BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

WARSAW ITCO,	)	
Petitioner,	)	
	)	
v.	)	PCB 11-76
	)	(UST Appeal)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
Respondent.	)	

NOTICE

John Therriault, Acting Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

Carol Webb, Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P. O. Box 19274
Springfield, IL 62794-9274

Robert M. Riffle
Elias, Meginnes, Riffle & Seghetti, P.C.
416 Main Street, Suite 1400
Peoria, IL 61602

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

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

_____

Melanie A. Jarvis
Assistant Counsel
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)
Dated: May 8, 2013

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ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

ILLINOIS EPA POST-HEARING BRIEF

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, Melanie A. Jarvis, Assistant Counsel and Special Assistant Attorney General, and hereby submits its Response to the Petitioner's Post-Hearing Brief to the Illinois Pollution Control Board ("Board").

I. INTRODUCTION

This matter cannot be considered in a light other than favorable to the Illinois EPA's decision. But, to frame to matter most precisely it must be noted at the very outset that this is a situation where Petitioner itself admitted to the Illinois EPA (and must now admit to the Board under review) that the system that they employed on-site failed to produce any results (Administrative Record, p.79).

Now, what does this admission mean? The facts are rather simple. The Illinois EPA on December 14, 2005, denied further costs for the system in order to have the Petitioner move on to a more productive and cost effective remediation proposal. This was done because after operating for 2 years, no results were seen and there was still a source of contamination that hadn't been removed. (Administrative Record, p. 79). This was after the Illinois EPA explicitly

denied the work and stated clearly in the denial letter that **"[y]ou must eliminate the source of contamination before remediation of groundwater can be implemented.**"

However, what the Petitioner is asking the Board to consider is a veiled argument that its consultant could interpret the Illinois EPA's denial of cost letter to mean that, somehow, Petitioner had approval from the Illinois EPA to continue to operate an ineffective system. This argument fails. Again, as above, the Illinois EPA's decision was justified by statute and reasonable under the known facts. Moreover, Petitioner is asking that the Board throw common sense out of the window and read the correspondence between the parties far more broadly than any facts allow, and despite being told **"[y]ou must eliminate the source of contamination before remediation of groundwater can be implemented.**". In addition, procedurally, the Illinois EPA must point out that Petitioner failed to appeal that December 14, 2005 decision letter and therefore, based upon Board precedent should not be able to appeal this issue at a later date. (See full discussion in Section VI, below.) When the Petitioner continued to operate the ineffective system, it did so, knowing what the Illinois EPA's position was on costs attributable to that failed technology, and did so, more importantly, at its own risk knowing that it was not the Illinois EPA's position that it would be reimbursed for the associated costs. It is clear from the record in this case and the testimony at hearing that the March 18, 2011 decision of the Illinois EPA should be upheld.

II. BURDEN OF PROOF

Section 105.112(a) of the Board's procedural rules (35 Ill. Adm. Code 105.112(a)) provides that the burden of proof shall be on a Petitioner. In reimbursement appeals, appeals that would be under Section 105.112(a), the applicant for reimbursement has the burden to

demonstrate that costs are related to corrective action, properly accounted for, and reasonable. Rezmar Corporation v. Illinois EPA, PCB 02-91 (April 17, 2003), p. 9.

As the Board itself has noted, the primary focus of the Board must remain on the adequacy of the permit application and the information submitted by the applicant to the Illinois EPA. John Sexton Contractors Company v. Illinois EPA, PCB 88-139 (February 23, 1989), p. 5. Further, the ultimate burden of proof remains on the party initiating an appeal of an Illinois EPA final decision. 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).

Thus, Warsaw ITCO, as Petitioner, must demonstrate to the Board that it has satisfied the high burden before the Board can enter an order reversing or modifying the Illinois EPA's decision under review. In this matter, the Petitioner cannot meet this burden, for a number of reasons, but notably based upon the clear admission by Petitioner that the technology failed to work and the Illinois EPA's clear notice that costs associated with this technology would not be reimbursed by the Fund.

III. STANDARD OF REVIEW

Section 57.8(i) of the Environmental Protection Act ("Act") grants an individual the right to appeal a determination of the Illinois EPA to the Board pursuant to Section 40 of the Act (415 ILCS 5/57.8(i)). Section 40 of the Act (415 ILCS 5/40) is the general appeal section for permits and has been used by the legislature as the basis for this type of appeal to the Board. When reviewing an Illinois EPA decision on a submitted corrective action plan and/or budget, the Board must decide whether or not the proposals, as submitted to the Illinois EPA, demonstrate compliance with the Act and Board regulations. Broderick Teaming Company v. Illinois EPA, PCB 00-187 (December 7, 2000).

