ILLINOIS POLLUTION CONTROL BOARD
May 20, 2010

WEEKE OIL COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 10-1
	)	(UST Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

PATRICK D. SHAW OF MOHAN, ALEWIT, PRILLAMAN &ADAMI APPEARED ON BEHALF OF PETITIONER; and,

J. GREG RICHARDSON APPEARED ON BEHALF OF THE RESPONDENT.

OPINION AND ORDER OF THE BOARD (by G.T. Girard):

Weeke Oil Company (Weeke Oil) filed a petition seeking review of a determination by the Illinois Environmental Protection Agency (Agency). The determination involves an underground storage tank (UST) site at 422 West St. Louis Street in Nashville, Washington County. The Agency first issued a letter that indicated that the site was not subject to the UST program. The Agency then denied reimbursement for early action at the site because the site had previously been issued a No Further Remediation (NFR) letter and there was not sufficient evidence to establish that a new release had occurred. Weeke Oil challenged the Agency's authority to make a determination that the site is not subject to the UST program and asserts that a new release did occur.

The Board agrees with Weeke Oil that the Agency cannot determine that a site is not eligible as that determination is made by the Office of State Fire Marshal (OSFM). However, the Board finds that the Agency can deny reimbursement from the leaking UST fund if an NFR letter has been issued for a site and proof of a new release is not provided. Based on the Agency's denial letter and the record in this case as properly supplemented at hearing, the Board affirms the Agency's decision to deny reimbursement as the record does not contain sufficient evidence to determine that a new release occurred.

The Board first summarizes the procedural background and then addresses a preliminary matter concerning offers of proof at the hearing. Next the Board sets forth the relevant facts and statutory and regulatory background. The Board then enunciates the standard of review and burden of proof before summarizing the arguments of Weeke Oil and the Agency. The Board then discusses the findings and the Board's reasoning for those findings.

PROCEDURAL BACKGROUND

On July 1, 2009, Weeke Oil timely filed a petition (Pet.) asking the Board to review a June 4, 2009 determination of the Agency. On July 23, 2009, the Board accepted the petition for hearing. On September 24, 2009, the Agency timely filed the record in this proceeding (R.).

A hearing was held on January 20, 2010, before hearing officer Carol Webb (Tr.). At hearing Bryan Williams and Don Grammer of Applied Environmental Technologies (Applied Environmental) testified on behalf of Weeke Oil, and Trent Benanti testified on behalf of the Agency. On February 22, 2010, Weeke Oil filed an opening brief (Br.) and on March 15, 2010, the Agency filed a brief (Ag.Br.). Weeke Oil filed a reply on March 26, 2010 (Reply).

PRELIMINARY MATTERS

At the hearing on January 20, 2010, Weeke Oil offered several exhibits which were not admitted. Exhibit 11 is the OSFM log of underground storage tank removal that was recorded by an OSFM observer during the tank removal at the site. Exhibit 12 is a letter sent by Weeke Oil to the Agency after the Agency's decision to deny reimbursement was made and includes several pictures taken at the tank excavation. Exhibits 6 through 9 are enlargements of photographs found in Exhibit 12. Weeke Oil made offers of proof for Exhibits 11 and 12. These documents were not admitted as they were not a part of the Agency's record. Tr. at 19, 37. In the brief, Weeke Oil continued to rely on Exhibits 11 and 12 to support arguments for reimbursement. Because of this reliance, the Board will determine whether or not the documents should be admitted into the record.

Weeke Oil argues that the Agency has previously relied on the OSFM log to determine that a release had occurred. Br. at 14-15, citing Dickerson Petroleum v. IEPA, PCB 9-87, 10-5 (consld.) (Feb. 4, 2010). Weeke Oil understands the hearing officer's ruling, but asserts that if the Agency "is going to be allowed to *sue sponte* declare a site to be outside" the leaking UST program, then Weeke Oil must be given an opportunity to respond.

The Agency argues that the hearing officer properly refused to admit the contested exhibits as the exhibits were not in the Agency's possession prior to the "issuance of the May 26, 2009 decision letter." Ag.Br. at 6. The Agency maintains that Weeke Oil should have submitted the UST removal log and the photographs in Exhibit 12 to the Agency before a decision was made and Weeke Oil did not do so. *Id.*

The law is well settled that the Board's review in permit type appeals is generally limited to the information that was before the Agency during the Agency's statutory review period, and is not based on information developed by the applicant, or the Agency, after the Agency's determination. Freedom Oil Company v. IEPA, PCB 03-54, 03-56, 03-105, 03-179, and 04-02 (consld) (Feb. 2, 2006), slip op. at 11; *See also* Alton Packaging Corporation v. PCB, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987); 415 ILCS 5/40(a), 57.8(i) (2004); 35 Ill. Adm. Code 105.412. However, as the Board noted in Freedom Oil, the Agency's position on what the Board may consider on appeal is unduly restrictive. As the Board stated in Freedom

Oil: "Alton Packaging, actually supports Freedom Oil." Freedom Oil, 03-54, slip. op at 11. The Board continued:

> It is the hearing before the Board, however, that affords the petitioner the opportunity "to challenge the reasons given by the Agency for [the denial] by means of cross-examination and the Board the opportunity to receive testimony which would 'test the validity of the information (relied upon by the Agency)'." Alton Packaging, 162 Ill. App. 3d at 738, 516 N.E.2d at 280, quoting IEPA v. PCB, 115 Ill. 2d 65, 70 (1986); *see also* Community Landfill Co. & City of Morris v. IEPA, PCB 01-170 (Dec. 6, 2001), *aff'd sub nom.* 331 Ill. App. 3d 1056, 772 N.E.2d 231 (3d Dist. 2002).
>
> Accordingly, under Alton Packaging, petitioners before the Board in appeals of this nature cannot introduce new matters outside the Agency administrative record, but they may cross-examine and present testimony to challenge the information relied on by the Agency for the denial. *Id*.

The Board is convinced that Exhibit 11 is evidence that is admissible under the case law precedent stated in Alton Packaging. The Agency's record contains the letter from the OSFM regarding eligibility, which indicates that a confirmed release occurred, but the removal log was not included. The Board finds that the removal log "tests the validity of the information" relied upon by the Agency to determine that a new release did not occur. Also the OSFM removal log is not evidence developed by the Agency or Weeke Oil after the Agency's decision but rather is information available before the decision was made. Furthermore, as discussed below, the OSFM removal log was included in the record in the Dickerson Oil PCB 09-87, 10-5 case. Therefore the Board will consider the Exhibit 11 and the testimony concerning Exhibit 11 in making the Board's decision.

However, Exhibit 12 is a communication regarding the Agency's decision after the decision was made. The letter contains photographs not included in the original 45-day report or 45-day report addendum. Therefore, the Board finds that Exhibit 12 was properly excluded.

The Board notes that at hearing Exhibit 10 was correctly admitted without Agency objection. Exhibit 10 was not included in the Agency's record even though the letter is an Agency response to the submission of the 45-day report.

FACTS

Weeke Oil's facility is located in Nashville, Washington County. The site was an active service station with three underground storage tanks from 1998 to 2008. R. at 116; Tr. at 30. The tanks were removed from service in September 2008. R. at 94. Applied Environmental is Weeke Oil's consultant and Bryan Williams from Applied Environmental testified at hearing. Tr. at 10-13. Mr. Williams had worked with Weeke Oil on a previous release. Tr. at 13

On October 29, 2008, while performing a subsurface investigation of the tank pit, Mr. Williams observed "[o]dorous and discolored soil in a boring advanced adjacent to the tank pit."

R. at 91. Mr. Williams reported that he "saw evidence of a release" at a depth of five feet and the Illinois Emergency Management Agency (IEMA) was notified of the release. *Id*; R. at 81; Tr. at 12. IEMA was informed of a leak or spill involving three USTs, one 4,000 gallon gasoline tank, one 6,000 gallon gasoline tank and one 4,000 gallon diesel tank. *Id*.

