BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

ILLICO INDEPENDENT OIL CO.	)	
Petitioner,	)	
	)	
v.	)	PCB 2017-084
	)	(UST Appeal - Land)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
Respondent.	)	

NOTICE

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PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board **RESPONDENT'S POST-HEARING BRIEF,** copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

_____

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Dated: **October 24, 2018**

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RESPONDENT'S POST-HEARING BRIEF

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA" or "Agency"), by one of its attorneys, Melanie A. Jarvis, Assistant Counsel and Special Assistant Attorney General, and hereby submits a Post-Hearing Brief in the above captioned matter.

BURDEN OF PROOF

Section 105.112(a) of the Illinois Pollution Control Board's ("Board") procedural rules (35 Ill. Adm. Code 105.112(a)) provides that the **burden of proof shall be on a Petitioner**. In reimbursement appeals, of which this matter is, the applicant for reimbursement has the burden to demonstrate that alleged costs are related to corrective action, properly accounted for, and reasonable. See: Rezmar Corporation v. Illinois EPA, PCB 02-91 (April 17, 2003), p. 9.

As the Board, itself has noted, the primary focus of a reimbursement appeal must remain on the adequacy of the permit application and the information submitted by the applicant (Petitioner) to the Illinois EPA for review. See: John Sexton Contractors Company v. Illinois EPA, PCB 88-139 (February 23, 1989), p. 5. Simply, the ultimate burden of proof will remain on the party initiating an appeal (Petitioner) and what Petition presented for the

Illinois EPA to review and render an opinion upon. See: John Sexton Contractors Company v. Illinois Pollution Control Board, 201 Ill. App. 3d 415, 425-426, 558 N.E.2d 1222, 1229 (1st Dist. 1990).

Petitioner must demonstrate to the Board that it satisfied this high burden before the Board may even entertain a review of the Illinois EPA's decision. The facts below and the arguments presented will lead the Board to one conclusion, that Petitioner has **failed** to meet its burden of proof.

STANDARD OF REVIEW

Section 57.8(i) of the Environmental Protection Act ("Act") (415 ILCS 5/57.8) allows an individual to challenge a determination of the Illinois EPA to the Board pursuant to Section 40 of the Act (415 ILCS 5/40). Section 40 of the Act is the general appeal section for permits and has been used by the legislature as the basis for this type of review to the Board. When considering an Illinois EPA determination on a submitted corrective action plan and/or budget, the Board must determine whether the proposal(s), as submitted to the Illinois EPA, demonstrate compliance with the Act and Board regulations. See: Broderick Teaming Company v. Illinois EPA, PCB 00-187 (December 7, 2000).

The Board will not, and should not, consider new information not presented to the Illinois EPA. Simply put, if the information was not before the Illinois EPA that information could not have been relied upon by either the Petitioner nor Illinois EPA in review and rendering a determination on the sufficiency of the application. As such, the Illinois EPA's final decision, and the application, as submitted for review, frame the appeal. See: Todd's Service Station v. Illinois EPA, PCB 03-2 (January 22, 2004), p.4; See also: Pulitzer Community Newspapers, Inc. v. EPA, PCB 90-142 (Dec. 20, 1990). The Board must,

therefore, look to the documents within the Administrative Record ("Record")[1] as the sole source of rendering an opinion on whether the Illinois EPA framed its determination consistently with the application and law. Petitioner has not challenged the sufficiency of the Record in this matter.

ISSUE

The Illinois EPA final determinations on the application frame the issues on appeal. The issue presented in this matter is:

> Whether, the Petitioner can be reimbursed for the removal of underground storage tanks (USTs), piping, and pump islands, outside of the early action timeframe, when the owner/operator has not demonstrated that the USTs, piping, and pump islands must be removed to access backfill/soil that contains contaminants at concentrations greater than the Tier 2 remediation objectives.

FACTS

On December 03, 1992, the Illinois Emergency Management Agency (IEMA) was notified of a release at the Illico Independent Oil site located at 3712 University Avenue, Peoria, Illinois. (AR 001). IEMA assigned incident number 923441 to the release. (AR 001). On March 2, 1993, Plaintiff, Illico Independent Oil, submitted the 45-day report. (AR 002). In this report, the cause of release was listed as "Spills and overfills (tanks and piping have tested tight)". (AR 003). At that time, it was reported that the "tanks are present, active and have passed tightness tests. There are no forthcoming plans in existence for the removal of these tanks." (AR 006).

[1] Citations to the Administrative Record will hereinafter be made as, "AR___."
Citations to the Hearing Transcript will hereinafter be made as, "Trans___."

On October 2, 2015, Premcor Refining Group, through their consultant, submitted a Stage 2 Site Investigation Results Report and an actual costs budget for the Stage 2 Site Investigation. (AR 010). This actual costs budget was approved on February 1, 2016. (AR 438). On October 6, 2015, Illico, through their consultant, submitted a Stage 3 Site Investigation Plan. (AR 129). The Stage 3 Plan was approved with one modification on February 1, 2016. (AR 443). Neither the actual costs budget nor the Stage 3 Plan decisions were appealed.

On December 14, 2015, the Petitioner submitted a Corrective Action Plan and Budget. (AR 174). This plan proposed the removal of the four 12,000-gallon tanks and the one 6,000-gallon tank. (AR 177). This plan was rejected on November 29, 2016. (AR 577). This plan was rejected because the Petitioner proposed remediation of soils already shown to meet Tier 2 objectives and the Petitioner needed to calculate remediation objectives in order to determine the most restrictive objectives for the site. (AR 561) (Transcript 28). The only reported sample locations at the site that exceeded Tier 2 objectives were SB-4, SB-17 and SB-31. While the letter dated November 29, 2016 stated the only reported sample locations that exceeded Tier 2 objectives or site-specific soil saturation limits were SB-4/MW-4, SB-17, and SB-31, it should be noted the Illinois EPA and the Premcor Refining Group Inc. agreed not to consider the analytical results of SB-4/MW-4 when evaluating the subsurface site conditions. (AR 14).

Further the proposed removal of the Underground Storage Tank System along with 1640 cubic yards of contaminated soil exceeded the minimum requirements of the Act. (AR 562). (Transcript 30).

On December 14, 2015, Petitioner submitted the Site Investigation Completion Report (SICR). (AR 238). The SICR and Stage 3 Site Investigation Budget, which was Attachment 5 of the SICR were approved on August 25, 2016 (AR 556), after subsequent submittal of additional

information via email on various dates by the consultant. (AR 429, 448, 457,466, 498, 517 and 551).

