

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

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

NOTICE

John Therriault, Acting Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

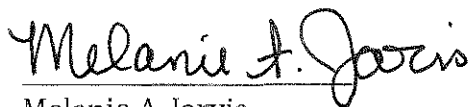
Carol Webb, Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P. O. Box 19274
Springfield, IL 62794-9274

Patrick Shaw
Fred C. Prillaman
Mohan, Alewelt, Prillaman & Adami
1 North Old Capitol Plaza, Suite 325
Springfield, IL 62701-1323

PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board a **RESPONSE TO PETITIONER'S POST-HEARING BRIEF AND MOTION TO DISMISS**, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



Melanie A. Jarvis
Assistant Counsel
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)
Dated: April 20, 2012

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

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

RESPONSE TO PETITIONER'S POST-HEARING BRIEF AND MOTION TO DISMISS

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, Melanie A. Jarvis, Assistant Counsel and Special Assistant Attorney General, and hereby submits its Response to the Petitioner's Post-Hearing Brief to the Illinois Pollution Control Board ("Board").

I. INTRODUCTION

The circumstances surrounding this appeal are not complicated, though Petitioner has made of yeoman's effort to make it appear as if it were. The Petitioner has simply argued that a 1991 diesel release, determined ineligible time and time again, is somehow now in 2012 eligible.

Simply put, the time has passed to reconsider each of the many determinations which have consistently held that the 1991 release is ineligible. And, when the Illinois EPA states that "the time has passed" it wishes to point out that the time past some 20 years ago, in the last millennium.

Petitioner has no issue to present on appeal and as such the appeal must be dismissed. Petitioner's only claim to an issue in this matter stems from its 11th hour attempt to muddy the water by offering, belatedly within this proceeding, that somehow the Illinois EPA's apportionment of payment opens the door to a review of each and every ineligibility

determination that has been made in the past. However, when you view this argument, it is clear that even this contention fails.

First, it can't be ignored that Petitioner had a hearing on the Petition and failed to present or even elicit any testimony or documentation at hearing mentioning the apportionment of the costs issue it now claims is the key to its aggrieved status.

Second, the Petitioner's brief is nothing more than a not so subtle attempt to use the apportionment of costs issue it now raises as, yet again, one more way to backdoor an appeal of the 1992 final eligibility decision on the 1991 "release" (and, for that matter a challenge to every other similar finding that has been made by every authorized Administrative Agency that has ever considered the 1991 matter). The Illinois EPA will more fully brief the jurisdictional implications of this unexpected twist in Petitioner's challenge in greater detail below.

What the Board will find, in the administrative record, is the fact that it is clear that the December 23, 1992 Illinois EPA eligibility decision is final determination, it was not appealed, and it cannot be appealed at this point in time. The only appealable issue in the January 20, 2011 and October 12, 2011 decision is the apportionment of costs and whether the 50% apportionment is correct. The Petitioner, however, did not appeal the apportionment issue. As such, the Board may disregard this argument and correctly find in favor of the Illinois EPA on the pending matter.

II. MOTION TO DISMISS FOR LACK OF JURISDICTION

Challenges to a tribunal's jurisdiction can be raised at any point in the proceeding. Concerned Boone Citizens, Inc. v. M.I.G. Investments, Inc. (2d Dist.1986), 144, Ill.App.3d 334, 494 N.E.2d 180; Ogle County Board v. PCB, 272 Ill. App. 3d 184, 191, 649 N.E.2d 545, 551 (2d Dist. 1995). Where the Board finds it lacks jurisdiction to hear a case, it must dismiss the matter. WEI

Enterprises v. Illinois EPA, PCB 04-22 (February 19, 2004); Mick's Garage v. Illinois EPA, PCB 03-126 (December 18, 2003); Panhandle Eastern Pipe Line Co. v. IEPA, PCB 98-102, slip op. at 30 (January 21, 1999); Kean Oil v. Illinois EPA, PCB 97-146 (May 1, 1997).

Petitioner brings this appeal based upon January 20, 2011 and October 12, 2011, decision letters that denied costs due to apportionment. However, as is evident from the Petitioner's appeal, testimony presented at hearing and its brief, the Petitioner is actually attempting to appeal a 1992 eligibility determination pertaining to a 1991 release. The Board in reviewing its jurisdiction to hear a matter must consider whether the Petitioner can appeal a 1992 decision, under the guise of appealing decisions of apportionment, when that 1992 decision was never appealed and has been final for about two decades. It is clear that they cannot do so. The time for appealing the eligibility of the release is long past.