The Board will not consider new information not before the Illinois EPA prior to its determination on appeal. The Illinois EPA's final decision frames the issues on appeal. Todd's Service Station v. Illinois EPA, PCB 03-2 (January 22, 2004), p. 4; Pulitzer Community Newspapers, Inc. v. EPA, PCB 90-142 (Dec. 20, 1990). In deciding whether the Illinois EPA's decision under appeal here was appropriate, the Board must therefore look to the documents within the Administrative Record ("Record"), along with relevant and appropriate testimony provided at the hearing held on February 26, 2013, in this matter.[1]

IV. STATEMENT OF FACTS

The facts in this case are presented within the Illinois EPA's administrative record already on file with the Board. Those facts have not changed. As a matter of 'fact,' so to speak, the characterization of events that occurred did not change following presentation of testimony at hearing. The facts in the Illinois EPA record supporting this motion are as follows:

1. On August 17, 2005, Petitioner, through its consultant, Midwest Environmental Consulting and Remediation Services ("Midwest"), submitted an Amended High priority Corrective Action Plan (Plan) and Budget for Incident Number 987987. (AR, p.5)

2. Pursuant to the August 17, 2005 Plan, Petitioner proposed a treatment system enhancement with horizontal recovery wells and enhanced bio-remediation study for soils and a treatment system enhancement with horizontal recovery wells for ground water. (AR, p.13 & 19)

3. On December 14, 2005, the Illinois EPA rejected the August 17, 2005, Plan. (AR, p.79) The Plan was rejected for the following reasons:

> "1. It is difficult to ascertain if the recovery well system proposed in the Plan is appropriate for remediation of groundwater at this time. Soil exceedances still

[1] Citations to the Administrative Record will hereinafter be made as, "AR, p. ___." Further, parts of the AR on disk will be referenced by document number. References to the transcript of the hearing will be made as, "Transcript, p. ___."

exist and are the source of contamination in groundwater. You must eliminate the source of contamination before remediation of groundwater can be implemented.

2. The Plan fails to provide which oxygen releasing agents would be considered.

3. Appendix G has been omitted from the Plan.

4. Soil sampling locations T-1 through T-10 were not provided on the site base map.

5. The Agency is requesting a list of sites which have had success with your proposed groundwater treatment system.

6. It appears the last sampling event occurred February 14, 2002. The Agency is requesting a re-sampling of MW-4 the only exceedance of Tier 1 groundwater remediation objectives for BTEX." (AR, p.79-80)

This denial letter was not appealed, although it did contain language indicating that the decision may be appealed within 35 days of the date of the letter. (Administrative record, p. 82)

4. In the same December 14, 2005 decision letter, the Illinois EPA rejected the associated budget because the plan was not approved. (AR, p.80-81) This denial letter was not appealed, although it did contain language indicating that the decision may be appealed within 35 days of the date of the letter. (Administrative record, p. 82).

5. On January 25, 2010, the Petitioner responded to the December 14, 2005 decision letter by sending a letter addressing the denial points and by submitting a new Plan and Budget. (AR, p. 86)

6. Petitioner again proposes "enhanced bio-remediation; soil washing" and as "groundwater treatment system" as the proposed methods of remediation. (AR, p. 95)

7. On October 18, 2010, the Illinois EPA rejected the Plan and Budget. (AR, p.149) The Budget was rejected because the Plan was rejected. The Plan was rejected for the following reasons:

> "1. Appendix G was not provided in the Plan which was to include equations, variables and site specific CUO's.
>
> 2. Soil sampling locations T-1 through T-10 were not provided on the site base map.
>
> 3. The Corrective Action Plan must comply with the requirements of Title XVI of the Act as amended by Public Act 92-0554 on June 24, 2002 and public Act 96-0908 on June 8, 2010." (AR, p. 149)

This denial letter was not appealed, although it did contain language indicating that the decision may be appealed within 35 days of the date of the letter. (Administrative record, p. 154).