Mr. Williams discussed the release with the owner who wanted the tanks removed and to proceed with remediation. Tr. at 13. On October 31, 2008, a tank truck was used to remove approximately 350 gallons of gasoline and 150 gallons of diesel fuel from the tanks to prevent any further release to the environment. R. at 91; Tr. at 13. The tanks had been in service until September 2008. R. at 94.

Mr. Williams indicated that at the time the release was reported the ground and soil around the tank were "obviously impacted" because it was discolored and odorous. Tr. at 14. Mr. Williams was aware that the site had been previously closed with contamination in place from another release, so the soil conditions did not surprise him. *Id*.

Weeke Oil filed the 45-day report received by the Agency on November 17, 2008. R. at 83-108. The 45-day report indicated that no free product or groundwater was encountered. R. at 87-88. The 45-day report states that the tanks will be removed and that a permit for removal was filed with the OSFM. R. at 93. The 45-day report further indicates that following removal of the tanks, soil samples will be tested for indicator contaminants including BTEX (benzene, toluene, ethylbenzene, xylenes), MTBE (methyl tertiary butyl ether) and PNA (polynuclear aromatic) Compounds. R. at 93-93. 135, 136. A site investigation will be conducted if the samples exceed the applicable remediation objectives. *Id*. However, at the time of the filing of the 45-day report, Mr. Williams certified that the report did not demonstrate that the most stringent Tier 1 remediation objectives had been met. R. at 87. The certification included in the 45-day report is "intended to meet the requirements for a plan and budget for the Stage 1 site investigation." R. at 89.

On November 21, 2008, the Agency extended the time for which early action costs may be considered payable beyond the initial 45-day period. R. at 42. The Agency extended the period for reimbursement of early action costs to February 11, 2009. *Id*. On December 4, 2008, the OSFM determined that the three tanks were eligible for reimbursement from the fund, listing the eligibility requirement which includes that the costs were incurred as a result of a confirmed release and were associated with "corrective action". R. at 44-45.

On December 8 and 9, 2008, the tanks were removed. R. at 120. No holes were observed in the tanks and a total of 309.30 cubic yard of impacted backfill was manifested to Perry Ridge Landfill as special waste. Tr. at 120-21. Soil samples were collected from the excavation following the removal of backfill. R. at 121. Present at the tank pull were Mr. Williams and Don Grammar, a civil engineer with Applied Environmental, as well as a field representative from the OSFM. Tr. at 16-17.

The OSFM removal log indicates that the tanks have appeared to leak with significant contamination. Exh. 11 at 1. Further, the removal log indicates that the areas of contamination include the tank walls, floor and pipe trench and that the groundwater is contaminated. *Id*.

When the tanks were removed, Mr. Williams observed a considerable amount of water in the tank pit that had a heavy sheen with a layer of fuel on the water. Tr. at 15. Mr. Williams stated that he has done so many of these that it was obvious to him that when encountering product you clean-up the site. *Id*. Mr. Williams mixed the water and the fuel with the backfill and clay from the side walls. *Id*. The resulting material was manifested to a landfill for disposal. Tr. at 15-16.

Mr. Williams stated the OSFM representative informed him that a new incident number would not be required for the site and he would reference significant impaction on his removal log. Tr. at 17. After removal of the impacted backfill and the water in the fuel, samples were taken from the excavation. Tr. at 16. Mr. Williams did not take samples in the areas covered by concrete. Tr. at 16-17. Mr. Williams took pictures of the tank pull. Tr. at 17, R. at 246-251.

On December 8, 2008, the Agency approved the Stage 1 site investigation plan and budget, while noting that "[a]t a latter time" a "full technical review of the 45-Day Report" would be conducted. Exh. 10. Weeke Oil filed a 45-day report addendum which was received on January 14, 2009. R. at 111-251. The addendum contains additional information from the site after removal of the tanks including analysis of the soil samples. R. at 123. The addendum indicates that no soil samples taken from the walls and floor of the excavation were above Tiered Approach to Corrective Action Objectives (TACO) Tier I commercial/industrial objectives. R. at 124. However, soil samples collected from the tank pit following early action were above TACO Tier I commercial/industrial objectives. R. at 126. The 45-day addendum also indicates that no free product or groundwater were present. R. at 116-17.

Mr. Williams testified that he believed two of the samples were above the TACO Tier I objectives; however, he believed the site was then cleaned up as the product did not come back. Tr. at 22. Mr. Williams also testified that the boxes on both the 45-day report and the 45-day addendum indicating no free product or groundwater were checked because the Agency has previously instructed Applied Environmental that if the tank pit is cleaned up and product does not return you do not file a free product report. Tr. at 45-46. Mr. Williams received the December 8, 2009 letter and proceeded with a stage one site investigation. Tr. at 23.

At hearing Trent Benanti, an Agency project manager, testified that he reviewed the 45-day report and 45-day report addendum and found that the samples collected were below the objectives and there was no evidence to indicate a new release. Tr. at 63. Mr. Benanti's opinion that the samples did not exceed the TACO Tier 1 objectives is based on the objective being listed to two decimal points and the numbers are rounded to those points. *Id*.

The 45-day report addendum includes results of the soil testing analysis. R. at 135, 136. The constituents analyzed are BTEX (benzene, toluene, ethylbenzene, xylenes), MTBE, and PNAs. *Id*. The benzene level is listed as 0.034. *Id*.

Mr. Benanti indicated that the December 8, 2008 letter is typical of a letter the Agency issues when a 45-day report is received and "screened to make sure the response are provided to

the items on the 45-day report form." Tr. at 67. Mr. Benanti testified that no real determination is made as to whether or not to accept those responses. *Id*

On February 2, 2009, Weeke Oil submitted the early action billing application to seek reimbursement for work performed in conjunction with the 20-day report, the 45-day report and the 45-day report addendum. R. at 17-40. The application seeks reimbursement for early action activities in the amount of $50,973.41. R at 20, 23.

On May 26, 2009, the Agency notified Weeke Oil that "[b]ased on the information currently in the Agency's possession, this incident is not subject to" the leaking UST program and thus there are no reporting requirements. R. at 78. The May 26, 2009 letter states:

> Based on the information currently in the Illinois EPA's possession, this incident is not subject to 35 Ill. Adm. Code 734, 732, or 731; therefore, the Illinois EPA Leaking Underground Storage Tank Program has no reporting requirements regarding this incident.
>
> Leaking UST Incident No. 20081591 is associated with the same 4,000-gallon diesel UST, 4,000-gallon gasoline UST, and 6,000-gallon gasoline UST as Leaking UST Incident No. 982004 for which a No Further Remediation (NFR) Letter was issued on September 13, 2006; however, neither the owner or operator nor his/her representative have presented evidence of a new release. Specifically, none of the soil samples collected from the excavation following removal of the backfill material contained concentrations of BTEX, MTBE, or PNAs in excess of the most stringent Tier 1 remediation objectives. In addition, no laboratory samples were collected from the soil boring that was drilled adjacent to the pit. *Id*.

Mr. Benanti testified that this letter was sent because based on the review of the 45-day report and 45-day addendum, he concluded that there was no "evidence demonstrating that a new release had occurred." Tr. at 67. Mr. Benanti based his conclusion on the soil samples and the fact that the wall and floor of the tank pit were clean after the removal of the tanks. *Id*.

On June 4, 2009, the Agency notified Weeke Oil that the application for reimbursement was denied because the costs are not associated with a confirmed a release. R. at 3. The Agency's denial letter continues to state that under 57.9(a) of the Act (415 ILCS 5/57.9(a) (2008)) the UST Fund shall be accessible by owners or operators who have a confirmed release from an underground storage tank. More specifically the Agency states that deductions are as follows:

> $50,973.41 for costs that are associated with an incident for which neither the owner or operator nor his/her representative have confirmed a release. Pursuant to Section 57.9(a) of the Act, the Underground Storage Tank Fund shall be accessible by owners or operators who have a confirmed release from an underground storage tank (UST) or related tank system of a substance listed in said Section.