On January 16, 2017, Petitioner submitted their second Corrective Action Plan, Soil Remediation and TACO Closure. (AR 584). This Plan stated as follows:

> "Due to the needs of the current property owner, the on-site excavation and UST system removal has **already been completed.** The excavation has been backfilled, and surface restored." (AR 590) (Emphasis added).

The Underground Storage Tank system was removed between January 28 to January 29, 2016. (AR 617 and 621). Petitioner did call IEMA on January 28, 2016, **after the tanks were removed from the ground** and a new incident number, 20160095, was issued by IEMA. (AR 561). Petitioner has not submitted information to the Illinois EPA that demonstrates that this second reported release was a re-reporting of the 923441 release. (AR 579). This plan was modified by the Agency on May 17, 2017. (AR634). While there were numerous modifications, (AR 636), the modification that is the subject of this appeal reads as follows:

> The owner/operator shall not remove the underground storage tanks (USTs), piping and pump islands because the owner/operator has not demonstrated that the USTs, piping, and pump islands must be removed to access backfill/soil that contains contaminants at concentrations greater than the Tier 2 remediation objectives. (AR 637).

The corresponding budget was modified to remove the reimbursement for the UST removal, piping, pump islands and for backfill/soil in the orange zone of the remediation. (AR 640) (For visual representation of the remediation zones, please see the Agency's Hearing Exhibit 1).

The Petitioner appealed the entire Agency decision on June 22, 2017. Motions for Summary Judgement were filed and argued and the Board, in its ruling on the Motions, found a material issue of fact existed. A hearing was held in this matter on September 19, 2018.

LAW

415 ILCS 5/57.2

As used in this Title * * *

"Corrective action" means activities associated with compliance with the provisions of sections 57.6 and 57.7 of this title. * * *

415 ILCS5/57.5(a)

Notwithstanding 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.

415 ILCS 5/57.6

(a) Owners and operators of underground storage tanks shall, in response to all confirmed releases, comply with all applicable statutory and regulatory reporting and response requirements.

(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.

35 Ill. Adm. Code 734.115

"Corrective action" means activities associated with compliance with the provisions of Sections 57.6 and 57.7 of the Act [415 ILCS 5/57.2]

35 Ill. Adm. Code 734.210

a) Upon confirmation of a release of petroleum from a~~n~~ UST system in accordance with regulations promulgated by the OSFM, the owner or operator, or both, must perform the following initial response actions:

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

BOARD NOTE: The OSFM rules for the reporting of UST releases are found at 41 Ill. Adm. Code 176.320(a).

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

3) Immediately identify and mitigate fire, explosion and vapor hazards.

b) Within 20 days after initial notification to IEMA of a release plus 14 days, the owner or operator must perform the following initial abatement measures:

1) Remove as much of the petroleum from the UST system as is necessary to prevent further release into the environment;

2) Visually inspect any aboveground releases or exposed below ground releases and prevent further migration of the released substance into surrounding soils and groundwater;

3) Continue to monitor and mitigate any additional fire and safety hazards posed by vapors or free product that have migrated from the UST excavation zone and entered into subsurface structures (such as sewers or basements);

4) Remedy hazards posed by contaminated soils that are excavated or exposed as a result of release confirmation, site investigation, abatement or corrective action activities. If these remedies include treatment or disposal of soils, the owner or operator must comply with 35 Ill. Adm. Code 722, 724, 725, and 807 through 815;

5) Measure for the presence of a release where contamination is most likely to be present at the UST site, unless the presence and source of the release have been confirmed in accordance with regulations promulgated by the OSFM. In selecting sample types, sample locations, and measurement methods, the owner or operator must consider the nature of the stored substance, the type of backfill, depth to groundwater and other factors as appropriate for identifying the presence and source of the release; and

6) Investigate to determine the possible presence of free product, and begin removal of free product as soon as practicable and in accordance with Section 734.215 of this Part.

c) Within 20 days after initial notification to IEMA of a release plus 14 days, the owner or operator must submit a report to the Agency summarizing the initial abatement steps taken under subsection (b) of this Section and any resulting information or data.

d) Within 45 days after initial notification to IEMA of a release plus 14 days, the owner or operator must assemble information about the site and the nature of the release, including information gained while confirming the release or completing the initial abatement measures in subsections (a) and (b) of this Section. This information must include, but is not limited to, the following:

1) Data on the nature and estimated quantity of release;

2) Data from available sources or site investigations concerning the following factors: surrounding populations, water quality, use and approximate locations of wells potentially affected by the release, subsurface soil conditions, locations of subsurface sewers, climatological conditions and land use;

3) Results of the site check required at subsection (b)(5) of this Section; and

4) Results of the free product investigations required at subsection (b)(6) of this Section, to be used by owners or operators to determine whether free product must be recovered under Section 734.215 of this Part.

e) Within 45 days after initial notification to IEMA of a release plus 14 days, the owner or operator must submit to the Agency the information collected in compliance with subsection (d) of this Section in a manner that demonstrates its applicability and technical adequacy.

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.

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.

1) At a minimum, for each UST that is removed, the owner or operator must collect and analyze soil samples as indicated in subsections (h)(1)(A) through (E). The Agency must allow an alternate location for, or excuse the collection of, one or more samples if sample collection in the following locations is made impracticable by site-specific circumstances.

A) One sample must be collected from each UST excavation wall. The samples must be collected from locations representative of soil that is the most contaminated as a result of the release. If an area of contamination cannot be identified on a wall, the sample must be collected from the center of the wall length at a point located one-third of the distance from the excavation floor to the ground surface. For walls that exceed 20 feet in length, one sample must be collected for each 20 feet of wall length, or fraction thereof, and the samples must be evenly spaced along the length of the wall.

B) Two samples must be collected from the excavation floor below each UST with a volume of 1,000 gallons or more. One sample must be collected from the excavation floor below each UST with a volume of less than 1,000 gallons. The samples must be collected from locations representative of soil that is the most contaminated as a result of the release. If areas of contamination cannot be identified, the samples must be collected from below each end of the UST if its volume is 1,000 gallons or more, and from below the center of the UST if its volume is less than 1,000 gallons.

C) One sample must be collected from the floor of each 20 feet of UST piping run excavation, or fraction thereof. The samples must be collected from a location representative of

soil that is the most contaminated as a result of the release. If an area of contamination cannot be identified within a length of piping run excavation being sampled, the sample must be collected from the center of the length being sampled. For UST piping abandoned in place, the samples must be collected in accordance with subsection (h)(2)(B) of this Section.

D) If backfill is returned to the excavation, one representative sample of the backfill must be collected for each 100 cubic yards of backfill returned to the excavation.

