the requirement that "[a] copy of the OSFM or Agency eligibility and deductibility determination" be enclosed with the submittal. (35 Ill. Adm. Code § 734.605(b)(3)) A copy of the only eligibility determination made at the site was attached. (A.R. at p. 43) Petitioner cannot be compelled to produce non-existent documents, nor as the technical reviewer noted can the Petitioner be compelled to accept responsibility for the 2005 incident, which it knows nothing about. (A.R. at pp. 322-323)

The last regulation referenced in the denial letter addresses the real issue motivating the denial, which is the deductible. There was no technical requirement that the plans and budgets for cleaning-up the 2011 incident include the 2005 incident, but at the payment stage, the non-technical reviewer wanted to assess a higher deductible. (A.R. at p. 219) Releases reported after June of 2010 are subject to a $5,000 deductible. (415 ILCS 5/57.9(b)(3)) Prior to the 2010 amendments, the deductible would have been $10,000 since all of the tanks were registered prior to 1989. (A.R. 329) To assess a higher deductible, the Illinois EPA would not only have to take the position that the 2005 incident was a confirmed release from an underground storage tank, but would also have to take the additional stance that the 2011 incident was a re-reporting of the 2005 incident, a position disputed by the IEPA's own technical reviewer. (A.R. at pp. 322-323)

Petitioner submitted an application for payment for work and costs approved in the cleanup of the 2011 incident, and there is no requirement in the Act or the regulations that would require it to elect to cleanup the 2005 incident in order to be paid for that work.

IV. Alternatively, Petitioner No Longer Owns the Property.

The Illinois EPA wants Petitioner to elect to proceed as owner of the 2005 incident. (A.R. 219) An election to proceed as owner requires a person "to the Agency a written election to proceed under this Title and has acquired an ownership interest in a site on which one or more registered tanks have been removed, but on which corrective action has not yet resulted in the issuance of a "no further remediation letter" by the Agency pursuant to this Title." (415 ILCS 5/57.2 (definition of "owner")) At the hearing herein, Petitioner asked the Board to take official notice of a copy of the quick claim deed recorded in the Madison County Recorder's Office, by which Petitioner had conveyed its ownership interest in the site, subsequent to the removal of all tanks. Therefore, it would be impossible to obtain an election to proceed and also by implication of the terminology used such an "election" is intended to be voluntary, not compulsory.

CONCLUSION

WHEREFORE, Petitioner aks the Board to reverse the IEPA's decision, denying payment in the amount of $17,562.48, authorize the Petitioner to submit application and proofs of litigation expenses incurred in this appeal pursuant to 415 ILCS 5/57.8(l), and for such other and further relief as the Board deems meet and just.

Respectfully submitted,

PAK-AGS, INC., Petitioner,

By: MOHAN, ALEWELT, PRILLAMAN & ADAMI

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APPENDIX
TABLE OF CONTENTS TO AGENCY RECORD