

ILLINOIS POLLUTION CONTROL BOARD  
June 20, 2024

1441 KINGSHIGHWAY, LLC, )  
 )  
 Petitioner, )  
 )  
 v. ) PCB 24-32  
 ) (UST Appeal)  
 ILLINOIS ENVIRONMENTAL )  
 PROTECTION AGENCY, )  
 )  
 Respondent. )

PATRICK D. SHAW OF LAW OFFICE OF PATRICK D. SHAW APPEARED ON BEHALF OF PETITIONER; and

RICHARD KIM, ASSISTANT COUNEL, DIVISION OF LEGAL COUNSEL, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, APPEARED ON BEHALF OF RESPONDENT.

INTERIM OPINION AND ORDER OF THE BOARD (by M. Gibson):

1441 Kingshighway, LLC (1441 Kingshighway or Petitioner) is the owner of a former self-service fueling station in St. Clair County at which underground storage tanks (UST) leaked petroleum. The Illinois Environmental Protection Agency (IEPA) denied a request for reimbursement of \$11,023.60 for early action activities involving the removal of tanks, associated piping, and contaminated backfill. Petitioner requests that the Board reverse IEPA’s denial and approve the reimbursement request as submitted.

For the reasons below, the Board finds that Petitioner’s reimbursement request, as submitted to IEPA, would not violate any provisions of the Environmental Protection Act (Act) (415 ILCS 5 (2022)) or Board UST rules cited in IEPA’s decision letter. The Board therefore reverses IEPA’s decision and orders IEPA to approve Petitioner’s reimbursement request. The Board sets deadlines for Petitioner to file a statement of legal fees and IEPA to respond, after which the Board will issue a final opinion.

The interim opinion first sets out the procedural history of this case. Next, the Board summarizes the factual background and then addresses the legal background, including the standard of review, burden of proof, and relevant statutory and regulatory authorities. The Board’s discussion then decides the issues before the Board reaches its conclusion and issues its order.

**PROCEDURAL HISTORY**

On November 3, 2023, 1441 Kingshighway filed a petition asking the Board to review an October 18, 2023 determination of IEPA (Pet.). On November 13, 2023, 1441 Kingshighway waived the decision deadline to June 30, 2024. On November 16, 2023, a Board order accepted 1441 Kingshighway's petition for hearing.

On January 31, 2024, IEPA filed its administrative record (R.). On February 29, 2024, IEPA filed a motion to supplement the record (Mot. to Supp.) and attached the Tank Removal Inspection Narrative with photographs (Mot. to Supp. Exh. A). On March 18, 2024, the Hearing Officer granted IEPA's motion. On March 22, 2024, Petitioner filed a motion for reconsideration objecting to IEPA's motion to supplement the record. On April 8, 2024, the Hearing Officer affirmed the order granting IEPA's motion.

On April 10, 2024, the Board held a hearing. The Board received the transcript on April 18, 2024 (Tr.). Petitioner offered one exhibit and IEPA offered four exhibits at hearing (Pet. Exh. 1 and IEPA Exh. 1 through 4).

On May 1, 2024, Petitioner filed its post-hearing brief (Pet. Br.). On May 15, 2024, IEPA filed its post-hearing brief (IEPA Br.). On May 20, 2024, Petitioner filed its reply brief (Pet. Reply Br.).

### **FACTUAL BACKGROUND**

Petitioner is the owner of a former self-service fueling station in Washington Park, St. Clair County known as "Tamers." Pet. Br. at 1, *citing* R. at 18-19, 104. Tamers, Inc. is the operator of the Tamers site. *Id.* On July 27, 2022, Tamers, Inc. "reported a leak or spill from the three gasoline underground storage tanks at the site." Pet. Br. at 1, *citing* R. at 14.

### **Early Action Reimbursement Request**

On August 12, 2003, the Office of the Illinois State Fire Marshal (OSFM) issued an installation permit for three tanks: a 20,000 gallon tank, a 12,000 gallon tank, and an 8,000 gallon tank. R. at 1. The application for the permit stated that tanks two and three were a split compartment, with a 12,000 gallon gas tank and an 8,000 gallon diesel tank. *Id.* at 2. Additionally, under the scope of work, the application listed furnishing and installing "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.* at 4.

On March 16, 2004, the OSFM approved an extension to the installation permit and, under number and size of tanks being installed, listed one 20,000 gallon tank (tank 1) and one 20,000 gallon tank consisting of 12,000 gallons (tank 2) and 8,000 gallons (tank 3). R. at 8. Again, the permit application noted that tanks two and three were a split compartment tank. *Id.* at 9.

On July 27, 2022, Tamers, Inc. reported a release from underground storage tanks. R. at 14. OSFM's hazardous materials incident report listed one 20,000 gallon tank, one 12,000 gallon tank, and one 8,000-gallon tank. *Id.* On August 5, 2022, IEPA acknowledged receiving

notification of the release from the Illinois Emergency Management Agency. *Id.* at 16. On August 15, 2022, CW3M Company, Inc. (CW3M), Petitioner's consultant, submitted the 20-day certification to IEPA. IEPA Br. at 3, *citing* R. at 17-19.