The law is very clear on this issue. Reichhold Chemicals, Inc. v. PCB [3d Dist.1990], 204 Ill.App.3d 674, 561 N.E.2d 1343, held that the Illinois EPA has no statutory authority to reconsider a permit decision. Further, it is well established that an administrative agency has no inherent authority to amend or change its decision and may undertake reconsideration only where authorized by statute. (Pearce Hospital v. Public Aid Commission (1958), 15 Ill.2d 301, 154 N.E.2d 691; Reichhold Chemicals Inc. v. PCB (3d Dist.1991), 204 Ill.App.3d 674, 561 N.E.2d 1343.) Although the Board possesses such power, the appellate court has held that the Illinois EPA has no such reconsideration powers. (Reichhold, 561 N.E.2d 1343.) In general, finality, as it pertains to administrative agency decisions, is a decision which "fully terminates proceedings before an administrative body." Taylor v. State Universities Retirement, 111 Ill. Dec. 283; 512 N.E.2d 399 (Ill.App. 4 Dist.1987)

The Board found in Mick's Garage v. Illinois EPA, PCB 03-126 (December 18, 2003) that it lacked jurisdiction to review the Illinois EPA's February 7, 1992 deductibility determination. The Board stated that it "has held that a condition imposed in a permit, not appealed to the Board under Section 40(a)(1), may not be appealed in a subsequent permit. Panhandle Eastern Pipe Line Co. v. IEPA, PCB 98-102, slip op. at 30 (Jan 21, 1999)".

In Kean Oil v. Illinois EPA, PCB 97-146 (May 1, 1997), the Board held that it was concerned that there was "an attempt by petitioner to misuse the submittal process in order to remedy its failure to properly appeal the first decision by the Agency concerning this matter. The Board cannot allow the potential misuse of the reimbursement system and as the Agency has properly identified, it does not have the authority to reconsider a final determination." A similar situation is found in this case.

The Illinois EPA issued a final, appealable, decision on December 23, 1992 informing the Petitioner that "[i]t has been determined that you are ineligible to seek reimbursement for corrective action costs". (AR2, p. 1289, Disk Doc. 50) The reason given in this letter for the denial was that "[i]n 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". The Illinois EPA does not have statutory authority to reconsider its final decisions. See, Reichhold Chemicals. The Board has held that where final decision is not appealed to the Board, it cannot be appealed in a subsequent decision. See, Mick's Garage. In this case, the Petitioner is attempting to appeal a 1992 eligibility determination when appealing January 20, 2011 and October 12, 2011 decision letters.

The Illinois EPA's final decision frames the issues on appeal. Todd's Service Station v. Illinois EPA, PCB 03-2 (January 22, 2004), p. 4. The Illinois EPA did not determine the eligibility

of the 1991 release in its January 20, 2011 and October 12, 2011 decision letters. That decision was made in 1992. The only denial point in the January 20, 2011 and October 12, 2011 letters was that the amount was apportioned due to a binding final decision made in 1992. The Board does not have jurisdiction to hear a case where the issue is whether or not the 1991 release was eligible, and that appears to be the only issue that the Petitioner appealed.

III. SUMMARY OF JURISDICTIONAL ISSUE

Based upon the above argument, the Illinois EPA respectfully requests that the Board dismiss this case due to lack of jurisdiction because the Petitioner is attempting to appeal a decision made in 1992 by appealing Illinois EPA apportionment decisions made in 2011. If the Board finds that it has jurisdiction to proceed, the Illinois EPA offers the following response to the Petitioner's Brief.

IV. BURDEN OF PROOF

Section 105.112(a) of the Board's procedural rules (35 Ill. Adm. Code 105.112(a)) provides that the burden of proof shall be on the petitioner. In reimbursement appeals, the applicant for reimbursement has the burden to demonstrate that costs are related to corrective action, properly accounted for, and reasonable. Rezmar Corporation v. Illinois EPA, PCB 02-91 (April 17, 2003), p. 9.

The primary focus of the Board must remain on the adequacy of the permit application and the information submitted by the applicant to the Illinois EPA. John Sexton Contractors Company v. Illinois EPA, PCB 88-139 (February 23, 1989), p. 5. Further, the ultimate burden of proof remains on the party initiating an appeal of an Illinois EPA final decision. John Sexton Contractors Company v. Illinois Pollution Control Board, 201 Ill. App. 3d 415, 425-426, 558 N.E.2d 1222, 1229 (1st Dist. 1990).

Thus Evergreen FS, Inc. (“Evergreen” or “Petitioner”) must demonstrate to the Board that it has satisfied its burden before the Board can enter an order reversing or modifying the Illinois EPA’s decision under review. The record in front of the Board clearly supports the Illinois EPA decision. In this case, Evergreen simply failed to meet their burden of proof.

V. STANDARD OF REVIEW

Section 57.8(i) of the Environmental Protection Act (“Act”) grants an individual the right to appeal a determination of the Illinois EPA to the Board pursuant to Section 40 of the Act (415 ILCS 5/57.8(i)). Section 40 of the Act (415 ILCS 5/40) is the general appeal section for permits and has been used by the legislature as the basis for this type of appeal to the Board. When reviewing an Illinois EPA decision on a submitted corrective action plan and/or budget, the Board must decide whether or not the proposals, as submitted to the Illinois EPA, demonstrate compliance with the Act and Board regulations. Broderick Teaming Company v. Illinois EPA, PCB 00-187 (December 7, 2000).

