

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

EVERGREEN FS, INC.,)	
Petitioner,)	
v.)	PCB Nos. 11-51 & 12-61
)	(LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
Respondent.)	

PETITIONER'S BRIEF

NOW COMES Petitioner, Evergreen FS, Inc. ("Evergreen"), and for its post-hearing brief states as follows:

INTRODUCTION

This consolidated appeal arises from two applications for payments for previously approved work which were reduced by an apportionment of 50% by the Agency pursuant to the Agency's interpretation of its authority under Section 57.8(m) of the Illinois Environmental Protection Act (415 ILCS 5/57.8(m)). The justification given for this apportionment is that a prior incident at the site was deemed ineligible. The record indicates that a prior release originated from the leaking portion of the underground piping system connected to a registered diesel fuel tank. We have the bill to prove it. Yet for unknown reasons, when the owner/operator was directed to speculate on the likely source of the incident, it forgot the leaking piping system and indicated that an overflow of a monitoring well was likely. Based upon that claim, the Agency decided in 1992 that the release had not originated from a leaking underground storage tank system, and therefore was ineligible for reimbursement.

Since an incident in 2007 involving major releases from four tanks at the operating service station, all of which were registered, Evergreen has been investigating and performing investigation and corrective action. The Agency has interjected the 1992 determination in response to the two of the latest payment applications, claiming that only half of the cleanup

costs are eligible for reimbursement. The Agency's position should be rejected for a multitude of reasons:

1. The 1992 release actually occurred from a leaking underground piping system and therefore was eligible;
2. Even if the release originated through the monitoring well, the monitoring well was a part of the required underground storage tank system and thus eligible;
3. Even if the 1992 release was not eligible, apportionment is not authorized under Section 57.8(m) where all of the tanks at the site were registered;
4. Even if apportionment is legally applicable here, any discharge through the monitoring well would have to have been de minimis;
5. Even if apportionment is legally and factually applicable here, the Agency is not authorized to make an apportionment at the payment stage.

The Agency did not provide prior notice and an opportunity for Evergreen to address its concerns about the prior incident prior to making its initial determination herein. At the hearing, Evergreen did not sponsor any new documents to supplement the record, but provided the testimony of a professional licensed engineer to explain the documents already in the record.¹

¹ Part I of the Administrative Record, which was filed and served in hard copy form will be cited herein as (Rec. Part I, at p. _____) Since Petitioner only has a digital copy of the remainder of the record, citation is herein made to the number assigned each document on the disk, followed by the page number. For example, the second page of the first document on the disk will be cited (Rec. 1, at p. 2) The hearing transcript will be cited as (Hrg. Trans. at p. ____). An index is attached hereto as well.

STATEMENT OF FACTS

A. 1991 INCIDENT REPORTED.

The facility was a service station, at one time known as Fuel 24, located in Dwight, Illinois, and operated in 1991 by Livingston Service Company. (Rec. 51, at p. 20) In 1987, Livingston timely registered all three tanks at the site, including a 10,000 gallon diesel tank. (Id., at pp. 20-21)

At 4:27 p.m. on March 5, 1991, a release of an unknown quantity of diesel fuel from a 10,000 gallon diesel tank was reported to the Illinois Environmental Management Agency (“IEMA”) and assigned incident number 910580. (Rec. 1) The release was reported from an “Underground tank,” and the blank for “Truck” was unmarked. (Id.) An hour later the local fire department called to report finding diesel fuel in Gooseberry Creek, about two-and-a-half miles to the North. (Rec. 1, at p.2) It appears that IEMA told the fire department about the call from the service station and that it had reported missing 5,300 gallons from a tank that had been filled the night before. (Id.)

B. INITIAL RESPONSE AND INVESTIGATION ACTIVITIES

On April 5, 1991, the owner/operator reported the results of corrective action that had been under taken since reporting the incident. (Rec. 2) On the day of the incident, the diesel tank was emptied, and a tile line running eastward across farmland between the service station and the creek was identified as the migration pathway to the creek. (Rec. 2, at p. 1) Petroleum absorbant booms and pillows were placed for miles along the creek and at the point where the tile line discharged into the creek. (Id.) By the end of the next day, no traces of diesel fuel were

discharging from the tile. (Id.) The following day the tile line was disconnected at the point it left the service station property and thereafter diesel fuel was captured with a sump. (Id. at p. 2)

The tanks were tested and a leak was discovered:

On Thursday, March 7, 1991 PEMCO Service Company, Inc. completed a pressure test of the piping system from the UST to the dispensing unit. A small leak was detected which may have been the source of our diesel fuel release. The leak was repaired and the system passed inspection (Exhibit A) Also, on Thursday, March 7, 1991, TANKOLOGY, Inc. completed a tightness test for the tank and piping for the diesel fuel. The attached report (Exhibit B) and certificate, verify that the entire system passed the inspection.

