ILLINOIS POLLUTION CONTROL BOARD
August 20, 2009

PRIME LOCATION PROPERTIES, LLC,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 09-67
	)	(UST Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
	)	
Respondent.	)	

FRED C. PRILLAMAN AND PATRICK D. SHAW OF MOHAN, ALEWELT, PRILLAMAN & ADAMI APPEARED ON BEHALF OF PETITIONER; and

THOMAS DAVIS, ASSISTANT ATTORNEY GENERAL, CHIEF, ENVIRONMENTAL BUREAU, OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF ILLINOIS, APPEARED ON BEHALF OF RESPONDENT.

INTERIM OPINION AND ORDER OF THE BOARD (by T.E. Johnson):

Prime Location Properties, LLC (Prime) has appealed a January 27, 2009 determination of the Illinois Environmental Protection Agency (Agency). In the determination, the Agency rejected Prime's amended plan and budget for the leaking underground storage tank (UST) site located at 600 W. 10th Street in Metropolis, Massac County. For the reasons below, the Board reverses the Agency's determination and remands the matter to the Agency for further consideration consistent with this opinion. The Board also denies Prime's request to sanction the Agency and denies the Agency's motion to dismiss.

In this opinion, the Board first provides the procedural history of the case and addresses Prime's request that the Agency be sanctioned for filing the administrative record late. Next, the Board discusses and rules on the Agency's motion to dismiss the appeal on the ground that the original petition for review was filed by a non-attorney. The Board then turns to the merits of the appeal, setting forth the Board's findings of fact. This is followed by a description of the parties' arguments concerning the Agency's rejection of Prime's plan and budget, after which the Board renders its legal conclusions. Today's decision comes as an interim opinion and order because further information is required regarding Prime's request for legal fees.

PROCEDURAL HISTORY

On March 9, 2009, the original petition for review was filed (Pet.). On March 19, 2009, the Board issued an order accepting the matter as timely filed, but finding that it was unclear whether the petition had been filed by an attorney. The Board directed Prime to file an amended petition for review, along with the appearance of an attorney, by April 20, 2009. On April 20,

2009, Prime filed an amended petition for review accompanied by the appearance of an attorney. On May 7, 2009, the Board accepted the amended petition for hearing.

On May 26, 2009, the Agency filed a motion to dismiss this appeal (Mot.). On June 4, 2009, Prime filed a response in opposition (Resp.) to the Agency's motion. A hearing was held on June 17, 2009, in Springfield before Board Hearing Officer Carol Webb. The Board received the hearing transcript on June 18, 2009 (Tr.). No witnesses testified at hearing. Prime offered eight exhibits at hearing, all of which were admitted (Exh.). The Agency offered no exhibits but sought and received the hearing officer's permission to file the Agency's record by June 22, 2009. Tr. at 5.

A compact disk of the Agency's record was filed on June 19, 2009. A hard copy was filed on June 22, 2009. The Agency's record consists of 39 documents. The record is not consecutively paginated, but the Agency assigned a number to each document (1-39). The Board therefore cites the Agency record by specific document number and then by page number within the document (*e.g.*, "AR4 at 3").

As permitted by hearing officer order, Prime filed a post-hearing brief (Br.) on June 29, 2009, and the Agency filed a response brief (Resp. Br.) on July 6, 2009. Prime's brief includes a request to sanction the Agency, to which the Agency responded in its response brief. On July 13, 2009, Prime filed a reply brief (Reply Br.) and on July 21, 2009, Prime filed a motion for leave to file the reply brief. The Agency did not respond to Prime's motion for leave to file, which is granted. Also on July 21, 2009, Prime filed a waiver of the statutory decision deadline (415 ILCS 5/40(a)(2) (2008)), extending to August 20, 2009, the deadline for the Board to decide this appeal.

PRIME'S REQUEST TO SANCTION THE AGENCY

In Prime's initial post-hearing brief, as an alternative to reversing the Agency's determination on the merits, Prime requests that a default judgment be entered against the Agency as a sanction for the Agency's late filing of the record. Br. at 12. Prime notes that the record on which the Agency based its determination was due by May 20, 2009, and that by that date, the Agency had filed neither the record nor a motion for an extension of the record-filing deadline. *Id.*, citing 35 Ill. Adm. Code 105.116. Prime further notes that the Board may sanction parties for unreasonably failing to comply with Board or hearing officer orders or the Board's procedural rules. Br. at 12, citing 35 Ill. Adm. Code 101.800(a), 105.118. Sanctions specifically applicable to the issue of late-filed Agency records, continues Prime, are to bar the Agency from filing any other document in the case or to immediately award petitioner the result it seeks. Br. at 12, citing E&L Trucking Co. v. IEPA, PCB 02-53 (Apr. 18, 2002) and Freedom Oil v. IEPA, PCB 03-54 (Feb. 2, 2006).

The Agency argues that Prime has not shown "any hardship due to the lateness of the record." Resp. Br. at 11. The Agency notes that the Board has already accepted the filing of the record pursuant to an Agency motion made at hearing. According to the Agency, Prime "was permitted to proffer several documents at the hearing" to which the Agency had "little to no objection to allowing into the record." *Id*. The Agency adds that Prime was "also allowed a full

hearing by which to present any evidence [it] chose and failed to present any witnesses." *Id*. The Agency concludes that because Prime has not demonstrated how it was prejudiced by the late filing of the record, Prime's sanction request should be denied. *Id*.

The Board notes that under its procedural rules, the Board may sanction parties for unreasonably failing to comply with Board or hearing officer orders or the Board's procedural rules. *See* 35 Ill. Adm. Code 101.800(a); *see also* 35 Ill. Adm. Code 105.118. Potential sanctions include entering a default judgment. *See* 35 Ill. Adm. Code 101.800(b); E&L Trucking, PCB 02-53, slip op. at 5 (among possible sanctions for the Agency's late record-filing in a UST appeal: "the petitioner may be immediately awarded the result it seeks, regardless of the Agency's position in the matter").

By Board order of May 7, 2009 and 35 Ill. Adm. Code 105.410(a), the Agency's record of its determination was due to be filed no later than May 20, 2009. Neither the record nor a motion for extension was filed by that date. *See* 35 Ill. Adm. Code 105.116. Ultimately, the administrative record was filed on June 19, 2009 (compact disk) and June 22, 2009 (hard copy). Accordingly, the record had not been filed at the time of the hearing on June 17, 2009. Prime received a copy of the record for the first time at the hearing, and that was a compact disk copy.

The Board has broad discretion in determining the imposition of sanctions. *See* IEPA v. Celotex Corp., 168 Ill. App. 3d 592, 597, 522 N.E.2d 888, 891 (3rd Dist. 1988); Modine Manufacturing Co. v. PCB, 192 Ill. App. 3d 511, 519, 548 N.E.2d 1145, 1150 (2nd Dist. 1989). In exercising this discretion, the Board considers such factors as "the relative severity of the refusal or failure to comply; the past history of the proceeding; the degree to which the proceeding has been delayed or prejudiced; and the existence or absence of bad faith on the part of the offending party or person." 35 Ill. Adm. Code 101.800(c).

Here, Prime offered eight exhibits as evidence at hearing, almost all of which are in the Agency's record. Specifically, Prime's Exhibits 1, 2, 3, 4, 6, and 7 are part of the Agency's record.[1] Exhibits 1, 2, and 6 are proposed plans and budgets, while Exhibits 3, 4, and 7 are Agency determination letters. Prime plainly had a number of record documents at its disposal before hearing. All exhibits offered by Prime were admitted into the record. Prime presented no witnesses at hearing. Prime did not seek continuance of the hearing based on the Agency's failure to timely file the record. Since the time of hearing, Prime has had use of the Agency-filed record to prepare Prime's brief and reply brief.

The Board's concerns about late-filed records are heightened when the record is not filed sufficiently in advance of hearing to allow for reasonable hearing preparation. In this case, however, the Board cannot find that the Agency's tardiness warrants the drastic sanction requested by Prime. Prime has not persuaded the Board that the Agency's single late filing amounts to bad faith, deliberate non-compliance with rules or orders, or a scheme designed to stall this proceeding. Nor can the Board find that Prime established material prejudice. *See*

[1] Prime's Exhibit 5 is an Office of the State Fire Marshal form entitled "Notification for Underground Storage Tanks," executed for the site in January 2007. Prime's Exhibit 8 is background information concerning the leaking UST site, printed from the Agency's website.

Celotex Corp., 168 Ill. App. 3d at 597-98, 522 N.E.2d at 891-92; Modine Manufacturing, 192 Ill. App. 3d at 517-18, 548 N.E.2d at 1149-50. Considering all of the circumstances, the Board denies Prime's motion for default judgment. *See* 35 Ill. Adm. Code 101.800(c).

DISCUSSION OF AGENCY'S MOTION TO DISMISS THE APPEAL

Agency's Motion

The Agency argues that the Board's procedural rules (35 Ill. Adm. Code 101.400(a)(2)) "clearly state that the petition for review must be filed by an attorney." Mot. at 5. The Agency moves to dismiss this appeal because the March 9, 2009 original petition was filed by a non-attorney, Joe Keebler, "in violation of Board rules and it could not be cured by a filing of an attorney after the due date of the appeal had run." *Id*. at 6; *see also id*. at 4. According to the Agency, because the 35-day timeframe to appeal ended on March 20, 2009, the April 20, 2009 amended petition is "past the date by which an appeal needed to be filed in this case by an attorney for the appeal to be valid." *Id*. at 4.

The Agency further asserts that "[a]ny judgment in a case initiated by a non-attorney is void, even if subsequent appearances are made by an attorney." Mot. at 5, citing Housing Authority of Cook County v. Tonsul, 115 Ill. App. 3d 739, 741 (1st Dist. 1983). Describing the Midwest Home decision, the Agency continues:

> A corporate party cannot file a valid notice of appeal in its own behalf without the advice and services of an attorney, and because the corporate party's notice of appeal was signed on behalf of the corporation by the secretary of the corporation, and did not indicate that counsel represented the corporation in the preparation and filing of the notice of appeal, the appeal would be dismissed. Mot. at 5, citing Midwest Home Savings & Loan v. Ridgewood, 123 Ill. App. 3d 1001, 1004 (5th Dist. 1984).

Finally, the Agency argues that Prime has failed to strictly comply with the appeal procedures of Section 40 of the Environmental Protection Act (Act) (415 ILCS 5/40 (2008)), and that when invoking "special statutory jurisdiction," one "'must strictly adhere to the prescribed procedures' in the statute." Mot. at 5-6, internal quotation from ESG Watts, Inc. v. PCB, 191 Ill. 2d 26, 30 (2000).

Prime's Response

Prime makes four arguments in opposition to the Agency's motion to dismiss: (1) it would be arbitrary for the Board to change its long-standing practice and interpretation of its procedural rules; (2) the Board's practice is consistent with the Act; (3) the Board's practice is consistent with the Administrative Procedure Act (5 ILCS 100/1-1 *et seq*. (2008)); and (4) judicial precedent supports the Board's practice. Resp. at 3, 4, 5, 6.

