

**BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS**

1441 KINGSHIGHWAY LLC.)	
)	
Petitioner,)	
)	
v.)	PCB 2024-032
)	(LUST Appeal)
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 **ILLINOIS EPA'S POST-HEARING BRIEF**, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

/s/ Rich Kim
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Dated: May 15, 2024

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ILLINOIS EPA'S POST-HEARING BRIEF

NOW COMES the Respondent, the Illinois Environmental Protection Agency (“Illinois EPA” or “Agency”), by one of its attorneys, Rich Kim, Assistant Counsel and Special Assistant Attorney General, and hereby, submits **ILLINOIS EPA'S POST-HEARING BRIEF** to the Illinois Pollution Control Board (“Board”).

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 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 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.

BURDEN OF PROOF

Section 105.112(a) of the Illinois Pollution Control Board’s procedural rules (35 Ill. Adm. Code 105.112(a)) provides that the **burden of proof shall be on a Petitioner**. 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 Petitioner 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). The standard of proof in UST appeals is a “preponderance of the evidence.” Evergreen FS v. IEPA, PCB 11-51, slip op. at 16 (June 21, 2012). “A proposition is proved by a preponderance of the evidence when it is more probable than not.” Id.

STATEMENT OF FACTS

The facts in this case are found within the Administrative Record, as well as the testimony provided at the hearing.

¹ Citations to the Administrative Record will hereinafter be made as, “R. at ____.”
Citations to the Hearing Transcript will hereinafter be made as, “Tr. at ____.”

On August 12, 2003, HRM, Inc received an installation permit to install 2 new underground storage tanks at the facility located at 1441 Kingshighway in Washington Park, Illinois. (R. at 1-6). The underground storage tanks consisted of one (1) 20,000-gallon single wall and one (1) 20,000 single wall split compartment 12,000/8,000-gallon. (R. at 4). On March 4, 2004, due to general contractor construction delays, an extension to the installation permit was sought and was approved on March 16, 2004. (R. at 7-13).

On July 27, 2022, Tamers Inc. by Majed Abusaid reported a release from underground storage tanks at the location to the Illinois Emergency Management Agency, which assigned Incident Number 2022-0688 to the release. (R. at 14). On August 5, 2022, the Illinois EPA acknowledge notification from the Illinois Emergency Management Agency of the release. (R. at 16). On August 15, 2022, Petitioner's consultant, CW3M Company, Inc. ("CW3M"), submitted the 20-Day Certification to the Illinois EPA. (R. at 17-19).

On August 30 and 31, 2022, the underground storage tanks were removed by CW3M and Carter Trucking and contaminated fill material was hauled to Milan landfill. (R. at 25-26, R. at 342-348, R. at 368-377). The removals were witnessed by OSFM Storage Tank Safety Specialist Travis Smith and Robert Mileur from the Illinois EPA. (Id.).

The 45-Day Report was submitted on September 21, 2022, which outlined the Early Action activities, including removal of the USTs as well as contaminated backfill removal. (R. at 20-99). The Agency approved the 45-Day Report on October 18, 2022. (R. at 102-103).

On December 6, 2022, Petitioner submitted an eligibility and deductible application to the Office of the State Fire Marshal ("OSFM") for the three tanks on file. (R. at 104-129). On December 13, 2022, OSFM issued an eligibility and deductible determination for three gasoline tanks. (R. at 130-131).

On February 8, 2023, CW3M submitted a Reimbursement Claim in the amount of \$124,117.66 on behalf of the Petitioner for early action activities for the period July 1, 2022-October 31, 2022. (R. at 132-321). In the claim, Petitioner sought \$82,407.88 for Remediation and Disposal and \$14,653.86 for UST Removal and Abandonment. (R. at 135, 138, 142-144). On June 6, 2023, the Illinois EPA approved \$93,666.30 for payment. (R. at 322-327). From the reimbursement claim, \$24,026.87 was deducted for disposal costs due to lack of supporting documentation and thus not reasonable, and \$892.38 was deducted for removal costs that exceeded the Subpart H maximum reimbursement rate. (R. at 324-325).