The Board will not consider new information not before the Illinois EPA prior to its determination on appeal. The Illinois EPA’s final decision frames the issues on appeal. Todd’s Service Station v. Illinois EPA, PCB 03-2 (January 22, 2004), p. 4; Pulitzer Community Newspapers, Inc. v. EPA, PCB 90-142 (Dec. 20, 1990). In deciding whether the Illinois EPA’s decision under appeal here was appropriate, the Board must therefore look to the documents within the Administrative Record (“Record”), along with relevant and appropriate testimony provided at the hearing held on February 15, 2012, in this matter.¹

¹ Citations to the Administrative Record will hereinafter be made as, “AR, p. ____.” Parts 1 and 2 will be referenced. Further, parts of the AR on disk will be referenced by document number. References to the transcript of the hearing will be made as, “TR, p. ____.”

VI. STATEMENT OF FACTS

The facts in this case are presented within the Illinois EPA's administrative record already on file with the Board. Those facts have not changed and the presentation of testimony at hearing has not changed any of the facts already before the Board. The facts in the Illinois EPA record supporting this motion are as follows:

1. Evergreen is the owner/operator of a service station located in Dwight, Livingston County, Illinois. (AR2, p.252, Disk Doc. 18)

2. LUST Incident Numbers 910580 (AR2, p.6, Disk Doc. 1) and 20070479 (AR2, p.155, Disk Doc. 17) were obtained by Evergreen. The site has been assigned LPC#1050255113. (AR2, p.5, Disk Doc. 1)

3. On March 5, 1991, a release was reported to the Illinois Emergency Services and Disaster Agency ("IESDA"), the predecessor to the Illinois Emergency Management Agency ("IEMA"). (AR2 p. 6, Disk Doc. 1)

4. In the narrative of the report to IESDA, it is noted as follows: "Dwight F.D. Donald Beier called in and said they found diesel fuel two and one half miles away, north of location in Gooseberry Creek. Unk if any fish kill. Req. IEPA to respond. Original Caller Sarlin said tank was filled last night and now only has 4,700 gallons in it. They are missing 5,300 gallons. When Beier called me from Dwight F.D. he said his fire chief on scene said company denied responsibility and didn't tell about the large loss they told ESDA about." (AR2, p. 7, Disk Doc. 1)

5. On April 5, 1991, Petitioner submitted a letter detailing the investigation ongoing at the site. At the time a small leak was detected in the piping system and free diesel fuel product was noted in the monitoring well at the southwest corner. (AR2, p. 9, Disk Doc. 2) The Petitioner revised its estimate of the quantity of diesel fuel lost down to 500 gallons. (AR2, p. 10, Disk Doc.

2) According the map provided, the monitoring well in question is located adjacent to the diesel tank on site. (AR2, p. 17, Disk Doc. 2)

6. On May 3, 1991, Petitioner submitted a Work Plan and Soil and Groundwater Investigation. (AR2, p. 24, Disk Doc. 5) At the time of this report, the tank tested tight, but a line leak was discovered and repaired where the pump was installed into the tank. (AR2, p. 28, Disk Doc. 5) In this same document it should be noted that the Facility Plan map shows that both the northwest and southwest monitoring wells are located within the tank excavation and are adjacent to the diesel tank. (AR2, p. 44, Disk Doc. 5)

7. In a December 15, 1992, application for reimbursement from the fund, Thomas Salrin, manager of Petitioner's predecessor, Livingston Service Company (AR2, p. 1301, Disk Doc. 51), indicated as follows:

"Has there been a release from the UST system – NO.
Apparently the release was caused by the transport driver putting fill hose in monitoring well instead of fill pipe for distillate tank." (AR2, p.1298, Disk Doc. 51)

8. On December 23, 1992, Illinois EPA issued a final decision letter informing the Petitioner that "[i]t has been determined that you are ineligible to seek reimbursement for corrective action costs". (AR2, p. 1289, Disk Doc. 50) The reason given in this letter for the denial was that "[i]n 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". (AR2, p. 1290, Disk Doc. 50) This final decision was never appealed.