Long-Standing Practice

First, Prime notes that since the Board adopted its new procedural rules, effective January 1, 2001, which require persons other than individuals to appear through an attorney, the Board has "[r]epeatedly . . . responded to non-attorney filings by requiring the petitioner to file an amended petition, accompanied by an appearance of an attorney." Resp. at 3. In support of this statement, Prime cites fifteen Board decisions from 2001 to 2007, by way of example. *Id*. n.3. According to Prime, it "does not appear that the Agency has ever before objected to non-attorney filings, either before or after the 2001 procedural rule change." Resp. at 3 (referring to repeal of Board procedural rule that allowed a corporation to appear through any non-attorney officer, employee, or representative). Prime adds that the Agency's "form denial letter indicates that the 'owner or operator' may appeal this final decision without any reference to the need for counsel." *Id*. Prime concludes that for the Board to "adopt a new construction" of its procedural rule now, that is inconsistent with the Board's "long-standing practice, without apparent objection from the IEPA," would be "entirely arbitrary." *Id*. at 4, citing IEPA v. PCB, 118 Ill. App. 3d 772, 780 (1st Dist. 1983).

The Act

Second, Prime asserts that the applicable portions of the Act providing for this appeal "merely state that an applicant may seek review of an Agency decision before the Board." Resp. at 4, citing 415 ILCS 5/40(a)(1), 57(c)(4) (2008)). According to Prime, "[n]owhere, does the Act direct the Board to require an attorney." Resp. at 4. In fact, the Act's permitting process, Prime notes, has been described as an "'administrative continuum.'" Resp. at 5, quoting IEPA v. PCB, 138 Ill. App. 3d 550, 551 (3rd Dist. 1985). Prime asserts that a petition for review is "preceded by a more informal process before the Agency," one which "frequently does not involve lawyers on either side." Resp. at 5. The Agency's denial letter is not signed by an attorney. *Id*. It is the Agency's denial letter, Prime continues, that frames the issues of law and fact before the Board, not the "formal filing of complaint and answer as . . . in the courts." Resp. at 5, citing IEPA v. PCB, 86 Ill. 2d 390, 405 (1981). Prime describes the Board proceeding as "generally mixed between the legal and the technical, the formal and the informal." Resp. at 5. According to Prime:

> While the Board has struggled with the question of at what point, if any, the practice of law begins in this mixed process, there is no basis to conclude that it does so automatically with the filing of the petition for review. *Id*.

Prime maintains that while the Act does not require an attorney, the Board has "in its discretion, citing prudential concerns discussed in In re Petition of Recycle Technologies decided to take a conservative approach" to requiring attorney representation. Resp. at 5. The Board's "substantial discretion in establishing its practices and procedures," however, cannot be exercised to "work an injustice or defeat the purposes of the Act." *Id*.; *see also id*. at 4.

The Administrative Procedure Act

Third, Prime states that administrative agencies are authorized by the Administrative Procedure Act (APA) (5 ILCS 100/1-1 *et seq*. (2008)) to establish procedures addressing the "'representation of parties.'" Resp. at 6, quoting 5 ILCS 100/10-10 (2008). Further, continues Prime, the APA requires that "'[a]n opportunity shall be afforded all parties to be represented by legal counsel.'" Resp. at 6, quoting 5 ILCS 100/10-25(b) (2008). Prime argues that these APA provisions, "[t]aken together," authorize the Board to adopt rules concerning representation, but:

> whether such rules are promulgated, an opportunity must always be given to the party to obtain representation. The Board's practice is consistent with these provisions, while the Agency's newfound position would deny Petitioner the opportunity for legal representation. Resp. at 6.

Judicial Precedent

Fourth, and finally, Prime argues that "[t]he Illinois Supreme Court has rejected the automatic voiding of cases initiated by nonattorneys." Resp. at 6. Prime cites the Illinois Supreme Court's decision in Applebaum v. Rush Univ. Med. Ctr., 231 Ill. 2d 429, 435 (2008) for the proposition that the so-called "nullity rule" should be invoked only when doing so is required to protect the public and the court system's integrity from the unauthorized practice of law and where no alternative remedy is available. Resp. at 6. Prime refers to several appellate court decisions holding that voidance of proceedings was unwarranted despite non-attorney filings or representation. For example, Prime describes Moushon v. Moushon, 147 Ill. App. 3d 140, 147 (3d Dist. 1986) as follows: "where a complaint was filed by a lay agent of the corporation and not by a licensed attorney, it was improper to void the lawsuit where an attorney was present throughout the litigation." Resp. at 6.

Prime argues that dismissing this appeal would not protect Prime "from the mistakes of the ignorant and the schemes of the unscrupulous." Resp. at 7, quoting Janiczek v. Dover Management Co., 134 Ill. App. 3d 543,546 (lst Dist. 1985). Prime explains:

> One does not protect the unwary from the traps of litigation by pushing them into the deadliest. While there is no statutory requirement that a petition be signed by an attorney, the thirty-five day time limit to file a petition for review is clear. Moreover, the idea of protecting litigants is strained where it is the litigant's own member [Mr. Keebler] acting on its behalf. Limited liability companies act through their members and the actions of the members are those of the company. (805 ILCS 18[0]/13-5[](a)(1)) This is obviously not a situation in which a litigant has been deceived into paying for legal services from a fraud. While not directly applicable, the Supreme Court's allowance of representation by corporate officers in small claims court (S. Ct. R. 282(b)), belies the notion that companies seeking to represent themselves are inherently troubling. Resp. at 7.

Prime further argues that the "harsh sanction of dismissal" (Resp. at 7) is not called for because the Board can safeguard "the administration of its proceeding from those lacking the requisite

skills" (*id.*, quoting Janiczek, 134 Ill. App. 3d at 546) through orders, "like the one entered in this case, which not only direct a party to obtain an attorney, but stay any decision deadline" (Resp. at 7).

Board's Analysis of Agency's Motion to Dismiss the Appeal

The Board finds that the filing of the original petition by Mr. Keebler met the Act's appeal procedures and therefore conferred jurisdiction on the Board. The amended petition, though required by the Board's procedural rule and precedent, was not required to cure any jurisdictional defect in the appeal. Further, even if filing a petition for review constitutes the practice of law, the Board finds that the "nullity rule," which is described below, should not be applied here.

The Board Has Jurisdiction Over this Appeal

Prime brings this appeal under Section 57.7(c)(4) of the Act (415 ILCS 5/57.7(c)(4) (2008)), which is located in Title XVI of the Act. Title XVI concerns the "Leaking Underground Storage Tank Program." 415 ILCS 5/57 (2008). Section 57.7(c)(4) reads in pertinent part as follows:

> 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 . . . . 415 ILCS 5/57.7(c)(4) (2008).

Section 40 is located in the Act's Title X, which concerns permits. Section 40 states in relevant part:

> If the Agency refuses to grant or grants with conditions a permit under Section 39 of this Act, the applicant may, within 35 days after the date on which the Agency served its decision on the applicant, petition for a hearing before the Board to contest the decision of the Agency. 415 ILCS 5/40(a)(1) (2008).

As is plain from these quoted passages, the appeal procedures of the Act do not require that petitions for review filed with the Board be filed by attorneys. The "owner or operator" or "applicant" need only file the petition within 35 days. It is uncontested that the original petition here was so filed. The Board has consistently required strict adherence to these statutory procedures, dismissing petitions filed after the jurisdictional 35-day appeal period of Section 40. *See, e.g.*, Illinois Ayers Oil Co. v. IEPA, PCB 05-48, slip op. at 5 (Mar. 17, 2005); DuPage Enterprises, Inc. v. IEPA, PCB 93-143, slip op. at 1-2 (Aug. 5, 1993).

The Agency's reliance upon ESG Watts, Inc. v. PCB, 191 Ill. 2d 26, 727 N.E.2d 1022 (2000) is not on point. In that case, the appellant's petition for review of the Board's decision did not comply with a party-naming requirement set forth in the Administrative Review Law and Supreme Court Rules ("The agency and all other parties of record shall be named respondents.").

ESG Watts, 191 Ill. 2d at 30, 727 N.E.2d at 1025, quoting identical language from Administrative Review Law at 735 ILCS 5/3-113(b) (West 1996) and Supreme Court Rules at 155 Ill. 2d R. 335(a). Section 41(a) of the Act (415 ILCS 5/41(a) (2008)), which provides for appellate court review of Board final decisions, incorporates by reference the petitioning provisions of the Administrative Review Law and rules adopted pursuant thereto. ESG Watts, 191 Ill. 2d at 29-30, 727 N.E.2d at 1025. The Illinois Supreme Court upheld the appellate court's dismissal of the appeal for lack of jurisdiction. Because there was not strict adherence to the appeal procedures of Section 41(a), the appellate court could not exercise its "special statutory jurisdiction." ESG Watts, 191 Ill. 2d at 28, 30-31, 727 N.E.2d at 1024-25. As the Supreme Court explained:

> [A]dministrative review actions, whether taken to the circuit court or directly to the appellate court, involve the exercise of "special statutory jurisdiction." When a court is exercising special statutory jurisdiction the language of the act conferring jurisdiction delimits the court's power to hear the case. A party seeking to invoke special statutory jurisdiction thus "must strictly adhere to the prescribed procedures" in the statute. Section 102 of the Review Law reinforces this point, by explicitly stating that a party is barred from obtaining judicial review of an administrative decision "[u]nless review is sought of an administrative decision within the time and in the manner herein [*i.e.*, in the Review Law] provided." ESG Watts, 191 Ill. 2d at 30, 727 N.E.2d at 1025 (citations omitted).

The defect in ESG Watts' petition (failure to name a party of record to the Board proceeding (ESG Watts, 191 Ill. 2d at 28-29, 727 N.E.2d at 1024)) was therefore jurisdictional. Here, in contrast, there is no *jurisdictional* defect with Prime's initial petition. As found above, the filing of the original petition strictly complied with the prescribed appeal procedures of Sections 40 and 57.7(c)(4) of the Act, which are the statutory provisions conferring jurisdiction on the Board. *See* Robinson v. Human Rights Commission, 201 Ill. App. 3d 722, 728, 559 N.E.2d 229, 233 (1st Dist. 1990) (analogizing jurisdiction of administrative agencies to "special statutory jurisdiction" of the courts).

The Board did not direct the filing of the amended petition through an attorney to cure any jurisdictional defect. Rather, the filing was ordered to ensure compliance with the provisions of the Board's procedural rule (35 Ill. Adm. Code 101.400(a)(2)) and the Attorney Act (705 ILCS 205/1 (2008)) concerning non-attorney representation, compliance with which is not a condition precedent to the Board acquiring jurisdiction to hear a UST appeal. *See* ESG Watts, 191 Ill. 2d at 31, 727 N.E.2d at 1026 ("the party seeking review must strictly comply with *the statute conferring jurisdiction* on the court" (emphasis added)).

Invoking the "Nullity Rule" is Not Warranted

The Supreme Court of Illinois in Applebaum v. Rush Univ. Med. Ctr., 231 Ill. 2d 429, 899 N.E.2d 262 (2008) described the "nullity rule" as follows: "where a person who is not licensed to practice law in Illinois attempts to represent another party in legal proceedings, this rule permits dismissal of the cause, thereby treating the particular actions taken by that person as

a nullity." Applebaum, 231 Ill. 2d at 435, 899 N.E.2d at 266. In another recent opinion, the Supreme Court explained that the nullity rule:

> is grounded in the fact that there are risks to individual clients and to the integrity of the legal system inherent in representation by an unlicensed person: The purpose of the nullity "rule is *** to protect litigants against the mistakes of the ignorant and the schemes of the unscrupulous and to protect the court itself in the administration of its proceedings from those lacking requisite skills." Ford Motor Credit Co. v. Sperry, 214 Ill. 2d 371, 389-90, 827 N.E.2d 422, 433 (2005), quoting Janiczek v. Dover Management Co., 134 Ill. App. 3d 543, 546, 481 N.E.2d 25, 27 (1st Dist. 1985).