8. On November 8, 2010, Petitioner filed a Correction Action Plan and Budget Amendment. (AR, p.158) This Plan proposed using TACO by excluding pathways. (AR, p. 162 & 170)

9. On March 18, 2011, the Illinois EPA approved the November 8, 2010 Plan and modified the Budget. (AR, p. 257)

10. The March 18, 2011, decision letter's Attachment A stated as follows:

> "**SECTION 1**
>
> As a result of the Illinois EPA's modification in Section 2 of this attachment, the following amounts are approved:

$0.00	Investigation Costs
$401.36	Analysis Costs
$15,698.00	Personnel Costs
$291.80	Equipment Costs
$0.00	Field Purchases and Other Costs

Handling charges will be determined at the time a bulling package is reviewed by the Illinois EPA. The amount of allowable handling charges will be determined in accordance with Section 57.8(f) of the Environmental Protection Act (Act) and 35 Illinois Administrative Code (35 Ill. Adm. Code) 732.607.

SECTION 2

1. $34,790.00 deduction in Personnel Costs for costs for corrective action implementation, CAP preparation, design, and research, and permitting costs associated with enhanced bioremediation and a groundwater treatment system.

   $7,800.00 deduction in Field Purchases and Other Costs for Bureau of Water and Bureau of Air permitting and repair of equipment.

   These costs are not consistent with materials, activities, and services associated with an Illinois EPA-approved technical plan. One of the overall goals of the financial review is to assure that costs associated with materials, activities, and services are consistent with the associated technical plan. Such costs are ineligible for payment from the Fund pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.510(b).

   The Plan at-hand, which is approved, does not propose corrective action activities involving enhanced bioremediation and/or groundwater treatment system.

   A Moisture Content sample and a Soil Bulk Density sample has been approved, costs are added to Analytical Costs to complete Section 734.410 (Remediation Objectives)."

11. Warsaw filed an appeal of the Illinois EPA's March 18, 2011 decision on April 20, 2011.

V. ISSUE

It is clear that the Illinois EPA's final decision must frame the issues on appeal. Todd's Service Station v. Illinois EPA, PCB 03-2 (January 22, 2004), p. 4; Pulitzer Community Newspapers, Inc. v. EPA, PCB 90-142 (Dec. 20, 1990). The issue presented is whether, the Petitioner can be reimbursed for items not approved in the budget. Based upon the express language of Sections 734.355 and 734.510of the Board's regulations and the facts presented, the answer is NO.

VI. ARGUMENT

Simply, when the Petitioner proceeded to perform work at the Warsaw site despite the Illinois EPA denial of such work on three occasions during the time when the costs were incurred, it did so, with knowledge of the status of its conduct and thus at its own risk. *See*, 35 Ill. Adm. Code 734.355(d). Since 2005, Petitioner was put on notice that the Illinois EPA would not agree to the corrective action, or costs associated with such, that it proposed for use at the site. Illinois EPA specifically, in writing, informed the Petitioner that **it could not do ground water remediation without removal of the source of the contamination**. (AR, p. 79) Read simply, the decision letter of December 2005 provided that "[i]t is difficult to ascertain if the recovery well system proposed in the Plan is appropriate for remediation of groundwater at this time. Soil exceedances still exist and are the source of contamination in groundwater. **You must eliminate the source of contamination before remediation of groundwater can be implemented.**" This provision is clear as to its meaning and implication on the proposed use of the system for which Petitioner seeks reimbursement now.

What Petitioner is left with is a thin argument that it was a misunderstanding of the denial letter that led to the Petitioner continuing the system and that the Illinois EPA meant that he could not expand the system. (Pet. Brief, p. 1) That is directly contrary to the wording of the decision letter most contemporaneous to the actions taken by Petitioner which stated: "**You must eliminate the source of contamination before remediation of groundwater can be implemented.**" More importantly, the debate should not be framed as Petitioner asks the Board to consider. Petitioner seeks the Board's consideration of the question of how reasonable is it for the Petitioner to think he could continue to run a groundwater remediation system when the Illinois EPA has told him that he must remove the source of the contamination first. Again, as

pointed out above, the standard is whether the Illinois EPA properly denied a request under applicable law or regulation. The answer is yes it did and that ends the review. However, if the Illinois EPA were to entertain the hypothetical debate it would be logical to provide that Petitioner's assertion is not reasonable at all. (Please see testimony on these issues at Testimony, P28-29.)