E) The samples must be analyzed for the applicable indicator contaminants. In the case of a used oil UST, the sample that appears to be the most contaminated as a result of a release from the used oil UST must be analyzed in accordance with Section 734.405(g) of this Part to determine the indicator contaminants for used oil. The remaining samples collected pursuant to subsections (h)(1)(A) and (B) of this Section must then be analyzed for the applicable used oil indicator contaminants.

2) At a minimum, for each UST that remains in place, the owner or operator must collect and analyze soil samples as follows. The Agency must allow an alternate location for, or excuse the drilling of, one or more borings if drilling in the following locations is made impracticable by site-specific circumstances.

A) One boring must be drilled at the center point along each side of each UST, or along each side of each cluster of multiple USTs, remaining in place. If a side exceeds 20 feet in length, one boring must be drilled for each 20 feet of side length, or fraction thereof, and the borings must be evenly spaced along the side. The borings must be drilled in the native soil surrounding the USTs and as close practicable to, but not more than five feet from, the backfill material surrounding the USTs. Each 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.

B) Two borings, one on each side of the piping, must be drilled for every 20 feet of UST piping, or fraction thereof, that remains in place. The borings must be drilled as close as practicable to, but not more than five feet from, the locations

of suspected piping releases. If no release is suspected within a length of UST piping being sampled, the borings must be drilled in the center of the length being sampled. Each boring must be drilled to a depth of 15 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 15 feet below grade. For UST piping that is removed, samples must be collected from the floor of the piping run in accordance with subsection (h)(1)(C) of this Section.

C) If auger refusal occurs during the drilling of a boring required under subsection (h)(2)(A) or (B) of this Section, the boring must be drilled in an alternate location that will allow the boring to be drilled to the required depth. The alternate location must not be more than five feet from the boring's original location. If auger refusal occurs during drilling of the boring in the alternate location, drilling of the boring must cease and the soil samples collected from the location in which the boring was drilled to the greatest depth must be analyzed for the applicable indicator contaminants.

D) One soil sample must be collected from each five-foot interval of each boring required under subsections (h)(2)(A) through (C) of this Section. Each sample must be collected from the location within the five-foot interval that is the most contaminated as a result of the release. If an area of contamination cannot be identified within a five-foot interval, the sample must be collected from the center of the five-foot interval, provided, however, that soil samples must not be collected from soil below the groundwater table. All samples must be analyzed for the applicable indicator contaminants.

3) If the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants have been met, and if none of the criteria set forth in subsections (h)(4)(A) through (C) of this Section are met, within 30 days after the completion of early action activities the owner or operator must submit a report demonstrating compliance with those remediation objectives. The report must include, but not be limited to, the following:

A) A characterization of the site that demonstrates compliance with the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants;

B) Supporting documentation, including, but not limited to, the following:

i) A site map meeting the requirements of Section 734.440 of this Part that shows the locations of all samples collected pursuant to this subsection (h);

ii) Analytical results, chain of custody forms, and laboratory certifications for all samples collected pursuant to this subsection (h); and

iii) A table comparing the analytical results of all samples collected pursuant to this subsection (h) to the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants; and

C) A site map containing only the information required under Section 734.440 of this Part.

4) If the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants have not been met, or if one or more of the following criteria are met, the owner or operator must continue in accordance with Subpart C of this Part:

A) There is evidence that groundwater wells have been impacted by the release above the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants (e.g., as found during release confirmation or previous corrective action measures);

B) Free product that may impact groundwater is found to need recovery in compliance with Section 734.215 of this Part; or

C) There is evidence that contaminated soils may be or may have been in contact with groundwater, unless:

i) The owner or operator pumps the excavation or tank cavity dry, properly disposes of all contaminated water, and demonstrates to the Agency that no recharge is evident during the 24 hours following pumping; and

ii) The Agency determines that further groundwater investigation is not necessary.

35 Ill. Adm. Code 734.335(d)

Notwithstanding any requirement under this Part for the submission of a corrective action plan or corrective action budget, except as provided at Section 734.340 or this Part, an owner or operator may proceed to conduct corrective action activities in accordance with this Subpart C prior to the submittal or approval of an otherwise required corrective action plan or budget. However, any such plan and budget must be submitted to the Agency for review and approval, rejection, or modification in accordance with the procedures contained in Subpart E of this Part prior to payment for any related costs or the issuance of a No Further Remediation Letter.

BOARD NOTE: Owners or Operators proceeding under subsection (d) of this Section are advised that they may not be entitled to full payment from the Fund. Furthermore, applications for payment must be submitted no later than one year after the date the Agency issues a No Further Remediation Letter. See Subpart F of this Part.

35 Ill. Adm. Code 734.625(a)(1)

Types of costs that may be eligible for payment from the Fund include those for corrective action activities and for materials or services provided or performed in conjunction with corrective action activities. Such activities and services may include, but are not limited to, reasonable costs for early action activities conducted pursuant to Subpart B of this Part.

35 Ill. Adm. Code 734.625(a)(12)

Types of costs that may be eligible for payment from the Fund include those for corrective action activities and for materials or services provided or performed in conjunction with corrective action activities. Such activities and services may include, but are not limited to, reasonable costs for the removal and disposal of any UST if a release of petroleum from the UST was identified and IEMA was notified prior to its removal, with the exception of any UST deemed ineligible by the OSFM.

35 Ill. Adm. Code 734.630(k)

Costs ineligible for payment from the Fund include, but are not limited to, costs for removal, disposal, or abandonment of a UST if the tank was removed or abandoned, or permitted for removal or abandonment, by the OSFM before the owner or operator provided notice to IEMA of a release of petroleum.

35 Ill. Adm. Code 734.630(i)

Costs ineligible for payment from the Fund include, but not limited to, costs associated with activities that violate any provision of the Act or Board, OSFM, or Agency regulations.

35 Ill. Adm. Code 734.630(o)

Costs ineligible for payment from the Fund include, but are not limited to, costs for corrective action activities and associated materials or services exceeding the minimum requirements necessary to comply with the Act.

35 Ill. Adm. Code 734.630(y)

Costs ineligible for payment from the Fund include, but are not limited to, costs related to activities, materials, or services not necessary to stop, minimize, eliminate, or clean up a release of petroleum or its effects in accordance with the minimum requirements of the Act and regulations.

35 Ill. Adm. Code 734.630(cc)

Cost ineligible for payment from the Fund include, but are not limited to, costs that lack supporting documentation.

35 Ill. Adm. Code 734.630(dd)

Cost ineligible for payment from the Fund include, but are not limited to, costs proposed as part of a budget that are unreasonable.