On June 13, 2023, Petitioner's consultant submitted a request for re-review of the cuts made from the reimbursement claim for disposal costs by providing additional invoices and a revised UST Removal form with corrected Subpart H rates. (R. at 331-337). On October 12, 2023, the Illinois EPA received email confirmation from OSFM that tanks 2 & 3 were contained in a compartment tank. (R. at 339-341). OSFM provided the 2 Underground Storage Tank Removal Logs completed by their Storage Tank Safety Specialist, Travis Smith, who was present for the removals on August 30 and 31, 2022. (R. at 342-348). Travis Smith completed diagrams of the site, which show the location of the underground storage tanks. (R. at 344, 348). The diagrams show a distance of 42 feet from Warren Avenue to the center of the first UST and 54 feet from Warren Avenue to the center of the other UST. (Id.)

On October 18, 2023, the Illinois EPA issued its final decision, authorizing payment of \$13,895.65. (R. at 349-353). \$892.38 for UST removal costs was deducted since the maximum payment amounts were based on two 20,000-gallon USTs, not three as suggested by CW3M, and \$10,131.22 was deducted for disposal costs based on maximum payments amounts in Appendix C for two 20,000-gallon USTs. (R. at 351-252).

On November 3, 2023, Petitioner filed a Petition for Review with the Pollution Control Board, which the Board accepted for hearing on November 16, 2023.

The hearing was held on April 10, 2024, before Hearing Officer Carol Webb. At the hearing, Goebel “Tod” Rowe, a senior project manager for CW3M, was the sole witness called by the Petitioner. (Tr. at 6-25). On cross-examination, Mr. Rowe testified that CW3M first realized there was a compartment tank only when the concrete was removed in late August 2022. (Tr. at 20). Mr. Rowe identified Respondent’s Exhibit 1 as the site map dated on August 1, 2022, 30 days before the UST removals. (Tr. at 20-21). The map shows two tanks contiguous to one another. (Tr. at 22).

The first witness called by the Illinois EPA was Carol Rowe, president of CW3M. (Tr. at 26-29). She testified the term “compartment tank” was probably not mentioned in the 45-Day Report or reimbursement claim. (Tr. at 27). She identified Respondent Exhibit 2 as the West UST Cross View Map. (Tr. at 27-28, R. at 50). The diagram showed an excavation depth of 14 feet and the diameter of the underground storage tanks was 10.5 feet. (Tr. at 28). The cross-view map did not depict tank 2. (Tr. at 29).

The next witness was Robert Mileur, a field project manager for the Illinois EPA in the LUST Section, who witnessed the UST removals on August 30 and August 31, 2022. (Tr. at 30-38). Mr. Mileur testified there were 2 Underground Storage Tanks that were removed at the site. (Tr. at 31). Mr. Mileur completed an inspection narrative that was admitted as Respondent’s Exhibit 3. (Tr. at 31, R. at 368-369). On August 30, 2022, the first UST, a 20,000-gallon UST, took a long time to be removed due to the lifting lugs breaking off. (Tr. at 31-32). The next day, the second UST, a 20,000-gallon double compartment tank, was removed. (Tr. at 32). Mr. Mileur took photographs of the UST removals, which were admitted as

Respondent's Group Exhibit 4. (Tr. at 33, R. at 370-377.).

The final witness for the Illinois EPA was Brian Bauer, who is the interim section manager for the LUST Section. (Tr. at 38-44). He testified that the term "compartment tank" was not mentioned in either the 45-Day Report or original reimbursement claim. (Tr at. 40). At the time of the initial Agency decision on the original claim, the issue of a compartment tank at the site was not known. (Id.). That issue arose after the re-review and was confirmed by the Office of the State Fire Marshal by email. (Tr. at 40-41).

STATUORY AND REGULATORY AUTHORITIES

41 Ill. Adm. Code 174.100 Definitions

"Tank" is a stationary device designed to contain an accumulation of regulated substances and constructed of non-earthen materials (e.g., steel, fiberglass, concrete or plastic) that provides structural support.