Compounding the difficulty for Petitioner is the fact that the record is clear on the point that the Illinois EPA twice rejected the Plan and Budget for such work. The Petitioner never appealed these decisions and would have the Board believe that it twice misunderstood the Illinois EPA when it told him to not run **an ineffective system when the source of contamination had not been removed**. The fact is that the Petitioner proceeded without an approved plan or budget.

Finally, and this particular point is rather telling when considered alongside of Petitioner's arguments in this matter, is the fact that the Petitioner, itself, submitted a revised plan proposing TACO instead of the alternative technologies it had originally suggested using at the site. Not a continued use of the technology that was not approved in 2005 or 2010, but another completely differing response action. If Petitioner was convinced it had an approved technology – why the "sudden" change? Thankfully, the Board need not consider this question since the answer is not necessary – the point only being made to highlight that Petitioner again, itself, understood the futility of the operation of the equipment. And, the Illinois EPA agreed with Petitioner that using TACO could be done, was appropriate and indeed approved that plan. Yet, consistent with its actions over the prior 5 years, when the Petitioner included costs for reimbursement that were outside the scope of that plan and included the work performed since 2005 on the alternative technologies that were rejected by the Illinois EPA. The Illinois EPA was

correct to modify the budget to delete these costs. After all, pursuant to 35 Ill. Adm. Code 734.510, "the overall goal of the financial review must be to assure that costs associated with materials, activities, and services must be reasonable" and "must be consistent with the associated technical plan". In this case, the costs in the budget were not consistent with the approved plan.

Further, Petitioner never appealed the decisions that rejected the technology it wished to use. It is late at this point to attempt to do so. The 2005 and 2010 plans and budgets were denied. Those final decisions cannot be reexamined here. Petitioner once again placed the twice denied costs within a budget for approval and once again was denied those costs. The Petitioner should not be surprised by the resulting denial. Nor is it entitled to the costs it requested three times and was denied three times. Reichhold Chemicals, Inc. v. PCB (3d Dist.1990), 204 Ill.App.3d 674, 561 N.E.2d 1343, held that the Illinois EPA has no statutory authority to reconsider a permit decision. Petitioner has asked for reconsideration of the same denied costs twice. Further, testimony at hearing presented by the Petitioner, clearly demonstrated that it was the earlier denials and not the current March 18, 2011 decision that the Petitioner was attempting to have the Board reverse. The testimony of Mr. Green all dated back to his reported "misunderstanding" of the 2005 Illinois EPA decision. All testimony regarded not the technical remedy approved by the Illinois EPA in 2011, but the decision of 2005, costs for which the Petitioner included in the budget for the TACO remedy approved in 2011. It is important to emphasize that these costs were **PREVIOUSLY DENIED TWICE.** Petitioner is attempting to litigate an issue that he already failed to appeal twice. The testimony of Thomas Henninger, Unit Manager in the Leaking Underground Storage Tank section is especially important. (See Transcript starting on Page 43.) When questioned about the March 2011 denial letter, (the

Illinois EPA would like to again point out that, except for the Illinois EPA questioning, the Petitioner only discussed the December 2005 denial letter at hearing, a denial that was never appealed), Mr. Henninger testified as follows:

> "Yes. This document was a denial of the cost affiliated with the ground water remediation system, and there was also some cost for the Bureau of Air and Water Permitting. We did approve a portion of the budget that -- Midwest wanted to use TACO to exclude all the pathways, so the site could obtain closure.
>
> The reason we denied the remediation system, the use of it anymore, is the same as in 2005 when we denied it because we didn't think it was effective, and there was still as source effective to remediate ground water, and there was still a source of contamination on the property."

After that brief discussion of the letter under appeal, by the Illinois EPA, Mr. Riffle began his cross examination. (Transcript, p. 46.) Did Mr. Riffle question Mr. Henninger regarding the March 2011 denial letter under appeal? Of course not, Mr. Riffle's first question was:

"I am showing you the December 14, 2005 letter that's been referred to before"

Mr. Riffle's questioning continues from that point on in the Transcript to only discuss the merits of the 2005 denial letter. A letter not under appeal! This further goes to show that the Petitioner had no intention of appealing the March 2011 letter that approved their TACO remediation in which they also included previously denied costs. They included the previously denied and never appealed costs in an attempt to get the December 2005 letter before the Board.