35 Ill. Adm. Code 734.630(tt)

Cost ineligible for payment from the Fund include, but are not limited to, costs associated with the treatment or disposal of soil that does not exceed the applicable remediation objectives for the release, unless approved by the Agency in writing prior to the treatment or disposal.

35 Ill. Adm. Code 734.630(aaa)

Cost ineligible for payment from the Fund include, but are not limited to, costs associated with on-site corrective action to achieve remediation objectives that are more stringent than the Tier 2 remediation objectives developed in accordance with 35 Ill. Adm. Code 742. This subsection (aaa) does not apply if Karst geology prevents the development of Tier 2 remediation objectives for on-site remediation, or if a court of law voids or invalidates a No Further Remediation Letter and orders the owner or operator to achieve Tier 1 remediation objectives on-site in response to the release.

35 Ill. Adm. Code 734.630(ddd)

Cost ineligible for payment from the Fund include, but are not limited to, costs associated with corrective action to achieve remediation objectives other than industrial/commercial property remediation objectives, unless the owner or operator demonstrates that the property being remediated is residential property or is being developed into residential property. This subsection (ddd) does not prohibit the payment of costs associated with remediation approved by

the Agency pursuant to Section 734.360(c) or (d) of this Part to remediate or prevent groundwater contamination at off-site property.

ARGUMENT

I. Introduction

The Agency's argument can be summed up simply. The only means available to Petitioner to seek reimbursement for removal of tanks on the site would be either (a) under early action of an incident or (b) following a demonstration that the system must be removed per sampling confirmation and approved within a Corrective Action Plan, reviewed and approved by the Agency. Petitioner cannot demonstrate either in this matter, a fact that Petitioner does not argue against.

Did Petitioner conduct its tank system pull pursuant to early action? No, it did not. As the facts demonstrate, Petitioner attempts to somehow equate the removal of the system with incident number 923441, which as Petitioner, the Agency and the Board are all fully aware, occurred 23 years ago. Arguments offered by Petitioner to attempt to place the system removal in early action from a release 23 years ago are, at best, ridiculous and strain the 'common sense' theory upon which Petitioner so heavily relies upon within its post hearing brief.

Facts are simple. Since the system removal occurred in 2017, without review from the Illinois EPA, it could hardly be reimbursed pursuant to the original Corrective Action Plan, or the Corrective Action Plan under appeal, which, though submitted, were never approved at the time of the system removal.

Moreover, Petitioner did not submit adequate proof that the tanks needed to be removed as part of corrective action. And remember, Petitioner missed the early action window for removing the tanks by over 23 years. Per the 45-Day Report, tests conducted by the Illinois

Department of Transportation during road improvements at the intersection of University Ave. and War Memorial Dr. prompted the reporting of a suspected release. The tanks were found to be tight and remained in use after the release was reported. That 1992 release was reported as an overfill and **not a release from the tanks**. Nowhere in the record does it state that the fills and overfills were from a tank or the tank area. The concentrations were the highest near the product line and dispensers. Therefore, it is reasonable to assume that the likely source was the product line or dispensers. The soils samples taken around the tanks did not exceed Tier 2 objectives as required. Further, though never noted by the Petitioner, the tank pull was never approved in a corrective action plan. The plain and simple fact is that this action, pulling the tanks to remediate contamination, was not presented as an option in 1992, contemporaneous with the release date, nor between 1993 and 2015, nor approved in either of the two Corrective Action Plans submitted by the Petitioner for Agency review. Only following removal did Petitioner determine somehow, that the tanks must be removed pursuant to the earlier release and that somehow the product spotted during removal must have been a re-reporting of the prior release.

If, as Petitioner continuously states, that common sense is the wind directing the reasoning of this matter, which it should be noted that the Agency objects to using this fictional common sense "standard" of review, it is more persuasive to recognize that the tanks in this case were removed most likely because they were older tanks. Their owner wanted to sell his business and needed to remove the tanks and replace them with new tanks prior to the sale. (Transcript 26). Mr. Wienhoff testified to the purpose of the removal of the tanks as follows:

> Q. Why were the tanks removed?
>
> A. For a myriad of reasons, but it had to do with the owner. I guess, Illico ended up back with the property and they were working on selling the property, and the tanks were also coming to the end of their useful life and so they wanted to get that -- they needed to get that work done prior to completing the sale.

During the removal of the tanks, a second release was reported to IEMA Incident Number 20160095. (AR 561). Petitioner states on page 3 of its brief that Incident Number 20160095 was a re-reporting of the 1992 release. However, this has not been determined. Petitioner failed to submit any reports for Incident Number 20160095. The Illinois EPA typically makes a re-reporting determination after the owner/operator submits the 45-Day Report, which includes the necessary analytical results. Without these results, a re-reporting determination cannot be made.

Why would Petitioner have an issue with the tank removal being associated with the 2016 release? The problem for Petitioner with the Incident Number 20160095 release was that it was reported after the tanks were removed, so the tank removal would not qualify for removal under the early action provisions of Section 57.6 of the Act which requires a confirmed release prior to an early action removal of the tanks. (Transcript 27, testimony of Jeff Wienhoff that confirms it is his understanding that a release needs to be confirmed prior to removal of the tanks under Early Action.)

Being foreclosed to removal of the tanks during the early action timeframe of the 2016 release, the 1992 release has to be used. However, under the Incident Number 923441 release, the Petitioner is well past the early action timeframes set forth in the Act, by give or take 23 years, therefore, they needed to demonstrate that the removal of the tanks was necessary for remediation of the site. Unfortunately, the Petitioner has been unable to make such a demonstration. Further, the Petitioner removed the tanks prior to approval of said removal in a Corrective Action Plan. When an owner/operator performs corrective action without Illinois EPA approval, they do so at their own risk. Section 734.335(d) includes a Board Note for instances when corrective action activities are performed without an approved Corrective Action Plan. That Board Note states as follows:

> BOARD NOTE: Owners or Operators proceeding under subsection (d) of this Section ***are advised that they may not be entitled to full payment from the Fund.*** Furthermore, applications for payment must be submitted no later than one year after the date the Agency issues a No Further Remediation Letter. See Subpart F of this Part. (Emphasis added).

It is important to note that the Leaking Underground Storage Tank section of the Act and regulations thereunder were intended to reimburse owners and operators for **LEAKING** underground storage tanks. These conditions to reimbursement were put in place to avoid the Leaking Underground Storage Tank Fund from paying for the removal of tanks that are not leaking but merely need to be removed or replaced at the whim of their owner. We unfortunately have such a situation here.