The Supreme Court in Applebaum held that:

> Although the nullity rule is well established in our courts, because the results of its application are harsh it should be invoked only where it fulfills its purposes of protecting both the public and the integrity of the court system from the actions of the unlicensed, and where no other alternative remedy is possible. Applebaum, 231 Ill. 2d at 435, 899 N.E.2d at 266 (reversed appellate court for determining that nullity rule was to be applied where attorney was on inactive status at the time complaint filed; attorney returned to active status before hearing on dismissal motion).

Applying these principles and in view of Mr. Keebler's filing, the Board finds that dismissal of this appeal is not required to protect Prime or the integrity of the Board's process from the actions of the unlicensed. As discussed above, Prime's original petition was jurisdictionally sufficient. Prime's amended petition was filed by an attorney and Prime has ever since been represented by legal counsel. Prime therefore had attorney representation before any Agency filing and well before hearing. Prime has faced none of the risks that the nullity rule is designed to avoid and the Board's process is safeguarded.

The Agency's motion incorrectly suggests that a filing by one who is not a licensed and registered attorney *automatically* requires application of the nullity rule. The Agency fails to recognize Applebaum or any other like decision in which the court found the nullity rule inapplicable to the facts presented. *See, e.g.*, Pratt-Holdampf v. Trinity Medical Center, 338 Ill. App. 3d 1079, 1085, 789 N.E.2d 882, 887 (3rd Dist. 2003) (nullity rule "is not to be applied automatically whenever a person not licensed to practice in Illinois signs a pleading"; complaint filed by non-attorney was improperly dismissed under the nullity rule where "risks to individual clients and to the integrity of the legal system inherent in representation by a person who has never qualified to practice law" not present; plaintiff represented by counsel at every stage of proceeding subsequent to initial filing). Nor does the Agency address whether the purposes of the nullity rule would be served by its application here.

As the Board has held, the practice of law will likely occur at some point in an adjudicatory proceeding, regardless of whether the filing of a petition so qualifies. *See* RTI, AS 97-9, slip op. at 5. When a petition has been filed by a non-attorney, the Board's practice since

1997, employed here, has been to require an amended petition through counsel before going forward with the proceeding. The filing of an amended petition accompanied by the appearance of an attorney protects litigants and the Board's administration of its proceedings. Because the purposes of the nullity rule would not be fulfilled by dismissal, the Board declines to invoke the nullity rule today. *See* Applebaum, 231 Ill. 2d at 435, 899 N.E.2d at 266.

This ruling comports with the Board's precedent and procedural rules. The other occasion on which the Agency challenged a proceeding based on a non-attorney filing was in 1997 in Petition of Recycle Technologies, Inc. for an Adjusted Standard from 35 Ill. Adm. Code 720.131(c), AS 97-9 (RTI). There, the Agency filed a motion to dismiss when an adjusted standard petition was filed by the non-attorney owner of the petitioning company. On July 10, 1997, the Board denied the Agency's motion, holding that while Illinois law precluded the non-attorney from representing the company, dismissal was unwarranted. *See* RTI, AS 97-9, slip op. at 1 (July 10, 1997). The Board found that the practice of law may include practice before an administrative agency and noted that an adjusted standard proceeding is a "contested case" and "adjudicatory proceeding" for which a public hearing would be held:

> Any person representing RTI therefore must represent RTI at that hearing, and must present arguments and precedents supporting a finding that the Board may grant an adjusted standard . . . .
>
> The Board finds that these tasks, like the representation of a party in pretrial and trial proceedings in a court, require legal knowledge or skill. At some point, then, Mr. Gunderson [the owner of petitioner] will necessarily be engaged in the "practice of law" under the Attorney Act [(705 ILCS 205/1 *et seq*. (2008))] and CPLP Act [Corporation Practice of Law Prohibition Act (705 ILCS 220/1 *et seq*. (2008))] if he continues to represent RTI.[2] RTI, AS 97-9, slip op. at 3-4.

The Board found in RTI that neither the Attorney Act nor the CPLP Act requires that cases initiated by non-attorneys be dismissed. The Board considered the court decisions (including those then and presently relied upon by the Agency) holding that proceedings initiated by a non-attorney on behalf of another are a nullity, even if all subsequent appearances are through an attorney, and that if the action has proceeded to judgment, the judgment is void (*e.g.*, Tonsul, 115 Ill. App. 3d 739, 450 N.E.2d 1248; Midwest Home, 123 Ill. App. 3d 1001, 463 N.E.2d 909). The Board observed, however, that other court decisions found dismissal inappropriate where applying the nullity rule would be yield too drastic a result (*e.g.*, McEvers v. Stout, 218 Ill. App. 3d 469, 472, 578 N.E.2d 321, 323 (4th Dist. 1991), *appeal denied*, 142 Ill. 2d 655, 584 N.E.2d 131 (1991) (relying on Janiczek, court refused to hold complaint a nullity, even

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[2] Section 1 of the Attorney Act provides in part: "No person shall be permitted to practice as an attorney or counselor at law within this State without having previously obtained a license for that purpose from the Supreme Court of this State." 705 ILCS 205/1 (2008). Section 1 of the CPLP Act specifically prohibits corporations from practicing law: "It shall be unlawful for a corporation to practice law or appear as an attorney at law for any reason in any court in this state or before any judicial body . . . ." 705 ILCS 220/1 (2008).

though it was filed by an attorney not licensed in Illinois; court allowed amended complaint to be filed *pro se* or by Illinois attorney)).

In RTI, the Board quoted from Janiczek, where the plaintiff had brought a personal injury action, through an attorney, only to learn before trial that the attorney had been disbarred before the complaint was filed:

> Given these unique circumstances, we believe that a rigid adherence to precedent would not advance, but would in fact defeat, the purposes of the rule prohibiting representation by non-attorneys. That rule is intended to protect litigants from the mistakes of the ignorant and the schemes of the unscrupulous and to protect the court itself in the administration of its proceedings from those lacking the requisite skills. But we do not believe that either of these purposes is promoted by the dismissal of plaintiff's action. Not only would such a result clearly penalize an innocent party possessing a substantial personal injury claim, but it also would overlook the fact that the party did secure the services of a licensed attorney to represent him at trial. RTI, AS 97-9, slip op. at 6, quoting Janiczek, 134 Ill. App. 3d at 546, 481 N.E.2d at 27.

In denying the Agency's motion to dismiss in RTI, the Board held:

> The Board finds that this case also presents special circumstances. The special circumstances here arise from the Board's own rules, which allow non-attorneys to represent corporations in adjusted standard proceedings. [citation omitted] In addition, the Agency has never before raised an objection to the Board's rule. Given the Board's rule and the Agency's previous silence on the rule, it was reasonable for Mr. Gunderson to assume that he could represent RTI in this proceeding. The Board also finds that it need not dismiss this case simply to promote the purposes of the rule prohibiting representation by nonattorneys; those purposes will be well served if RTI retains an attorney before this matter proceeds any further. For these reasons, the Board denies the motion to dismiss. RTI, AS 97-9, slip op. at 6

This case likewise presents special circumstances. The Board has never dismissed a timely-filed petition for review solely on the ground that it was filed by a non-attorney, without providing the petitioner an opportunity to file an amended petition through an attorney. In fact, at the July 10, 1997 Board meeting where the Board adopted its RTI decision, the Board issued an analogous order in a UST appeal. In Riverview FS v. IEPA, PCB 97-226, the Board found unwarranted the dismissal of a petition timely filed by petitioner's environmental consultant, a lay person, but held that before the UST appeal could proceed, an amended petition must be filed through an attorney within 45 days. *See* Riverview FS, PCB 97-226, slip op. at 1, 3 (July 10, 1997). The Agency did not object to the Riverview FS ruling, even though the amended petition was permitted to be filed after the 35-day appeal period. *See* Riverview FS, PCB 97-226, slip op. at 1 (Sept. 4, 1997) (amended petition, filed by attorney, accepted for hearing)

Since the 1997 RTI and Riverview FS decisions, the Board has repeatedly accepted

petitions timely filed by non-attorneys and allowed for amended petitions through an attorney after the 35-day appeal period. The Agency did not object to the Board's approach in Riverview FS and has not objected in any subsequent UST appeal, until now. The Board's practice did not change with the January 1, 2001 effective date of the Board's procedural rule on attorney representation, which reads as follows:

> a) Appearances. A person who is a party in a Board adjudicatory proceeding may appear as follows:
>
> 1) Individuals may appear on their own behalf or through an attorney-at-law licensed and registered to practice law. (Section 1 of the Attorney Act [705 ILCS 205/1])
>
> 2) When appearing before the Board, any person other than individuals must appear through an attorney-at-law licensed and registered to practice law. (Section 1 of the Corporation Practice of Law Prohibition Act [705 ILCS 220/1] and Section 1 of the Attorney Act [705 ILCS 205/1]). 35 Ill. Adm. Code 101.400(a)(1), (2).

When considering a petition timely filed by a non-attorney, the Board has consistently interpreted Section 101.400(a)(2) as requiring that counsel file an appearance and amended petition, not as requiring that the case be dismissed. *See*, *e.g.*, Premcor Refining Group, Inc. v. IEPA, PCB 01-116, slip op. at 1 (Apr. 19, 2001); Estate of William Eggert v. IEPA, PCB 08-35, slip op. at 1 (Dec. 6, 2007); *see also* 35 Ill. Adm. Code 105.114(b) (amended petition recommences decision period), 105.402 ("owner or operator" may file a petition for review). The Board has implemented the procedural rule in this fashion when petitioners are limited liability companies as well. *See*, *e.g.*, Mac's Convenience Stores, LLC v. IEPA, PCB 05-101, slip op. at 1-2 (Dec. 16, 2004). Before the instant appeal, the Agency has never objected to the Board's interpretation of this rule. Under these circumstances, it was reasonable for Mr. Keebler to assume that Prime's timely-filed appeal would not be dismissed. The Agency's motion has presented no reason for the Board to disregard its years of precedent. *See* Modine Manufacturing Co. v. PCB, 40 Ill. App. 3d 498, 502, 351 N.E.2d 875, 879 (2nd Dist. 1976) ("An administrative agency has the power to construe its own rules and regulations to avoid absurd or unfair results."); Chemetco, Inc. v. PCB, 140 Ill. App. 3d 283, 289, 488 N.E.2d 639, 643 (5th Dist. 1986) ("abrupt shifts" in agency practice "constitute 'danger signals'").

The Board finds that it need not dismiss this appeal to promote the purposes of the rule prohibiting the unauthorized practice of law. As discussed above, those purposes have been well served by Prime retaining counsel before this case could proceed any further. Moreover, finding that Prime's original petition is a nullity would be especially harsh—because the 35-day jurisdictional appeal period has run, dismissal of this appeal would necessarily be with prejudice, foreclosing review of the Agency's determination. *Cf.* RTI, AS 97-9, slip op. at 6 (Board declined to apply the nullity rule even though another adjusted standard proceeding could have been initiated if the Board had granted the Agency's motion to dismiss)

The Board's Ruling on the Motion to Dismiss

For the reasons set forth above, the Board finds that it has jurisdiction over this appeal and that invocation of the nullity rule is unwarranted in this case. Accordingly, the Board denies the Agency's motion to dismiss.