The Board stated in Mick's Garage v. Illinois EPA, PCB 03-126 (December 18, 2003) that it "has held that a condition imposed in a permit, not appealed to the Board under Section 40(a)(1), may not be appealed in a subsequent permit. Panhandle Eastern Pipe Line Co. v. IEPA, PCB 98-

102, slip op. at 30 (Jan 21, 1999)". In Kean Oil v. Illinois EPA, PCB 97-146 (May 1, 1997), the Board held that it was concerned that there was "an attempt by petitioner to misuse the submittal process in order to remedy its failure to properly appeal the first decision by the Agency concerning this matter. The Board cannot allow the potential misuse of the reimbursement system and as the Agency has properly identified, it does not have the authority to reconsider a final determination." Therefore, this appeal should be dismissed for lack of jurisdiction because the time for appeal of this issue has long since passed.

The Petitioner's argument in this case is simple. The Petitioner's consultant "misunderstood" the December 2005 letter. The Petitioner, through this same consultant, told the Illinois EPA in August of 2005 that the system was ineffective. In fact, Petitioner stated, and their consultant testified at hearing, that no water has been removed and remediated through the system from its startup in 2003 (Transcript, p. 33) and the submittal in August 2005. (AR, p. 19). Mr. Henninger's testimony on Page 46 of the transcript, under cross-examination, made it clear that the Illinois EPA denied the system because of **soil exceedances still existing and that the source needed to be eliminated prior to groundwater remediation**. Further he stated that this decision was based upon the admission in the August 2005 submittal that the system was not effective. No reasonable person could think that the Illinois EPA would approve and reimburse for an ineffective system that had already been running for 2 years. The Petitioner, however, would have you believe that they thought that Illinois EPA would approve and reimburse for just such a system.

The Petitioner proceeded at its own risk by performing work before having an approved plan and ignored the warnings of the Board in Section 734.355 of the regulations, that by doing so, it was possible that it may not be reimbursed for the work. The costs that the Illinois EPA

denied in the March 18, 2011, decision letter could not be approved under either the Boards regulations, specifically 734.510, nor could they be approved under the Reichhold case. It is clear from the Board's regulations and case law that the Petitioner is not entitled to the relief it seeks.

During the relevant time period for which Petitioner seeks costs, it is damning that Petitioner can point to no document in the administrative record which provides that the Illinois EPA reviewed and approved the continued use of the technology for which the costs were associated. Petitioner is left with trying to convince us that a denial – in some light – is an approval which is not possible. So, we come to Petitioner's true assertion for review, that a misunderstanding of a denial is an approval.

As opposed to Petitioner's plait of having no document approving such costs and having to contort a meaning from within a denial letter, the Illinois EPA has pointed to specific documents which not only state that such technology is not approved for use, but also directly denies the request. On several occasions the Illinois EPA expressly stated that such request was denied including: December 14, 2005, October 18, 2010 as well as March 18, 2011. Thus, on three separate occasions, in formal written notice, the Illinois EPA denied Petitioner's request. Consistently, over the period of 5 years, three months and 5 days, the Illinois EPA consistently informed Petitioner such costs would not be reimbursable.

VII. CONCLUSION

For all the reasons and arguments included herein, the Illinois EPA respectfully requests that the Board dismiss this cause for lack of jurisdiction or in the alternative affirm the Illinois EPA's March 18, 2011 final decision. The Petitioner has not met even its *prima facie* burden of proof, and certainly has not met its ultimate burden of proof. For these reasons, the Illinois EPA respectfully requests that the Board affirm the Illinois EPA's final decision.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent

_____

Melanie A. Jarvis
Assistant Counsel
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544, 217/782-9143 (TDD)
Dated: May 8, 2013

This filing submitted on recycled paper.

ATTACHMENT A

Relevant Law

A. ENVIRONMENTAL PROTECTION ACT:

415 ILCS 5/57.7. Leaking underground storage tanks; site investigation and corrective action, states, in part, as follows:

(c) Agency review and approval.

(1) Agency approval of any plan and associated budget, as described in this subsection (c), shall be considered final approval for purposes of seeking and obtaining payment from the Underground Storage Tank Fund if the costs associated with the completion of any such plan are less than or equal to the amounts approved in such budget.

(2) In the event the Agency fails to approve, disapprove, or modify any plan or report submitted pursuant to this Title in writing within 120 days of the receipt by the Agency, the plan or report shall be considered to be rejected by operation of law for purposes of this Title and rejected for purposes of payment from the Underground Storage Tank Fund.