II. Illinois EPA Argument

In 1992, the Illinois Department of Transportation notified the Petitioner that they have found contamination in the intersection of West War Memorial Drive and N. University Street in Peoria, Illinois. (AR 1). The gas station notified by IDOT is the same station in this matter. A release was reported to the IEMA which assigned Incident Number 923441. The tanks and piping system were tested and were shown to be tight. It was determined within the 45-day report filed under this incident number that the cause of the release was overfills and spills and was not a release from the tank system.

Fast Forward 23 years and the owner/operator of that tank system is now ready to sell his property but owns tanks that are reaching or have reached the end of their useful life. (Transcript 26). In order to sell the property, yet maintain its usefulness as a gas station, the old tanks needed to be removed and new tanks needed to be installed. Permits are obtained to remove the old tanks and install the new tanks in early January 2016. (AR 423 and 425). A rush is on to remove the tanks as evidenced by the owner's consultant files several reports with the Illinois EPA in the

middle of December 2015, following a prolonged silence from 1993 to 2015. One of these reports is a December 14, 2015 Corrective Action Plan and Budget. This plan provides for the removal of the tank system but had not established the corrective action objectives under Tier 2, which are required prior to corrective action commencing and prior to a tank removal being approved. (Transcript 28). The Petitioner was not going to wait for the Illinois EPA to have time to review its Corrective Action Plan and Budget, however, and removed the tanks a mere 45 days after the submittal of the plan to the Agency. (AR 590). It is important to note that the 45 days included the holidays of Christmas, New Year's and Martin Luther King's Birthday, substantially reducing the number of business work days available for a comprehensive review. Was this removal done due to an environmental emergency? Was there free product streaming into the nearby sewer system or the waters of the State? No to both questions. What was likely more pressing was a sale of property. The Petitioner knowingly risked reimbursement from the fund because it did not have an approved Corrective Action Plan. Jeff Wienhoff testified at hearing as follows:

> Q. So they were moved because the owner wanted them removed prior to any approval for the removal.
>
> A. The owner chose not to wait for the approval because of the timeline he had.
>
> Q. And you're aware that, then, underneath the regulations, he took the risk that it might not be reimbursed?
>
> A. Correct. (Transcript 26,27)

Retroactively claiming that a release from 23 years ago made it urgently necessary to remove the tanks without Agency approval is not credible. The product seen by IEMA and OSFM had to be the very same product encountered 23 years ago.

Let's review the facts. An unresolved 1992 incident remained at the property. Twenty-three years later, it is obvious that the 1992 incident is outside the timeframe for early action

removal of the tanks. The Petitioner planned to remove their tanks and replace them with new ones. (AR 423 and 425). Petitioner desired to have the tank system replaced as soon as possible and was unwilling to wait for Illinois EPA approval prior to removal of the tank system and removes it 45 days after submitting its initial Corrective Action Plan and Budget. (AR590). The Office of State Fire Marshall required another release to be called in to IEMA during removal of the tank system. Due to the nature and timing of the tank system removal, the removal of the tank system would not be reimbursed under a new IEMA number relative to a new release. (Transcript 27).

Considering all of the above, the regulations require that a valid corrective action purpose needs to be demonstrated to qualify the tanks for payment from the Fund. When asked during his testimony, Jeff Wienhoff testified as follows:

Q. What soil borings indicate that the orange section was hot?

A. Well, there are no soil borings in the orange section* * * (Transcript 23).

In order to make this demonstration, the soil removed from the tank area needed to have contamination over the Tier 2 numbers. Was the soil removed from the tank pit tested for its level of contamination? No, it was not. Jeff Wienhoff testified at hearing regarding the testing of material as follows:

Q. So we do not have any evidence that it was above Tier 2.

A. Correct. We didn't collect any samples of that material.

Section 734.630(tt) requires that costs associated with the treatment or disposal of soil must exceed the applicable remediation objectives for the release, Tier 2 in this instance, for the costs to be reimbursed, unless approved by the Illinois EPA in writing prior to the treatment or disposal. Not only was the soil not tested to determine if it exceeded the Tier 2 objectives, approval

was not sought from the Illinois EPA prior to disposal. Testing the soil removed from the tank pit was necessary to show that there was a corrective action purpose in the removal of the tanks thereby qualifying the removal for reimbursement. Yet this major step that is a common practice when removing tanks, was not performed.

When reviewing the Corrective Action Plan and Budget that is subject to this appeal, the Agency noted several deficiencies and violations of the Act and regulations.

- Costs ineligible for payment from the Fund include, but are not limited to, **costs for removal, disposal, or abandonment of a UST if the tank was removed or abandoned, or permitted for removal or abandonment, by the OSFM before the owner or operator provided notice to IEMA of a release of petroleum**. 35 Ill. Adm. Code 734.630(k). (Emphasis added).

- Costs ineligible for payment from the Fund include, but are not limited to, costs associated with **activities that violate any provision of the Act or Board, OSFM, or Agency regulations.** 35 Ill. Adm. Code 734.630(i). (Emphasis added).

- Costs ineligible for payment from the Fund include, but are not limited to, costs for corrective action activities and associated materials or services **exceeding the minimum requirements necessary to comply with the Act**. 35 Ill. Adm. Code 734.630(o). (Emphasis added).

- Costs ineligible for payment from the Fund include, but are not limited to, costs related to activities, materials, or services **not necessary to stop, minimize, eliminate, or clean up a release of petroleum or its effects in accordance with the minimum requirements of the Act and regulations**. 35 Ill. Adm. Code 734.630(y). (Emphasis added).

- Cost ineligible for payment from the Fund include, but are not limited to, costs that **lack supporting documentation.** 35 Ill. Adm. Code 734.630(cc). (Emphasis added).

- Cost ineligible for payment from the Fund include, but are not limited to, **costs proposed as part of a budget that are unreasonable**. 35 Ill. Adm. Code 734.630(dd). (Emphasis added).

- Cost ineligible for payment from the Fund include, but are not limited to, **costs associated with the treatment or disposal of soil that does not exceed the applicable remediation objectives for the release, unless approved by the Agency in writing prior to the treatment or disposal**. 35 Ill. Adm. Code 734.630(tt). (Emphasis added).

- Cost ineligible for payment from the Fund include, but are not limited to, **costs associated with on-site corrective action to achieve remediation objectives that are more stringent than the Tier 2 remediation objectives developed in accordance with 35 Ill. Adm. Code 742**. This subsection (aaa) does not apply if Karst geology prevents the development of Tier 2 remediation objectives for on-site remediation, or if a court of law voids or invalidates a No Further Remediation Letter and orders the owner or operator to achieve Tier 1 remediation objectives on-site in response to the release. 35 Ill. Adm. Code 734.630(aaa). (Emphasis added).