41 Ill. Adm. Code 178.100 Definitions

"Underground storage tank" or "UST" means any one or combination of tanks (including underground pipes connected thereto) that is used to contain an accumulation of regulated substances, and the volume of which (including the volume of the underground pipes connected thereto) is 10 percent or more beneath the surface of the ground. The term "underground storage tank" shall not include any pipes connected to any tank which is excluded from this definition. The term underground storage tank does not include any of the following:

Farm or residential tank of 1,100 gallons or less capacity used or storing motor fuel for noncommercial purposes;

Septic tank;

Pipeline facility (including gathering lines):

That is regulated under chapter 601 of title 49; or

That is an intrastate pipeline facility regulated under state laws as provided in chapter 601 of title 49, and which is determined by the U.S. Department of Transportation to be connected to a pipeline, or to be

operated or intended to be capable of operating at pipeline pressure or as an integral part of a pipeline;

Surface impoundment, pit, pond or lagoon;

Storm-water or wastewater collection system;

Flow-through process tank;

Liquid trap or associated gathering lines directly related to oil or gas production and gathering operations; or

Storage tank situated in an underground area (such as a basement, cellar, mineworking, drift, shaft or tunnel) if the storage tank is situated upon or above the surface of the floor. (42 U.S.C. 6991(10))

The term "underground storage tank" shall also mean an underground storage tank used exclusively to store heating oil for consumptive use on the premises where stored and which serves other than a farm or residential unit. [415 ILCS 5/57.2]

"UST system" or "Tank system" or "related tank system" means an underground storage tank, connected underground piping, underground ancillary equipment, and containment system, if any.

35 Ill. Adm. Code 734.115 Definitions

"Underground storage tank" or "UST" means any one or combination of tanks (including underground pipes connected thereto) that is used to contain an accumulation of regulated substances, and the volume of which (including the volume of the underground pipes connected thereto) is 10 per centum or more beneath the surface of the ground. Such term does not include any of the following or any pipes connected to the following:

Farm or residential tank of 1,100 gallons or less capacity used or storing motor fuel for noncommercial purposes;

Septic tank;

Pipeline facility (including gathering lines) regulated under the Natural Gas Pipeline Safety Act of 1968 (49 USC App. 1671 et seq.), or the Hazardous Liquid Pipeline Safety Act of 1979 (49 USC App. 2001 et seq.), or which is an intrastate pipeline facility regulated under State laws as provided in either of these provisions of law, and that is determined by the Secretary of Energy to be connected to a pipeline or to be operated or intended to be capable of operating at pipeline pressure or as an integral part of a pipeline;

Surface impoundment, pit, pond or lagoon;

Storm-water or wastewater collection system;

Flow-through process tank;

Liquid trap or associated gathering lines directly related to oil or gas production and gathering operations; or

Storage tank situated in an underground area (such as a basement, cellar, mineworking, drift, shaft or tunnel) if the storage tank is situated upon or above the surface of the floor. (Derived from 42 USC § 6991)

The term "underground storage tank" shall also mean an underground storage tank used exclusively to store heating oil for consumptive use on the premises where stored and which serves other than a farm or residential unit. [415 ILCS 5/57.2]

"UST system" or "tank system" means an underground storage tank, connected underground piping, underground ancillary equipment, and containment system, if any.

415 ILCS 5/57.6 Underground storage tanks; early action.

- (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 734.210 Early Action

- 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.

35 Ill. Adm. Code 734.625 Eligible Corrective Action Costs

- a) 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:
 - 1) Early action activities conducted pursuant to Subpart B of this Part.

35 Ill. Adm. Code 734.630 Ineligible Corrective Action Costs

Costs ineligible for payment from the Fund include, but are not limited to:

- a) Costs for the removal, treatment, transportation, and disposal of more than four feet of fill material from the outside dimensions of the UST, as set forth in Appendix C of this Part, during early action activities conducted pursuant to Section 734.210(f) of this Part, and costs for the replacement of contaminated fill materials with clean fill materials in excess of the amounts set forth in Appendix C of this Part during early action activities conducted pursuant to Section 734.210(f) of this Part;
- cc) Costs that lack supporting documentation;
- zz) Costs that exceed the maximum payment amounts set forth in Subpart H of this Part.