(Rec. 2, at p. 2)

Attached as Exhibit A was an invoice showing that PEMCO had charged \$202.35 to apply an air test to the diesel line, repaired leak at the S.T.P., and retested the diesel line. (Rec. 2, at 4) "S.T.P." stands for submersible tank pump, which is an underground pump that sucks the product out of the tank and sends it to the dispensers. (Hrg. Trans. at p. 18)

On March 8, 1991, OSFM gave Livingston permission to resume diesel fuel sales. (Rec. 2, at p.2) While fuel was being captured at the sump, it was also being captured from pre-existing monitoring wells with absorbant pillows,² and by April 3, 1991, only a monitoring well on the Southwest corner and the submerged pump for the middle (non-diesel) tanks indicated the trace presence of free product. (Rec. 2, at p. 2) Livingston also reported the results of study of its inventory:

Based on the records of total annual shrinks which would provide the most liberal estimate, the quantity of diesel fuel released could not exceed 500 gallons.

² As acknowledged by the Agency at the time, these monitoring wells are a "part of the required leak detection system." (Rec. 3)

...

As of this date, over 100 gallons of diesel fuel has been collected.

(Rec. 2, at p.3)

The owner/operator then hired a consultant, Eldredge Engineering Associates, Inc. which submitted a Work Plan for Soil and Groundwater Investigation on May 3, 1991. (Rec. 5) The Work Plan summarized the April 5, 1991 report, and again reiterated the suspected cause of the release was from the tank system:

Two contractors were called in to test the diesel fuel UST system. The tank tested tight, but a leak was discovered and repaired where the pump was installed into the tank. The results of this testing were included in Livingston Services Company's initial response to the IEPA which is attached as Exhibit 4. It is believed this leak was the source of the petroleum release.

(Rec. 5, at p. 5)

The Work Plan proposed (a) examining the extent of any contamination from the tile on the neighboring property (b) examining the extent of any contamination near the tanks and (c) installing monitoring wells to investigate any groundwater contamination. (Rec. 5, at pp 6-13)

At this point, activities appear to slow as the Agency would ultimately never review or approve the Work Plan. In response to an October 1, 1991 IEPA memorandum (not contained in the Agency Record), Livingston reminded the IEPA of its intent to enact the Work Plan upon approval and its intent to seek reimbursement from the LUST Fund. (Rec. 6) More time passed and on May 1, 1992, the consultants called the Agency to determine the status of the Agency's review of the Work Plan, and was informed that the Agency would not review a Work Plan at a site where the owner intends to access the LUST Fund until an application for reimbursement is submitted and approved. (Rec. 7, at p. 2)

C. APPLICATION FOR REIMBURSEMENT

On September 9, 1992, over eighteen months after the release was reported, Livingston submitted an application for reimbursement from the LUST Fund. (Rec. 7) The actual application as submitted is not contained in the Agency record. This appears to be because the application was rejected as incomplete and returned by the Agency twice and revised and resubmitted twice by Livingston. There are, however, enough surrounding documents to have a good idea of the sequence of events. It appears most likely that the following question on the application was left blank, incomplete or unresponsive:

(d) This release is:

_____ tank leak	
_____ tank system leak,	part of system _____
_____ product spill,	date of spill _____
_____ product overfill,	date of overfill _____

(Rec. 51, at p 5)

On or about September 18, 1992, the Agency contacted the consultant in order to determine the type of release, and was told by the consultant that tank tightness tests were performed on all tanks and all tanks were found to be tight, and that while there was another service station in the area, the consultant “concurred with me in that a likely cause of the release was a product overfill.” (Rec. 51, at 3) This is the first mention of a product overfill theory, and it appears to be premised solely on the notion that all of the tanks tested tight, when in fact, not all of the tanks were tested (only the diesel tank and lines were tested) and the diesel tank line had actually been found to be leaking and was repaired.

On November 23, 1993, the Agency rejected the application for payment as incomplete,

stating in relevant part:

Please complete item 7(d). If the type of release has not been confirmed, then indicate the likely type of the release.

(Rec. 49)

On December 7, 1993, the first revised application for reimbursement was submitted. Again, the actual submittal is not in the Agency's record because it was rejected and returned as incomplete, but it appears probable that the relevant page in the record is substantially the same as what was submitted. (Rec. 51, at p. 5) Next to item 7(d) the box for "product spill" is checked, the words "a 10000 gal tank" are inserted, and "March 5, 1991" is identified as the date of the spill. (Rec. 51, at p. 5)

Upon receipt of the revised application, the Agency noted a discrepancy between a "product spill" theory and evidence previously submitted of a line leak:

Technical Reports indicate that a diesel fuel line failed a tightness test on 3/7/91 and was subsequently repaired.

(Rec. 51, at p. 4 (Dec.11, 1992))

On December 14, 1992, the Agency rejected and returned the application for reimbursement for a second time. (Rec. 51, at 28) This time it requested "[a] detailed description of the nature and cause of the release (product spill)." (Rec. 51, at 28) The Agency did not identify the failed tightness test of the diesel fuel line as raising a discrepancy that contradicted the theory of a "product spill." In response, a second revised application was submitted in which Livingston stated that "[a]pparently the release was caused by the transport truck putting fill hose in monitoring well instead of fill pipe for distillate tank." (Rec. 51, at p. 6) This is the first mention of a theory that the truck had filling a monitoring well.