9. On August 7, 1993, Petitioner filed a Subsurface Exploration and Limited Petroleum Hydrocarbon Site Assessment which was prepared on May 7, 1993. (AR2, p.68, Disk Doc. 9 & 10)

10. In the May 7, 1993 Site Assessment, the Petitioner stated: "It is understood that a release of diesel fuel may have occurred on-site during UST filling activities. Both Mr. Newman and Mr. Salrin indicted that one observation well located on the northwest corner of the existing UST cavity may have been mistaken as the diesel fuel UST fill pipe by the tanker-truck driver, and that an undetermined quantity of diesel fuel was subsequently off-loaded into the observation well." (AR2, p.75-76, Disk Doc. 10)

11. The 45-day report, filed by Petitioner on May 14, 1993, stated that an unknown amount had been released and that the cause of the release was "[s]uspected Truck Driver unloaded some product into observation well instead of UST. (See attachment)". (AR2, p.126, Disk Doc. 11) The attachment to the 45-day report, stated:

"This release incident was originally reported when, in 1991, water flowing in Gooseberry creek was observed to contain a petroleum sheen by municipal workers. The creek, which is located east of the Livingston Service Company property on the opposite side of a bordering 20-acre tract of land, apparently flows in a southerly direction towards the municipal sewage treatment plant.

Subsequent investigations made to determine the source of the petroleum product were traced to a field drainage tile crossing beneath the 20-acre property and Livingston Service Company which discharged into the creek. The severity of the release is not known.

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. Livingston Service Company absorbs the product as it forms and has also removed the field drain tile from their property and capped the entry point to avert further discharge into the creek." (AR2, p.132, Disk Doc. 11)

12. On April 18, 2007, based upon analytical results the Petitioner notified IEMA of a release and they were issued Incident # 20070479. (AR2, p.155, Disk Doc. 17)

13. On September 10, 2007, Petitioner, through their current consultant, Environmental Management, Inc. ("EMI") filed a Limited Phase II Environmental Site Assessment Report that was prepared by Midwest Engineering Service, Inc., on behalf of the Petitioner. The report is dated September 23, 2005. (AR2, p.246, Disk Doc. 18) Pursuant to this report, under the heading "Project Background", the Petitioner stated the following: "According to Mr. Salrin, a release of diesel fuel may have occurred in 1991 during underground storage tank (UST) filling activities. The tanker truck driver may have mistaken an observation well located at the northwest corner of the UST cavity as the diesel fuel fill port." (AR2, p.252, Disk Doc. 18)

14. On December 24, 2007, Petitioner, through its current consultant, EMI, filed a Stage 2 Site Investigation Plan and Budget. (AR2, p.403, Disk Doc. 21) In Section 5a of this plan, Petitioner stated: "The investigation activities performed in May 1993 were associated with a suspected release that may have occurred when a fuel delivery truck driver inadvertently dispensed diesel fuel into an observation well located adjacent to the UST system. An incident was reported to IEMA at which time indent (sic) number 910580 was assigned." (AR2, p.412, Disk Doc. 21)

15. Since the December 24, 2007, plan, Petitioner, through its current consultant, EMI, filed several other reports on July, 31, 2008 (AR2, p.502, Disk Doc. 24), April 1, 2009, (AR2, p.629, Disk Doc. 27), October 19, 2009, (AR2, p.740, Disk Doc. 32), February 16, 2010 (AR2, p.845, Disk Doc. 34), July 6, 2010 (AR2, p.866, Disk Doc. 37), March 11, 2011 (AR2, p.1080, Disk Doc. 45). In not one of these reports did EMI clarify, change, or further describe the cause of the 910580 release.

16. On November 12, 2010, the Petitioner submitted a LUST billing package for Stage 3 Site Investigation Activities. (AR1, p.13)

17. On January 20, 2011, the Illinois EPA issued a final decision letter relating to the Petitioner's November 12, 2010 application for payment. In that final decision, the Illinois EPA paid \$13,250.20 out of the \$26,500.40 that was requested for payment. (AR1, p.1)(Exhibit 1)

18. Reviewer notes indicate that an apportionment of 50% was applied to the amount requested due the release related to incident number 910580 not being eligible because a tanker filled a monitoring well. (AR1, p.6)

19. On July 21, 2011, the Petitioner submitted a LUST billing package for Corrective Action Activities. (AR1, p.55)

20. On October 12, 2011, the Illinois EPA issued a final decision letter relating to the Petitioner's July 21, 2011, application for payment. In that final decision, the Illinois EPA paid \$6,151.63 out of the \$12,303.26 that was requested for payment. (Exhibit 2)

21. Reviewer notes indicate that an apportionment of 50% was applied to the amount requested. (AR1, p.46)

22. Petitioner appealed the January 20, 2011 decision letter on February 23, 2011, PCB 2011-51. Petitioner appealed the October 12, 2011 decision letter on November 16, 2011, PCB 2012-61.

VII. ISSUE

It is clear that the Illinois EPA's final decision must frame the issues on appeal. Todd's Service Station v. Illinois EPA, PCB 03-2 (January 22, 2004), p. 4; Pulitzer Community Newspapers, Inc. v. EPA, PCB 90-142 (Dec. 20, 1990). In this case, the Petitioner filed a Petition which claims to appeal from an issue set forth in the Illinois EPA final decision letter. If it had

done that, this appeal would be about the apportionment of costs. However, the Petitioner is attempting to appeal a December 23, 1992 eligibility decision through the January 20, 2011 and October 12, 2011 apportionment decisions. Since the apportionment of costs issue was not raised by the Petitioner in its Petition for Review, a valid issue cannot be set forth by the Illinois EPA.