On September 23, 2023, IEPA received Tamers, Inc.'s 45-day report, which detailed its early action activities. R. at 20-99. The 45-day report showed that CW3M and Carter Trucking conducted tank and contaminated backfill removal between August 29, 2022, and September 1, 2022. *Id.* at 25. The report also stated that OSFM Tank Specialist Travis Smith oversaw the UST removal. *Id.* On October 18, 2022, IEPA approved the 45-day report. *Id.* at 102-103.

On December 6, 2022, Petitioner submitted an eligibility and deductible application to OSFM for its three tanks. R. at 104-129. On December 13, 2023, OSFM determined that Petitioner was eligible to "seek payment of costs in excess of \$5,000" in response to the leak associated with the three tanks. *Id.* at 130. OSFM found each of the three tanks to be "eligible tanks." *Id.*

On February 8, 2023, IEPA received Petitioner's reimbursement claim. R. at 132-321. Petitioner submitted a reimbursement request for \$124,117.66 in total for the period of July 1, 2022 through October 31, 2022. *Id.* at 133. Specifically, Petitioner requested \$82,407.88 for remediation and disposal and \$14,653.86 for UST removal and abandonment. *Id.* at 135. In the UST removal form, Petitioner listed the tank removal costs for each of the three tanks as \$4,884.62, for a total removal cost of \$14,653.86. *Id.* at 144.

On June 6, 2023, IEPA approved \$93,666.30 of the request for reimbursement. R. at 322. IEPA deducted the following costs:

1. \$24,026.87 in disposal costs that lacked supporting documentation. Specifically, documentation for disposal costs that supported the amount of cubic yardage requested for reimbursement;
2. \$892.38 in tank removal costs for the 8,000- and 12,000-gallon tanks that exceeded the Subpart H maximum reimbursement rate;
3. \$422.64 in personnel costs which exceeded the minimum requirements necessary to comply with the Act;
4. \$24 in costs for consultant's materials which exceeded the minimum requirements necessary to comply with the Act;
5. \$15.63 in costs for consultant's materials that lacked supporting documentation; and
6. \$69.84 in handling charges due to the deduction of ineligible costs. *Id.* at 324.

In response, CW3M submitted a request for a re-review of Petitioner's reimbursement claim on June 13, 2023. R. at 331. Along with its request, CW3M included invoices and a revised UST removal form with corrected Subpart H rates. *Id.* at 332-337. The updated UST removal form listed the 20,000 gallon tank removal cost as \$5,777 and the 12,000 and 8,000 gallon tanks' removal costs as \$4,438.43 each for a total tank removal cost of \$14,653.86. *Id.* at 337.

### **IEPA Review**

Beginning October 12, 2023, IEPA looked into whether tanks two and three were compartment tanks. R at 339-341. IEPA emailed OSFM asking for the removal log for Tamers to determine if there was a compartment tank. *Id.* at 340. OSFM provided the removal logs, which include a diagram of the site showing the location of the tanks. *Id.* at 342-48. IEPA emailed back asking if OSFM had any documentation showing that the UST was a compartmental tank because IEPA believed two of the tanks were compartmental tanks. *Id.* In response, OSFM stated that the OSFM inspector present at the removal, Travis Smith, recalled that tanks two and three were compartmental tanks. *Id.* However, OSFM stated that it doesn't identify the tanks as being compartmental tanks because all tanks are recorded separately. *Id.*

IEPA's review notes state that upon re-review "it was discovered that the smaller tanks are compartmentalized in one larger tank. Therefore, overpayment of tank pull and new limits on ET&D as well as backfill exist." R. at 356. IEPA also made notes on Petitioner's revised UST removal form and marked the 12,000 and 8,000 gallon tanks as having a combined maximum removal cost of \$5,777 and a total maximum removal cost of \$11,554. *Id.* at 337.

### **IEPA Determination**

In a letter dated October 18, 2023, IEPA approved payment of \$13,895.65 out of the requested reimbursement of \$24,919.25. R. at 349. IEPA deducted \$892.38 for:

tank removal costs that exceed the maximum payment amounts set forth in Subpart H, Appendix D, and/or Appendix E of 35 Ill. Adm. Code 734. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 734.630(zz). In addition, such costs are not approved pursuant to Section 57.7(c)(3) of the Act because they are not reasonable.

In addition, deduction for costs that are based on mathematical errors. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 734.630(bb). In addition, such costs are not approved pursuant to Section 57.7(c)(3) of the Act because they are not reasonable.

In addition, deduction for costs for tank removal, which lack supporting documentation. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 734.630(cc). Since there is not supporting documentation of costs, the Illinois EPA cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act. Therefore, such costs are not approved pursuant to Section 57.7(c)(3) of the Act because they may be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of Title XVI of the Act.

In addition, deduction for site investigation or corrective action cost for tank removal that are not reasonable as submitted. Such costs are ineligible for

payment from the Fund pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.630(dd).