On December 23, 1992, the Agency rejected the application for reimbursement, stating that:

You are ineligible for reimbursement from the Fund for the following reason(s): In your Application, you stated that the contamination resulted from personnel pumping fuel into a monitoring well instead of the UST system. Therefore, you fail to satisfy 22.18b(a)(3) of the Illinois Environmental Protection Act.

(Rec.50)

The odd sequence of events reveals that Livingston was invited by the Agency to speculate on the likely cause of the release and without any basis other than the inaccurate assumption that the tanks and lines had tested tight, they theorized a fuel overfill occurred on the very same day Livingston had called IEMA to report the incident. The Agency accepted this explanation while knowing that the diesel fuel line had in fact failed a tightness test.

D. LIVINGSTON STOPS ENVIRONMENTAL RESPONSE.

Livingston had expended approximately \$150,000 on corrective action at the time of the reimbursement application. (Rec. 51, at p. 11) In May of 1993, a new consultant, Midwest Engineering Services, submitted a 45 Day Report (Rec. 11) and a report of additional corrective action activities entitled "Subsurface Exploration and Limited Petroleum Hydrocarbon Site Assessment," which recommended further soil and groundwater investigation. (Rec. 10, at p. 22) The report also identified the previous use of the property as an Amoco service station. (Rec. 10, at pp. 7 & 19)

The 45-day Report reiterates the mistaken assumption about tight lines:

When Livingston Service Company was notified that the problem could be originating from their property, various steps were taken to determine and

remedy the cause. The tanks and piping system were tightness tested and found to be acceptable. Because a skim of diesel fuel was noted to periodically be forming on the water within the UST cavity observation well, it was suspected that some product may have been off-loaded into the observation well by the fuel hauler by mistake.

(Rec. 11, at p. 9)

There is no suggestion that anybody observed an accidental off-loading, or has any other evidence that the fuel hauler accidentally pumped fuel into a well. The belief is premised on (i) the erroneous recollection that the tank system tested tight, and (ii) the periodic presence of product in the UST cavity, observable through a monitoring well.

Livingston later told the Agency that its consultants were unable to perform additional investigation because of other work commitments and on two occasions asked for an extension of time to proceed. (Rec. 14 & 16) The Agency agreed to the extensions, reminding Livingston that if it seeks reimbursement from the LUST Fund, prior approval of the work will be needed. (Rec. 13 & 15) No further work was performed, nor did Livingston submit a revised request for reimbursement from the LUST Fund.

E. THE 2007 LUST INCIDENT

In 2007, Evergreen FS was operating the service station pursuant to a lease. (Rec. 18, at p. 7) The same three tanks were still in use on the property as in 1991, plus an additional E-85 tank had been installed. (Rec. 17, at pp. 11-12)

On April 4, 2007, a limited subsurface soil investigation of the property was performed in the vicinity of the tanks by Evergreen's consultant, Environmental Management, Inc. (Rec. 17, at p. 13) The soil samples taken at the time showed exceedances of the constituents for petroleum

beyond Tier 1 Soil Remediation Objectives, and as a result IEMA was notified and incident number 20070479 was assigned. (Rec. 17, at p. 13) On June 13-15, 2007, the four tanks were removed and the representative of the Office of the State Fire Marshall (“OSFM”) directed that the IEMA be called again and a second report resulted in incident number 20070804. (Rec. 17, at pp. 13 & 77) The OSFM logs indicated that all four tanks had experienced a major release. (Rec. 17 at 77) There does not appear to be any dispute that incidents 20070479 and 20070804 are the same, (Rec. 17, at p. 14) and therefore, Petitioner will hereinafter refer to them jointly as the 2007 incident.

The OSFM issued an eligibility and deductibility determination to Evergreen for the 2007 incident. (Rec. 17, at p. 11) Since all tanks at the site are registered, OSFM determined that the deductible is \$10,000. (Rec. 17)

F. EVERGREEN SITE INVESTIGATION AND CORRECTIVE ACTION.

On August 15, 2007, an amended **45 day report** was submitted that also served as an initial corrective action completion report. (Rec. 17) This report was submitted solely in response to a 2007 incident, but the Agency responded that the cleanup would also need to address the 1991 incident. (Rec. 19, at p. 2)

On December 24, 2007, Evergreen submitted a **Stage 2 Site Investigation Plan and Budget**, for both the 1991 and 2007 incidents. (Rec. 21, at p. 2) It was approved by the Agency. (Rec. 23) The subsequent investigation revealed significant contamination near the location of the former pump islands, extending west towards the highway. (Rec. 24, at pp. 6-7)

On July 31, 2008, a **Stage 3 Site Investigation Plan and Budget** were then submitted

and additional work was proposed to further delineate the extent of contamination. (Rec. 24)

The Agency approved the plan and budget with slight modifications. (Rec. 26) The subsequent work indicated that the extent of contamination had been defined to the east and west of the property, but not to the north and south of the existing monitoring well network. (Rec. 27, at p. 10)

On April 1, 2009, an **Amended Stage 3 Site Investigation Plan and Budget** were then submitted and additional work was proposed to further delineate the extent of contamination. (Rec. 27, at p. 14) The Agency approved the work. (Rec. 31) Contamination discovered during this work was subsequently reported to the Agency, as was the need for additional off-site investigation to the south. (Rec. 32, at p. 11)