- Cost ineligible for payment from the Fund include, but are not limited to, **costs associated with corrective action to achieve remediation objectives other than industrial/commercial property remediation objectives**, unless the owner or operator demonstrates that the property being remediated is residential property or is being developed into residential property. This subsection (ddd) does not prohibit the payment of costs associated with remediation approved by the Agency pursuant to Section 734.360(c) or (d) of this Part to remediate or prevent groundwater contamination at off-site property. 35 Ill. Adm. Code 734.630(ddd). (Emphasis added).

The bottom line is that the tank system was removed prior to approval by the Illinois EPA and there was no supporting documentation that the Tier 2 remediation objectives were exceeded around the tanks and in the soil removed for disposal. Jeff Wienhoff testified at hearing that even he did not know if the soil around the tanks exceeded Tier 2.

> Q. The contamination around the tanks was not over Tier 2, correct?
>
> A. That's not correct. We did not -- that's not correct. ***I don't know that***. (Transcript 30).

Highlighting this again, Petitioner, who has the burden of proof, is seeking reimbursement within a Corrective Action Plan and Budget that was not approved for a tank system and soils and presented no supporting documentation that the Tier 2 remediation objectives were exceeded around the tank system and in the soil removed for disposal. This lack of supporting documentation results in this "remediation" effort to be unreasonable in light of the Act and regulations and for it to exceed the minimum requirements of the Act.

III. Response to Petitioner's Post Hearing Brief

Petitioner makes several incredulous arguments in support of its claim that the tank removal be approved for reimbursement from the Leaking Underground Storage Tank Fund.

The Agency approved removal of soils and remediation at portions of the site where the information submitted by the Petitioner demonstrated that the contamination was above the Tier 2 standards. However, the Agency could not approve the removal of the tanks and the soil around the tank pit because the Petitioner did not submit information supporting its claims that there was contamination in that area of the site that exceeded Tier 2.

The Petitioner, on page 9 to 10 of its brief, states that the "worst contamination being around the tanks" for the reason why the tank removal should be reimbursed by the Leaking Underground Storage Tank Fund. This ignores, however, that, as discussed above, there has been no showing that the worst contamination was around the tanks. In fact, just the opposite information has been submitted to the Agency by the Petitioner. Remember, the consultant in this case failed to take samples from the soil removed from the tank pit. Therefore, it will never be possible to know what the contamination level was around those tanks. The soil borings that were above Tier 2 were nowhere near the tanks. Let's then examine the documentation submitted by the Petitioner. The reports submitted to the Agency, which are within the Administrative Record, show that SB-15, which was drilled 41' north of the tanks, SB-17, which was drilled 17' west of the tanks and SB-31, which was drilled 26' east of the tanks, are the only soil samples that needed to be remediated under the Corrective Action Plan, as they were the only soil boring above the Tier 2 remediation objectives. The owner/operator did not demonstrate that removal of five tanks, associated piping, 1309 yd^3 of soil/backfill, and 313 yd^3 of overburden is necessary to remediate three soil samples. Please note that, except for naphthalene, the concentrations of contaminants

in SB-31 are greater than the concentrations of contaminants in SB-17. Also note that the concentrations of contaminants in SB-18 and SB-19, which are closer to the tanks than SB-15, do not exceed the Tier 2 objectives. Please see Illinois EPA Hearing Exhibit 1 for indication of the locations of the above-mentioned soil borings and the color of the zone they are located within.

Petitioner next argues on page 10 of its brief as follows:

> "The releases occurred from the fill ports on top of each underground storage tank. (Hrg Trans. at p. 11) Based upon his expertise, which follows pretty close to common sense, this is where the contamination would be the worst because:
>
> **. . . based on the fact that the material at the source is generally the worst, and as you get further away, it gets better. So, by inference, that the nearest borings in the downgradient direction were above Tier 2, I believe that the material where the petroleum first was released would also be above Tier 2.** (Hrg. Trans. at p. 31)"

"Common sense" is really all that the Petitioner and its consultant have at this point as it is unable to submit any sampling data from the tank pit area, the orange zone, that is above Tier 2 objectives. Sampling was supposedly not taken from that area or from the soils removed from the tank pit, even though the consultant knew that he needed to show that the soil in that area was above Tier 2 in order to prove that corrective action was necessary under the Act and regulations to be reimbursed from the fund.

It is important to once again point out that nowhere in any of the documents in the file does it state the fills and overspills were from or near the tanks. Further, the concentrations are greatest near the product lines and dispensers. The concentrations in SB-18 and SB-19, between the dispensers and USTs, did not exceed the Tier 2 remediation objectives. Therefore, "common sense" actually points to the fact that the likely source of contamination is the spills and overfills from the product lines or dispensers. Mr. Wienhoff's testimony that while the piping is supposed to slope towards the tanks so that any contamination would flow in that direction, however, it was "possible" that the trench was not

sloped in this direction and resulted in the contamination pooling around the pumps is not credible. Why would a consultant slope the piping towards the tanks, but not the trench? The answer is that there is absolutely no valid reason as to why this would occur. Petitioner inferred that the groundwater direction is the cause for the elevated concentrations near the pumps. Whether a soil boring is located hydraulically downgradient is irrelevant to the concentrations of soil contamination in the vadose zone. Groundwater contamination might flow downgradient, however even if that did affect the level of soil contamination, the soil borings closes to the tanks did not exceed applicable Tier 2 remediation objectives. Once again, all evidence in the record demonstrates that overfills and spills near the pumps and piping are the logical source of the contamination at the site.

Petitioner sometime prior to December 18, 2015, unilaterally determined that "… due to issues with the property, remediation would need to be performed by the end of February, …." (AR at 422, Pet brief at 3) Prior to receiving permission for removal within either early action or CAP, Petitioner removed the tank system. Petitioner sought approval and reimbursement in a submittal of a CAP and Budget following removal of the system.

Petitioner offers a vast array of argument base solely upon expert testimony (of which there is an obvious objection by the Agency) and 'common sense' (for Petitioner has little to no facts or law in support of its argument for reimbursement).

Petitioner's common-sense argument can be summed up like this. Money exists within the fund, that money is to be used for reimbursement, so reimburse us for removal of tanks. Common sense is a good argument from a procedural standpoint, akin to offering that something alleged, but unsupported by fact, is incontrovertible, much like offering that 'trees are the right height.' Hard to offer differently. Yet, common sense is not something that is submitted within an

application for reimbursement and neither is 'expert' opinion. And, neither suffices for facts or review and approval of a regulatory Agency or this Board.