Based on additional information received by the Illinois EPA, the 12,000-gallon tank (Tank 2) and 8,000-gallon tank (Tank 3) comprise one single 20,000-gallon compartment tank, not two separate tanks as was previously indicted in the reimbursement requests. Therefore, the maximum payment amounts are based on two 20,000-gallon USTs. R. at 351.

IEPA also deducted \$10,131.22 for:

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 35 Ill. Adm. Code 734.Appendix C, during early action activities conducted pursuant to 35 Ill. Adm. Code 734.210(f), and/or costs for the replacement of contaminated fill materials with clean fill materials in excess of the amounts set forth in 35 Ill. Adm. Code 734.Appendix C during early action activities conducted pursuant to 35 Ill. Adm. Code 734.210(f). Such costs are ineligible for payment from the Fund pursuant to Section 57.6(b) of the Act and 35 Ill. Adm. Code 734.630(a).

In addition, deduction for costs that are based on mathematical errors. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 734.630(bb). In addition, such costs are not approved pursuant to 57.7(c)(3) of the Act because they are not reasonable.

Based on additional information received by the Illinois EPA, the 12,000-gallon tank (Tank 2) and 8,000-gallon tank (Tank 3) comprise one single 20,000-gallon compartment tank, not two separate tanks as was previously indicted in the reimbursement requests. Therefore, the maximum payment amounts are based on two 20,000-gallon USTs.

Excavation allowable	\$47,554.80
Excavation paid	<u>\$33,659.15</u>
Eligible	\$13,895.65. R. at 352

### **LEGAL BACKGROUND**

In this part of the opinion, the Board provides the standard of review, burden of proof, and statutory and regulatory authorities.

#### **Standard of Review**

The Board must decide whether Petitioner's early action reimbursement request to IEPA would violate the Act or the Board's rules. Ill. Ayers Oil Co. v. IEPA, PCB 03-214, slip op. at 8 (Apr. 1, 2004) (Ill. Ayers); Kathe's Auto Serv. Ctr. v. IEPA, PCB 96-102, slip op. at 13 (Aug. 1, 1996). "[T]he Board does not review the IEPA's decision using a deferential manifest-weight of

the evidence standard,” but “[r]ather the Board reviews the entirety of the record to determine that the [submission] as presented to the IEPA demonstrates compliance with the Act.” Ill. Ayers, PCB 03-214, slip op. at 15, *citing* IEPA v. PCB, 115 Ill. 2d 65, 70 (1986).

The Board’s review is generally limited to the record before IEPA at the time of its determination. Freedom Oil Co. v. IEPA, PCB 03-54, 03-56, 03-105, 03-179, 04-04 (consol.), slip op. at 11 (Feb. 2, 2006). The Board typically does not admit or consider information developed after the IEPA’s decision, although the Board hearing allows the petitioner to challenge IEPA’s reasons for its decision. *See* Alton Packaging Corp. v. PCB, 162 Ill. App. 3d 731, 738 (5th Dist. 1987); Cmty. Landfill Co. & City of Morris v. IEPA, PCB 01-170 (Dec. 6, 2001), *aff’d. sub nom.* Cmty. Landfill Co. & City of Morris v. PCB & IEPA, 331 Ill. App. 3d 1056 (3rd Dist. 2002).

IEPA’s denial letter frames the issues on appeal. Pulitzer Cmty. Newspapers, Inc. v. IEPA, PCB 90-142, slip op. at 6 (Dec. 20, 1990). This focus on IEPA’s letter “is necessary to satisfy principles of fundamental fairness because it is the applicant who has the burden of proof” to demonstrate that the reasons for denial are inadequate. *Id.*, *citing* Technical Servs. Co. v. IEPA, PCB 81-105, slip op. at 2 (Nov. 5, 1981).

### **Burden of Proof**

In appeals of final IEPA determinations, “[t]he burden of proof shall be on the petitioner. . . .” 35 Ill. Adm. Code 105.112(a), *citing* 415 ILCS 5/40(a)(1), 40(b), 40(e)(3), 40.2(a) (2022); Ted Harrison Oil v. IEPA, PCB 99-127, slip op. at 5-6 (July 24, 2003). The standard of proof in UST appeals is the “preponderance of the evidence.” Freedom Oil, PCB 03-54, 03-56, 03-105, 03-179, 04-04 (consol.), slip op. at 59. “A proposition is proved by a preponderance of the evidence when it is more probably true than not.” McHenry County Landfill, Inc. v. County Bd. of McHenry County, PCB 85-56, 85-61, 85-62, 85-63, 85-64, 85-65, 85-66 (consol.), slip op. at 3 (Sept. 20, 1985).

### **Statutory and Regulatory Authorities**

Section 57.6(b) of the Act states:

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. 415 ILCS 5/57.6(b) (2022).

Section 57.7(c)(3) of the Act states:

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. 415 ILCS 57.7(c)(3) (2022).