> Leaking UST Incident No. 20081597 is associated with the same 4,000-gallon diesel UST, 4,000gallon gasoline UST, and 6,000-gallon gasoline UST as Leaking UST Incident No. 982004, for which a No Further Remediation (NFR) Letter was issued on September 13, 2006; however, neither the owner or operator nor his/her representative have confirmed a new release. Specifically, none of the soil samples collected from the excavation following removal of the backfill material contained concentrations of BTEX, MTBE, or PNAs in excess of the most stringent Tier 1 remediation objectives. In addition, no laboratory samples were collected from the soil boring that was drilled adjacent to the pit. *Id*.

At hearing Mr. Benanti testified that he had been the project manager for the incident at this site in 1998. Tr. at 65. Mr. Benanti indicated that the early action reimbursement claim was brought to his attention and that claim "tipped me off that there was another incident reported for this site." Tr. at 63.

Mr. Benanti stated that the 1998 incident involved three tanks and the 1998 incident involved the same tanks and resulted in the NFR letter. Tr. at 65; Exh. 1. Mr. Benanti indicated that the extent of the contamination was investigated in 1998 and TACO Tier 2 calculations were performed. Tr. at 65. Mr. Benanti stated that an NFR letter was issued with highway authority agreements and groundwater restrictions. Tr. at 65-66. Mr. Benanti stated that generally if there is an NFR letter in place, the Agency reviews the concentrations of contaminants and compares with the current concentrations. Tr. at 68. Mr. Benanti felt there was no need to do a comparison in this case because groundwater was not encountered according to the 45-day report and the soil samples were below the TACO Tier 1 objectives. *Id*. Mr. Benanti did "briefly" review the file from the 1998 incident before issuance of the non-leaking UST letter and reviewed the file more extensively before hearing. Tr. at 73

Mr. Williams testified that Applied Environmental and Mr. Grammer performed closure for the first incident in 1998. Tr. at 26-27. The work performed in 1998 involved pathway exclusion and required soil borings around the perimeter of the property or down gradient from the tank pits. Tr. at 28. The site was closed leaving contamination in place under TACO. Tr. at 29. Mr. Williams' recall is that the soil borings were taken in 1999. *Id*. An NFR letter was issued in 2006 and three tanks continued in use at the site until 2008. Tr. at 30, 41.

Mr. Grammer testified concerning the 1998 site classification and indicated that he had certified the site classification completion report. Tr. at 55. Mr. Grammer's understanding was that no samples or analyticals were taken from the tank pit in 1998. *Id.* During the tank pull in 2008, Mr. Grammer observed that the site was extremely contaminated and the ground was petroleum saturated. Tr. at 57-58. Mr. Grammer observed free product floating on the water. Tr. at 58.

STATUTORY AND REGULATORY BACKGROUND

Section 57.2 of the Act provides in pertinent part that "'[c]orrective action' means activities associated with compliance with the provisions of Sections 57.6 [early action] and 57.7 [site investigation and corrective action] of this Title [XVI]." 415 ILCS 5/57.2 (2008).

Section 57.6 of the Act (415 ILCS 5/57.6 (2008)) sets forth requirements for early action at a leaking underground storage tank site and provides, in part:

> b) Notwithstanding any other corrective action taken, an owner or operator may, at a minimum, and prior to submission of any plans to the Agency, remove the tank system or abandon the underground storage tank in place, in accordance with the regulations promulgated by the Office of the State Fire Marshal. The owner or operator may also remove visibly contaminated fill material and any groundwater in the excavation which exhibits a sheen. . . . 415 ILCS 5/57.6(b) (2008).

Section 57.7 of the Act (415 ILCS 5/57.7 (2008)) sets forth the requirements for site investigation and corrective action at a site where a leaking underground storage tank has been removed. Section 57.7(c) of the Act (415 ILCS 5/57.7(c) (2008)) sets forth the provisions for Agency review and approval of plans submitted under the Act. Section 57.7(c)(4) of the Act provides in part that:

> 4) For any plan or report . . ., any action by the Agency to disapprove or modify a plan submitted pursuant to this Title shall be provided to the owner or operator in writing within 120 days of the receipt by the Agency or, in the case of a site investigation plan or corrective action plan for which payment is not being sought, within 120 days of receipt of the site investigation completion report or corrective action completion report, respectively, and shall be accompanied by:
>
> A) an explanation of the Sections of this Act which may be violated if the plans were approved;
>
> B) an explanation of the provisions of the regulations, promulgated under this Act, which may be violated if the plan were approved;
>
> C) an explanation of the specific type of information, if any, which the Agency deems the applicant did not provide the Agency; and
>
> D) a statement of specific reasons why the Act and the regulations might not be met if the plan were approved.
>
> Any action by the Agency to disapprove or modify a plan or report or the rejection of any plan or report by operation of law shall be subject to appeal to the Board in accordance with the procedures of Section 40. If the owner or operator elects to incorporate modifications required by the Agency rather than appeal, an amended plan shall be submitted to the Agency within 35 days of receipt of the Agency's written notification.

Furthermore, Section 57.7(c)(5) of the Act defines "plan" as:

> 5) For purposes of this Title, the term "plan" shall include:
>
> A) Any site investigation plan submitted pursuant to subsection (a) of this Section;
>
> B) Any site investigation budget submitted pursuant to subsection (a) of this Section;
>
> C) Any corrective action plan submitted pursuant to subsection (b) of this Section; or
>
> D) Any corrective action plan budget submitted pursuant to subsection (b) of this Section

Section 57.9(a) of the Act (415 ILCS 5/57.9(a) (2008)) sets forth the eligibility requirements for an owner to receive reimbursement for a leaking UST. Those requirements include that:

1) Neither the owner nor the operator is the United States Government.
2) The tank does not contain fuel which is exempt from the Motor Fuel Tax Law.
3) The costs were incurred as a result of a confirmed release fuel.
4) The owner or operator registered the tank and paid all fees in accordance with the statutory and regulatory requirements of the Gasoline Storage Act.
5) The owner or operator notified the IEMA of a confirmed release, the costs were incurred after the notification and the costs were a result of a release of a substance listed in this Section.
6) The costs have not already been paid to the owner or operator under a private insurance policy, other written agreement, or court order.
7) The costs were associated with corrective action. *See* 415 ILCS 5/57.9(a)(1)-(7) (2008))

Section 57.10(c)(1) of the Act provides:

> c) The Agency's issuance of a no further remediation letter shall signify, based on the certification of the Licensed Professional Engineer, that:
>
> 1) all statutory and regulatory corrective action requirements applicable to the occurrence have been complied with;
>
> 2) all corrective action concerning the remediation of the occurrence has been completed; and

3) no further corrective action concerning the occurrence is necessary for the protection of human health, safety and the environment.

Section 734.210 sets forth the requirements for early action. Section 734.210 (a) provides:

> Upon confirmation of a release of petroleum from an UST system in accordance with regulations promulgated by the OSFM, the owner or operator, or both, must perform the following initial response actions within 24 hours after the release:
>
> 1) Report the release to IEMA (e.g., by telephone or electronic mail);
>
> 2) Take immediate action to prevent any further release of the regulated substance to the environment; and
>
> 3) Identify and mitigate fire, explosion and vapor hazards. 35 Ill. Adm. Code 734.210(a).

STANDARD OF REVIEW AND BURDEN OF PROOF

The Board must decide whether Weeke Oil'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.").