VIII. ARGUMENT

On November 12, 2010 and July 21, 2011, Petitioner submitted billing packages for reimbursement from the LUST Fund. The Illinois EPA issued decision letters on January 20, 2011 and on October 12, 2011 apportioning the amount reimbursed by 50% due to the fact that Incident number 910580 was deemed ineligible. As stated above, and more importantly as framed by Petitioner itself within its appeal, Petitioner appeals the final December 23, 1992 eligibility determination instead of the apportionment of costs. As the record will show, the Illinois EPA was correct in issuing the January 20, 2011 and October 12, 2011 decisions.

A. Preliminary Matters

Petitioner's petition states:

"6. On January 20, 2011, the Agency refused to pay the requested amount and instead determined that the payment should be reduced by fifty-percent because "[t]he release for lust incident number 910580 was deemed ineligible." A true and correct copy of the Agency decision letter is attached hereto as Exhibit A."

...

"8. The Agency's decision is wrong. There has been no determination that the release for Lust Incident number 910580 was deemed ineligible, nor is there any basis in fact or law to deem that prior incident ineligible. ..."

What is appealed, in Petitioner's own hand, is the Illinois EPA's determination that the 1991 incident (#910580) is ineligible. Twice within the paragraph that frames the Petition, Petitioner highlights the fact that it seeks review of whether incident number 910580 is "ineligible." Petitioner in paragraph 6 notes that the Agency refused to pay the requested amount (100% of the requested amount) based upon the determination that the 1991 incident was ineligible.

The Board should consider that this is not a Petitioner who is claiming that more work was done to respond to the more recent incident than the past incident. Nor is this a Petitioner who presented facts or data to indicate that more funds should be paid on one incident as opposed to the other. What Petitioner seeks is full payment for all costs submitted regardless of which incident is being responded to by it.

Also, no assertion or argument is made that somehow the apportionment is incorrect. What Petitioner claims is that the 1991 incident should be. This is an all or nothing argument. No reasonable interpretation of this argument could support a conclusion that Petitioner seeks to challenge the 50% allocation between the two incidents.

So, what is contained within the record and the hearing transcript relative to a determination regarding the 1991 incident?

INITIAL DETERMINATION: The Illinois EPA reviewed all information submitted to it by the facility and made a final determination that the incident was not eligible. This determination was not appealed.

SECOND DETERMINATION: Following Illinois EPA's determination in the pending appeal, Petitioner filed an eligibility application for the 1991 incident with the Office of the State Fire Marshall ("OSFM").

OSFM, prior to the hearing on this matter, issued a determination finding the 1991 release ineligible. (Exhibit 3)

THIRD DETERMINATION: Petitioner filed yet another eligibility application with OSFM requesting a third review of the decision relative to the 1991 incident. This third application was pending at the time of hearing.

OSFM issued a denial on March 29, 2012, regarding Petitioners request that the State, once again, reconsider its prior determination. (Exhibit 4)

The issue regarding the eligibility of the 1991 matter has been reviewed, re-reviewed, and re-re-reviewed. In none of these incidents did Petitioner appeal the decision directly. Petitioner chooses to ask the Board for its opinion, in this proceeding, without ever once following an appeal which was available to it over the many years between the 1991 incident and now. Petitioner has attempted to change the State's mind, based upon multiple filings in the past several years, but has yet to be successful in any of these endeavors.

The Illinois EPA will grant that the reality of the determinations became more important to Petitioner when the Illinois EPA issued the most recent determination on reimbursement. However, the failure to reduce prior determinations has no impact on the fact that costs for responding to the 1991 incident are not eligible for fund reimbursement and the determination was final and is binding upon Petitioner.

Re-inventing this issue, again, before the Board in this appeal does not breathe life into the dead issue. Jurisdiction to seek review ended many years ago. In addition, OSFM, who is now the proper source for seeking a determination on fund eligibility has also denied Petitioner's same request, on two occasions, while Petitioner sought to drag the Board into this age old decision.

This is a good time to respond to Petitioner's assertion that – somehow – the State is playing a game of telephone. Petitioner likens the situation it finds itself in to a children's game where a person tells a story and that story is repeated, and when the final person is told the story, typically it does not match the original version. While a unique offer, the rationale is neither intuitively similar nor intellectually compelling to Petitioner's situation. The record is replete with examples of where individuals who have assessed the matter have drawn the same conclusion time and time again.