DISCUSSION OF THE MERITS OF THE APPEAL

Legal Background

Under Title XVI of the Act, the Agency determines whether to approve proposed cleanup plans and budgets for leaking UST sites, as well as requests for cleanup cost reimbursement from the State's UST Fund. *See* 415 ILCS 5/57.7, 57.8 (2008). As discussed above, a UST owner or operator may appeal Agency determinations to the Board under Section 40 of the Act (415 ILCS 5/40 (2008)), which governs Board review of Agency permit decisions. *See* 415 ILCS 5/40(a)(1), 57.7(c)(4), 57.8(i) (2008); 35 Ill. Adm. Code 105.Subpart D. The Office of the State Fire Marshal (OSFM) determines whether USTs may be registered, which is a prerequisite for UST Fund eligibility. *See* 415 ILCS 5/57.9 (2008). The 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. *See* 415 ILCS 5/57.9(c)(2) (2008); *see also* 35 Ill. Adm. Code 105.Subpart E. In addition, the OSFM oversees the removal and abandonment in-place of USTs. *See* 41 Ill. Adm. Code 170.

Facts

The Site and USTs

The site is located at 600 W. 10th Street in Metropolis, Massac County, at the southwest corner of the intersection of 10th Street (U.S. Highway 45) and Johnson Street. AR1 at 1; AR 4 at 1; AR 36, Fig. 2. Metropolis Tire & Oil Co., Inc. (Metropolis Tire & Oil) sold the site to Prime in March 2006. Pet., Exh. 4; AR28 at 1 (letter).

The site is rectangular in shape. The eastern boundary of the site faces Johnson Street while the northern boundary faces 10th Street. AR36, Fig. 2. The site had a single-story building that covered the southern half of the property. AR4, App. D; AR36, Fig. 2. The building extended from the eastern to the western boundaries of the property, along the length of the property's southern boundary. The building was set back from the northern property boundary and faced 10th Street. Three bays were located in roughly the western third of the building. A pump island canopy was located between the building and 10th Street, *i.e.*, in front of or north of the building. The canopy extended approximately from the property's eastern boundary to the center of the site. AR 36, Fig. 2.

The site had seven USTs. AR4 at 4. The tanks were used to contain the following

substances and had the capacities indicated:

UST 1	gasoline	4,000 gallon
UST 2	gasoline	3,000 gallon
UST 3	used oil	1,000 gallon
UST 4	kerosene	550 gallon
UST 5	gasoline	1,000 gallon
UST 6	gasoline	1,000 gallon
UST 7	gasoline	1,000 gallon

AR36, Fig. 2; Exh. 5.[3]

The USTs, which were registered with the OSFM, were installed in 1954. USTs 1 through 3 were last used in 1987 while USTs 4 through 7 were last used in 1995. Exh. 5; AR5, App. D; *see also* AR4, App. C.

USTs 1 and 2 were located in the area of the bays while USTs 3 through 7 were located in the area of the pump island canopy. Specifically, UST 1 was located just in front of the two western-most bays, to the north of the building. UST 2 was located under the western-most bay and extended just beyond the building to the north. USTs 3 through 7 were located under or partially under the canopy. USTs 3 and 4 were located roughly in the center of the site, at the western end of the canopy, while USTs 5 through 7 were located toward the eastern end of the canopy. AR36, Fig. 2.

2001

Release Reporting, 20-Day Certification, OSFM Tank Removal Permit. On August 1, 2001, a petroleum release from the site's seven USTs was reported to the Illinois Emergency Management Agency (IEMA). AR1 at 1; AR 4 at 1, 4; AR8 at A-2; AR36 at 1 (letter). IEMA assigned Incident No. 2001-1314 to the reported release. AR1at 1; AR 4 at 1; AR8 at A-2. At the time, the site was owned by Metropolis Tire & Oil. AR1 at 1; AR 4 at 1; Pet., Exh. 4.

Metropolis Tire & Oil "decided to have the tanks removed to prevent any further release." AR4 at 2. On August 13, 2001, "[t]he tanks were inspected to ensure that as much of the regulated substance as possible had been removed." AR3 at 3. On August 15, 2001, Metropolis Tire & Oil submitted a 20-day certification to the Agency. AR4 at 1. On August 21, 2001, Metropolis Tire & Oil applied for, and on August 22, 2001, the OSFM issued, a permit for removal of the seven USTs. AR4 at 3, App. C.

[3] For purposes of identifying the seven USTs, different environmental consultants have numbered the USTs differently. The Board uses the tank numbering system employed by the environmental consultant in the final submittal that led to the Agency determination being appealed. *See* AR36, Fig. 2; *see also* Exh. 5. Likewise, the gallon capacity and contents indicated for the USTs varied occasionally among record documents, although the 11,500 gallon total for all tanks was consistent and the contents were limited to gasoline, used oil, and kerosene. The table above reflects the environmental consultant's information in the final submittal that led to the Agency determination on appeal. *See* AR36, Fig. 2; *see also* Exh. 5.

45-Day Reporting. On September 6, 2001, IEPA issued a determination in response to an "Early Action Extension" request submitted by Metropolis Tire & Oil. AR2 at 1. In the determination, the Agency extended "the initial 45-day period for which early action costs shall be considered reimbursable" to December 15, 2001. AR2 at 1. The Agency letter noted that the 45-day report must be submitted on time but added that "[a]n amended 45 Day Report or other report documenting the activities conducted during the early action extension period must also be submitted to the Illinois EPA." AR2 at 1.

On September 13, 2001, Metropolis Tire & Oil submitted a 45-day report to the Agency. AR3. The 45-day report noted that the request for extension of the early action period was made "to allow additional time for scheduling tank removals with the [OSFM], the removal of the USTs, and the removal and transport of contaminated backfill material to a licensed landfill." AR3 at 1. The OSFM's permit for removal of the seven USTs was attached to the 45-day report. AR3, App. C. The 45-day report concluded:

> Based on observations by owner representative Ms. Stevey Joyce, it was determined that a release had occurred on the property. To avoid further migration of contamination, removal of the USTs was deemed prudent. The removal of the USTs will be conducted under the supervision of the OSFM and has tentatively been scheduled with the OSFM for October 23, 2001. *** A better understanding of the extent of any release will be gained after tank removal and early action operations have been completed. An addendum to this Report will be submitted to the IEPA, within the approved time frame, to document these additional early action activities. AR3 at 9.

On December 3, 2001, Metropolis Tire & Oil submitted a 45-day report addendum to the Agency. AR4. The 45-day report addendum stated that on October 24, 2001, Metropolis Tire & Oil's environmental consultant, CW^3M Company, Inc. (CW^3M), visited the site to uncover the tanks in preparation for their removal the next day. AR4 at 3. However, upon:

> the unveiling of the tanks it was determined that removal of them would jeopardize the integrity of the building, because one tank was close to the foundation while another was almost completely under the foundation. The foundation was in poor condition further jeopardizing safety of removal activities. Additionally, the other tanks were inaccessible due to the location of a low canopy. Tanks were also positioned next to footings for the canopy and pump island structure. The tanks could not be removed at this time to ensure the integrity of the property building and the connected building. AR4 at 3.

The 45-day report addendum lists the seven USTs and describes the "[t]ype of [r]elease" from each as "[u]nknown." AR4 at 4. At the time of the October 24, 2001 site visit, CW^3M confirmed the location of four of the USTs (USTs 1 and 2 in the area of the bays on the west side of the site; USTs 3 and 7 near the pump island canopy area), but could not confirm the exact location of USTs 4-6. AR4 at 4, App. B (site and utility map). CW^3M suspected that two of those three USTs were near the pump island canopy area. AR4 at 4, App. B (site and utility

map). The 45-day report addendum concluded that a "better understanding of the extent of any release will be gained after the site classification process has been completed." AR4 at 8.

2002

OSFM Eligibility/Deductibility Determination. On February 4, 2002, the OSFM issued a letter determining that Metropolis Tire & Oil is eligible for UST Fund reimbursement of costs over $15,000 incurred "in response to the occurrence referenced above [Incident No. 2001-1314] and associated with" the seven USTs. AR5, App. D.

Site Classification. On February 18, 2002, Metropolis Tire & Oil submitted a site classification work plan and budget to the Agency. AR5. On March 21, 2002, the Agency modified the site classification work plan and rejected the associated budget. AR7. On April 19, 2002, Metropolis Tire & Oil submitted an amended site classification work plan and budget to the Agency. AR8. On May 21, 2002, the Agency modified the amended site classification work plan and associated budget. AR10.

On June 21, 2002, Metropolis Tire & Oil submitted a site classification completion report to the Agency, proposing to designate the site as "high priority." AR11 at 16. CW^{3}M installed four monitoring wells and advanced two soil borings to sample for benzene, toluene, ethybenzene, and total xylenes (BTEX), polynuclear aromatic hydrocarbons (PNAs), and for soil only, Toxicity Characteristic Leaching Procedure (TCLP) lead. AR11 at 9, 13. One soil boring and monitoring well location (MW-1) was on the eastern edge of the site, just north of the pump island canopy. AR11, App. B (site boring location map; monitoring well location map). In installing MW-1, a slight odor was noted from 6 to 12 feet below land surface. AR11 at 9. The sample at 9 feet below land surface from MW-1 was submitted for laboratory testing because it had the highest photo-ionization detector (PID) reading (42 parts per million). AR11 at 13.

The June 2002 report documented exceedences of the Tiered Approach to Corrective Action Objectives (TACO)[4] Tier I residential soil remediation objective for TCLP lead (0.0075 milligrams per liter (mg/L), soil component of the groundwater ingestion exposure route, Class I groundwater) in MW-1 at nine feet and the TACO Class I groundwater objective for lead (0.0075 mg/L, Class I groundwater remediation objective) in three of the four monitoring wells, including MW-1. AR11 at 11, 14, 16; AR18 at 6. The groundwater sample from MW-1 had a detectable concentration of toluene and the soil sample from MW-1 had a detectable concentration of naphthalene, but both concentrations were below the most stringent respective Tier I TACO remediation objectives. AR11 at 11, 14. On July 29, 2002, the Agency approved the site classification with modifications. AR14 at 1.

First Corrective Action Plan and Budget. On August 13, 2002, Metropolis Tire & Oil submitted a "Phase I" corrective action plan (CAP) and budget to the Agency, stating:

> The Phase I CAP is proposing to remove the site obstacles prior to the site investigation process followed by complete delineation of the contaminant plume.

[4] 35 Ill. Adm. Code 742.

> These activities are necessary to comply with the investigation efforts required by the Agency.
>
> ***
>
> The plan proposes to remove the USTs and the contaminated backfill surrounding the tanks. In order to remove the USTs, the removal of the building, canopy and possibly underground retaining walls will be required. AR15 at 6, 7.

On October 22, 2002, the Agency modified the CAP and rejected the associated budget. AR17 at 1. Regarding the CAP modifications, the Agency required additional soil borings and monitoring wells to define the full extent of soil and groundwater contamination and stated that:

> The plan includes the removal of the USTs, contaminated backfill, the building, canopy, and underground retaining walls, which are not required for corrective action at this time.
>
> ***
>
> The Illinois EPA is requiring further investigation to determine which, if any, of the USTs had a release. *** After further investigation has been performed and the full extent defined, some or all of the above activities may be approved. AR17, Att. A at 1, 2.