WEEKE OIL'S ARGUMENTS

Weeke Oil presents two central arguments: (1) the Agency's decision that the site was a non-leaking UST site is not authorized by the Act and "retroactively" reverses prior decisions (Br. at 8), or in the alternative, (2) the record, or evidence that should have been allowed in the

record, demonstrates that a release occurred. Br. at 14. The Board summarizes these arguments in turn below.

Non-Leaking UST Site

Agency's Decision Contrary to Law

Weeke Oil argues that the Agency's decision that the site was a non-leaking UST site "was premised on retroactively voiding the notices given during early action and reversing its approval of site investigation." Br. at 8. Weeke Oil maintains that this action by the Agency violates the Act and the provisions of the Administrative Procedures Act (IAPA) (5 ILCS 100/1 *et. seq.* (2008)). *Id*. Specifically, Weeke Oil points out that the Board's rules identify early action and the response to a release that includes reporting requirements such as reporting to IEMA, a 20-day report and a 45-day report. Br. at 8-9, citing 35 Ill. Adm. Code 734.210. Weeke Oil further points out that early action is undertaken without a plan and budget so that the application for reimbursement for early action requires identification of the early action reports. Br. at 9. Weeke Oil opines that for the Agency to find that there are no reporting requirements because this is a non-leaking UST site "is to find that there was no early action performed and is comparable to finding that there was no budget approved." *Id*.

Weeke Oil argues that the 45-day report requires a certification by the licensed geologist or engineer as to whether the most stringent TACO Tier 1 objectives have not been met and stems from the Board's regulations which requires a report to demonstrate compliance within 30 days of completing early action activities. Br. at 9, citing 35 Ill. Adm. Code 734.210(h)(3). If compliance is not achieved, the owner must proceed with a site investigation pursuant to Section 734.210(h)(4) of the Board's rules (35 Ill. Adm. Code 734.210(h)(4)). Weeke Oil asserts that given the regulatory parameters, three situations may exist at the close of early action: 1) the site is in compliance; 2) the site is not in compliance; or 3) there is insufficient information. *Id*. Weeke Oil opines that the Board's regulatory requirement that "compliance be demonstrated within the time-frame means that where there is insufficient information to certify compliance, it is the same as not being in compliance." *Id*.

Weeke Oil maintains that the Agency's forms indicate that a certification from the reports that the site does not meet the most stringent TACO Tier 1 objectives is intended to meet the requirements for a plan and budget for a stage one site investigation. Br. at 9. Weeke Oil asserts that the Agency approved the 45-day report and thus approved the stage one site investigation plan and budget. Br. at 10; Exh. 10. Weeke Oil argues that a stage one site investigation includes sampling around each UST piping run. Br. at 10.

Weeke Oil claims that as a result of the application for reimbursement, the Agency determined that this incident was not a leaking UST incident and issued a letter indicating that this was a non-leaking UST site and that there were no reporting requirements for the site. Br. at 10, citing Tr. at 82. Weeke Oil asserts that since the costs of complying with early action are reimbursable under the leaking UST fund, the decision that there were no reporting requirements equates to there being no reimbursable costs. Br. at 10. Weeke Oil maintains that this action reverses the Agency approval of the 45-day report and Weeke Oil's plan to proceed with stage

one site investigation. *Id*. Weeke Oil asserts that the Agency is not authorized to reverse a decision by either the Act or Board regulations and the action violates the Administrative Procedures Act (5 ILCS 100/1 *et. seq.* (2008)).

Non-Leaking UST Determination Violates the Act

Weeke Oil asserts that the Agency is not authorized by the Act or Board regulations to make non-leaking UST determinations; but rather, the Agency is authorized only to review plans and budgets submitted by the applicant. Br. at 10, citing 415 ILCS 5/57.7(c) (2008). In this case, Weeke Oil maintains that the Agency reviewed the 45-day report, and approved the plan and budget for the stage one site investigation. Br. at 10. Weeke Oil asserts that, having given approval, the Agency then "thought better of its decision" and used the non-leaking UST determination to "retroactively reverse" the Agency's prior approval. Br. at 10-11. Weeke Oil maintains that the Agency's has no statutory authority to reconsider or modify a decision pursuant to Reichhold Chemicals v. IPCB, 204 Ill. App. 3d 674, 678; 561 N.E.2d 1343, 1345 (3rd Dist. 1990). Br. at 11

Weeke Oil also argues that the Board's rules also do not provide the Agency with a mechanism for reconsidering the Agency's decisions. Br. at 11. Weeke Oil maintains that the Board's rules are clear that the Agency has the authority to "approve, reject, or require modification of any plan, budget, or report" but not the authority to "tentatively approve and later reject plan, budgets or reports" the Agency chooses to review. *Id*. Weeke Oil opines that allowing the Agency to tentatively approve a plan, budget or report would be inconsistent with the sequential nature of the leaking UST program, where prompt action is necessary to remediate and investigate a site. *Id*. Weeke Oil further opines that the information gathered for the 45-day report is used to demonstrate compliance with the most stringent TACO Tier 1 objectives and if compliance is not achieved further investigation is the next stage of the process. *Id*.

Weeke Oil asserts that pursuant to States Land Improvement Corp. v. IEPA, 231 Ill. App. 3d 842, 848; 596 N.E.2d 1164, 1167 (4th Dist. 1992) the Agency is not authorized to make stand-alone legal determinations of a site's regulatory status without express authority. Br. at 11. Weeke Oil maintains that the Agency's determination that the site is not a leaking UST incident "is merely the mirror image of the program invalidated in States Land Improvement." *Id*. Weeke Oil further maintains that to remove a site from the leaking UST program and nullify all early action reporting requirements has substantial consequences for the owner of the site. *Id*. Weeke Oil argues that in reliance on the Agency's approval, Weeke Oil continued early action work and postponed some soil samples until the site investigation stage. Br. at 11-12. Weeke Oil opines that unlike States Land Improvement there is no environmental benefit in creating uncertainty in the reimbursement program. Br. at 12.

Non-Leaking UST Determination Violates the Administrative Procedures Act

Weeke Oil argues that even assuming that the authority does exist under the Act for the Agency to reconsider a decision, the "revocation of a prior agency approval raises issues" under the IAPA. Br. at 12. Weeke Oil points out that the IAPA provides:

> No agency shall revoke, suspend, annul, withdraw, amend materially, or refuse to renew any valid license without first giving written notice to the licensee of the facts or conduct upon which the agency will rely to support its proposed action and an opportunity for a hearing in accordance with the provisions of this Act concerning contested cases. At the hearing, the licensee shall have the right to show compliance with all lawful requirements for the retention, continuation, or renewal of the license. If, however, the agency finds that the public interest, safety, or welfare imperatively requires emergency action, and if the agency incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. Those proceedings shall be promptly instituted and determined. (5 ILCS 100/10-65(d) (2008)); Br. at 12.

Weeke Oil further points out that the IAPA defines a license as "any agency permit, certificate, approval, registration, charter, or similar form of permission required by law. (5 ILCS 100/1-35; *see also* Pioneer Processing v. IEPA, 102 Ill. 2d 119,141 (1984)." Br. at 12-13. Weeke Oil maintains that in this case the Agency approved a stage one early action plan and budget and then reversed that decision and under the IAPA the Agency was required to give Weeke Oil notice and the opportunity for a contested case hearing. Br. at 13.

Weeke Oil opines that even if the IAPA does not apply, the Constitution requires fundamental fairness in administrative proceedings. Br. at 13, citing Lyon v. Dep't of Children & Family Servs., 335 Ill. App. 3d 376, 384 (4th Dist. 2002). Weeke Oil maintains that when a siting statute is retroactively applied the courts have found that siting should not be retroactively invalidated. *Id*., citing American Fly Ash Co. v. County of Tazewell, 120 Ill. App. 3d 57, 59 (3rd Dist. 1983). Weeke Oil maintains that this situation is similar in that when reimbursement was sought the Agency "retroactively eviscerated" the prior approvals and removed the incident from the leaking UST program. Br. at 13.