On October 19, 2009, Evergreen submitted a **Second Amended Stage 3 Site Investigation Plan and Budget**, along with the **Stage 3 and Amended Stage 3 Actual Cost Budget**. (Rec. 32) The Plan sought permission to conduct further investigation to delineate offsite contamination. (Rec. 32, at p. 11) The budget was revised, (Rec. 34), and then approved by the Agency on February 17, 2010. (Rec. 35)

On July 6, 2010, Evergreen submitted a **Site Investigation Completion Report** and **Second Amended Stage 3 Actual Costs Budget**. (Rec. 37) The site investigation work had delineated the extent of soil and groundwater contamination as above remediation objectives across most of the property, extending under the highway to the west and a small portion of the agricultural property to the south. (Rec. 37, at p. 12) The report was approved on October 26, 2010 and the budget was approved as modified. (Rec. 39) The budget approved in the amount of \$25,500.40. (Rec. 39, at p. 3)

By this point in time, Evergreen had submitted four payment applications that had been approved for a total of \$153,934.64. (Rec. Part I, at p. 11) At no time had the issue of apportionment been raised or any issues specific to the 1991 incident been raised. Furthermore, the site investigation had, if anything, revealed contamination to the West and South of the site, whereas the 1991 incident had involved a tile line running East from the property.

G. THE AGENCY APPORTIONS TWO PAYMENT APPLICATIONS

1. PCB 11-51.

On November 10, 2010, Evergreen applied for payment of the \$25,500.40 approved in the budget, plus \$911.65 in handling charges, for a total of \$26,063.15. (Rec. Part I, at pp. 13 & 18) The denial letter states in relevant part:

Item # Description of Deductions

- 1. \$13,250.20, deduction for costs that require a 50% apportionment of costs pursuant to 35 Ill. Adm. Code 734.640. Pursuant to Section 57.8(m) of the Act, the Illinois EPA may apportion payment of costs for plans submitted under Section 57.7 of the Act if:**
 - a. The owner or operator was deemed eligible to access the Fund for payment of corrective action costs for some, but not all, of the underground storage tanks at the site; and**
 - b. The owner or operator failed to justify all costs attributable to each underground storage tank at the site.**

The release for lost incident number 910580 was deemed ineligible.

(Petition for Review; see also Rec. Part I, at p. 6 (reviewer notes: “release not eligible tanker filled monitoring well”))

2. PCB 12-61

On March 11, 2011, Evergreen submitted a **Corrective Action Plan and Budget**, which proposed institutional controls on the subject and neighboring properties to close-out the site.

(Rec. 45) The budget was approved and the plan was approved with the modification that some re-sampling be performed on one of the monitoring wells. (Rec. 47) Specifically, the budget was approved for \$18,297.22 with no reference to apportionment. (Rec. 47, at p. 4)

On July 21, 2011, Evergreen applied for payment of \$12,303.26 approved in the budget (the consulting fees had come in under budget). (Rec. Part I, at pp. 50, 60) This application is the subject of the second pending appeal. The payment was also subjected to a 50% apportionment for the same reasons as the prior payment application. (Petition for Review)

ARGUMENT

The burden of proof in these proceedings is on the Petitioner. “The standard of review under Section 40 of the Act is whether the application, as submitted to the Agency, would not violate the Act and Board regulations.” Swif-T-Food Mart v. IEPA, PCB 03-185 (May 0, 2004). “Further, on appeal before the Board, the Agency’s denial letter frames the issue and the UST owner or operator has the burden of proof.” Freedom Oil Co. V. IEPA, PCB 03-54 (Feb. 2, 2006).

I. THERE WAS AN UNDERGROUND STORAGE TANK RELEASE IN 1991.

*[Telephone] is one name for a game played around the world, in which one person whispers a message to another, which is passed through a line of people until the last player announces the message to the entire group. Errors typically accumulate in the retellings, so the statement announced by the last player differs significantly, and often amusingly, from the one uttered by the first.*³

The best evidence of the source of the 1991 incident is the tightness test conducted immediately after the incident was reported that revealed a leak that was repaired. (Rec. 2, at 4) For reasons unknown, that knowledge was lost over time. Most likely the source of lapsed memory originated from the fact that different companies tested the tank and the lines, which is not in and of itself unusual. (Hrg. Trans. at p. 16) Only memory that the tank tested tight was maintained, while the memory of the leak in the line was lost, and the problem was compounded by the Agency insisting that a theory of the release be presented, even if unknown. (Rec. 49) Falsely assuming underground storage tanks were tight, speculation of an overfill or spill was entertained.

³ http://en.wikipedia.org/wiki/Chinese_whispers (visited Mar. 16, 2012).

At the hearing, a professional engineer offered his expert opinion on whether the information in the files from the early 1990s “is consistent with an overflow of the observation well?”

No. There is no consistency, but they did, like I said, check the piping. They did determine that there was a leak in the piping pretty well a day or two after the release was reported. They fixed the piping and then that’s when they tested the tank as well to make sure everything was back in so they could get the facility back in operation.