Now, if the Illinois EPA was asked to frame an in kind argument based upon an example of a child and what they typically do and play, this situation seems far more similar to a child who has received a negative decision from an adult going from Mother to Father to any other adult to receive a differing opinion from the one they received. Yet, even this analogy is not perfect, which is why the Illinois EPA will attempt to sustain an argument based upon the appeal itself, the record filed before the Board and how the exact facts and applicable law applies to the Petitioners situation.

B. De Minimis Release?

Petitioner attempts to reinvent the circumstances that make up the 1991 incident by claiming that the amount introduced into the environment through the monitoring well was de minimus.

Initially, the Board should note that no such contention was made by Petitioner prior to this proceeding. Petitioner does not point to any information within the record to support such a classification of the incident. As for the record, it does contain evidence that the release was anything but. For example, the record establishes that following the dispensing of diesel fuel at the site, in one night, 5,300 gallons of fuel went missing. The record establishes that Mr. Salrin,

manager of Petitioner's predecessor, indicated that the fuel truck "put [the] fill hose in the monitoring well instead of fill pipe for distillate tank." Within the 45-day report submitted on this site, the report indicated that the 1991 incident was of such significance that a petroleum sheen was visible on Gooseberry creek. Product was traced the length of the 20-acre property adjacent to the site. The record does not support Petitioner's contention that this incident was "de minimis" under any definition within the law or regulations or any commonly used concept of this term.

Petitioner's argument that the release through the monitoring well was de minimis was never presented to the Illinois EPA prior to its decision. No mention of it can be found within the record. No evidence of it is presented at hearing to frame a contention that the incident was "de minimus." Moreover, since this contention was not before the Illinois EPA at the time of the decision, Illinois EPA asks that the argument be stricken from the record. Further, as the record indicates, varying amounts of diesel fuel were released in 1991. As such, it is disingenuous to now argue that a release that was large enough for emergency responses from several agencies was somehow de minimis in nature. Conceptually, a small drip onto the ground may de minimis. However, a release, such as the 1991 incident, where fire trucks and emergency response personnel have to respond, is, as noted above, definitely anything but.

C. Information Submitted by Petitioner Supports Decision

The information submitted to the Illinois EPA by Evergreen that led to the issuance of the final decision under appeal fully supports the content and conclusion of the final decisions, in that the Petitioner failed to demonstrate that the information they submitted to the Illinois EPA and upon which the Illinois EPA based its decisions supported any other conclusion than that reached by the Illinois EPA when it issued its January 20, 2011 and October 12, 2011 decision

letters. The Board's review of the Administrative Record, as well as the hearing transcript, should yield the same conclusion as that reached by the Illinois EPA. The Illinois EPA relies upon the owner/operator and their consultants to provide full information regarding the on-site conditions and remediation activities. It is this information that the Illinois EPA relies upon to form its decisions. In this case, the information submitted by the Petitioner supports the decision of the Illinois EPA. It is important to point out that what information the Illinois EPA reviews is totally within the control of the owner/operator and their consultant. Simply, if it is not submitted to the Illinois EPA, the Illinois EPA cannot review it.

D. The Petitioner's Speculation

As noted in the above argument, the Petitioner's brief fails to present any tangible or persuasive argument on which the Board could rely in reversing the Illinois EPA's final decision. The Petitioner spends most of its brief speculating on a final decision made almost 20 years ago. On page 8 of the Petitioner's brief, Petitioner even has the audacity to claim that information submitted contemporaneously at the time of release was "inaccurate" or was a "mistaken assumption." The Illinois EPA respectfully asks the Board to consider the question "based upon what?" when reviewing these claims. On page 14, Petitioner sums up all of the audacity that can be imagined to claim that somehow its current consultant has better information than the manager of the facility did at the time of the release. A consultant, which by the way, testified that he had not been to the very site at issue, but only reviewed the documents 20 years later. (Transcript p.26, line 2) Petitioner flat out claims that during the time between the March 1, 1991 release and the December 15, 1992, 45 day report, a report filed by the Petitioner, the manager of the site at the time of the release, had somehow forgot that he hired someone to test the tanks and lines, paid for that test and then somehow, after this lapse of memory, fabricated a

cause of the release because the Illinois EPA requires that one is put onto a form. (AR2, p.1298, Disk Doc. 51) And we are to believe that he wrote this "alleged" fabricated cause of release in his own handwriting after playing a game of telephone with the Illinois EPA. Not only that, we are to believe that he fabricated a cause of release that was not in his best interests! Were we at hearing, I would object to this and feel somehow compelled to do so now. This argument is ridiculous. Only 21 months had lapsed between the release and the filing of the 45 day report. Would it not be more likely that after the emergency response to the release was over, the manager of the site had time to investigate the actual cause of the release? He then reported this cause of release to the Illinois EPA, when asked to do so. I hesitate to speculate because the Petitioner is doing enough of that for both of us and for the Board as well, but it is more plausible that the Petitioner was hesitant to put the cause of release on to the 45 day report due to the fact that it was not in their favor to do so.