35 Ill. Adm. Code 734.810 UST Removal

Payment for costs associated with removal of each UST must not exceed the amounts set forth in this Section. Such costs must include, but not be limited to, those associated with the excavation, removal, and disposal of UST systems.

UST Volume	Maximum Total Amount per UST ²
110 – 999 gallons	\$2,100
1,000 – 14,999 gallons	\$3,150
15,000 or more gallons	\$4,100

² Amounts shown in this section have been updated. See R. at 365 for relevant maximum amounts.

Section 734.APPENDIX C Backfill Volumes

Volume of Tank in Gallons	Maximum amount of backfill material to be removed: Cubic yards	Maximum amount of backfill material to be replaced: Cubic yards
<285	54	56
285 to 299	55	57
300 to 559	56	58
560 to 999	67	70
1000 to 1049	81	87
1050 to 1149	89	96
1150 to 1999	94	101
2000 to 2499	112	124
2500 to 2999	128	143
3000 to 3999	143	161
4000 to 4999	175	198
5000 to 5999	189	219
6000 to 7499	198	235
7500 to 8299	206	250
8300 to 9999	219	268
10,000 to 11,999	252	312
12,000 to 14,999	286	357
>15,000	345	420

A conversion factor of 1.5 tons per cubic yard must be used to convert tons to cubic yards.

ILLINOIS EPA'S ARGUMENT

The Illinois EPA does not contest there were three (3) tanks at the facility located at 1441 Kingshighway in Washington Park, Illinois. However, it is the Illinois EPA's position that there were two (2) 20,000-gallon underground storage tanks (USTs), with one of them having two separate compartments (12,000-gallon/8,000-gallon).

OSFM regulations define a "tank" to be "a stationary device designed to contain an accumulation of regulated substances and constructed of non-earthen materials (e.g., steel, fiberglass, concrete or plastic) that provides structural support." 41 Ill. Adm. Code 174.110. The Board's regulations do not contain a definition of "tank".

The Board's regulations define an "Underground storage tank" or "UST" to mean "any one **or combination of tanks** (including underground pipes connected thereto) that is used to contain an accumulation of regulated substances, and the volume of which (including the volume of the underground pipes connected thereto) is 10 per centum or more beneath the surface of the ground. ...". 35 Ill. Adm. Code 734.115 (emphasis added). OSFM has the identical definition of "Underground storage tank" or "UST" in its Part 178 regulations concerning eligibility and deductible determinations. 41 Ill. Adm. Code 178.100. Both sets of regulations clearly state that a combination of tanks can be part of a single underground storage tank. In this case, tanks 2 and 3 were contained in single dual compartment underground storage tank.

Illinois EPA Field Project Manager Robert Mileur was an eyewitness to the underground storage tank removals on August 30 and 31, 2022. (Tr. at 30-34). He completed an inspection narrative that clearly stated there were two 20,000-gallon USTs at the site, with one of them having two separate compartments. (Tr. at 31-33, R. at 368-369). The photographs he took show the USTs during the removal process. (Tr. at 33-34, R. at 370-377). The photograph of the first 20,000 UST being removed is shown in Exposure #005. (R. at 372). The second UST removal is shown in Exposure #12. (R. at 375). The two USTs are identical in appearance and size. Both had a diameter of 10.5 feet. (R. at 50). At the hearing, Mr. Mileur testified there were two underground storage tanks at the site. (Tr. at 31). The second underground storage tank had a divider between the two compartments and the first UST did not. (Tr. at 33-34, R. at 373, 376).

OSFM Storage Tank Safety Specialist Travis Smith also witnessed the underground storage tank removals and completed removal logs with diagrams showing the 20,000-gallon regular unleaded UST and 12,000-gallon premium/8,000-gallon regular split compartment

UST. (R. at 342-348).