Petitioner, doubles down, by offering that "[t]he Agency's agenda here is transparent." (Pet brief at 11) True, of course the Agency denial is transparent; it is a denial. But, putting the rest of the words or speculation in our mouth is objectionable, and the Agency does object to assertions not represented in citation to the record. As noted within this brief, reimbursement can be had, IF Petitioner follows the statute and if done following review and approval or within early action. Petitioner's inability to establish either is not the result of some 'agenda' of the Agency. Any 'agenda' became transparent when Petitioner's consultant cryptically presented a deadline for moving forward that did not have any specificity nor importance to the Agency's review. And, again, any claim to reimbursement must be made properly and supported by the administrative record as well as Petitioner bearing the burden of proof for establishing a right to payment under the record – not common sense.

Finally, it is very important to recognize that Petitioner is offering a new standard of proof for reimbursement cases within its conclusion. Petitioner states that "No provision of the Act , or the Board's regulations, would be violated by removing the underground storage tanks, piping, pump islands and backfill or soil form the orange zone…. Accordingly, the related modifications to the budget… should be reversed." It is not the standard of review for the Board, nor is it the standard to which the Agency must be held. This matter is not akin to a permit review and the Fund is to be reviewed by the Agency and the Petitioner bears the burden on appeal.

The Petitioner ascribes some nefarious agenda upon the Agency on page 11 of its brief. Frankly, the Illinois EPA does not have an agenda other than ensuring compliance with the Act and

Board regulations. The Petitioner's conspiracy theories do not help move this discussion forward. The Agency is a creature of statute and as such operates within its statutory authority.

Petitioner states as follows on page 11 of its brief:

> "The Agency's agenda here is transparent. It believes that this is a planned tank pull, a concept not found in statute or regulation, and solely of internal significance to the Agency. Because it does not desire to reimburse any tank removal, only contaminated soils in zones without tanks can be removed. This means the soils where the contamination originated cannot be remediated, despite the evidence during the tank removal confirming the presence of contaminated soil and groundwater surrounding the tanks. Where corrective action is taken before approval, a corrective action plan must be submitted which details the corrective action taken, which in turn becomes part of the justification for the corrective action."

Technically, all tank pulls are planned tank pulls. Permits need to be received and tank removals need to be scheduled and the Office of State Fire Marshall notified. However, for purposes of payment from the Fund, the term "planned tank pull" is merely shorthand for Section 734.630(k) which provides if the tank was removed or abandoned, or permitted for removal or abandonment, **before the owner or operator provided notice to IEMA of a release** of petroleum its cost is not to be reimbursed from the Fund. Here, under the second IEMA number, #20160095, this tank removal would not have been eligible for reimbursement from the fund because the tanks were removed prior to the 2016 release being called in to IEMA. This reason was noted in the reviewer's notes but does not apply to the 1992 incident. The Illinois EPA is not arguing that removal of the tanks under the 1992 incident meets the definition of a "planned tank pull" under Section 734.630(k). The Illinois EPA is arguing that removal of the tanks under Incident #923441 cannot be reimbursed because the removal:

- Exceeds the minimum requirements necessary to comply with the Act and regulations.
- Is not corrective action.

- Violates provisions of the Act or Board, OSFM, or Agency regulations.
- Lacks supporting documentation.
- Is not necessary to stop, minimize, eliminate, or clean up a release of petroleum or its effects in accordance with the minimum requirements of the Act and regulations.
- Is associated with treatment or disposal of soil that does not exceed the applicable remediation objectives and therefore does not need to be treated or disposed.
- Is associated with on-site corrective action to achieve remediation objectives that are more stringent than the Tier 2 remediation objectives required in the regulations.
- Is not reasonable.

Pursuant to Section 57.6 (b) of the Act and 35 Ill. Adm. Code 734.210(f) and 734.210(g), an owner/operator may remove tanks prior to submission of a plan to the Illinois EPA and receive payment from the Fund if the tanks are removed within 45 days after initial notification to IEMA of a release plus 14 days. The tanks under the 1992 incident were removed over 23 years after initial notification to IEMA of a release. Therefore, the owner/operator must submit a plan to the Illinois EPA and demonstrate that removal of the tanks is pursuant to a valid corrective action objective and does not violate the Act or regulations. As stated above, Petitioner has failed to demonstrate that the soil around the tanks was contaminated above Tier 2 objectives.

The Illinois EPA is not disputing the presence of contaminated soil and groundwater surrounding the tanks. The Illinois EPA is disputing the necessity of the removal of the tanks under Incident #923441. The presence of contaminated soil and groundwater surrounding the tanks does not justify the removal of the tanks because it is below Tier 2 cleanup objectives. The owner/operator must demonstrate that removal of the tanks was necessary to access soil/backfill that contains contaminants at concentrations ***in excess of*** the Tier 2 remediation objectives.

At the bottom of page 11 of its brief, Petitioner makes a statement that is not accurate.

> "Nothing in the Act or Board's regulations preclude removal of tanks according to the conditions described in the Agency decision letter. Pursuant to Board regulations, eligible corrective action costs expressly include:
>
> > The removal and disposal of any UST if a release of petroleum from the UST was identified and IEMA was notified prior to its removal, with the exception of any UST deemed ineligible by the OSFM; (35 Ill. Adm. Code § 734.625(a)(12))
>
> Moreover, releases were not merely reported to IEMA, but during removal of the USTs, ***the OSFM representative opined that a release had occurred from the USTs as well. (R.561)***" (Emphasis added)

First, nowhere on Page 561 of the Administrative Record does it state that a release occurred from the USTs. Further, nowhere does it state that an OSFM representative opined that such a thing occurred. Nothing in the record indicates that the tanks had a release. It was argued at hearing and in the documents submitted to the Agency that overfills and spills were the cause of the release in 1992 and continued to be the cause for the contamination on the site. (Transcript 11, 12, Jeff Wienhoff testifying overfills and spills were the only release reported at the site. Transcript 22, Jeff Wienhoff testifying that the tanks did not have a release.)

Once again, the Petitioner misstates the law. Contrary to the Petitioner's assertion that removal of tanks are expressly included in reimbursable costs, and contrary to Petitioner's redaction of important regulatory language, 35 Ill. Adm. Code 734.625(a)(12) actually states that types of cost that ***may be*** eligible for payment from the Fund include those for corrective action activities and materials or services provided or performed ***in conjunction with corrective action activities***. Such activities and services ***may include***, but are not limited to, reasonable costs for the removal and disposal of any UST if a release of petroleum from the UST was identified and IEMA was notified ***prior*** to its removal, with the exception of any UST deemed ineligible by the OSFM. The highlighted terms and omitted language are key for this discussion.