When it comes right down to it, the Petitioner can speculate all it wants. Reality is the record. The record shows that the cause of the release was the filling of a monitoring well. The record shows that even the Petitioner's current consultant stated in reports he filed with the Illinois EPA that the cause of the release was the filling of a monitoring well. (AR2, p. 252, Disk Doc. 18) All Petitioner has is speculation at this point and the testimony of the current consultant who was never at the site and could not testify to actual site conditions. SPECULATION. It is all the Petitioner offers and it is not enough.

Speculation on behalf of the Petitioner does not rise to the level of proof necessary for the Petitioner to show that the Illinois EPA's decisions were in error. Petitioner fails to meet its burden of proof.

E. Release into Monitoring Well

The Petitioner argues that the release into the monitoring well should be considered as a release into the UST system. Such a contention cannot be found within the applicable regulations and is also not found within any case law. However, Petitioner attempts to glean some support out of the Harlem case merely to make a specious argument. Suffice it to say that the Harlem decision has no impact on the current facts and that any determination of the Board on this issue would be a case of first impression. So, the Illinois EPA will establish why the Petitioner's argument is completely counter-intuitive and would not fit within any reasonable interpretation of applicable law.

Thankfully, the "debate" on this issue can be resolved by simply looking to the definitions within the regulations. The term "UST system" or "tank system" is defined in 35 Ill. Adm. Code 734.115 to mean "an underground storage tank, connected underground piping, underground ancillary equipment and containment system, if any." It is clear from this definition, that a monitoring well is not part of the UST system.

Monitoring wells are part of a release detection system. In other words, monitoring wells are intended to detect releases from an UST system and as such are not part of the system themselves. Monitoring wells are not intended to be used to store a regulated substance nor are they part of the system to pump it out of the tank to the above ground pump. It is clear that a monitoring well is NOT part of a UST system.

F. Payments Not Apportioned

On page 12 of Petitioner's brief, Petitioner indicates that the Illinois EPA already paid \$153,934.64 to Petitioner without apportioning the payment. The Illinois EPA admits this

mistake and plans to take steps to recover the amounts paid in error to the Petitioner pursuant to 35 Ill. Adm. Code 734.660(a).

G. Apportionment (Better Known as The Issue Petitioner Never Appealed)

While the Illinois EPA's January 20, 2011 and October 12, 2011 decision letters apportioned the amount requested for reimbursement, the Petitioner did not appeal the apportionment of the costs. And, at hearing, Petitioner never submitted any information to the Board to show that the 50% apportionment was not done correctly.

There was no argument presented regarding the only issue subject to appeal in the decision letters! The Petitioner never even attempted to dispute the manner in which the apportionment was done. The only evidence that the Board has regarding the apportionment of the costs is what is contained within the record, and that clearly supports the decision of the Illinois EPA. Since this is the only issue framed by the Illinois EPA's decision letters; since the record overwhelming supports the apportionment of costs; and since the Petitioner offered no evidence to the contrary, the Board must rule in favor of the Illinois EPA.

H. Summary

The Illinois EPA is concerned that a hearing had to proceed when OSFM had before it an application that could have decided the very issue being heard before the Board. Without any way for the Illinois EPA, or for the Board for that matter, to delay the hearing and push back the decision deadline while relevant matters are pending before another administrative agency, OSFM, the Board runs the risk of making a determination that could affect or interfere with the other agency's decision making process. Further, judicial economy suggests that it is prudent to wait until such decisions are made and final before proceeding in duplicative proceedings. Due

to the Petitioner's actions, it is questionable as to whether the issue was ripe for review considering OSFM was reviewing an application that could have been dispositive.

The Illinois EPA is further concerned that the Petitioner was able, in 2011, to apply for eligibility for a release where eligibility was determined in 1992. Since the site changed names between 1992 and 2011, as happens frequently with sites regulated by the Illinois EPA, it would be difficult for most Administrative Agencies to track what prior decisions were made after that length of time. It is even harder when the original decision maker, the Illinois EPA and the secondary decision maker, OSFM are not the same entity. How many bites at the apple can one party receive when it comes to eligibility determinations?

The Administrative Record, along with the Act and the Board's regulations, clearly supports the decision of the Illinois EPA that the 1991 release was ineligible. Petitioner has absolutely no support for its argument that the 1991 incident should be eligible and as such the Board must rule in favor of the Illinois EPA.

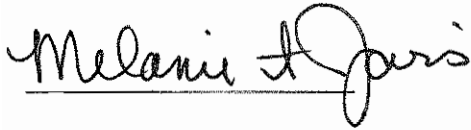
IX. CONCLUSION

For all the reasons and arguments included herein, the Illinois EPA respectfully requests that the Board dismiss this cause for lack of jurisdiction or in the alternative affirm the Illinois EPA's January 20, 2011 and October 12, 2011 final decision. The Petitioner has not met even its *prima facie* burden of proof, and certainly has not met its ultimate burden of proof. For these reasons, the Illinois EPA respectfully requests that the Board affirm the Illinois EPA's final decision.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent

A handwritten signature in black ink that reads "Melanie A. Jarvis". The signature is written in a cursive style and is positioned above a horizontal line.