2003

Second Corrective Action Plan and Budget. On July 30, 2003, Metropolis Tire & Oil submitted its Phase I CAP "II" and budget to the Agency. AR18. The submittal described the analytical results of samples taken from four soil borings advanced in May 2003. The investigation was designed to sample "as near as possible to the USTs and pump island locations." AR18 at 6. To that end, a skid-mounted drill rig along with an air compressor and multiple jackhammers were used. Two borings were taken near the site's bays and two borings were taken near the site's pump island canopy. AR18 at 6. A slight odor and discoloration was noted in each of the four borings. AR18 at 6-7. Each of the four borings was completed at six feet below land surface. AR18 at 6-7. Samples were collected at a depth of six feet in each boring so as to sample near the depth of the USTs and another sample was collected at a depth of three feet in the boring under the canopy so as to sample near the depth of UST piping. AR18 at 7.

All samples were tested for BTEX, PNAs, and TCLP lead. All four borings indicated exceedences of the TACO residential Tier I soil remediation objective for TCLP lead (0.0075 mg/L, soil component of the groundwater ingestion exposure route, Class I groundwater). The sample from one of the bay borings ("Bay2" at six feet) revealed concentrations greater than the TACO residential Tier I soil remediation objectives for benzene and naphthalene (respectively, 0.03 milligrams per kilogram (mg/kg) and 12 mg/kg, soil component of the groundwater ingestion exposure route, Class I groundwater). AR18 at 6-8. Samples from the boring beneath the pump island canopy (PI-1 at three feet and six feet) revealed detectable levels of BTEX but at concentrations below TACO residential Tier I soil remediation objectives for those parameters. AR18 at 7.

The Phase I CAP II proposed to remove the site obstacles before continuing with the site investigation to "completely delineate [] the contaminant plume." AR18 at 8. Metropolis Tire & Oil sought to "remove the USTs and the contaminated backfill surrounding the tanks," noting that "[i]n order to remove the USTs, the removal of the building, canopy and possibly underground retaining walls will be required." AR18 at 9. Metropolis Tire & Oil proposed that afterward it would prepare a Phase II CAP "for the remediation of any soil and groundwater contamination at the site that is found during the site investigation process." AR18 at 10.

On October 3, 2003, the Agency rejected the CAP and associated budget. AR21. The Agency determined that the full extent of soil and groundwater contamination had not been defined and that the "full extent of contamination must be defined before a [High Priority] CAP can be approved." AR21, Att. A. Further, the Agency stated that the full extent of contamination must be defined before the Agency would consider approving "the removal of the USTs, contaminated backfill, the building, canopy, and underground retaining walls, which are not required for corrective action at this time." AR21, Att. A.

The Agency required that the extent of contamination be defined in specified areas around the bays and pump island canopy. The Agency required that the soil and groundwater samples collected be tested for BTEX and PNAs. AR21, Att. A. The Agency also stated, however, that:

> after further review of the small concentrations of lead contamination at the site, the Illinois EPA believes the lead is background. Therefore, the migration to groundwater and groundwater pathways for lead have been addressed. AR21, Att. A.

In rejecting the budget, the Agency noted that according to the 45-day report, the tanks were inspected to ensure that as much regulated substance as possible had been removed, from which the Agency concluded that "not much, if any, liquid should remain in the USTs." AR21, Att. B at 2; *see also* AR18 at A-2, I-1 (3) (the capacity of all 7 USTs was 11,550 gallons; Metropolis Tire & Oil had sought liquid disposal costs for one-half that capacity, *i.e.*, 5,775 gallons).

2005-2006

Third Corrective Action Plan and Budget. On August 22, 2005, Metropolis Tire & Oil submitted another CAP and budget. AR22. The submittal documents that three monitoring wells were installed in April 2005, two near the bays and one off-site to the west of the bay area. AR22 at 8. The soil sample from one of the borings near the bays exceeded the TACO Tier I residential remediation objective for benzene (0.03 mg/kg, soil component of the groundwater ingestion exposure route, Class I groundwater). AR22 at 9. No groundwater exceedences of BTEX or PNA parameters were detected based on Class I groundwater remediation objectives. AR22 at 10. Two soil borings advanced in July 2005 around the well that had the elevated soil benzene level revealed no exceedences of Tier I residential soil remediation objectives for BTEX or PNA parameters. AR22 at 11. The 2005 activities did not involve advancing borings or monitoring wells near the pump island canopy area. AR22.

After concluding that "groundwater contamination does not appear to be located" at the site, environmental consultant CW^{3}M proposed to "remove the USTs and the contaminated soils surrounding the tanks," adding that their removal would require removing the building and canopy. AR22 at 11-12. CW^{3}M stated:

> Previously, the IEPA has requested that it be determined which tanks had releases, and at this point it is impossible to tell which tanks have caused the contamination. The OSFM representative on-site during the tank pull will make the determination as to which tanks have leaked . . . . AR22 at 12.

The CAP mapped a soil contaminant plume around the bays and USTs 1 and 2 on the west side of the site, extending east to roughly the center of the site. The CAP proposed excavating an irregularly-shaped area that included the mentioned soil contaminant plume. The proposed excavation area encompassed approximately the western third of the site. The northeastern-most point of the proposed excavation reached the general location of UST 3 at the western edge of the pump island canopy. AR22, App. B, #0012, 0013; AR36, Fig. 4. CW^{3}M proposed to remove contaminated soil in conjunction with removing the USTs:

> Approximately 370 cubic yards of soil some of which is beneath the building will be removed during the excavation based upon the defined soil plume. *** An additional 480 cubic yards of soil will be removed, if the OSFM representative on site determines that the USTs which are outside of the soil plume have had a release. In this situation up to 4 feet of contaminated backfill surrounding those USTs will also be removed. It is impossible to tell at this point if the backfill materials around the tanks is contaminated, since their exact location is unknown. If the OSFM representative determines that the USTs have not released, no soil from these areas will be disposed of. AR22 at 12.

Regarding the liquid disposal costs in the budget rejected by the Agency, CW^{3}M responded that while the USTs had been inspected to ensure that as much substance as possible had been removed:

> these are tanks that have leaked contamination into the environment and if regulated substance can get out, water can get in through the same pathways, and may need to be disposed of at the time of removal. AR22 at 2 (letter).

On November 23, 2005, the Agency modified the CAP and rejected the budget. AR24. The Agency determined that any activities not associated with the proposed excavation of the area around the bays were in excess of the minimum requirements of the Act and therefore the costs of such activities could not be reimbursed from the UST Fund. AR24, Att. A. In modifying the CAP, the Agency further stated:

> Please note only UST [1 and 2, located in the bay area] have shown evidence of a possible release; and therefore, are associated with Incident #20011314. Furthermore, any additional USTs that are found on-site and contamination that

> may be associated with these USTs must be reported as a new release and addressed accordingly. AR24, Att. A.

The Agency did not modify the elements of the CAP proposing removal of UST 1 and 2 and excavation of the soil plume around that area of the bays. AR24 at 11, Att. A. However, in requiring submission of "the correct groundwater classification demonstration," the letter cautioned that "[i]f the groundwater beneath the site is Class II groundwater, the site should only be remediated to Class II remediation objectives on-site." AR24, Att. A.

In rejecting the budget, the Agency also determined:

> The proposed costs associated with USTs [3 and 7, located in the pump island canopy area], and the three USTs that have not been located to date are not associated with the release and Incident #20011314; and therefore, are activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act. All costs associated with the above must be removed from the budget. AR24, Att. B (emphasis in original).

Fourth Corrective Action Plan and Budget. Metropolis Tire & Oil responded on December 20, 2005 by submitting a modified CAP and budget to the Agency. AR25. In the cover letter, CW^3M stated:

> While we disagree with the Agency's contention that only USTs [1 and 2] have shown evidence of a possible release, in order to move the site forward, the budget has been modified so that nothing beyond the proposed excavation and removal of USTs [1 and 2] is included in the budget. Furthermore, if other USTs are found to have released while on-site, they will be appropriately addressed. AR25 at 1 (letter).

The December 20, 2005 submittal also included a groundwater classification demonstration, concluding that the site's groundwater "would most likely be properly classified as Class II groundwater." AR25 at 1 (letter). For purposes of the plan and budget, the groundwater was "assumed as Class II groundwater." AR25 at 2 (letter). CW^3M proposed that during corrective action activities, it would conduct a confirmation sample for sieve analysis to verify the Class II status, adding that if Class I is the appropriate groundwater classification, an amendment will be submitted to address any resulting CAP changes. AR25 at 2 (letter).

On February 24, 2006, the Agency approved the CAP (including removal of USTs 1 and 2) and rejected the budget for lack of supporting documentation. AR27.

2006

Prime Becomes Owner. On April 3, 2006, a letter was submitted to the Agency on behalf of Prime, stating that Prime became the owner of the site on March 28, 2006. AR28 (letter). Attached to the letter is the Agency's "Election to Proceed as 'Owner'" form, executed by Prime, which stated, among other things, that:

> I understand that by making this election I become subject to all responsibilities and liabilities of an "owner" under Title XVI of the Environmental Protection Act and the Illinois Pollution Control Board's rules at 35 Ill. Adm. Code 734. AR28 (form).[5]

The Agency accepted Prime's election on April 10, 2006. AR29 at 1.

Prime's Amended Corrective Action Plan Budget. On July 18, 2006, Prime submitted an amended CAP budget to the Agency (AR30), which included $6,475.78 for removal of USTs 1 and 2 (AR30 at 13). The Agency modified the budget on September 15, 2006 (AR32), approving the proposed $6,475.78 for removal of USTs 1 and 2 (AR32, Att. A at 1).

OSFM Eligibility/Deductibility Determination. Attached to Prime's amended CAP budget was an April 17, 2006 OSFM letter, determining that Prime is eligible for UST Fund reimbursement of costs over $15,000 incurred "in response to the occurrence referenced above [Incident No. 2001-1314] and associated with" the seven USTs. AR30.

Release Reporting. Prime reported a UST release for the site to IEMA on December 13, 2006. AR33 at 1. IEMA assigned Incident No. 2006-1558 to the release. AR33 at 1. IEMA noted that the release had been "[d]iscovered" in August 2001. AR33 at 1.

2008

Prime's "Corrective Action Investigation Plan and Budget." On November 10, 2008, Prime's environmental consultant, Environmental Management, Inc. (EMI), submitted a "Corrective Action Investigation Plan and Budget" to the Agency. AR36. The submittal described some of the site history since the initial release reporting in August 2001 and explained that various activities were performed at the site in December 2006, including the removal of all seven USTs:

> An environmental incident was initially reported to IEMA on August 1, 2001 and subsequently, Incident No. 20011314 was issued for this facility. It was reported that all tanks at the site had a release. Through correspondence with the IEPA Project Manager, it was stated that only the tanks on the west side of the property were responsible for the release reported. As a result, corrective action costs were only approved to remove the two tanks located on the west side of the property [USTs 1 and 2]. During corrective action excavation and tank removal activities, all seven tanks at the site were removed. The OSFM official on-site during tank removal activities confirmed that all seven (7) tanks on-site had releases. As a result, Incident No. 20061558 was issued on December 13, 2006 and was noted as

[5] Owners or operators of USTs for which a release was reported to IEMA before June 24, 2002, may elect to proceed under Title XVI of the Act and Part 734 of the Board's regulations. *See* 415 ILCS 5/57.13 (2008); 35 Ill. Adm. Code 734.105.