Section 57.9(a)(4) of the Act states:

The Underground Storage Tank Fund shall be accessible by owners and operators who have a confirmed release from an underground storage tank or related tank system of a substance listed in this Section. The owner or operator is eligible to access the Underground Storage Tank Fund if the eligibility requirements of this Title are satisfied and:

\* \* \*

- 4) The owner or operator registered the tank and paid all fees in accordance with the statutory and regulatory requirements of the Gasoline Storage Act. 415 ILCS 5/57.9(a)(4).

Section 57.9(c)(2) of the Act states:

Eligibility and deductibility determinations shall be made by the Office of the State Fire Marshal.

\* \* \*

- 2) Within 60 days of receipt of the “Eligibility and Deductibility Determination” form, the Office of the State Fire Marshal shall issue one letter enunciating the final eligibility and deductibility determination, and such determination or failure to act within the time prescribed shall be a final decision appealable to the Illinois Pollution Control Board. 415 ILCS 5/57.9(c)(2).

“Underground Storage Tank” means:

any one or combination of tanks (including underground pipes connected thereto) which is used to contain an accumulation of regulated substances, and the volume of which (including the volume of underground pipes connected thereto) is 10 per centum or more beneath the surface of the ground. 35 Ill. Adm. Code 734.115.

The definition of “Underground Storage Tank” includes eight specific exceptions, none of which is relevant to the case.

Section 734.210(f) of the Board's UST rules states:

- 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 materials 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.*

Section 734.630 of the Board's UST rules states that costs ineligible for payment from the UST Fund include:

- 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 the 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. 35 Ill. Adm. Code 734.630(a).

\* \* \*

- bb) Costs requested that are based on mathematical errors.
- cc) Costs that lack supporting documentation.
- dd) Costs proposed as part of a budget that are unreasonable. 35 Ill. Adm. Code 734.630(bb), (cc), (dd).

\* \* \*

- zz) Costs that exceed the maximum payment amounts set forth in Subpart H of this Part. 35 Ill. Adm. Code 734.630(zz).

Section 734.810 of the Board's UST rules (35 Ill. Adm. Code 734.810) states:

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
110 – 999 gallons	\$2,100
1,000 – 14,999 gallons	\$3,150
15,000 or more gallons	\$4,100

Section 734.Appendix C of the Board's UST rules (35 Ill. Adm. Code 734.Appendix C) states:

Volume of Tank in Gallons	Maximum amount of backfill material to be removed:	Maximum amount of backfill material to be replaced:
	Cubic yards	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

Section 734.Appendix D of the Board's UST rules (35 Ill. Adm. Code 734.Appendix D) states:

Chemical	Max. Total Amount per Sample
BETX Soil with MTBE	\$85

BETX Water with MTBE	\$81
COD (Chemical Oxygen Demand)	\$30
Corrosivity	\$15
Flash Point or Ignitability Analysis EPA 1010	\$33
FOC (Fraction Organic Carbon)	\$38
Fat, Oil, & Grease (FOG)	\$60
LUST Pollutants Soil – analysis must include all volatile, base/neutral, polynuclear aromatic, and metal parameters listed in Section 734.AppendixB of this Part	\$693
Organic Carbon (ASTM-D 2974-87)	\$33
Dissolved Oxygen (DO)	\$24
Paint Filter (Free Liquids)	\$14
PCB/Pesticides (combination)	\$222
PCBs	\$111
Pesticides	\$140
PH	\$14
Phenol	\$34
Polynuclear Aromatics PNA, or PAH SOIL	\$152
Polynuclear Aromatics PNA, or PAH WATER	\$152
Reactivity	\$68
SVOC – Soil (Semi-volatile Organic Compounds)	\$313
SVOC – Water (Semi-volatile Organic Compounds)	\$313
TKN (Total Kjeldahl) "nitrogen"	\$44
TOC (Total Organic Carbon) EPA 9060A	\$31
TPH (Total Petroleum Hydrocarbons)	\$122
VOC (Volatile Organic Compound) – Soil (Non-Aqueous)	\$175
VOC (Volatile Organic Compound) – Water	\$169

#### Geo-Technical

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Bulk Density ASTM D4292/D2937	\$22
Ex-Situ Hydraulic Conductivity/Permeability	\$255
Moisture Content ASTM D2216-90/D4643-87	\$12
Porosity	\$30
Rock Hydraulic Conductivity Ex-Situ	\$350
Sieve/Particle Size Analysis ASTM D422-63/D1140-54	\$145
Soil Classification ASTM D2488-90/D2487-90	\$68

#### Metals

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Arsenic TCLP Soil	\$16
Arsenic Total Soil	\$16
Arsenic Water	\$18
Barium TCLP Soil	\$10
Barium Total Soil	\$10
Barium Water	\$12
Cadmium TCLP Soil	\$16
Cadmium Total Soil	\$16