(A) For purposes of those plans as identified in paragraph (5) of this subsection (c), the Agency's review may be an audit procedure. Such review or audit shall be consistent with the procedure for such review or audit as promulgated by the Board under Section 57.14. The Agency has the authority to establish an auditing program to verify compliance of such plans with the provisions of this Title.

(B) For purposes of corrective action plans submitted pursuant to subsection (b) of this Section for which payment from the Fund is not being sought, the Agency need not take action on such plan until 120 days after it receives the corrective action completion report required under subsection (b) of this Section. In the event the Agency approved the plan, it shall proceed under the provisions of this subsection (c).

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

(A) For purposes of payment from the Fund, corrective action activities required to meet the minimum requirements of this Title shall include, but not be limited to, the following use of the Board's Tiered Approach to Corrective Action Objectives rules adopted under Title XVII of this Act:

(i) For the site where the release occurred, the use of Tier 2 remediation objectives that are no more stringent than Tier 1 remediation objectives.

(ii) The use of industrial/commercial property remediation objectives, unless the owner or operator demonstrates that the property being remediated is residential property or being developed into residential property.

(iii) The use of groundwater ordinances as institutional controls in accordance with Board rules.

(iv) The use of on-site groundwater use restrictions as institutional controls in accordance with Board rules.

(B) Any bidding process adopted under Board rules to determine the reasonableness of costs of corrective action must provide for a publicly-noticed, competitive, and sealed bidding process that includes, at a minimum, the following:

(i) The owner or operator must issue invitations for bids that include, at a minimum, a description of the work being bid and applicable contractual terms and conditions. The criteria on which the bids will be evaluated must be set forth in the invitation for bids. The criteria may include, but shall not be limited to, criteria for determining acceptability, such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose. Criteria that will affect the bid price and be considered in the evaluation of a bid, such as discounts, shall be objectively measurable.

(ii) At least 14 days prior to the date set in the invitation for the opening of bids, public notice of the invitation for bids must be published in a local paper of general circulation for the area in which the site is located.

(iii) Bids must be opened publicly in the presence of one or more witnesses at the time and place designated in the invitation for bids. The name of each bidder, the amount of each bid, and other relevant information as specified in Board rules must be recorded and submitted to the Agency in the applicable budget. After selection of the winning bid, the winning bid and the record of each unsuccessful bid shall be open to public inspection.

(iv) Bids must be unconditionally accepted without alteration or correction. Bids must be evaluated based on the requirements set forth in the invitation for bids, which may include criteria for determining acceptability, such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose. Criteria that will affect the bid price and be considered in the evaluation of a bid, such as discounts, shall be objectively measurable. The invitation for bids shall set forth the evaluation criteria to be used.

(v) Correction or withdrawal of inadvertently erroneous bids before or after selection of the winning bid, or cancellation of winning bids based on bid mistakes, shall be allowed in accordance with Board rules. After bid opening, no changes in bid prices or other provisions of bids prejudicial to the owner or operator or fair competition shall be allowed. All decisions to allow the correction or withdrawal of bids based on bid mistakes shall be supported by a written determination made by the owner or operator.

(vi) The owner or operator shall select the winning bid with reasonable promptness by written notice to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the invitation for bids. The winning bid and other relevant information as specified in Board rules must be recorded and submitted to the Agency in the applicable budget.

(vii) All bidding documentation must be retained by the owner or operator for a minimum of 3 years after the costs bid are submitted in an application for payment, except that documentation relating to an appeal, litigation, or other disputed claim must be maintained until at least 3 years after the date of the final disposition of the appeal, litigation, or other disputed claim. All bidding documentation must be made available to the Agency for inspection and copying during normal business hours.

(C) Any bidding process adopted under Board rules to determine the reasonableness of costs of corrective action shall (i) be optional and (ii) allow bidding only if the owner or operator demonstrates that corrective action cannot be performed for amounts less than or equal to maximum payment amounts adopted by the Board.

(4) For any plan or report received after June 24, 2002, any action by the Agency to disapprove or modify a plan submitted pursuant to this Title shall be provided to the owner or operator in writing within 120 days of the receipt by the Agency or, in the case of a site investigation plan or corrective action plan for which payment is not being sought, within 120 days of receipt of the site investigation completion report or corrective action completion report, respectively, and shall be accompanied by:

(A) an explanation of the Sections of this Act which may be violated if the plans were approved;

(B) an explanation of the provisions of the regulations, promulgated under this Act, which may be violated if the plan were approved;

(C) an explanation of the specific type of information, if any, which the Agency deems the applicant did not provide the Agency; and

(D) a statement of specific reasons why the Act and the regulations might not be met if the plan were approved. Any action by the Agency to disapprove or

modify a plan or report or the rejection of any plan or report by operation of law shall be subject to appeal to the Board in accordance with the procedures of Section 40. If the owner or operator elects to incorporate modifications required by the Agency rather than appeal, an amended plan shall be submitted to the Agency within 35 days of receipt of the Agency's written notification.