> being a re-reporting of the 20011314 incident. *** Confirmation samples collected during the corrective action excavation activities are also included. Confirmation sampling was also conducted during tank removal activities on the east side of the property. Based on these confirmation samples, it is evident that the other tanks on-site were in fact responsible for contributing to the release initially reported. AR36 at 1-2 (letter); *see also* Exh. 5.

EMI's submittal documented laboratory analyses identifying detectable levels of BTEX in post-excavation samples taken in December 2006 along the eastern edge of the excavation of the soil plume around USTs 1 and 2 (area of bays) and throughout the former pump island area where USTs 3 through 7 had been located. AR36, App. A, Fig. 2, Fig. 4, App. B, Tab. 1. These analyses included exceedences of the TACO Tier I benzene soil remediation objectives for residential properties (0.03 mg/kg, soil component of the groundwater ingestion exposure route, Class I groundwater). AR36, App. B, Tab. 1. Specifically, benzene exceedences of this objective were detected in soil samples collected from the excavation walls (W) and floors (F) at the following locations:

1. Along the eastern edge of the excavation on the west side of the site, extending east toward the center of the site (from north to south, sample locations F-10, W-2, W-3, W-10); and

2. Throughout the former pump island area on the east side of the site, extending west to the center of the site (from east to west, sample locations W-4, F-2, W-5, W-7, W-6, F-3, F-4).[6] AR36, App. A, Fig. 1, Fig. 4, App. B, Tab. 1.

The "[t]ype of release" indicated for each of the seven USTs was "[o]verfill." AR36, App. E at 5.

To identify the vertical and horizontal extent of contamination on the east side of the site, EMI proposed to advance five soil borings and analyze samples for BTEX and PNAs:

> EMI is enclosing a Corrective Action Investigation Plan and Budget to delineate the contamination on the east side of the property in the vicinity of the other five tanks. Earlier site investigation activities conducted did not properly define the soil contamination at this facility. *** [A]n amended corrective action budget is enclosed with costs necessary to delineate the remaining contamination present at this facility. Also included in the budget is costs incurred for removing the additional five (5) tanks at the facility, as well as the confirmation samples that were collected during said tank removal activities. AR36 at 1-2 (letter), App. A, Fig. 6.

[6] The Board makes no finding as to the applicable remediation objectives for the site. The TACO Tier I benzene soil remediation objectives for residential properties, soil component of the groundwater ingestion exposure route, Class II groundwater is 0.17 mg/kg, which was exceeded at W-3, F-2, W-7, W-6, F-3, and F-4.

Agency Determination Under Review. On January 27, 2009, the Agency rejected the November 2008 plan and associated budget submitted by Prime. AR38. The Agency rejected the plan for the following reasons:

> A) During the investigation activities associated with Incident #20011314 soil and groundwater contamination were not identified in the vicinity of USTs #3 through #7. However, three years later during the removal of these USTs, soil contamination was identified in these areas. Therefore, Incident #20061558 is a new release and is not considered a re-reporting of Incident #20011314.
> B) Pursuant to 35 Ill. Adm. Code 734.210(c) and 734.210(e), the 20- and 45-Day reporting requirements must be fulfilled.
> C) In addition, pursuant to 35 Ill. Adm. Code 734.310(a), prior to conducting site investigation activities pursuant to Section 734.315, 734.320 or 734.325 of this Part, the owner or operator must submit to the Agency for review a site investigation plan. AR38 at 1.

The Agency rejected the budget because the Agency "has not approved the plan with which the budget is associated." AR38 at 2. Further, in rejecting the budget, the denial letter noted that "most of the costs in the proposed budget will have to be submitted as Early Action costs." AR38 at 2.

The Agency's January 27, 2009 letter concluded by requiring that Prime submit a "Stage 1 Site Investigation Plan" for Incident No. 2006-1558 and a "Corrective Action Completion report" for Incident No. 2001-1314. AR38 at 2.

The Agency's "technical review notes" underlying the January 27, 2009 determination included the following recommendation:

> Incident #20061558 is NOT a re-reporting of Incident #20011314. There was not any evidence of contamination in this area until the USTs were removed 3 years later. There will have a new deductible. AR37 at 2 (emphasis in original).

Parties' Arguments on the Merits

Prime's Brief

According to Prime, the Agency denied the subject plan and budget "solely based upon its unsupported finding that the work entails a new release reported in 2006, and not a re-reporting of a 2001 release that has been and continues to be the subject of remediation efforts at the site." Br. at 1. Prime argues that there is no evidence in the record to support the Agency's finding of "an additional release from tanks that had clearly been abandoned prior to 2001 and drained in 2001." *Id*. at 9.

The "only thing that happened at the site since 2001," Prime continues, is that the Agency's Leaking UST Section has been acting in its "customary role of protecting the LUST fund" by precluding the type of site work activities that "any other division of the Agency"

would require. Br. at 9. According to Prime, the Agency directed the site investigation in the "hopes" that the Fund would not have to pay for demolition costs, despite the presence of USTs "next to crumbling building foundations and under canopies." *Id*. Prime maintains that without removing site obstacles, soil borings could not be advanced near the tanks, and thus the extent of contamination could not be determined using the approach mandated by the Agency. Prime asserts that the Agency imposed "a classic Catch-22" on the project:

1. Removal of site obstacles is necessary to investigate the extent of contamination;

2. Site obstacles cannot be removed without first investigating the extent of contamination. *Id*. at 10.

Despite what Prime describes as "the Agency's efforts to try and rule out a release from the tanks that might trigger expensive demolition costs," the environmental consultant ultimately determined that it was "impossible" to identify the tanks that had experienced a release without removing the tanks. Br. at 10. All of the tanks were removed in 2006 in the presence of an OSFM representative and, "unsurprisingly, holes were found" in the USTs. *Id*. The 2006 incident was a re-reporting of the 2001 incident, according to Prime. *Id*. Noting that re-reporting releases is not uncommon, Prime argues that the 2006 incident number was just "further confirmation that all of the tanks had experienced a release by 2001." *Id*. Prime maintains that such "multiple reportings" promote:

> the Act's purpose of making sure the site is fully cleaned-up and no evidence is ignored; it is certainly not intended to promote multiple, bureaucratic parceling of the cleanup process into multitudes of parallel clean-up tracts. *Id*.

According to Prime, even assuming there were "multiple occurrences at the site, this is legally irrelevant" because the Board has held that "deductibles are assessed per site, not per occurrence." Br. at 11, citing Mac Investments v. OSFM, PCB 01-129 (Dec. 19, 2002) and Swif-T-Food Mart v. IEPA, PCB 03-185 (May 20, 2004). The Agency can deny a plan only if the Agency "articulates how the Act or its regulations would be violated" and here, Prime argues, the Agency's denial letter merely cites "general provisions concerning the LUST program," none of which "contradict the Board's prior decisions." Br. at 11.

Finally, Prime asserts that the Agency's determination is neither consistent with the purposes of the Act nor good policy:

> The LUST program should be interpreted in a manner which furthers the purposes of the Act, which are foremost the "protection of Illinois' land and water resources." (415 ILCS 5/57) The Agency's decision is bad for the environment because it will infuse more delays as the owner/operator is required begin the process anew. The Agency's decision is bad for the LUST Fund, as it will give rise to redundant costs, which may not even be offset by charging an additional deductible it seeks to assess the owner. Better for the environment would be to

> continue investigation of the extent of contamination as part of a second phase of investigative corrective action. Br. at 12.

Agency's Response Brief

The Agency asserts that the issue for the Board to decide on appeal is:

> WHETHER Incident # 20061558 is a new incident under the Act and regulations thereunder requiring a new deductible; 20- and 45-day report; and a site investigation plan? Resp. Br. at 7.

The "20-day and 45-day reports" and "a Site Classification Plan and a Corrective Action Plan and Budget," according to the Agency, "clearly show that the release was centered around tanks #1 and 2 and that tanks #3 through #7 were not included in the release." Resp. Br. at 7. The Agency continues:

> Indeed, the reports submitted to the Illinois EPA show that not only were there clean borings around the plume associated with tanks #1 and #2, but that three out of the remaining five tanks could not be located. *Id*. at 7.

The Agency emphasizes that the 45-day report addendum acknowledged that the locations of all the tanks had not been identified. Resp. Br. at 7. The locations of the three "unknown" tanks, according to the Agency, were discovered during the Agency-approved excavation activities for Incident No. 2001-1314. *Id*. at 8. The Agency asserts that USTs 3-7 "were not in the defined contamination plume," but instead "were tanks the Petitioner just wanted to remove." *Id*. Further, the Agency continues, site investigation activities (borings MW-1, SB-1 and PI-1) performed during April 2002 and May 2003:

> did not show any contamination near the tanks that were outside of the defined contamination plume. This indicates a release did not occur in this area prior to the dates of this sampling. *Id*.

The Agency argues that a map submitted at the time "clearly shows the area of excavation and the clean borings surrounding that area." Resp. Br. at 8. The Agency's November 23, 2005 determination stated that activities not associated with the proposed excavation as shown on the map were not reimbursable. That final determination, the Agency stresses, was not appealed. *Id*.

The Agency argues that the Board 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." Resp. Br. at 8, citing Panhandle Eastern Pipe Line Co. v. IEPA, PCB 98-102, slip op. at 30 (Jan 21, 1999). Further, the Agency continues, it is well-established that the Agency is "not authorized under Illinois law to change its final decision." Resp. Br. at 8-9, citing Reichhold Chemicals, Inc. v. PCB, 204 Ill. App. 3d 674, 561 N.E.2d 1343 (3rd Dist. 1990). Therefore, the Agency states, the Agency "is bound to its November 23, 2005 final decision." Resp. Br. at 9, citing Mick's Garage v. IEPA, PCB 03-126 (Dec. 18, 2003). Prime purchased the property and is now, according to the Agency, "stuck with decisions that the prior owner and consultant

made." Resp. Br. at 10. The Agency maintains that Prime is "trying at this late date to change those decisions by creating a controversy in order to get the November 23, 2005 decision before the Board in the hopes of getting that decision overturned." *Id*.

Prime also seems to contend, according to the Agency, that the OSFM should determine the applicable deductible, but the Agency maintains that:

> The law is well settled that the OSFM's decisions do not determine the applicable deductible. Section 22.18b(d)(3)(G) of the Act provides that the deductible application must be submitted to the Illinois EPA and that the Illinois EPA makes the deductible determination. Resp. Br. at 9.

The Agency further argues that Prime "casts aspersions in its brief by stating that the Illinois EPA is trying to protect a fund over the clean-up obligations of the site." Resp. Br. at 9. That, according to the Agency, "is a ridiculous statement" because the Agency "is a creature of statute and the LUST fund and its remediations are very highly regulated by State law and Board regulations." *Id*.

The Agency also asserts that the facts of this case and those of Swif-T-Food Mart are distinguishable:

> In Swif-T Food Mart, the second incident number was issued prior to any site classification or other work performed on the site. This case has had site investigation performed at the site and maps were submitted to the Illinois EPA that clearly shows that there were clean borings around the area of contamination and that the plume had been defined for Incident #20011314. Resp. Br. at 10.