Weeke Oil maintains that the Agency reviewer reviewed the 45-day report and the addendum which were provided to the Agency 190 and 132 days before the May 26, 2008 letter indicating that the site was a non-leaking UST site. Br. at 14. Those reports were relied upon by the Agency when approving the plan and budget for stage one site investigation. *Id*. Weeke Oil asserts that had the Agency received information which necessitated changing the prior approval, the Agency was required to initiate a formal process. *Id*.

Record Demonstrates that Leak Occurred

Evidence Support New Release

Weeke Oil asserts that the evidence in the record clearly establishes that a release occurred. Br. at 15. Weeke Oil cites to the 45-day report and the addendum certifications by the geologist that compliance with the most stringent TACO Tier 1 remediation objectives was not demonstrated. *Id*., citing R. at 87, 89-90, 116, 118-19. Weeke Oil also relies on the Agency's approval of the stage one site investigation plan and budget and the soil samples for benzene. Br. at 15-16, citing Exh. 10, R. at 135. Weeke Oil points to pictures of contamination and

product given to the Agency and observations of the site by both the consultant and the OSFM. Br. at 15, citing R. at 247, 123, 81, Tr. at 17.

Weeke Oil offers that the most stringent applicable soil sampling objective is 0.03 mg/kg for benzene. Br. at 16. Weeke Oil notes that Mr. Benanti testified the soil sample for benzene was 0.034 mg/kg and that number was below the most stringent TACO Tier 1 remediation objective because he rounded the number down. *Id*. Weeke Oil maintains that there is no rule authorizing the rounding in the leaking UST program and samples are taken to determine whether or not the owner or operator can demonstrate compliance. *Id*. Weeke Oil asserts that neither sample for benzene demonstrated compliance and further investigation should continue. Br. at 16-17.

The 1998 Release

Weeke Oil argues that the Agency's position on the 1998 release, which is incident number 982004, is ambiguous. Br. at 17. For example, Weeke Oil notes that Mr. Benanti testified that his review of the 45-day report was triggered by information that there had been a previous release at the site. *Id*., citing Tr. at 63. However, Mr. Benanti's decision that this is a non-leaking UST incident was made solely on the 45-day report. *Id*. Weeke Oil notes that the record in this proceeding contains no documents from the 1998 release, but the NFR letter from the 1998 release was admitted at hearing. Br. at 17, Exh. 1. Weeke Oil argues that while the 1998 release and the NFR letter were referenced in the non-leaking UST determination letter, the "Agency's position appears to be no more than to raise anecdotal doubts that a new release could occur ten years later." Br. at 17.

Mr. Williams was also the consultant for Weeke Oil in 1998 and testified about the incident in 1998. Br. at 17. Weeke Oil notes that the testimony indicates that the 1998 incident resulted from work on tanks to bring the USTs into compliance with the law in 1998 and when the tanks were uncovered contamination was found in the backfill and material over the tanks. Br. at 17-18, citing Tr. at 27. Weeke Oil further notes that Mr. Williams testified that the material was removed and one soil boring was taken downgradient; however Weeke Oil maintains that the tank pit was never investigated. Br. at 18, citing Tr. at 28.

Weeke Oil asserts that Mr. Benanti's position that the tank pit was investigated is based on a drawing attached to the NFR letter issued in response to the 1998 incident. Br. at 18, citing Tr. at 88. However, Mr. Williams rebutted Mr. Benanti's position testifying that the boring logs establish the soil boring near the tank pit in the drawing was outside the tank pit. Br. at 18, citing Tr. at 93. Weeke Oil asserts that the only reason that investigation of the tank pit is an issue is to demonstrate that the analytical data from 1998 are not a part of the record and thus are not available for comparison to the analytical data from this incident. Br. at 18.

Weeke Oil argues that even more significant than the tank pit not being investigated in 1998 is the fact that the service station continued in use for over ten years. Br. at 18. Weeke Oil asserts that the Act contemplates that a site may have more than one release and requires payment of more than one deductible. *Id*., citing 415 ILCS 5/57.9(b)(3) (2008)).

Weeke Oil takes issue with Mr. Benanti's contention that contamination at the site was required to be cleaned up because of the conditions in the 1998 NFR letter. Br. at 19. Weeke Oil notes that the NFR letter provision at issue states:

> Any contaminated soil or groundwater removed, excavated from, or disturbed at the above-referenced site, more particularly described in the Leaking Underground Storage Tank Environmental Notice of this Letter, must be handled in accordance with all applicable laws and regulations under 35 Ill. Adm. Code Subtitle G. Exh. 1; Br. at 19.

Weeke Oil asserts that this condition does not establish an obligation to remediate the site, but merely states that the leaking UST program still applies to the site. Br. at 19. Weeke Oil opines that the NFR letter is only a safeguard from liability for the incident addressed in the NFR. *Id*.

Weeke Oil maintains that any doubt that the site is not remediated should be decided in favor of completing the remediation. Br. at 19. Weeke Oil states that the consultant had planned to conduct sampling along the piping run and below the dispensers as a part of the stage one site investigation. *Id*. Weeke Oil argues that the site investigation phase should be continued. Br. at 20.

AGENCY'S ARGUMENTS

The Agency's responsive arguments can be grouped in two main positions. The first is that the site conditions support the Agency's determination that there was not a new release. Second, the Agency addresses Weeke Oil's arguments concerning the December 8, 2008 letter and what that letter means. The Board summarizes these arguments below.

Site Conditions

The Agency argues that the benzene standard is not exceeded because mathematically rounding the benzene sample result of 0.034 mg/kg to a number within two places of the decimal point brings the sample to 0.03 mg/kg. Ag.Br. at 3. The Agency notes that the benzene standard is 0.03 mg/kg and thus, the sample taken at the site does not exceed the TACO Tier 1 objective. *Id*. The Agency maintains that examination of the contaminant concentrations from the 1998 incident was not necessary because neither free product nor groundwater were encountered and the current contaminant concentrations do not exceed TACO Tier 1 objectives. Ag.Br. at 4. The Agency also takes issue with Weeke Oil's claim that the one wall sample (number 3) is above the acceptable detection limit for benzene. Ag.Br. at 6. The Agency argues that the sample has little probative value as the actual sample could fall anywhere between 0 mg/kg and 0.249 mg/kg. *Id*. The Agency argues that Weeke Oil should have collected another soil sample from the area and obtained a useful analytical result. *Id*.

The Agency maintains that the decision that the site was a non-leaking UST site was "driven, if not dictated" by the facts before the Agency prior to the letter of May 26, 2009. Ag.Br. at 4. The Agency notes that visual and olfactory observations were produced by the soil boring taken on October 29, 2008; however, the Agency argues that such a discovery is not

unusual for a typical gas station. *Id*. The Agency maintains that this site is not just another gas station as Weeke Oil obtained an NFR letter in 2006 and Mr. Williams testified that he was not surprised to encounter discolored and odorous soil. *Id*. The Agency asserts that "visual and olfactory observations have little, if any, probative value as to whether a new release occurred" at the site. *Id*. The Agency opines that it is difficult to justify a finding of a new release when considering no free product or groundwater was encountered and the TACO Tier 1 objectives were not exceeded. *Id*.