Cadmium Water	\$18
Chromium TCLP Soil	\$10
Chromium Total Soil	\$10
Chromium Water	\$12
Cyanide TCLP Soil	\$28
Cyanide Total Soil	\$34
Cyanide Water	\$34
Iron TCLP Soil	\$10
Iron Total Soil	\$10
Iron Water	\$12
Lead TCLP Soil	\$16
Lead Total Soil	\$16
Lead Water	\$18
Mercury TCLP Soil	\$19
Mercury Total Soil	\$10
Mercury Water	\$26
Selenium TCLP Soil	\$16
Selenium Total Soil	\$16
Selenium Water	\$15
Silver TCLP Soil	\$10
Silver Total Soil	\$10
Silver Water	\$12
Metals TCLP Soil (a combination of all RCRA metals)	\$103
Metals Total Soil (a combination of all RCRA metals)	\$94
Metals Water (a combination of all RCRA metals)	\$119
Soil preparation for Metals TCLP Soil (one fee per sample)	\$79
Soil preparation for Metals Total Soil (one fee per sample)	\$16
Water preparation for Metals Water (one fee per sample)	\$11

Other

En Core <sup>®</sup> Sampler, purge-and-trap sampler, or equivalent sampling device	\$10
Sample Shipping (*maximum total amount for shipping all samples collected in a calendar day)	\$50*

Section 734.Appendix E of the Board's UST rules (35 Ill. Adm. Code 734.Appendix E) states:

Title	Degree Required	Ill. License Req'd.	Min. Yrs. Experience	Max. Hourly Rate
Engineer I	Bachelor's in Engineering	None	0	\$75
Engineer II	Bachelor's in Engineering	None	2	\$85
Engineer III	Bachelor's in Engineering	None	4	\$100
Professional Engineer	Bachelor's in Engineering	P.E.	4	\$110
Senior Prof. Engineer	Bachelor's in Engineering	P.E.	8	\$130

Geologist I	Bachelor's in Geology or	None	0	\$70
Geologist II	Hydrogeology	None	2	\$75
Geologist III	Bachelor's in Geology or	None	4	\$88
Professional Geologist	Hydrogeology	P.G.	4	\$92
Senior Prof. Geologist	Bachelor's in Geology or Hydrogeology	P.G.	8	\$110
	Bachelor's in Geology or Hydrogeology			
	Bachelor's in Geology or Hydrogeology			
Scientist I	Bachelor's in a Natural or Physical	None	0	\$60
Scientist II	Science	None	2	\$65
Scientist III	Bachelor's in a Natural or Physical	None	4	\$70
Scientist IV	Science	None	6	\$75
Senior Scientist	Bachelor's in a Natural or Physical Science	None	8	\$85
	Bachelor's in a Natural or Physical Science			
	Bachelor's in a Natural or Physical Science			
Project Manager	None	None	8 <sup>1</sup>	\$90
Senior Project Manager	None	None	12 <sup>1</sup>	\$100
Technician I	None	None	0	\$45
Technician II	None	None	2 <sup>1</sup>	\$50
Technician III	None	None	4 <sup>1</sup>	\$55
Technician IV	None	None	6 <sup>1</sup>	\$60
Senior Technician	None	None	8 <sup>1</sup>	\$65
Account Technician I	None	None	0	\$35
Account Technician II	None	None	2 <sup>2</sup>	\$40
Account Technician III	None	None	4 <sup>2</sup>	\$45
Account Technician IV	None	None	6 <sup>2</sup>	\$50
Senior Acct. Technician	None	None	8 <sup>2</sup>	\$55
Administrative Assistant I	None	None	0	\$25
Administrative Assistant II	None	None	2 <sup>3</sup>	\$30
Administrative Assistant III	None	None	4 <sup>3</sup>	\$35
Administrative Assistant IV	None	None	6 <sup>3</sup>	\$40
Senior Admin. Assistant	None	None	8 <sup>3</sup>	\$45
Draftperson/CAD I	None	None	0	\$40
Draftperson/CAD II	None	None	2 <sup>4</sup>	\$45
Draftperson/CAD III	None	None	4 <sup>4</sup>	\$50
Draftperson/CAD IV	None	None	6 <sup>4</sup>	\$55
Senior Draftperson/CAD	None	None	8 <sup>4</sup>	\$60

<sup>1</sup> Equivalent work-related or college level education with significant coursework in the physical, life, or environmental sciences can be substituted for all or part of the specified experience requirements.

- 2 Equivalent work-related or college level education with significant coursework in  
accounting or business can be substituted for all or part of the specified experience  
requirements.
- 3 Equivalent work-related or college level education with significant coursework in  
administrative or secretarial services can be substituted for all or part of the specified  
experience requirements.
- 4 Equivalent work-related or college level education with significant coursework in  
drafting or computer aided design (CAD) can be substituted for all or part of the specified  
experience requirements.

## **BOARD DISCUSSION**

The Board first discusses the Petitioner’s and IEPA’s arguments on the following issues: 1) the Board’s jurisdiction to hear appeals of OSFM decisions, 2) whether IEPA’s treatment of compartment tanks constitutes an unpromulgated rule, and 3) how the Board should treat compartment tanks in terms of maximum reimbursement rates. The Board then discusses and rules on these issues.