Lastly, the Agency notes that a proposed budget cannot be approved unless the corresponding plan is approved. Therefore, because Prime's plan was rejected, the Agency correctly rejected Prime's budget. Resp. Br. at 11.

Prime's Reply Brief

Prime argues that the Agency's statement of the burden of proof "tellingly omits the all important detail, which is what exactly the petitioner must prove." Reply Br. at 2. That burden is to show that the proposed plan, as submitted by the applicant, will not result in the violation of the Act or regulations. *Id*., citing Browning-Ferris Industries of Illinois v. PCB, 179 Ill. App. 3d 598, 607 (2nd Dist. 1989) and John Sexton Contractors Co. v. PCB, 201 Ill. App. 3d 415, 425 (1st Dist. 1990). The Agency's brief, according to Prime, is "twelve pages that fail to identify the provisions of the Act or regulations that would be violated, plus twenty-one single-spaced pages of the 'Relevant Law.'" Reply Br. at 3. "One can only assume," continues Prime, "that the Agency either wants the Board to find a legal violation, or hopes that the Board misconstrues the nature of the burden of proof in these proceedings." *Id*.

Prime also takes issue with the Agency's statement that there were "clean borings" surrounding the excavation area. Reply Br. at 3-4. Prime asserts that the environmental

consultant was "never able to sample inside of the area of the tanks and repeatedly sought permission to remove the site obstacles that would permit such borings." *Id*. at 4.

Next, Prime states that even assuming "a new incident occurred in 2006 during the ongoing cleanup of the 2001 incident," that is immaterial:

> The LUST program is premised on cleaning up an underground storage tank "site." (415 ILCS 5/57.8(a)(4)) The number of occurrences on a site doesn't matter, and it certainly doesn't require a new deductible. Reply Br. at 4, citing Mac Investments and Swif-T-Food Mart.

Still, Prime asks "[w]here did the alleged 2006 product come from when the tanks were emptied and out of service long before 2006?" Reply Br. at 5. This "simple question" remains "unanswered and unaddressed by the Agency," according to Prime. *Id*. Prime states that the tanks were out of service before the 2001 incident was reported and, as confirmed by the Agency's October 3, 2003 letter, the environmental consultant drained the tanks. Because abandoned tanks containing petroleum are a threat to human health and the environment, Prime continues, "[h]ad the LUST reviewer believed the tanks still contained product, he would [have] almost certainly ordered them drained." *Id*. n.1.

Prime argues that the Agency:

> sought to delay the investigation into all seven tanks by refusing to authorize removal of site obstructions that would permit soil borings next to the tanks, as well as removal of the tanks themselves, which the licensed professional engineer indicated made it "impossible" to rule out releases from all of the tanks.
>
> It may or may not have been reasonable for the Agency to direct the investigation toward the tanks closest to the property line and farthest from the building, but its willful blindness to conclude that once the tanks were examined, the releases from them had to have originated from recent events. Reply Br. at 5.

Those site activities that were allowed by the Agency, leading up to the tank removals, "were insufficient to rule out releases from the seven tanks for which the OSFM issued an eligibility determination for the 2001 release." *Id*.

Another "oddity" of the Agency's response brief, according to Prime, is that "the Agency does not appear to know that it no longer has responsibility for deductibility determinations." Reply Br. 6. Section 22.18(d)(3)(G) of the Act was of course amended in 1993, Prime continues, giving responsibility for eligibility and deductibility determinations to the OSFM, "as noted by the very case the Agency cites," Mick's Garage, PCB 03-126, slip op. at 4 n.2 (finding that the 1991 incident was governed by pre-1993 law). Reply Br. at 6.

"The 1993 change" to the Act, according to Prime, has "broader implications as well." Reply Br. at 6. Under the 1993 changes:

> the OSFM now has a much greater role in the present UST program than in the previous ones. In particular, the OSFM must provide on-site assistance to the owner/operator for leak confirmation, evaluation and eligibility information. The OSFM is also the state entity responsible for making eligibility and deductibility determinations (access to the fund issues). *Id*., quoting Kathe's Auto Service Center v. IEPA, PCB 96-102 (Aug. 1, 1996).

Here, Prime continues, the OSFM issued an eligibility and deductibility determination, finding that all seven USTs were eligible for Fund reimbursement, subject to a $15,000 deductible. Reply Br. at 7. Further, an OSFM representative was on-site during tank removal activities and confirmed that all seven tanks on-site had releases. *Id*. In turn, Prime maintains, Incident No. 20061558 was issued on December 13, 2006, and was noted as being a re-reporting of Incident No. 20011314. Prime asserts that the Agency is "overstepping its role by disputing deductibility determinations and on-site activities entrusted by law to the OSFM." *Id*.

Prime argues that "the tank owner/operator had no duty to appeal prior Agency letters." Reply Br. at 7. According to Prime, the Agency's argument that this appeal is an "impermissible effort to seek reconsideration of a prior Agency decision," if accepted by the Board, "would essentially gut the LUST program." *Id*. Prime explains:

> The complication with remediating underground storage tanks are that all of the activities take place under the ground. Consequently, investigation and remediation may uncover new data that give rise to more investigation and remediation. The Agency's letters in the record reflect this. For example, the October 22, 2002, denial letter refused to allow removal of the USTs, contaminated backfill, the building, canopy, and underground retaining walls, but stated that "[a]fter further investigation has been performed and the full extent defined, some or all of the above activities may be approved." (R.18) To say that new information obtained from on-site activities cannot be presented to the Agency to seek approval of a new plan would be to force the premature closing of any underground storage tank site with conditions worse than may have been expected. *Id*.

Concerning the Agency's November 23, 2005 determination, on which the Agency "seems to place particular importance," Prime states as follows:

> As an initial matter, that decision letter, required modifications, and consequently, a new plan and budget were submitted on February 23, 2006. (R. 25) That document[] stated: "While we disagree with the Agency's contention that only USTs [1 and 2] have shown evidence of a possible release, in order to move the site forward, the budget has been modified so that nothing beyond the proposed excavation and removal of USTS [1 and 2] is included in this budget. Furthermore, if other USTs are found to have released while on-site, they will be appropriately addressed." (R.25) On February 24, 2006, the Agency issued a decision letter, stating that "the plan is approved." (R.27) Subsequent on-site

activities confirmed releases from the remaining USTs, and thus further corrective action is appropriate. Reply Br. at 8.

Prime concludes by asserting that the Agency's "notion" that UST releases at a property "are remediated via discrete cleanups of separate 'incidents,' subject to separate deductibles, clearly violates the Act." Reply Br. at 8, citing 415 ILCS 5/ 57.8(a)(4) (2008) ("Only one deductible shall apply per underground storage tank site.").

Board's Analysis of the Merits

Standard of Review and Burden of Proof

The Board must decide whether Prime's submittal to the Agency demonstrated compliance with the Act and the Board's regulations. *See, e.g.,* Illinois Ayers Oil Co. v. IEPA, PCB 03-214, slip op. at 8 (April 1, 2004); Kathe's Auto, PCB 96-102, slip op. at 13. The Board's review is generally limited to the record before the Agency at the time of its determination. *See, e.g.*, Freedom Oil, PCB 03-54, slip op. at 11; *see also* Illinois Ayers, PCB 03-214, slip op. at 15 ("the Board does not review the Agency'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 [submittal] as presented to the Agency demonstrates compliance with the Act").

Further, on appeal before the Board, the Agency's denial letter frames the issue (*see, e.g.*, Karlock v. IEPA, PCB 05-127, slip op. at 7 (July 21, 2005)) and the UST owner or operator has the burden of proof (*see, e.g.*, Ted Harrison Oil v. IEPA, PCB 99-127, slip op. at 5-6 (July 24, 2003); *see also* 35 Ill. Adm. Code 105.112). The standard of proof in UST appeals is the "preponderance of the evidence" standard. Freedom Oil, PCB 03-54, slip op. at 59; *see also* 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) ("A proposition is proved by a preponderance of the evidence when it is more probably true than not.").

"New Release"

The Act requires that the Agency's denial letter provide "an explanation of the provisions of the regulations . . . which may be violated if the plan were approved" and "a statement of specific reasons why . . . the regulations might not be met if the plan were approved." 415 ILCS 5/57.7(c)(4)(B), (D) (2008). The Agency rejected Prime's plan because the Agency determined that there was a "new release" from USTs 3 through 7, requiring Prime to now submit a 20-day certification, a 45-day report, and a site investigation plan. The 20-day and 45-day reporting provisions cited in the denial letter read as follows:

> c) Within 20 days after initial notification to IEMA of a release plus 14 days,[7] the owner or operator must submit a report to the Agency summarizing the initial abatement steps taken under subsection (b) of this Section[8] and any resulting information or data.
>
> ***
>
> e) Within 45 days after initial notification to IEMA of a release plus 14 days, the owner or operator must submit to the Agency the information collected in compliance with subsection (d) of this Section[9] in a manner that demonstrates its applicability and technical adequacy. 35 Ill. Adm. Code 734.210(c), (e).

The Agency denial letter cited Section 734.310(a) for requiring a site investigation plan:

> a) Prior to conducting site investigation activities pursuant to Section 734.315, 734.320, or 734.325 of this Part, the owner or operator must submit to the Agency for review a site investigation plan. The plan must be designed to satisfy the minimum requirements set forth in the applicable Section and to collect the information required to be reported in the site investigation plan for the next stage of the site investigation, or in the site investigation completion report, whichever is applicable. 35 Ill. Adm. Code 734.310.

The Act defines a "release" as follows:

> "Release" means any spilling, leaking, emitting, discharging, escaping, leaching or disposing of petroleum from an underground storage tank into groundwater, surface water or subsurface soils. 415 ILCS 5/57.2 (2008); *see also* 35 Ill. Adm. Coe 734.115 (quoting Act).

The site's seven USTs were installed in 1954. The USTs were last used in 1987 (USTs 4-7) or 1995 (USTs 1-3), many years before Prime acquired the site. In August 2001, IEMA was notified of a release from the seven USTs, at which point IEMA assigned Incident No. 2001-

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[7] OSFM regulations provide that "[u]nless corrective action is initiated, owners or operators shall investigate and confirm all suspected releases of regulated substances requiring reporting within 14 days, using the following procedures: . . . ." 41 Ill. Adm. Code 170.580(b).

[8] Initial abatement steps include "[r]emov[ing] as much of the petroleum from the UST system as is necessary to prevent further release into the environment" and "[i]nvestigat[ing] to determine the possible presence of free product." 35 Ill. Adm. Code 734.210(b).

[9] The collected information is to include "[d]ata on the nature and estimated quantity of release" and "[d]ata from available sources or site investigations concerning the following factors: surrounding populations, water quality, use and approximate locations of wells potentially affected by the release, subsurface soil conditions, locations of subsurface sewers, climatological conditions and land use." 35 Ill. Adm. Code 734.210(d).

1314. After this initial notification of the release, Prime applied for and received from the OSFM, in August 2001, a permit to remove the seven tanks. Prime submitted to IEPA a 20-day certification in August 2001; a 45-day report in September 2001; and a 45-day report addendum in December 2001. In rejecting a budget request for the costs of disposing liquids from the seven USTs, the Agency in October 2003 noted that "not much, if any, liquid should remain in the USTs" because shortly after the August 2001 release notification, the USTs were inspected to ensure that as much of the tank contents as possible had been removed. AR21, Att. B at 2.