(5) For purposes of this Title, the term "plan" shall include:

(A) Any site investigation plan submitted pursuant to subsection (a) of this Section;

(B) Any site investigation budget submitted pursuant to subsection (a) of this Section;

(C) Any corrective action plan submitted pursuant to subsection (b) of this Section; or

(D) Any corrective action plan budget submitted pursuant to subsection (b) of this Section.

B: POLLUTION CONTROL BOARD REGULATIONS:

35 Ill. Adm. Code 734.355 Corrective Action Plan, states as follows:

a) *If any of the applicable indicator contaminants exceed the* most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants*, within 30 days after the Agency approves the site investigation completion report, the owner or operator shall submit to the Agency for approval a corrective action plan designed to mitigate any threat to human health, human safety, or the environment resulting from the underground storage tank release.* [415 ILCS 5/57.7(b)(2)]. The corrective action plan must address all media impacted by the UST release and must contain, at a minimum, the following information:

1) An executive summary that identifies the objectives of the corrective action plan and the technical approach to be utilized to meet such objectives. At a minimum, the summary must include the following information:

A) The major components (e.g., treatment, containment, removal) of the corrective action plan;

B) The scope of the problems to be addressed by the proposed corrective action, including but not limited to the specific indicator contaminants and the physical area; and

C) A schedule for implementation and completion of the plan;

2) A statement of the remediation objectives proposed for the site;

3) A description of the remedial technologies selected and how each fits into the overall corrective action strategy, including but not limited to the following:

A) The feasibility of implementing the remedial technologies;

B) Whether the remedial technologies will perform satisfactorily and reliably until the remediation objectives are achieved;
C) A schedule of when the remedial technologies are expected to achieve the applicable remediation objectives and a rationale for the schedule; and
D) For alternative technologies, the information required under Section 734.340 of this Part;

4) A confirmation sampling plan that describes how the effectiveness of the corrective action activities will be monitored or measured during their implementation and after their completion;
5) A description of the current and projected future uses of the site;
6) A description of any engineered barriers or institutional controls proposed for the site that will be relied upon to achieve remediation objectives. The description must include, but not be limited to, an assessment of their long-term reliability and operating and maintenance plans;
7) A description of water supply well survey activities required pursuant to Sections 734.445(b) and (c) of this Part that were conducted as part of site investigation; and
8) Appendices containing references and data sources relied upon in the report that are organized and presented logically, including but not limited to field logs, well logs, and reports of laboratory analyses.

b) Any owner or operator intending to seek payment from the Fund must, prior to conducting any corrective action activities beyond site investigation, submit to the Agency a corrective action budget with the corresponding corrective action plan. The budget must include, but is not limited to, a copy of the eligibility and deductibility determination of the OSFM and an estimate of all costs associated with the development, implementation, and completion of the corrective action plan, excluding handling charges. The budget 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. As part of the budget the Agency may require a comparison between the costs of the proposed method of remediation and other methods of remediation.

c) *Upon the Agency's approval of a corrective action plan, or as otherwise directed by the Agency, the owner or operator shall proceed with corrective action in accordance with the plan* [415 ILCS 5/57.7(b)(4)].

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 of 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. (Emphasis added)

e) If, following approval of any corrective action plan or associated budget, an owner or operator determines that a revised plan or budget is necessary in order to mitigate any threat to human health, human safety, or the environment resulting from the underground storage tank release, the owner or operator must submit, as applicable, an amended corrective action plan or associated budget to the Agency for review. The Agency must review and approve, reject, or require modification of the amended plan or budget in accordance with Subpart E of this Part.