CW3M knew of the existence of a dual compartment UST at least 5 days from the reported release date of July 27, 2022. Tod Rowe's testimony that it did not know there was a compartment tank until the concrete was removed is directly contradicted by the Site Map and Release Confirmation Map, both dated August 1, 2022, which was 30 days prior to the removal of the second 20,000-gallon UST. (Tr. at 20, R. at 50-51). Despite its knowledge of the compartment UST, CW3M never disclosed that fact in either its 45-Day Report or Reimbursement Claim.

The best and clearest evidence showing the existence of only two underground storage tanks at 1441 Kingshighway is found in the original installation application and permit in August 2003 and the extension application and permit in March 2004. (R. at 1-13). The original permit application and extension application both identified tanks 2 and 3 as a split compartment. (R. at 2, 9). Originally, tank 3 contained 8,000-gallons of diesel fuel. (Id.). As part of the applications, Neumayer Equipment Company, Inc. provided documentation for its scope of work. (R. at 4, 11). In relevant part, it stated:

"2. Furnish and install one (1) 20,000-gallon single wall and one (1) 20,000-gallon single wall split compartment 12,000/8,000 underground storage tanks." (Id.).

The maps included in the installation applications show the location of the two underground storage tanks. (R. at 5, 12).

The Illinois EPA's decision of two underground storage tanks at 1441 Kingshighway was based upon site specific facts, as well as the Board's definition of "Underground storage tank" or "UST" to include a "combination of tanks". As such, the decision was not an unpromulgated rule in violation of the Illinois Administrative Procedure Act (5 ILCS 100/1 *et seq.*) as suggested by Petitioner.

UST Removal Costs

An owner or operator may, at a minimum, and prior to submission of any plans to the Agency, remove the tank system during early action. 35 Ill. Adm. Code 734.210(f); 415 ILCS 5/57.6(b). Under the Board's regulations, a "tank system" means an underground storage tank, connected underground piping, underground ancillary equipment, and containment system, if any. 35 Ill. Adm. Code 734.115.

In general, reasonable costs for early action activities may be eligible for payment from the Fund. 35 Ill. Adm. Code 734.625(a)(1). However, costs that exceed the maximum payment amounts set forth in Subpart H of Part 734 are ineligible for payment. 35 Ill. Adm. Code 734.630(zz). Section 734.810 establishes the maximum payment amounts for UST removal. For the relevant period (July 1, 2022 - June 30, 2023), the maximum payment amount for a UST volume 1,000 to 14,999 gallons was \$4,438.43 per UST and for a UST volume of greater than 15,000 gallons was \$5,777.00 per UST. (R. at 365).

In its original Reimbursement Claim, CW3M requested a total of \$14,653.86 for UST Removal and Abandonment Costs. (R. at 138). It sought \$4,884.62 for each listed UST - 20,000-gallon, 12,000-gallon, and 8,000-gallon. (R. at 144). Since the amount requested for the removal of the 12,000 and 8,000-gallon tanks exceeded the Subpart H maximum reimbursement rate (\$4,438.43), the Agency deducted \$892.38 from the \$14,653.86. (R. at 322-328). The Agency paid \$13,761.48 for UST removal in the original Reimbursement Claim. (R. at 144).

CW3M then requested a re-review of the Reimbursement Claim, which included a revised UST Removal form seeking payment of \$892.38 that was previously deducted. (R. at 330-331, 337). At the time of the initial claim, the issue of a possible compartment tank was

not known to the Agency. (Tr. at 40). Brian Bauer looked at the re-review request and sought confirmation from OSFM whether a compartment tank was present on site. (Tr. at 41). OSFM confirmed tanks 2 and 3 were contained in a 20,000-gallon compartment tank and provided their two removal logs. (R. at 339-348).