The OSFM official who was on-site during the tank removal activities in December 2006 verified that all seven USTs had leaked. IEMA was again notified and a second incident number was assigned, Incident No. 2006-1558. After the tanks were removed, the "[t]ype of release" for each of the seven USTs was specified as "[o]verfill." AR36, App. E at 5. IEMA documentation of the release reporting in December 2006 (Incident No. 2006-1558) noted that the release had been discovered in August 2001 (Incident No. 2001-1314).

The USTs had been used to contain gasoline, kerosene, and used oil. Indicator contaminants for gasoline, kerosene, and used oil include benzene, ethylbenzene, toluene, and total xylenes (BTEX). *See* 35 Ill. Adm. Code 734.405(b), (c), (g). Detectable levels of BTEX parameters were present in post-excavation soil samples collected across the site in December 2006, from the area of the bays on the west side through the area of the pump island canopy on the east side. These levels included exceedences of the most stringent TACO Tier I residential soil remediation objective for benzene (0.03 mg/kg, soil component of the groundwater ingestion exposure route, Class I groundwater).[10] These benzene exceedences were detected consistently from along the eastern limit of the remedial excavation around USTs 1-2 through the area of USTs 3-7. Additionally, the TACO Tier I benzene soil remediation objective for residential properties, based on the soil component of the groundwater ingestion exposure route, Class II groundwater, which is 0.17 mg/kg, was exceeded near the eastern-most extent of the bay area excavation and throughout the pump island canopy area.

The Board finds that the Agency's argument about soil borings being "clean" is unpersuasive in the context of this appeal. While samples from some borings were non-detect for BTEX parameters (*e.g.*, SB-1), others revealed detectable levels of BTEX parameters (*e.g.*, PI-1). The definition of a "release" is not limited to exceedences of remediation objectives. *See* 35 Ill. Adm. Code 734.115. Moreover, the soil boring investigation on the east side of the property was restricted by site structures. That limited investigation did not rule out a release from USTs 3 through 7 and the Agency never determined otherwise. The preponderance of the evidence shows that a release from all seven USTs was reported in 2001 and that all seven USTs have contributed to the release at the site. The record does not support the Agency's position that the release from USTs 3 through 7 occurred only after the 2001 reporting. The 2006 IEMA Incident No. 2006-1558 was a re-reporting of the 2001 IEMA Incident No. 2001-1314.

Based on a thorough review of the record, the Board finds that Prime's November 2008 plan established that the contamination from USTs 3 through 7 is not a "new release" triggering new document submission requirements. The Agency therefore erred in determining that

[10] The Board makes no finding as to the applicable remediation objectives for the site.

Incident No. 2006-1558 constituted a "new release" rather than a re-reporting of Incident No. 2001-1314. The 20-day and 45-day reporting for this release was submitted in 2001 and is not required again now. Further, Prime's submittal not only documented site activities from December 2006, it proposed investigatory soil borings. The Agency, however, having determined there was a "new release," did not consider the substance of Prime's plan or budget. The Board finds that the Agency erred in failing to do so.

The Board's ruling is consistent with precedent. For example, in Swif-T-Food Mart, the service station at issue had eight USTs. During a boring test in 1995, a release was discovered, IEMA was notified, and Incident No. 95-1716 was assigned. Swif-T-Food represented at the time that three of the USTs had experienced a release. *See* Swif-T-Food Mart, PCB 03-185, slip op. at 2 (May 20, 2004). In 1996, all eight tanks were removed, a release was reported to IEMA, and Incident No. 96-0723 was assigned. At that time, Swif-T-Food represented that all eight USTs had experienced a release. *Id*. The Agency's project manager testified that the contamination from the two incident numbers was commingled. *See* Swif-T-Food Mart, PCB 03-185, slip op. at 5, Tr. at 41-42, 70-71. The Board found that the 1996 incident was "a re-reporting of the 1995 incident." Swif-T-Food Mart, PCB 03-185, slip op. at 11.

Early Action Costs and Corrective Action Completion Report

The Agency's denial letter here also mentioned that "most of the costs in the proposed budget will have to be submitted as Early Action costs." AR3 at 2. This statement presumably refers to a future application by Prime for payment of those costs in this budget other than the costs for the proposed borings, such as the costs of removing USTs 3 through 7 in December 2006.[11] As there has been no "new release," the Board finds that such costs, incurred many years after this release was initially reported, are not properly characterized as "early action" costs. *See* Kathe's Auto, PCB 96-102, slip op. at 28-29 (*e.g.*, "the activities of tank removal and fill material removal are not necessarily early action activities"); Regulation of Petroleum Leaking Underground Storage Tanks; Amendments to 35 Ill. Adm. Code 732, R01-26, slip op. at 7 (Feb. 21, 2002).

It is true that Prime's November 2008 plan and budget do address work performed in December 2006 that went beyond the Agency-approved plan and budget. It is also true that "in the ordinary course, submission of a budget or plan is generally required prior to corrective action being taken." FedEx Ground Package System, Inc. v. PCB and IEPA, 382 Ill. App. 3d 1013, 1016, 889 N.E.2d 697, 700 (1st Dist. 2008). However, Section 57.7(e)(1) of the Act allows UST owners and operators to undertake site investigation or corrective action without the Agency's pre-approval, and to submit the plan and budget after performing the work:

> Notwithstanding the provisions of this Section, an owner or operator may proceed to conduct site investigation or corrective action prior to the submittal or approval

[11] Generally, no work plan or budget is required for "early action" activities. *See* 35 Ill. Adm. Code 734.200.

> of an otherwise required plan.[12] If the owner or operator elects to so proceed, an applicable plan shall be filed with the Agency at any time.[13] Such plan shall detail the steps taken to determine the type of site investigation or corrective action which was necessary at the site along with the site investigation or corrective action taken or to be taken, in addition to costs associated with activities to date and anticipated costs. 415 ILCS 5/57.7(e)(1) (2008); *see also* 35 Ill. Adm. Code 734.310(e), 734.335(d) and accompanying Board notes (owners or operators proceeding in this manner "are advised that they may not be entitled to full payment from the Fund.").

Accordingly, Prime's November 2008 plan and budget, in addressing work already performed but not pre-approved, is permitted by Section 57.7(e)(1) of the Act. *See* FedEx Ground, 382 Ill. App. 3d at 1016-17, 889 N.E.2d at 700 (Part 734 regulation codifying Section 57.7(e)(1) applies either where there is no plan or budget or where the owners or operators "go beyond the scope of an approved plan or budget"). The Agency must review Prime's submittal as provided in Section 57.7(e)(2): "Upon receipt of a plan submitted after activities have commenced at a site, the Agency shall proceed to review in the same manner as required under this Title." 415 ILCS 5/57.7(e)(2) (2008).

In addition, the Agency's denial letter directs that Prime submit a corrective action completion report for Incident No. 2001-1314. The Board finds the Agency's directive inappropriate because it is premised on the erroneous conclusion that there were two separate releases at the site.

Reversal and Remand

Prime has met its burden of proof. The Board reverses the Agency's January 27, 2009 determination and remands the matter to the Agency to consider the merits of Prime's plan and budget. In so doing, the Agency will be not be improperly "reconsidering" its November 23, 2005 determination. The Reichhold court made clear that when the Agency denies an application, not only are "[r]equests to modify or reconsider [] not permissible" under the Act, but "the applicant's only options are to start over with a new application or file a petition for review." Reichhold, 204 Ill. App. 3d at 679-80, 561 N.E.2d at 1346. Here, on remand, the Agency will be assessing additional information about subsurface site conditions submitted by Prime in the November 2008 submittal, a "new application." The Agency did as much when it determined, "after further review of the small concentrations of lead contamination at the site," that lead is background and the pathways for lead had been addressed after all. AR21, Att. A.; *see also* AR17, Att. A. Contrary to the Agency's argument, Prime is not "creating a controversy in order to get the November 23, 2005 decision before the Board." Resp. Br. at 10. Prime has

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[12] For purposes of Title XVI of the Act, "plan" includes "budget." 415 ILCS 5/57.7(c)(5) (2008).

[13] The plan and budget must be submitted to the Agency prior to receiving payment for any related costs or the issuance of a No Further Remediation Letter. *See* 35 Ill. Adm. Code 734.310(e), 734.335(d).

the statutory right to appeal the Agency's January 27, 2009 determination and that is the only determination reviewed today by the Board.

Deductible

Finally, the Board notes that both parties argue repeatedly about whether one or two deductibles should apply here. As stated, the issue on appeal is defined by the Agency's denial letter. The word "deductible" does not appear in the denial letter and, of course, this is not an appeal of an OSFM deductible determination. Nor is this an instance where the Agency applied a deductible to a request for reimbursement. Prime submitted a plan and budget, not a reimbursement request. Accordingly, the Board finds that the parties' arguments about deductibles are misplaced and warrant no further discussion.

LEGAL FEES

Section 57.8(l) of the Act provides that corrective action excludes "legal defense costs," which include "legal costs for seeking payment . . . unless the owner operator prevails before the Board in which case the Board may authorize payment of legal fees." 415 ILCS 5/57.8(l) (2008). The Board has required the reimbursement of legal fees from the UST Fund where the petitioner has prevailed in appealing the Agency's rejection of a plan and budget. *See* Illinois Ayers Oil Co. v. IEPA, PCB 03-214 (Aug. 5, 2004). Prime seeks legal fees for prosecuting this appeal, but reserved the issue for post-judgment filings. Br. at 13. The record therefore does not presently include the amount of legal fees incurred by Prime.

The Board today reserves ruling on the issue of legal fees. Prime is directed to file a statement of its legal fees that may be eligible for reimbursement and its arguments why the Board should exercise its discretion to direct the Agency to reimburse those fees from the UST Fund. Prime must file its statement by September 21, 2009, which is the first business day following the 30th day after the date of this order. The Agency may file a response within 14 days after being served with Prime's statement.

CONCLUSION

The Board denies Prime's request to sanction the Agency for the late filing of the administrative record. The Agency's motion to dismiss this appeal because it was originally filed by a non-attorney is denied. The Agency's January 27, 2009 determination rejecting Prime's plan and budget is reversed and the matter is remanded to the Agency to consider the merits of Prime's plan and budget. Prime's legal fees are to be addressed as discussed above.

This interim opinion constitutes the Board's findings of fact and conclusions of law.

ORDER

1. The Board denies Prime's request to sanction the Agency.

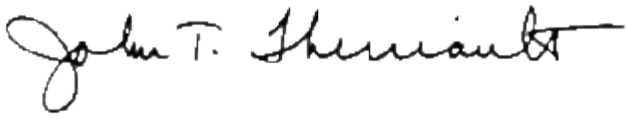
2. The Board denies the Agency's motion to dismiss.

3. The Board reverses the Agency's January 27, 2009 determination and remands the matter to the Agency to undertake actions consistent with this opinion.

4. Prime is directed to file by September 21, 2009, a statement of its legal fees in accordance with this opinion. The Agency may file a response within 14 days after being served with Prime's statement.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above interim opinion order on August 20, 2009, by a vote of 5-0.



John Therriault, Assistant Clerk
Illinois Pollution Control Board