Corrective action means activities associated with compliance of the provisions of Sections 57.6 and 57.7 of the Act. Therefore, corrective action includes early action and site investigation and corrective action. Pursuant to Section 57.6 (b) of the Act and 35 Ill. Adm. Code 734.210(f) and 734.210(g), an owner/operator may remove the tank system, or abandon the tank in place, remove visibly contaminated fill material within 4 feet from the outside dimensions of the tank, and remove any groundwater in the excavations that exhibits a sheen without submitting a plan to the Illinois EPA. However, for purposes of payment from the Fund, these activities must be performed within 45 days after initial notification to IEMA of a release plus 14 days. The tanks were removed over 23 years after initial notification to IEMA of a release. Clearly this does not comply with the Act or Board regulations for a removal of the tanks during early action.

35 Ill. Adm. Code 734.625(a)(12) and 734.630(k) reinforce the concept that the owner/operator must notify IEMA of a release of petroleum ***before*** permitting the tank system for removal and removing the tank system. 35 Ill. Adm. Code 734.625(a)(12) does not automatically authorize removal of the tank system beyond 45 days plus 14 days. Such a removal after the early action timeframe must be included in a Corrective Action Plan and approved by the Agency. That was not done here. Petitioner did not comply with the Act and regulations and is now trying to shoe horn its actions into the law while casting aspersions at the Illinois EPA.

The assertion that there is no time limit for the USTs to be removed is not exactly correct. It has a kernel of truth there, but it isn't the whole picture. Pursuant to 35 Ill. Adm. Code 734.210(g), for purposes of payment from the Fund, the activities set forth in 35 Ill. Adm. Code 734.210(f) 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.

The second statement, like the first, is only a half truth. While there isn't a requirement that tanks be removed only as part of early action, tanks removed after early action must be approved in a corrective action plan. Outside of early action, costs associated with removal or abandonment of tanks are conditioned by Board regulations, which the Petitioner violated. See above for discussion, on pages 19 and 20 of this brief, of sections of the regulations violated by the Petitioner.

The USTs did not need to be removed to access contaminated soils. There was no evidence presented to the Agency that the soils were contaminated above Tier 2 remediation objectives. The Petitioner is asserting that it was above remediation objectives. However, all evidence submitted to the Illinois EPA shows that the soil was not found to be in contaminated above the Tier 2 objectives. The tanks in question were removed and replaced due to a pending sale of the property and not due to a release above Tier 2 objectives surrounding the tanks.

PROCEDURAL MATTERS

I. Response to Petitioner's Motion to Strike Illinois EPA Exhibit 2.

Petitioner objects to a public OSFM document that the Illinois EPA used to impeach its consultant witness, which Petitioner claims is an "expert" witness several places in its brief. The consultant testified that he did not take confirmation samples when the tanks were pulled. (Transcript 30). However, the OSFM document shows that these samples were in fact taken. (Transcript 49). It is true that the Agency did not rely upon the OSFM document when conducting its review. However, the Illinois EPA did not use the OSFM document at hearing to demonstrate

the sufficiency of the application. It was used solely to impeach the witness. The Petitioner did not submit confirmation sampling within its submittals. Would such sampling have been helpful for the review? Yes. Did the sampling show that the contamination in the tank pit after remediation was below Tier 2? Yes. Was the sampling necessary for the review? No. However, the Agency used the document for impeachment of a witness and not for the matter asserted. Therefore, the document should not be stricken from the record.

II. Credibility of Petitioner's Witness.

As shown above, Petitioner's witness made claims that were later impeached by the Agency. The Hearing Officer did not make a ruling on the credibility of the witnesses. The Agency requests that the Board find that the Petitioner's witness Jeff Wienhoff not a credible "expert" witness but merely an occurrence witness at most. Besides being a Professional Engineer, which the Agency's witness Trent Benanti also earned this designation, no demonstration of Mr. Wienhoff's expert status was presented at hearing, nor was one requested by Petitioner itself, except the self-serving proclamation of him as such repeatedly in the Petitioner's brief. (Petitioner's Brief 7). However, repeatedly claiming that someone is an expert does not make it true. As discussed above, the important step of sampling the soil removed from the tank pit to determine if it was above Tier 2, was not done, thereby leaving no method by which to determine if the tank removal was justified under Corrective Action except the non-standard of "common sense" that Petitioner puts forth. Surely an expert witness would not miss this step in the process when reimbursement from the Fund is being held in the balance. The Agency respectfully requests that the Board find the Petitioner's witness to not be an expert.

III. Agency Objection to Appendix A of Petitioner's Brief

Appendix A to the Petitioner's Brief is not a document drafted by the Illinois EPA. The only documents that frame the issues on appeal are the Illinois EPA's final decision, and the application, as submitted for review. See: Todd's Service Station v. Illinois EPA, PCB 03-2 (January 22, 2004), p.4; See also: Pulitzer Community Newspapers, Inc. v. EPA, PCB 90-142 (Dec. 20, 1990).

The Petitioner appears to be using Appendix A to reframe the issues as to what was denied when the budget was modified. It is irrelevant to this appeal as it was not before the Agency during its review, nor was it compiled by the Agency. There is also a complete lack of foundation for this document and a lack of opportunity to review or cross examine this maker of this document. To attach such a document to a brief when it could have been proffered at hearing is not proper.

The Board must, therefore, look to the documents within the Administrative Record as the sole source of rendering an opinion on whether the Illinois EPA framed its determination consistently with the application and law. The Illinois EPA requests that Appendix A be stricken and not considered by the Board when considering the merits of this appeal.

CONCLUSION

The Petitioner did not demonstrate to the Illinois EPA that the tanks in question needed to be pulled as part of a remediation plan. The tanks were pulled over 23 years after the release was reported. The tanks tested tight and were found to not be leaking at that time. They remained in service during the interim period. When tanks are pulled outside of the statutory early action timeframe, additional statutory and regulatory steps must be taken before they are removed. The tank removal in this instance was never approved by the Illinois EPA as part of a plan. There has

been no evidence presented by the Petitioner that the soil was contaminated above Tier 2 objectives. The information in front of the Illinois EPA at this time indicates that the tank pull violated the Act and regulations there under.

WHEREFORE: for the above noted reasons, the Illinois EPA respectfully requests the Board **AFFIRM** the Illinois EPA's May 17, 2017 Decision.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent

_____

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Dated: **October 24, 2018**

This filing submitted on recycled paper.

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on **October 24, 2018**, I served true and correct copies of **RESPONDENT'S POST-HEARING BRIEF** via the Board's COOL system and email, upon the following named persons:

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