(Hrg. Trans. at p. 19)

The final rendition of the story, as is typical in the “telephone game,” however, is particularly absurd, because an additional explanation is offered that because a sheen is “periodically . . . forming on the water within the UST cavity observation well” there must have been an accidental release into the observation well. (Rec. 11, at p. 9) Observing a sheen in the observation well, however, is evidence of a tank release, not a release into the observation well. Under the federal regulations, the observation or monitoring well is installed in order “to detect releases within the excavation zone from any portion of the tank that routinely contains product.”

(40 CFR 280.43(f)(7)) As explained in the hearing:

An observation well -- typically, the way they install them is they usually put four observation wells around the perimeter of the underground storage tanks to detect if the groundwater shows a sheen of the product that was being stored in the tank. They typically put it in the backfill of the tank excavation. That’s the . . . most likelihood to determine where the release would be.

(Hrg. Trans. at pp. 14-15)

Furthermore, the observation well is typically nine-inches in diameter, whereas the fill pipe is typically three to four inches in diameter and has a “quick connect” to secure the tanker truck hose securely. (Hrg. Trans. At pp. 15-16)

my opinion would be that most of these tank drivers that do this every day, no matter what, they would be able to connect the tank line that they used to pull or put into the underground storage tank fill pipe. They have a quick connect there. It's a thru have pulled the observation well, they would have to take the cap off or they would have to more or less pull the lid off and stick the hose in there, which they know there would be no way to connect it.

There's not too many tank drivers that wouldn't know what to do and wouldn't know what they're doing when they're putting fuel in a tank. That's why I don't think it was a direct spill into the observation well. It could have been other things. It could have been where it overspilled when they were fueling the tank. It could have been the piping itself, but definitely my opinion would be they couldn't stuck that in that well.

(Hrg. Transcript, at pp. 19-20)

It will likely be argued that the Agency determination made in December 23, 1992 was a final and appealable decision, and therefore Evergreen cannot challenge the decision. However, the 1992 decision only related to the issues presented to the Agency at the time and were made specifically within the mandate that if "the type of release has not been confirmed, then indicate the likely type of the release." (Rec. 49) The rule has long been that the Agency is precluded from "unilaterally chang[ing] its eligibility determination," Hillsboro Glass Co., v. IEPA, PCB No. 93-9 (Mar. 11, 1993). Which is to say, that the purpose of finality is to protect the interests of the applicant, who has relied on prior determinations. Id. at p. 4. In this case, the applicant has relied on several Agency budgets and payments that were not apportioned and the issue of the factual and legal relevance of the 1991 incident was not presented. The better practice where the Agency has uncovered "new" information (or more specifically old information that was unknown or ignored) is to give the applicant notice and an opportunity to address the factual and legal relevance of the information prior to a final Agency decision. That information by necessity has been submitted herewith to the Board, and clearly establishes by a preponderance

of the evidence that the 1991 incident was not the result of filling a monitoring well.

II. ALTERNATIVELY, ANY RELEASE THROUGH THE MONITORING WELL WAS A RELEASE FROM THE UNDERGROUND STORAGE TANK SYSTEM.

The LUST Fund “shall be accessible by owners and operators who have a confirmed release from an underground storage tank or related tank system.” (415 ILCS 5/57.9(a)) :

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

35 Ill. Admin. Code § 731.112 (derived from 40 CFR 280.10).

The containment system is not defined and the Board has previously indicated that the term should be “given its ordinary meaning.” Harlem Township v. Illinois EPA, PCB No. 92-83 (Oct. 16, 1992). That case involved the question of whether a dispensing pump and nozzle were part of the UST system; unlike the dispensing equipment, the monitoring well is an integral part of the tank system’s release detection and containment system.

As acknowledged in an Agency Memorandum in April of 1991, the monitoring wells are a "part of the required leak detection system." (Rec. 3) Monitoring wells were a means for “[o]wners and operators of new and existing UST systems” to comply with the release detection requirements of federal regulations. (40 CFR 280.40) The purpose of a monitoring well is to detect releases within the excavation zone from any portion of the tank that routinely contains product. (40 CFR 280.43(f)(7)) There are several requirements for the monitoring well in 40 CFR 280.43(f), including that the well be “sealed” and “clearly marked and secured to avoid unauthorized access and tampering.” (40 CFR 280.4(f)(4) & (8)) Release detection is one of many parts of the underground storage tank system intended to contain or minimize releases into

the environment.

In the early 1990s, there were several appeals to the Board concerning whether the dispensing pump was part of the underground storage tank system, Harlem Township v. Illinois EPA, PCB No. 92-83 (Oct. 16, 1992); Ramada Hotel, O'hare, v. Illinois EPA, PCB No. 92-87 (Oct. 29, 1992); and Greenville Airport Authority, v. Illinois EPA, PCB No. 92-157 (Feb. 4, 1993), culminating in an appellate court decision. Township of Harlem v. EPA, 265 Ill. App. 3d 41 (2d Dist. 1994). Until the Illinois Appellate Court resolved the dispute, the matter is significantly contested, and included dissenting opinions from Board members. Many of the considerations in those decisions favor treating the monitoring well as part of the underground storage tank system. (1) The dispensing pump was aboveground, Township of Harlem, 265 Ill. App. 3d at 45, while the monitoring well was “underground,” a prominent adjective in the statutory text. (2) Furthermore, above-ground releases pose a different type of risk since they can be easily detected and cleaned-up and lack the threat of corrosive contact with the tanks themselves, id., whereas a release through a monitoring well would be no more visible than an overflow of a fill pipe, and would go directly into the loose backfill area surrounding the tank where it could corrode the tanks and lines. (3) As discussed earlier, the regulatory system governing the dispensing unit is entirely separate from the environmental regulations of which a detection system is a required component. Cf. Harlem Township v. Illinois EPA, PCB No. 92-83 (Oct. 16, 1992). While Petitioner cannot claim that filling a monitoring well is a likely scenario (particularly as it seems unlikely that it in fact happened here), the regulations express at least some concern over this risk by requiring the monitoring well to be clearly marked and sealed.