The Agency takes issue with Weeke Oil's contention that the Agency's position on the 1998 incident is "ambiguous" and meant to raise "doubts" about the 2008 release. Ag.Br. at 4. Specifically the Agency maintains that Weeke Oil misunderstands Mr. Benanti's testimony as Mr. Benanti only became aware of the 2008 incident when an Agency reviewer brought the reimbursement application to Mr. Benanti's attention. Ag.Br. at 4-5. The Agency claims the reimbursement application led to Mr. Benanti's review of the 45-day report and the 45-day report addendum, not the fact that there had been an incident in 1998. Ag.Br. at 5. The Agency maintains that no analytical comparison of contaminant levels was performed because no free product or groundwater was encountered and the TACO Tier 1 objectives were not exceeded. Ag.Br. at 5. The Agency claims that no documents from the 1998 incident are included in the administrative record because no comparison was conducted. *Id*. Furthermore, the Agency maintains that the record contains no evidence that the continued operation of the site as a gas service station bolsters Weeke Oil's position. *Id*.

The Agency argues that the testimony concerning the tank pull and the conditions at the time of the tank pull is alleviated by the testimony that the site was cleaned up and the product did not return. Ag. Br. at 6. Further, the Agency opines that regardless of the visual and olfactory conditions, the only scientific evidence indicates that the TACO Tier 1 objectives are not exceeded. Ag. Br. at 7. The Agency asserts that the site conditions are consistent with the Agency's finding that there is no evidence of a new release. *Id*.

The Agency notes that Mr. Benanti believed the water in the tank pit to be "perched water" and he was not surprised by the existence of the water in the tank pit. Ag. Br. at 6. The Agency argues that Weeke Oil "apparently believes" that the leaking UST program requires removal of the "perched water" and the non-leaking UST determination is contrary to the purpose of the UST program. Ag.Br. at 7. The Agency asserts that removal of the "perched water" is prudent because leaving such water in place could result in an allegation of violations of the Act. *Id*.

Procedural Matters

The Agency notes that the purpose of the leaking UST program is to set procedures for remediation of UST sites and establish requirements for reimbursement. Ag.Br. at 8, citing 415 ILCS 5/57 (2008). The Agency also notes that for an owner to receive reimbursement from the UST program, the owner must comply with the requirements of the program. Ag.Br. at 8. The Agency claims that "[n]o one remediation activity guarantees entry into the LUST program and access to the UST Fund. All tank pulls simply do not qualify for the Program and the Fund." *Id*.

The Agency claims that Weeke Oil's references to the letter accepting the 45-day report (Exh. 1) are misleading. Ag.Br. at 8. For example the Agency acknowledges that the letter indicates the Agency reviewed the 45-day plan and approved the plan and budget for stage one site investigation. However, the Agency points out that the next line of the letter indicates that at a later time the Agency will conduct a full technical review of the 45-day report. *Id*. The Agency argues that "clearly no full review was performed, and in reality there was a minimum of information to review in the 45-day report" about whether a new release had occurred. *Id*. The Agency points out that the 45-day report merely identifies the October 29, 2008 soil boring and states that the analytical results will be a part of the 45-day report addendum. Ag.Br. at 9.

The Agency further argues that the December 8, 2008 letter (R. at 87) merely acknowledges the receipt of the 45-dayr report and does not make any determinations regarding the 45-day report. Ag.Br. at 9. Also, the Agency claims that the 45-day report and 45-day report addendum could not have been relied upon by the Agency in approving a stage one site investigation in the December 8, 2008 letter as the 45-day addendum was not received until January 14, 2009. *Id*. The Agency asserts that the December 8, 2008 letter was issued on the day the tank pull commenced and thus could not have been relied upon by Weeke Oil in continuing early action. *Id*

The Agency argues that the December 8, 2008 letter was not an "'approval' letter as argued by Weeke [Oil] moots many of its arguments concerning administrative procedures." Ag.Br. at 9. The Agency asserts that Weeke Oil cites to no authority which supports the position that the situation here is similar to a license or permit holder under the IAPA. *Id*. Further, the Agency maintains that Weeke Oil's reliance on States Land Improvement is misplaced as the Act provides mechanisms for review of Agency decisions under the leaking UST program. Ag.Br. at 10. The Agency notes that no such review provisions were a part of the program discussed in States Land Improvement. *Id*.

WEEKE OIL'S REPLY

In the reply, Weeke Oil argues that the OSFM confirmed the release, that the Agency does not have the authority to determine a site is not eligible for leaking UST fund and that free product and groundwater were impacted. Weeke Oil also argues that the evidence is scientific and that rounding is not a rule. The Board summarizes those arguments below.

OSFM's Confirmation of a Release

Weeke Oil asserts that the Agency does not distinguish the position taken by the Agency in Dickerson Petroleum that the OSFM's determination is sufficient to confirm a release, but rather the Agency argues that the OSFM logs were not a part of the record. Reply at 2. Weeke Oil defends the position that OSFM's reporting of a release should be given merit and deference. *Id*.

Weeke Oil maintains that the OSFM administers the leaking UST program with the Agency and during removal the OSFM renders an opinion as to whether there has been a release during tank removal. Reply at 2, citing 415 ILCS 5/57.7(c) (2008). Weeke Oil opines that the

OSFM's opinion can nullify the need for the owner to determine whether a release occurred although in this case the owner's consultant certified that a release occurred. Reply at 2-3, citing R. at 116, 415 ILCS 5/57.7(c) (2008). Weeke Oil claims that while some overlap exists between the Agency and OSFM, tank removal is traditionally conducted under OSFM's oversight and early action historically includes the initial response required upon confirmation of a release by OSFM. Reply at 3, citing Kathe's Auto, PCB 96-102.

Weeke Oil argues that the owner's consultant obtained the OSFM log under the Freedom of Information Act (5 ILCS 140/1 *et. seq.* (2008)). Reply at 3. The OSFM log was obtained only after the Agency's determination that there was not a release. Weeke Oil claims that submission of the OSFM log to the Agency "was too late under the Agency's self-created deadline and procedures." *Id*.

Agency's Procedures

Weeke Oil asserts that the Agency's letter is not sufficient authority for the Agency to reconsider a decision and the Board's rules do not authorize conditional approval of reports. Reply at 3. Weeke Oil maintains that there is no authority for non-leaking UST determinations under "any law or regulation" and no authority to retroactively repeal an approval of a plan or budget. Reply at 3-4.

Weeke Oil claims that the Agency is wrong to assert that the 45-day report was not reviewed. Reply at 4. Weeke Oil concedes that the review may not have been 100%, but the 45-day reports are reviewed "to the extent of the importance of such a review to the Agency." *Id*. Furthermore, Week Oil contends that the Agency uses that review to approve stage one site investigation plans and budgets and that Weeke Oil did rely on the approval in proceeding with early action and delaying other site investigations. *Id*.

Weeke Oil argues that the Agency's date used for the closure of the record is the May 26, 2008 non-leaking UST determination which has no basis in law or regulations. Reply at 4. Weeke Oil opines that the use of the non-leaking UST determination seems to be the "only way the Agency can find to deny early action costs" in this case. *Id*., citing R. at 11. Weeke Oil maintains that this process is problematic and "hopes the Board sees that the process cannot be used to deny otherwise reasonable costs of early action activities, or remove a site from the LUST program without any conceivable way of challenging the decision." Reply at 4-5.

Free Product and Groundwater

Weeke Oil maintains that free product and groundwater were encountered, but that none was observed in the tank pit following removal of the tanks and backfill. Reply at 5, citing R. at 124. Weeke Oil opines that the 45-day reports are intended to describe the site following early action, while the OSFM observes the preliminary excavation of the site. Reply at 5, citing 415 ILCS 5/57.7(c) (2008). Weeke Oil argues that the consultant performed activities authorized by the Act by mixing the water, fuel and backfill in the pit and manifesting the waste to a landfill. Reply at 5. At this point, Weeke Oil claims the consultant observed a dry excavation pit that did not recharge with either free product or groundwater. *Id*.

Weeke Oil opines that the 45-day reports require the owner/operator to certify whether or not early action has cleaned-up the spill and remediation objectives include consideration as to whether free product remains. Reply at 5. Weeke Oil notes that according to Mr. Williams, the Agency instructs consultants that a free product report need not be provided if the product in the tank, once removed, does not come back; therefore, he did not check the box regarding free product on the 45-day report. Reply at 6.