BOARD NOTE: Owners and operators are advised that the total payment from the Fund for all corrective action plans and associated budgets submitted by an **owner or operator must not exceed the amounts set forth in Subpart H of this Part.**

35 Ill. Adm. Code 734.505 Review of Plans, Budgets, or Reports, states as follows:

a) The Agency may review any or all technical or financial information, or both, relied upon by the owner or operator or the Licensed Professional Engineer or Licensed Professional Geologist in developing any plan, budget, or report selected for review. The Agency may also review any other plans, budgets, or reports submitted in conjunction with the site.

b) The Agency has the authority to approve, reject, or require modification of any plan, budget, or report it reviews. The Agency must notify the owner or operator in writing of its final action on any such plan, budget, or report, except in the case of 20 day, 45 day, or free product removal reports, in which case no notification is necessary. Except as provided in subsections (c) and (d) of this Section, if the Agency fails to notify the owner or operator of its final action on a plan, budget, or report within 120 days after the receipt of a plan, budget, or report, the owner or operator may deem the plan, budget, or report rejected by operation of law. If the Agency rejects a plan, budget, or report or requires modifications, the written notification must contain the following information, as applicable:

1) An explanation of the specific type of information, if any, that the Agency needs to complete its review;

2) An explanation of the Sections of the Act or regulations that may be violated if the plan, budget, or report is approved; and

3) A statement of specific reasons why the cited Sections of the Act or regulations may be violated if the plan, budget, or report is approved.

c) For corrective action plans submitted by owners or operators not seeking payment from the Fund, the Agency may delay final action on such plans until 120 days after it receives the corrective action completion report required pursuant to Section 734.345 of this Part.

d) An owner or operator may waive the right to a final decision within 120 days after the submittal of a complete plan, budget, or report by submitting written notice to the Agency prior to the applicable deadline. Any waiver must be for a minimum of 60 days.

e) The Agency must mail notices of final action on plans, budgets, or reports by registered or certified mail, post marked with a date stamp and with return receipt requested. Final action must be deemed to have taken place on the post marked date that such notice is mailed.

f) Any action by the Agency to reject or require modifications, or rejection by failure to act, of a plan, budget, or report must be subject to appeal to the Board within 35 days after the Agency's final action in the manner provided for the review of permit decisions in Section 40 of the Act.

g) In accordance with Section 734.450 of this Part, upon the approval of any budget by the Agency, the Agency must include as part of the final notice to the owner or operator a notice of insufficient funds if the Fund does not contain sufficient funds to provide payment of the total costs approved in the budget.

35 Ill. Adm. Code 734.510 Standards for Review of Plans, Budgets, or Reports, states as follows:

a) A technical review must consist of a detailed review of the steps proposed or completed to accomplish the goals of the plan and to achieve compliance with the Act and regulations. Items to be reviewed, if applicable, must include, but not be limited to, number and placement of wells and borings, number and types of samples and analysis, results of sample analysis, and protocols to be followed in making determinations. The overall goal of the technical review for plans must be to determine if the plan is sufficient to satisfy the requirements of the Act and regulations and has been prepared in accordance with generally accepted engineering practices or principles of professional geology. The overall goal of the technical review for reports must be to determine if the plan has been fully implemented in accordance with generally accepted engineering practices or principles of professional geology, if the conclusions are consistent with the

information obtained while implementing the plan, and if the requirements of the Act and regulations have been satisfied.

b) A financial review must consist of a detailed review of the costs associated with each element necessary to accomplish the goals of the plan as required pursuant to the Act and regulations. Items to be reviewed must include, but are not limited to, costs associated with any materials, activities, or services that are included in the budget. The overall goal of the financial review must be to assure that costs associated with materials, activities, and services must be reasonable, must be consistent with the associated technical plan, must be incurred in the performance of corrective action activities, must not be used for corrective action activities in excess of those necessary to meet the minimum requirements of the Act and regulations, and must not exceed the maximum payment amounts set forth in Subpart H of this Part.

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on May 8, 2013, I served true and correct copies of a **ILLINOIS EPA'S POST-HEARING BRIEF** to the Board by electronic filing through the Board's COOL system and to the Petitioner and Hearing Officer by email and by placing true and correct copies thereof in properly sealed and addressed envelopes and by depositing said sealed envelopes in a U.S. Mail drop box located within Springfield, Illinois, with sufficient First Class postage affixed thereto, upon the following named persons:

John Therriault, Acting Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

Carol Webb, Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P. O. Box 19274
Springfield, IL 62794-9274

Robert M. Riffle
Elias, Meginnes, Riffle & Seghetti, P.C.
416 Main Street, Suite 1400
Peoria, IL 61602

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

_____

Melanie A. Jarvis
Assistant Counsel
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)