Consequently, assuming *in arguendo* that there was a release by filling a monitoring well,

such a release is from the underground storage tank system.

III. ASSUMING IN ARGUENDO THAT THERE WAS A NON-LUST INCIDENT IN 1991, APPORTIONMENT IS NOT AUTHORIZED WHERE ALL OF THE TANKS WERE REGISTERED.

Even assuming the Agency's factual claims, the apportionment provisions have no application here since they are intended to address non-registered tanks.

The Agency may apportion payment of costs for plans submitted under Section 57.7 if:

(1) the owner or operator was deemed eligible to access the Fund for payment of corrective action costs for some, but not all, of the underground storage tanks at the site . . .

(415 ILCS 5/57.8(a)(1) (emphasis added)

All of the tanks at the site were registered and eligible. The Board has explained the purpose of this rule is to apportion cleanup costs in the presence of unregistered tanks. "Under Section 57.8(m) of the Environmental Protection Act (Act) (415 ILCS 5/57.8(m) (2004)), if some but not all of a site's USTs are eligible for reimbursement and the UST owner or operator fails to attribute all cleanup costs to each UST, the Agency may apportion the payment of costs between eligible and ineligible tanks." Freedom Oil v. IEPA, PCB Nos. PCB 03-54; PCB 03-56; PCB 03-105; PCB 03-179; PCB 04-2 (Feb. 2, 2006) (emphasis added). The Board also identified a decision that preceded Section 57.8(m) of the Act as setting forth the justification for apportionment:

Where active UST systems are operated near closed tanks or in multi-tank systems it can be difficult to accurately determine which tanks caused the contamination or what degree of contamination is related to each leaking tank. Where registered and unregistered tanks are located at a common site it may be necessary to apportion the costs of corrective action accordingly.

Freedom Oil v. IEPA, PCB Nos. PCB 03-54; PCB 03-56; PCB 03-105; PCB 03-179; PCB 04-2 (Feb. 2, 2006) (quoting Martin Oil v. IEPA, PCB 92-53).

In Freedom Oil, the site contained five unregistered USTs from which a release was reported, but the tanks had been filled with sand in the 1960s and thus were ineligible for registration. Similarly, in Martin Oil, the case which preceded Section 57.8(m), there were also several unregistered tanks that were ineligible for registration because they had been taken out of service too long ago.⁴

The Board's regulations only authorize apportionment on the basis of tanks:

The Agency will determine, based on volume or number of tanks, which method of apportionment will be most favorable to the owner or operator. The Agency will notify the owner or operator of such determination in writing.

(35 Ill. Admin. Code § 734.640(b))

It is not clear how the Agency determined a 50% apportionment in the absence of any reference to either the "volume or number of tanks." Indeed the Agency's position is inherently contradictory -- a release into a monitoring well is not a release attributable to a tank and therefore we will treat it as a release from multiple ineligible tanks. It would appear that the Agency is simply making up a rule on the fly in derogation of the statute and regulations cited in its denial letter.

⁴ While the recent decision in Metropolitan Pier and Exposition Authority v. IEPA, PCB No.10-73 (July 7, 2011), raised the issue of apportionment under Section 57.8(m) of the Act, the case was decided on other grounds. However, it is worth observing that once again apportionment was sought because of the presence of several older tanks that were not only unregistered but ineligible for registration.

V. ASSUMING IN ARGUENDO THAT AN APPORTIONMENT IS REQUIRED, ANY RELEASE THROUGH A MONITORING WELL WAS DE MINIMIS.

Even if an apportionment were required in this case, the Board has previously ruled that such an apportionment should not be required where, as here, the amount is de minimis:

The Board is not holding that in every instance a UST owner or operator must prove that 100% of cleanup costs are attributable to eligible tanks. Rather, a UST owner or operator could avoid apportionment if it shows by a preponderance of the evidence that, for example, 5% of the cleanup costs incurred were attributable to ineligible tanks, with 95% attributable to eligible tanks.

Freedom Oil v. IEPA, PCB Nos. PCB 03-54; PCB 03-56; PCB 03-105; PCB 03-179; PCB 04-2 (Feb. 2, 2006).