## **Petitioner’s Arguments**

### **OSFM Decision**

Petitioner argues that OSFM, not IEPA, is the agency responsible for counting eligible tanks under the Act. Pet. Br. at 14. According to Petitioner, IEPA “lacks authority to create its own tank count and the Board lacks authority to review the registration or eligibility of the three tanks.” *Id.* at 13, *citing* 415 ILCS 5/57.6(b); 415 ILCS 5/57.9(a); 415 ILCS 5/57.9(a)(4); 415 ILCS 5/57.9(c); 415 ILCS 5/57.9(c)(2). Petitioner cites Estate of Slightom and Freedom Oil in support of its position that IEPA “is without the authority to disregard the eligibility and deductible determination of OSFM.” Pet. Br. at 13, *citing* Estate of Slightom v. Pollution Control Board, 2015 IL App (4th) 140593; Freedom Oil v. IEPA, PCB 03-54, slip op. at 36 (Feb. 2, 2006).

Petitioner contends that “OSFM registered three tanks at the site and found all three tanks eligible for payment from the Underground Storage Tank Fund.” Pet. Br. at 13, *citing* R. at 130. Furthermore, Petitioner claims that IEPA “did not know whether there was a ‘compartment tank’ without asking OSFM, which does not identify or track tanks as being compartment tanks.” Pet. Br. at 13-14. Therefore, Petitioner claims that all three USTs that OSFM counted should be eligible for payment.

### **Unpromulgated Rule**

Petitioner argues that IEPA’s treatment of compartment tanks as a single UST is an unpromulgated rule under the Administrative Procedure Act (APA). Pet. Br. at 14. Petitioner states that the APA defines a rule as “each agency statement of general applicability that implements, applies, interprets or prescribes law or policy.” *Id.*, *citing* 5 ILCS 100/1-70. According to Petitioner, the “imposition of a requirement of general applicability that was never

promulgated is an invalid rule.” Pet. Br. at 15, *citing Ackerman v. Department of Public Aid*, 128 Ill. App. 3d 982, 983 (3rd Dist. 1984). Petitioner contends that having promulgated or publicly known rules is important so that people can voluntarily comply with them and regulators can uniformly implement them. Pet. Br. at 16. Petitioner claims that IEPA Interim Section Manager Brian Bauer testified at the hearing that if IEPA is aware of a compartment tank, it “always” views it as a single tank. *Id.*, *citing* Tr. at 44. Petitioner argues that, since OSFM and IEPA do not track compartment tanks and regulations don’t require identification of compartment tanks, treating them as a single tank is an unpromulgated “secret” rule. Pet. Br. at 16.

### **Compartment Tanks**

Petitioner contends Subpart H of the Board’s UST regulations determine the maximum payment amounts based on the number of tanks, but those regulations do not authorize different treatment for compartment tanks. Pet. Br. at 16, *citing* 35 Ill. Adm. Code 734.800 et seq. According to Petitioner, the definitions in Part 734 apply since Subpart H does not have its own definition section, and nothing in Part 734 references “compartment tanks.” *Id.* Therefore, because the regulations do not mention compartment tanks, Petitioner argues that compartment tanks should not be treated differently than any other USTs. Pet. Br. at 17.

### **IEPA’s Arguments**

#### **OSFM Decision**

IEPA does not contest that there were three tanks at the site; however, it argues that there were two 20,000-gallon USTs, with one of them having two separate compartments. IEPA Br. at 10. IEPA states that OSFM regulations define “tank,” but Board regulations do not. *Id.* IEPA also contends that Board regulations define “UST” and OSFM regulations use the same definition of “UST” in their regulations. *Id.* at 11. According to IEPA, 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 a single dual compartment underground storage tank.” *Id.*

In support of its position, IEPA points to the testimony of IEPA Field Project Manager Robert Mileur, who was present when the tanks were removed. IEPA Br. at 11, *citing* Tr. 30-34. Mileur testified that he completed an “inspection narrative that clearly stated that there were two 20,000-gallon USTs at the site, with one of them having two compartments.” IEPA Br. at 11, *citing* Tr. at 31-33; R. at 368-369. Mileur also testified that there were two USTs at the site. IEPA Br. at 11, *citing* Tr. at 31. IEPA states that OSFM’s Storage Tank Safety Specialist Travis Smith also witnessed the UST 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.” IEPA Br. at 11-12, *citing* R. at 342-348. Additionally, IEPA argues that the original installation application and permit for the tanks shows that there were two USTs because it identifies tanks 2 and 3 as split compartment. IEPA Br. at 12, *citing* R. 1-13.

#### **Unpromulgated Rule**

In response to Petitioner's argument that IEPA's classification of compartment tanks as a single UST is an unpromulgated rule, IEPA contends that its decision in this case 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.'" IEPA Br. at 12.