In its re-review decision, the Agency did not approve the additional \$892.38 for UST removal costs since the 12,000-gallon tank (Tank 2) and 8,000-gallon tank (Tank 3) comprised one single 20,000-gallon compartment tank. (R. at 349-356). Based on two 20,000-gallon USTs, the maximum payment amount per UST was \$5,770.00 each. (R. at 365). The Agency should have paid \$11,554.00 for removal costs of the 2 USTs, but actually paid \$13,761.48.

Excavation, Transportation, and Disposal of Contaminated Soil Costs

An owner may remove visibly contaminated fill material and any groundwater in the excavation which exhibits a sheen during early action. 35 Ill. Adm. Code 210(f); 415 ILCS 5/57.6(b). However, costs for the removal, treatment, transportation, and disposal of more than four feet of fill material from the outside dimensions of the UST, as set forth in Appendix C of Part 734, during early action activities are ineligible for payment from the Fund. 35 Ill. Adm. Code 734.630(a).

In the original Reimbursement Claim, CW3M sought payment for 837 cubic yards for excavation, transportation, and disposal of contaminated soil at the rate of \$68.92 per cubic yard, resulting in a total amount of \$57,685.52. (R. at 142). The documentation provided by CW3M showed only 488.38 cubic yards of contaminated soil that was excavated, transported, and disposed. (R. at 142, 197-320). The Agency paid \$33,659.15 for excavation, transportation, and disposal of 488.38 cubic yards of contaminated soil. (R. at 142).

Therefore, \$24,026.87 was deducted for disposal costs due to a lack of supporting documentation, pursuant to Section 734.630(cc). (R. at 322-327). No deduction was taken for backfilling the excavation, so \$24,722.36 was paid by the Agency. (R. at 142).

As part of its re-review request, CW3M provided additional invoices from Waste Management to attempt to provide documentation for the total amount of excavation, transportation, and disposal of contaminated soil for payment of the \$24,026.87 that was previously deducted. (R. at 330-336).

Based upon the recent discovery of the existence of a compartment tank at the site, the Agency deducted \$10,131.22 for the removal, treatment, transportation, and disposal of more than four feet of fill material from outside the dimensions of the UST, as set forth in 35 Ill. Adm. Code 734, Appendix C. (R. at 349-353). Thus, the maximum payment amounts were based on two 20,000-gallon USTs. (R. at 352). For a UST greater than 15,000 gallons, the maximum amount of backfill material that can be removed is 345 cubic yards. 35 Ill. Adm. Code 734, Appendix C. Based on two 20,000-gallon underground storage tanks, the maximum amount of contaminated soil allowed to be removed, treated, transported, and disposed was 690 cubic yards. Therefore, the total amount allowable for excavation during early action was \$47,554.80. Since \$33,659.15 was paid in the original reimbursement claim, an additional \$13,895.65 was eligible to be paid in the re-review.

Since the total amount for backfilling the excavation was paid in the original reimbursement claim and was not part of the re-review request, no additional deduction was taken by the Agency for backfilling.

Petitioner is correct that the relevant maximum payment amount for excavation, transportation and disposal of contaminated soil is \$80.31 per cubic yard. However,

Petitioner sought payment at the rate of \$68.92. Therefore, Petitioner's suggestion that \$54,413.90 would be reimbursable by submitting a new form for re-review (Petitioner's Brief, page 8, footnote 1) is not relevant to the current Petition for Review and should not be considered by the Board.

CONCLUSION

The Petitioner has not met its burden of proof to show that the Agency erred in its decision. The facts and the law are clear and in favor of the Illinois EPA. Board regulations constrain the Illinois EPA from reimbursing UST removal costs for 3 USTs, where there only 2 USTs, and for payment of ETD more than 4 feet outside the dimensions of the UST.

WHEREFORE: for the above noted reasons, the Illinois EPA respectfully requests the Board find in favor of the Illinois EPA in this matter and against the Petitioner.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent

/s/Rich Kim

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217/782-5544, 217/782-9143
(TDD)
Dated: May 15, 2024

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on **May 15, 2024**, I served true and correct copies of the **ILLINOIS EPA'S POST-HEARING BRIEF**, via the Board's COOL system and email, upon the following named persons:

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ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

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