More so than any previous argument herein, this issue is particularly difficult to address since Petitioner maintains that there was no release through the monitoring well and none of the cleanup costs are attributable to ineligible tanks. Nonetheless, entertaining such a theory would certainly lead to the conclusion that very little of the cleanup costs incurred by Evergreen arose from the 1991 incident: (1) The 1991 incident was believed not to exceed 500 gallons, a liberal estimate, of which at least 100 gallons had been recovered. (Rec. 2, at p.3) (2) Neither the local fire department nor the operator reported a visible spill to IEMA on the day that “the spill” allegedly occurred. (Rec. 1) (3) The monitoring well was probably no more than 9 inches in diameter and 20 feet deep. (Hrg. Trans. at p. 15)⁵ (4) The USEPA has also noted that typically a small volume of fuel is released from “spills and overfills” in comparison to leaks. See Township of Harlem v. EPA, 265 Ill. App. 3d 41, 45 (2nd Dist. 1994).

The 1991 incident also involved a release which flowed to the creek through a field tile

⁵ At the most, assuming there was no groundwater in the monitoring well, the volume of such a cylinder would be about 66 gallons.

running East from the property. If there had been a release into the observation well which was discovered in a creek two-and-a-half miles away later that day, it would obviously be moving fairly quickly and whatever was released “would have gone out immediately into the creek and whatever was remaining would have been in the backfill of the tank.” (Hrg. Trans. at p. 22)

In contrast, the 2007 incident involved a major release from all four tanks. (Rec. 17 at 77) Instead of to the East, the consultant testified:

The contamination that’s found presently is actually west and south of the tank pit. So the investigation work that was done back in ‘91 that was limited determined that there was very low levels of soil and groundwater contamination on the site at the present time. Now, the levels are extremely high and the plume is extremely large compared to ‘91.

(Hrg. Trans. at p. 21)

While the contamination levels are higher today, the nature of the cleanup work has largely been removal of the tanks and immediately surrounding contaminated soil through early action and subsequent investigation to determine whether the incidents can be closed with the use of institutional controls. This work would have been performed regardless of the 1991 incident. So, in the highly improbable and unlikely event that a release had been discharged in 1991 through a monitoring well, no current costs were employed to address them given the continual and more substantial releases from all of the tanks present through 2007.

VI. THE APPLICATION FOR PAYMENT IS NOT A “PLAN” SUBJECT TO APPORTIONMENT.

This case involves an apportionment of an application for payment. Under the Act, apportionment is authorized only “for plans submitted under Section 57.7.” (415 ILCS 5/57.8(m)) Section 57.7 identifies a “plan” as follows:

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.

(415 ILCS 5/57.7(c)(5))

The structure of the Act provides several distinctions between Section 57 plans and Section 58 applications for payment. Agency approval of site investigation and corrective action plans and budgets is considered final for purposes of seeking payment from the LUST Fund so long as the actual costs come in within budget. (415 ILCS 5/57.7(c)(1)) If the Agency denies or modifies any such plan or budget, the decision is subject to the review procedures in Section 57.7 of the Act. (415 ILCS 5/57.7(c)(4)) Alternatively, if the Agency fails to timely act, the plan is deemed denied. (415 ILCS 5/57.7(c)(2))

In contrast, an application for payment is submitted under Section 57.8 of the Act. (415 ILCS 5/57.8(a)(1)) An application for payment is subject to limited review pursuant to generally accepting accounting practices and auditing for adherence to the corrective action measures previously approved under Section 57.7. (415 ILCS 5/57.8(a)(1)) If the Agency denies payment, in full or part, the decision is appealable under Section 57.8(I) of the Act. (415 ILCS 5/57.8(I)) If the Agency fails to Act, contrary to plans submitted under Section 57.7, the payment application is deemed approved if a timely decision is not made. (415 ILCS 5/57.8(a)(1))

The application for payment is not a “plan” submitted under Section 57.7 of the Act; it is submitted under Section 57.8 of the Act, for work and costs approved in a Section 57.7 submittal. The statute is designed to have almost all of the important decisions about the scope of work and budget decided at the “plan” stage, leaving little but confirmation that the approved work was actually performed and the expenses accounted for. Clearly, the Agency has violated the Act by apportioning an application for payment for work previously approved without an apportionment.

In addition, practical reasons justify this interpretation of the Act. After the plan is performed, it becomes more difficult “to justify all costs attributable to each underground storage tank.” (415 ILCS 5/57.8(m)(2)) The performance of corrective action has the necessary consequence of removing evidence of the contamination, making it harder for such a determination to be made by the owner/operator, the Agency or the Board. Indeed, the preferred approach should be to raise the potential issue earlier, so that the site investigation can be conducted in light of this potential issue. Such investigation, to the extent required by Section 57.8(m) should be a reimbursable expense as well.

In summary, even if all of the previous arguments are not persuasive, there is no legal basis for directing an apportionment at the application for payment stage.

CONCLUSION

Through a series of alternate arguments, Petitioner has provided several factual and legal errors in the Agency's decisions. Accordingly, the denial should be reversed, payment of the requested amounts approved and attorney's fees awarded upon post-hearing proof of the amount incurred in this appeal, or for such other and further relief as the Board deems meet and just.