## **Compartment Tanks**

### **UST Removal Costs.**

IEPA states that the maximum payment amount for removal of a UST with a volume of 1,000-14,999 gallons was \$4,438.43 and the maximum payment amount for removal of a UST with a volume greater than 15,000 gallons was \$5,777. IEPA Br. at 13, *citing* 35 Ill. Adm. Code 734.810. According to IEPA, Petitioner's original reimbursement claim requested \$4,884.62 in tank removal costs for all three USTs, which exceeded the maximum reimbursement rate for the 12,000 and 8,000-gallon tanks. IEPA Br. at 13, *citing* R. at 144. Therefore, IEPA deducted \$892.38 (the difference between \$4,439.43 and \$4,884.62 for both tanks) from the total \$14,653.86 in tank removal costs and paid \$13,761.48 for UST removal in the original claim. *Id.*

On re-review, IEPA argues that it did not approve the \$892.38 for UST removal costs since the 12,000-gallon tank and the 8,000-gallon tank were really one 20,000-gallon tank. IEPA Br. at 14, *citing* R. at 349-356. Because there were only two 20,000-gallon USTs, IEPA claims that the maximum payment amount per UST was \$5,777 each. IEPA Br. at 14, *citing* R. at 365. According to IEPA, it should have only "paid \$11,554.00 for removal costs of the 2 USTs, but actually paid \$13,761.48." IEPA Br. at 14.

### **Contaminated Soil Removal Costs.**

IEPA contends that Petitioner requested reimbursement for "837 cubic yards for excavation, transportation, and disposal at the rate of \$68.92 per cubic yard, resulting in a total amount of \$57,685.52." IEPA Br. at 14, *citing* R. at 142. However, according to IEPA, the documentation provided by Petitioner only showed "488.38 cubic yards of contaminated soil that was excavated, transported, and disposed." IEPA Br. at 14, *citing* R. at 142, 197-320. IEPA paid \$33,659.15 for removal of 488.38 cubic yards of contaminated soil and deducted \$24,025.87 because removal cost of the other 348.62 cubic yards lacked supporting documentation. IEPA Br. at 14-15, *citing* R. at 142, 322-237.

While Petitioner provided additional invoices to support the contaminated soil removal costs, IEPA argues that it properly deducted \$10,131.22 from the request for reimbursement on re-review because it exceeded the maximum amount of contaminated soil that can be removed for two USTs greater than 15,000 gallons. IEPA Br. at 15. IEPA states that the maximum amount of contaminated soil that can be removed for USTs greater than 15,000 gallons is 345 cubic yards. IEPA Br. at 15, *citing* 35 Ill. Adm. Code 734.Appendix C. Therefore, according to IEPA, the maximum amount of contaminated soil that can be removed for two 20,000-gallon USTs is 690 cubic yards and the total amount allowed for excavation was \$47,554.80. IEPA Br. at 15. IEPA contends that it already paid \$33,659.15 in the original reimbursement claim, so only \$13,895.65 was eligible to be paid for the re-review. *Id.*

## **Petitioner's Reply to IEPA's Arguments**

### **OSFM Decision**

In response to IEPA's argument that compartment tanks are a "combination of tanks," Petitioner argues that the plain language of the definition of UST states that a "combination of tanks" are combined by connecting pipes. Pet. Reply at 1, *citing* 41 Ill. Adm. Code 178.100. According to Petitioner, the definition of UST "originates from the 1984 RCRA Amendments that initiated the regulation of underground storage tanks." Pet. Reply at 1-2, *citing* 42 U.S.C. 6991(1). Petitioner contends that, in 1988, USEPA created the technical requirements for USTs, which identify a type of tank called a "manifold tank." Pet. Reply at 2, *citing* 53 Fed. Reg. 37082, 37090 (Sept. 23, 1988). Petitioner claims that manifold tanks are "filled through piping connecting the tanks together" and are "considered as one UST system." *Id.*; 53 Fed. Reg. 37114.

Petitioner argues that "compartment tanks do not operate in combination" and they are "not connected to each other by pipes." Pet. Reply at 2, *citing* Tr. at 10. Instead, compartment tanks have "separate fill ports and separate pumps in each" and "frequently contain different products which can be piped to separate dispensing mechanisms." Pet. Reply at 2, *citing* Tr. at 11. Furthermore, Petitioner claims that compartment tanks appeared in the late 90s, so it is unlikely they were contemplated when the definition of UST was created. Pet. Reply at 2, *citing* Tr. at 11-12.

However, Petitioner still contends that OSFM is the agency responsible for tank registration and it registered three tanks in this case. Pet. Reply at 2-3, *citing* 430 ILCS 15/4(b). According to Petitioner, if OSFM "decides that the owner/operator is seeking to register a non-registerable tank, it will issue an administrative order modifying the registration status. Pet. Reply at 3, *citing* 430 ILCS 15/2(e). Once the owner or operator receives the administrative order, they have ten days to appeal that decision. *Id.* Therefore, Petitioner argues that State law allows owners and operators to challenge OSFM's decision on tank registration. *Id.*

Petitioner also reiterates its argument that OSFM's decisions on UST registrations are a final decision that the Board will not review. Pet. Reply at 3, *citing* Christ Episcopal Church v. OSFM, PCB 94-192, slip op. at 2 (Dec. 1, 1994); Hoing v. OSFM, PCB 98-146, slip op. at 5 (May 17, 2001); Divane Bros. Electric Co. v. IEPA, PCB 93-105, slip op. at 6 (Nov. 4, 1993).