Evidence of a Release is Scientific

Weeke Oil contends that visual and olfactory observations are relevant data to determine if a release occurred and to ignore visual and olfactory observations would be unscientific. Reply at 6. Further, Weeke Oil points out that the Board's rules require that the owner/operator visually inspect releases. *Id*., citing 35 Ill. Adm. Code 734.210(b)(2). Weeke Oil opines that the Agency seems to want analytical results to confirm releases; however, there are not analytical requirements to confirm an historical release. Reply at 6. Weeke Oil maintains that TACO rules are remediation objectives not investigatory objectives. Reply at 6. Weeke Oil argues that the leaking UST program assumes that a number of sites can be closed after early action and "[i]t is not analytical, nor scientific, to assume that a site that can be closed-out following early action, was never supposed to be in the LUST program to begin with." Reply at 6-7.

Rounding is not a Rule

Weeke Oil contends that no legal authority was given to support the Agency's position that the confirmatory sample should be rounded. Reply at 7. Weeke Oil further contends that even assuming that a release can only be confirmed by an exceedance of the TACO Tier 1 objectives, there is no basis for the proposition that failure to round down constitutes a violation of any law. Reply at 7, citing Swif-T-Food Mart v. IEPA, PCB 03-185 (May 20, 2004). Weeke Oil argues that particularly where the Board regulations require and owner to affirmatively demonstrate compliance before discontinuing investigations. *Id*.

DISCUSSION

The Board first discusses the relationship of this case to Dickerson Oil PCB 09-87, 10-5 as that issue is raised by Weeke Oil. Next the Board discusses the May 26, 2009 non-leaking UST letter and the Agency's authority to make such a determination. The Board then turns to the arguments about the effect of the December 8, 2008 letter "approving" the stage 1 site investigation plan. Finally the Board discusses the June 4, 2009 denial letter.

Relationship to Dickerson

Weeke Oil argues that the Agency's position concerning the OSFM removal log and the relevance of that log in this case is inconsistent with the Agency's position in Dickerson Oil, PCB 9-87, 10-5. Reply at 2. The Board notes that the Agency's decisions in the instant case, both the non-leaking UST decision and the denial of reimbursement, were made within a few days of the Agency's decisions in Dickerson Oil. In Dickerson Oil, the Board found that the

denial letters did not meet the requirements of the Board's rules at 35 Ill. Adm. Code 734.505 and remanded the decision to the Agency. Dickerson Oil, PCB 9-87, 10-5, slip op. at 2. Weeke Oil has not made the same arguments concerning the denial letters as those made by the petitioner in Dickerson Oil and a review of the denial letters demonstrates some significant differences. Therefore, the Board finds that the decision in Dickerson Oil[1] is not controlling here. As to the argument by Weeke Oil concerning the Agency's positions on the OSFM removal log, the Board is not convinced that the positions are contrary.

May 26, 2009 non-leaking UST Letter

Weeke Oil argues that the Agency is not authorized by the Act to make a non-leaking UST determination. Br. at 10. The Agency defends the findings of the May 26, 2009 letter, but does not specifically address the issue of whether or not the Agency is authorized to make a non-leaking UST decision.

The May 26, 2009 letter provides:

> Based on the information currently in the Illinois EPA's possession, this incident is not subject to 35 Ill. Adm. Code 734, 732, or 731; therefore, the Illinois EPA Leaking Underground Storage Tank Program has no reporting requirements regarding this incident.
>
> Leaking UST Incident No. 20081591 is associated with the same 4,000-gallon diesel UST, 4,000-gallon gasoline UST, and 6,000-gallon gasoline UST as Leaking UST Incident No. 982004. for which a No Further Remediation (NFR) Letter was issued on September 13, 2006; however, neither the owner or operator nor his/her representative have presented evidence of a new release. Specifically, none of the soil samples collected from the excavation following removal of the backfill material contained concentrations of BTEX, MTBE, or PNAs in excess of the most stringent Tier 1 remediation objectives. In addition, no laboratory samples were collected from the soil boring that was drilled adjacent to the pit. R. at 78.

The Agency's decision is that this incident is "not subject to to 35 Ill. Adm. Code 734, 732, or 731" which are the rules relating to remediation and reimbursement at a leaking UST site. The Agency's letter does not indicate that the determination is appealable to the Board; although the effect of the letter is to potentially deny the rights of an owner or operator to access the UST fund and thus should be appealable to the Board. *See* 35 Ill. Adm. Code 734.500(f).

Under the Act, the leaking underground storage tank program has roles for several state agencies. IEMA is the state agency that receives notification of a release within 24 hours of the

[1] The Board notes that the petitioner in Dickerson Oil PCB 9-87, 10-5, has filed a motion to reconsider which is pending before the Board. The motion to reconsider addresses the Board decision to deny a request for attorney's fees and is not related to the issues relevant in this proceeding.

discovery of the release. *See* 415 ILCS 5/57.5(c) (2008). OSFM adopts rules regarding tank removal and makes determinations regarding the eligibility of an owner or operator to access the UST fund. *See* 415 ILCS 5/57.5(c), 57.9 (2008). The Agency reviews plans and reports and determines the appropriate reimbursement amounts. *See* 415 ILCS 5/57.7, 57.8, 57.14A (2008). The Board adopts rules setting remediation objectives, reimbursement levels, and reviews decisions by the Agency and OSFM. *See* 415 ILCS 5/57.7, 57.8, 57.9, 57.14A (2008). The Act does not allow the Agency to review or reverse a finding by OSFM of eligibility; only the Board may reverse OSFM's eligibility determinations. *Id*.

The Agency like the Board is a creature of statute and has only the authority granted by the statute. *See* Granite City Division of National Steel Company v. Pollution Control Board, 155 Ill. 2d 149, 162, 613 N.E.2d 719, 724 (1993)). Under the Act, specific UST Fund administrative duties are divided between the Agency and OSFM. The Agency is authorized to determine that reimbursement is not appropriate as well as the appropriate amounts that may be reimbursed (*see* 415 ILCS 5/57.7, 57.8, 57.14A (2008)). The OSFM determines whether an owner or operator is eligible to access the fund (*see* 415 ILCS 5/57.5(c), 57.9 (2008)). Therefore, the Board finds that the Agency's statement in the May 26, 2009 letter that Weeke Oil cannot access the UST Fund is without statutory authority and is not an appropriate determination by the Agency.

However, the Agency may deny reimbursement for cleanup costs at a UST site because an NFR letter has been previously issued for the site and a new release has not been established. *See e.g.* 35 Ill. Adm. Code 734.100(d) (owners must proceed expeditiously to obtain an NFR letter signifying final disposition of the site for purposes of Part 734), 734.720 (reasons to void an NFR letter), and 734.630(gg) (costs ineligible for reimbursement are costs incurred after NFR letter is issued). The Agency's denial letter of June 4, 2009 denied reimbursement because the site had previously been issued an NFR letter and there was no evidence of a new release. Therefore, the Agency's June 4, 2009 letter denying reimbursement is within the Agency's authority under the Act and the Board can review that Agency decision.

Agency's Reconsideration of Prior Decision

Having found that the May 26, 2009 letter from the Agency was an improper Agency determination, the Board need not examine the arguments made by Weeke Oil that the Agency cannot reconsider a prior decision. However, the Board will examine those arguments as they relate to the June 4, 2009 denial letter.