EVERGREEN FS, INC.,
Petitioner

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THIS FILING IS SUBMITTED ON RECYCLED PAPER

APPENDIX
INDEX TO RECORD

Digital Record

Doc. No.	Description	Date
1.	IEMA Report of Release	March 5, 1991
2.	LSC Corrective Action Response Report	April 5, 1991
3.	IEPA Review of Report	April 19, 1991
4.	IEPA Ltr Requiring Site Investigation	April 19, 1991
5.	LSC Work Plan for Soil & Groundwater Investigation	May 3, 1991
6.	LSC Follow-Up Letter	Oct. 18, 1991
7.	LSC Cover Letter for Application to Access Fund	Sept. 9, 1992
49.	IEPA Letter Stating Application Incomplete	Nov. 23, 1992
48.	IEPA Letter Requesting Clarification of Cause of Release	Dec. 14, 1992
51.	Application to Access Fund w/ reviewer notes (pp. 1-2) IEPA Reviewer Notes (Dec. 22, 1992) (p. 3) IEPA Reviewer Notes (Sept. 18, 1992) (p. 4) IEPA Fax (Dec. 11, 1992) (pp. 5-27) Application (Various Dates) (p.28) IEPA Letter of Incompleteness (Dec. 14, 1992) (pp. 29-31) IEPA Completeness Checklist (Sept. 18, 1992) (p. 32) IEPA Communication to OSFM (Sept. 23, 1992)	Dec. 22, 1992
50.	IEPA Denial of Application	Dec. 23, 1992
8.	IEPA Demand for Update	Mar. 16, 1993
9.	LSC Response to IEPA	April 7, 1993
10.	LSC Subsurface Exploration And Limited Petroleum Hydrocarbon Site Assessment	May 7, 1993
11.	LSC 45 Day Report	May 7, 1993
12.	IEPA Technical Reviewer Notes	May 25, 1993
13.	IEPA Letter Directing Further S & GW Investigation	June 17, 1993
14.	LSC Request for Six Month Extension	Aug 25, 1993
15.	IEPA Letter Directing Further S & GW Investigation	Sept. 3, 1993
16.	LSC Request for Six Month Extension	Dec. 13, 1993
17.	EFS Amended 45-Day Report & Corrective Action Completion Report	Aug. 15, 2007
18.	EFS Ltr forwarding Previous Phase II	Sept. 10, 2007
19.	IEPA Reviewer Notes	Dec. 4, 2007
20.	IEPA Ltr Rejecting Completion Report	Dec. 7, 2007
21.	EFS Stage 2 Site Investigation Plan & Budget	Dec. 27, 2007
22.	IEPA Reviewer Notes	April 18, 2008

23.	IEPA Ltr Approving Stage 1 & 2 Site Investigation Plan and Budget	April 29, 2008
24.	EFS Stage 3 Site Investigation Plan & Budget	July 31, 2008
25.	IEPA Reviewer Notes	Nov. 3, 2008
26.	IEPA Ltr Approving Stage 3 Site Investigation Plan & Budget	Nov. 18, 2008
27.	EFS Stage 3 Amended Site Investigation Plan & Budget	April 1, 2009
28.	IEPA Reviewer Notes	June 22, 2009
31.	IEPA Letter Conditionally Approving Stage 3 Amended Site Investigation Plan & Budget	June 29, 2009
32.	EFS Second Amended Stage 3 Site Investigation Plan et al.	Oct. 19, 2009
33.	IEPA Reviewer Notes	Feb. 5, 2010
34.	EFS Revised Stage 3 Budget Amendment	Feb. 16, 2010
35.	IEPA Ltr Approving Revised Stage 3 Budget Amendment	Feb. 17, 2010
37.	EFS Site Investigation Completion Report & Actual Costs	July 6, 2010
38.	IEPA Reviewer Notes	Oct. 21, 2010
39.	IEPA Ltr Approving Site Investigation Completion Report and Actual Costs Budget as Modified	Oct. 26, 2010
45.	EFS Corrective Action Plan	Mar. 11, 2011
46.	IEPA Reviewer Notes	July 6, 2011
47.	IEPA Ltr Approving Corrective Action Plan and Budget with modification to Plan	July 8, 2011

NOTE: Exhibits 29, 30, 36, 40-44 relate to different site.

Part I – Paper Record

Pages	Description	Date
1-3	IEPA Decision Letter on Payment Application	Jan. 20, 2011
4-7	IEPA Reviewer Notes of Payment Application	Jan. 19, 2011
8-10	IEPA Reviewer Handwritten Notes on L.I.T.	Jan. 14, 2011
11	LUST Claims Tracking System	Nov. 30, 2010
12	IEPA Reviewer (BB) Handwritten Notes	Undated
13-43	EMI Billing Package for Stage 3 Site Investigation	Nov. 10, 2010
44-47	IEPA Reviewer Notes of Second Payment Application	Sept. 14, 2011
48-50	IEPA Reviewer Handwritten Notes on L.I.T.	Aug. 31, 2011
51	LUST Claims Tracking System	July 27, 2011
52-53	IEPA Fax from Elston to VanScyoc re W-9	Sept. 14, 2011
54	IEPA Reviewer Handwritten Notes	Undated
55-80	EMI Billing Package for Corrective Action	July 21, 2011
81-84	IEPA Denial of Application for Reimbursement	Dec. 23, 1992
85-92	MES, Subsurface Exploration and Limited Petroleum Hydrocarbon Site Assessment (partial)	May 7, 1993