### **Unpromulgated Rule**

Petitioner argues that IEPA's decision to count the compartment tank as one UST in this case was not specific to this site, but is IEPA policy. Pet. Reply at 4. Petitioner again cites to the hearing transcript, where IEPA Interim Manager Brian Bauer stated that IEPA always views compartment tanks as "one tank for reimbursement." *Id.*, *citing* Tr. at 44. Additionally, Petitioner states that IEPA did not list Section 734.115 in its decision letter; therefore, IEPA cannot argue that it interpreted a "combination of tanks" in the definition of UST under Section 734.115 to include compartment tanks. Pet. Reply at 5.



### **Board Discussion**

The Board agrees with Petitioner that “OSFM determines whether USTs may be registered, which is a prerequisite for UST Fund eligibility.” Freedom Oil, PCB 03-54, slip op. at 3; *see* 415 ILCS 5/57.9 (2004). “OSFM also determines whether a UST owner or operator is eligible for reimbursement and, if so, which deductible applies. OSFM eligibility and deductibility determinations may be appealed to the Board.” *Id.* at 4; *see also* 35 Ill. Adm. Code 105.Subpart E. Additionally, “OSFM oversees the removal and abandonment in-place of USTs.” Freedom Oil, PCB 03-54, slip op. at 4; *see* 41 Ill. Adm. Code 170.

While “OSFM decisions on tank registration and whether to issue a corrective action order requiring tank removal are not reviewable by the Board,” OSFM “determinations of Fund eligibility and deductibility for UST releases are appealable to the Board.” Freedom Oil, PCB 03-54, slip op. at 36. Here, however, the Petitioner did not appeal OSFM’s determination that there were three eligible tanks subject to the deductible. *Id.*

IEPA does not contest the fact that there were three tanks at the facility; however, it contends that there were only two USTs at the site because IEPA interprets a “combination of tanks” in the definition of UST to include compartment tanks. The Board is unpersuaded by IEPA’s argument that “a combination of tanks” is intended to include compartment tanks as a single tank. Compartment tanks contain separate tanks that can contain different liquids, as they did in this case, and are not connected to each other by piping. Also, as compartment tanks have only recently been introduced, it is unlikely that the legislature contemplated compartment tanks when defining USTs.

Further, the OSFM is the agency charged with determining the eligibility and deductibility of USTs and it determined that there were three eligible tanks in this case. Since Petitioner did not appeal OSFM’s decision on the eligibility and deductibility of the tanks, the Board cannot review OSFM’s final decision. IEPA cannot ignore the OSFM’s decision that Petitioner could seek payment from the UST Fund for all three tanks stands. Therefore, the Board finds that Petitioner’s requested reimbursement will not violate the Act or Board regulations. The Board orders IEPA to approve Petitioner’s request for the maximum reimbursement rates for all three tanks under Subpart H of the Board’s UST regulations.

Additionally, because the Board finds that it cannot review OSFM decision to deem all three tanks eligible, the Board does not need to rule on the issue of whether IEPA’s decision to view compartment tanks as single tanks is an unpromulgated rule.

### **Reimbursement of Legal Fees**

Petitioner seeks reimbursement of its legal fees. *See* Pet. at 3. The record does not now include the amount of these fees or Petitioner’s argument that they would be reimbursable under Section 57.8(1) of the Act. 415 ILCS 5/57.8(1) (2022). In its order below, the Board directs Petitioner to file a statement of legal fees that may be eligible for reimbursement and its

arguments that the Board should exercise its discretion to direct IEPA to reimburse those fees from the UST Fund. The order also sets a deadline for IEPA to respond.

### **CONCLUSION**


The Board finds that Petitioner's early action reimbursement request would not violate either of the Board rules cited in IEPA's decision letter. The Board therefore reverses IEPA's decision and orders IEPA to approve the reimbursement request for three USTs. The Board sets deadlines for Petitioner to file a statement of legal fees and IEPA to respond. This interim opinion constitutes the Board's findings of fact and conclusions of law.

### **ORDER**

1. The Board reverses IEPA's October 18, 2023 determination partially denying Petitioner's early action reimbursement request.
2. The Board orders IEPA to approve Petitioner's reimbursement request of \$11,023.60.
3. Petitioner is directed to file a statement of legal fees that may be eligible for reimbursement and its arguments why the Board should exercise its discretion to order reimbursement of legal fees from the UST fund. Petitioner must file the request by Monday, July 22, 2024, which is the first business day following the 30th day after the date of this order. IEPA may file a response within 14 days after being served with Petitioner's statement.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above interim opinion and order on June 20, 2024, by a vote of 4-0.



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Don A. Brown, Clerk  
Illinois Pollution Control Board