The Agency issued a letter on December 8, 2008, acknowledging the receipt of the 45-day report and noting that a "full technical review" pursuant to Section 57.6 of the Act (415 ILCS 5/57.6 (2008)) and 35 Ill. Adm. Code 734.Subpart B would be conducted at a later time. Exh. 10 at 1. The Board's rules at Subpart B of Part 734 relate to early action as does Section 57.6 of the Act (415 ILCS 5/57.6 (2008)). The Agency's letter indicates that pursuant to the certification on the 45-day report the stage 1 site investigation plan is approved and must be conducted in accordance with Section 734.315 (35 Ill. Adm. Code 734.315). Exh. 10 at 1. Section 734.315 sets forth the steps to be taken in site investigation. *See* 35 Ill. Adm. Code 734.315. The Agency's letter warns that if the owner or operator is determined to be ineligible

for reimbursement by the OSFM, costs will not be reimbursed. Exh. 10 at 1. The December 8, 2008 letter also requires submission of additional materials within 90 days and warns that certain other elections by the owner or operator may result in no reimbursement being made. Exh. 10 at 1-2.

Weeke Oil argues that the Agency's decision of May 26, 2009, negates the approval of the Stage 1 site investigation plan and budget as well as the submission of the 20-day report, the 45-day report and the 45-day report addendum. Weeke Oil argues that the Agency cannot negate the approval and cites to the IAPA, Reichhold Chemicals and States Land Improvement to support the argument.

The Board is unconvinced that the Agency's June 4, 2009 denial letter is a reconsideration of the Agency's December 8, 2008 letter. At most, the December 8, 2008 letter acknowledges receipt of the 45-day report and specifically notes that further review may occur. The June 4, 2009 letter denies reimbursement for early action based on the existence of an NFR letter for the site. The June 4, 2009 letter is not "voiding the earlier reports", but rather denies reimbursement for early action where the record lacks sufficient evidence to find that a new release occurred. Furthermore, all the steps taken in early action are premised on a confirmed release. The Agency's June 4, 2009 letter finds that the record does not support a finding of a new release. Therefore, the Board finds that the June 4, 2009 letter does not "reconsider" the December 8, 2008 letter, but rather clarifies the status of the site based on the reimbursement request.

Moreover, the Board must decide whether Weeke Oil's submittal to the Agency demonstrated compliance with the Act and the Board's regulations. *See, e.g.*, Illinois Ayers, PCB 03-214, slip op. at 8 (April 1, 2004); Kathe's Auto, PCB 96-102, slip op. at 13. If the site has an NFR letter and the record does not support a finding of a new release, then the Agency cannot reimburse Weeke Oil for the early action activities without violating Board regulations (*see e.g.* 35 Ill. Adm. Code 734.100(d) (owners must proceed expeditiously to obtain an NFR letter signifying final disposition of the site for purposes of Part 734), 734.720 (reasons to void an NFR letter), and 734.630(gg) (costs ineligible for reimbursement are costs incurred after NFR letter is issued).

June 4, 2009 Denial Letter

As previously stated the Agency's denial letter frames the issue on appeal and Weeke Oil bears the burden of proving that the request for reimbursement does not violate the Act or Board regulations. *See* Karlock, PCB 05-127, slip op. at 7 (July 21, 2005)) and Ted Harrison, PCB 99-127, slip op. at 5-6 (July 24, 2003); *see also* 35 Ill. Adm. Code 105.112. Weeke Oil relies on the observations of the consultants and the OSFM representative as well as the OSFM removal log for support that there was a new release. Weeke Oil also relies on a soil sample analysis for benzene of 0.034 mg/kg and argues that the benzene level exceeds TACO Tier 1 objectives. The Board is not convinced that these observations and the soil sample are sufficient to find evidence of a new release.

With regards to the visual and olfactory observations, Weeke Oil emphasizes the consultants' and OSFM's observations that the soil was obviously impacted and there was a sheen on the water. However, the record also includes evidence that the tanks when removed did not have holes in them. *See* R. at 120. Further, this site was previously remediated and closed in 1998 under Tier II TACO objectives that allowed pollutants to remain in place with some institutional controls to exclude human exposure pathways. Exh. 1. Thus, the presence of impacted soil and odors of gasoline are consistent with a site with previous contamination where no new release has occurred. Even Mr. Williams testified that he was not surprised by the "discolored and odorous" soil because he "was aware that the site was previously closed with contamination in place." *See* Tr. at 14.

Weeke Oil tested for BTEX (benzene, toluene, ethylbenzene, xylenes), MTBE, and PNA compounds, all indicator contaminants for petroleum products. The only test result that Weeke Oil argued exceeded a TACO Tier 1 objective was a benzene level of 0.034 mg/kg. The Board is not persuaded by Weeke Oil's argument that a benzene level of 0.034 mg/kg exceeds the TACO Tier I objective of 0.03 mg/kg because there is nothing in the Board's rule about rounding. Instead, the Board agrees with the Agency's position that the observed benzene value of 0.034 mg/kg should be rounded to 0.03 mg/kg according to standard scientific practice. A benzene value of 0.03 mg/kg does not exceed the TACO Tier I objective (35 Ill. Adm. Code 742.Table A). The TACO Tier 1 objective for benzene (0.03 mg/kg), has two numbers to the right of the decimal point. Those two numbers to the right of the decimal are the only significant figures to the right of the decimal according to general scientific practice. The generally accepted scientific practice is to round any observed or mathematically derived values to maintain the same number of scientific figures. Therefore, if the Board's benzene standard were 0.030 mg/kg, then a detection level of 0.034 mg/kg would be an exceedance. However, since the standard is written as 0.03 mg/kg, rounding is an acceptable mathematical and scientific process, and 0.034 should be rounded down to 0.03. Therefore, the Board finds that the TACO Tier 1 objective for benzene of 0.30 mg/kg has not been exceeded by an observed value of 0.034 mg/kg for benzene.

As the only Tier 1 TACO objective that Weeke Oil argues was exceeded in the soil analyzes was benzene, and the record supports that no exceedences of the TACO Tier 1 objectives was indicated in the soil samples, the Board finds that the soil samples do not support a finding that a new release has occurred. Therefore, the Agency properly denied the request for reimbursement as the record does not indicate a new release has occurred.

CONCLUSION

Under the Environmental Protection Act, administrative duties under the leaking UST program are divided among several state agencies. The Board finds that pursuant to the Environmental Protection Act the Office of State Fire Marshal determines whether or not a site is eligible for reimbursement from the UST Fund. *See* 415 ILCS 5/57.5(c), 57.9 (2008). The Board finds that the Illinois Environmental Protection Agency lacks the authority to determine that a site is not eligible for the UST fund; however, the Agency can appropriately deny reimbursement for remediation at a site if an NFR letter has issued previously and no new UST release is confirmed. *See e.g.* 35 Ill. Adm. Code 734.100(d) (owners must proceed expeditiously to obtain an NFR letter signifying final disposition of the site for purposes of Part 734), 734.720

(reasons to void an NFR letter), and 734.630(gg) (costs ineligible for reimbursement are costs incurred after NFR letter is issued.

In this case, the Boards finds that Weeke Oil has failed to establish that the contamination found in the tank pit where three tanks were removed in 2008 is a new release. The Board finds that the Tier 1 TACO objectives have not been exceeded at the site and that any evidence of contamination is consistent with the conditions of the NFR letter, which allowed contamination to stay in place (with institutional controls) from an earlier release in 1998. Therefore, the Board affirms the Agency denial of reimbursement for early action at the Weeke Oil site.

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

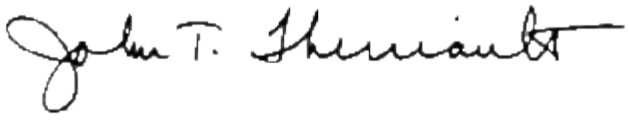
ORDER

The Illinois Environmental Protection Agency's denial of Weeke Oil Company request for reimbursement for early action at an underground storage tank (UST) site at 422 West St. Louis Street in Nashville, Washington County is affirmed.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2008); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on May 20, 2010, by a vote of 5-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board