Melanie A. Jarvis
Assistant Counsel
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544, 217/782-9143 (TDD)
Dated: April 20, 2012

This filing submitted on recycled paper.

ATTACHMENT A

Relevant Law

35 Ill. Adm. Code 734.640

Section 734.640 Apportionment of Costs

- a) The Agency may apportion payment of costs 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; and*
 - 2) *The owner or operator failed to justify all costs attributable to each underground storage tank at the site. [415 ILCS 5/57.8(m)]*
- b) 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. Adm. Code 734.660

Section 734.660 Determination and Collection of Excess Payments

- a) If, for any reason, the Agency determines that an excess payment has been paid from the Fund, the Agency may take steps to collect the excess amount pursuant to subsection (c) of this Section.
 - 1) Upon identifying an excess payment, the Agency must notify the owner or operator receiving the excess payment by certified or registered mail, return receipt requested.
 - 2) The notification letter must state the amount of the excess payment and the basis for the Agency's determination that the payment is in error.
 - 3) The Agency's determination of an excess payment must be subject to appeal to the Board in the manner provided for the review of permit decisions in Section 40 of the Act.
- b) An excess payment from the Fund includes, but is not limited to:

- 1) Payment for a non-corrective action cost;
 - 2) Payment in excess of the limitations on payments set forth in Sections 734.620 and 734.635 and Subpart H of this Part;
 - 3) Payment received through fraudulent means;
 - 4) Payment calculated on the basis of an arithmetic error;
 - 5) Payment calculated by the Agency in reliance on incorrect information; or
 - 6) Payment of costs that are not eligible for payment.
- c) Excess payments may be collected using any of the following procedures:
- 1) Upon notification of the determination of an excess payment in accordance with subsection (a) of this Section or pursuant to a Board order affirming such determination upon appeal, the Agency may attempt to negotiate a payment schedule with the owner or operator. Nothing in this subsection (c)(1) of this Section must prohibit the Agency from exercising at any time its options at subsection (c)(2) or (c)(3) of this Section or any other collection methods available to the Agency by law.
 - 2) If an owner or operator submits a subsequent claim for payment after previously receiving an excess payment from the Fund, the Agency may deduct the excess payment amount from any subsequently approved payment amount. If the amount subsequently approved is insufficient to recover the entire amount of the excess payment, the Agency may use the procedures in this Section or any other collection methods available to the Agency by law to collect the remainder.
 - 3) The Agency may deem an excess payment amount to be a claim or debt owed the Agency, and the Agency may use the Comptroller's Setoff System for collection of the claim or debt in accordance with Section 10.5 of the "State Comptroller Act." [15 ILCS 405/10.05]

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on April 20, 2012, I served true and correct copies of a **RESPONSE TO PETITIONER'S POST-HEARING BRIEF** to the Board by electronic filing through the Board's COOL system and to the Petitioner and Hearing Officer by email and by placing true and correct copies thereof in properly sealed and addressed envelopes and by depositing said sealed envelopes in a U.S. Mail drop box located within Springfield, Illinois, with sufficient First Class postage affixed thereto, upon the following named persons:

John Therriault, Acting Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

Carol Webb, Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P. O. Box 19274
Springfield, IL 62794-9274

Patrick Shaw
Fred C. Prillaman
Mohan, Alewelt, Prillaman & Adami
1 North Old Capitol Plaza, Suite 325
Springfield, IL 62701-1323

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



Melanie A. Jarvis
Assistant Counsel
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)



ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

1021 North Grand Avenue East, P.O. Box 19276, Springfield, Illinois 62794-9276 • (217) 782-2829
James R. Thompson Center, 100 West Randolph, Suite 11-300, Chicago, IL 60601 • (312) 814-6026

PAT QUINN, GOVERNOR

DOUGLAS P. SCOTT, DIRECTOR

217/782-6762

JAN 20 2011

CERTIFIED MAIL #

7009 2820 0001 7493 4132

Evergreen FS, Inc.
Attn: Environmental Management, Inc.
1154 North Bradfordton Road
Springfield, IL 62711

Re: LPC #1050255113 -- Livingston County
Dwight / Dwight Fuel 24
808 North Union Street
Incident-Claim No.: 20070479 -- 59466
Queue Date: November 12, 2010
Leaking UST Fiscal File

Dear Mr. Eichelberger:

The Illinois Environmental Protection Agency (Illinois EPA) has completed the review of your application for payment from the Underground Storage Tank (UST) Fund for the above-referenced Leaking UST incident pursuant to Section 57.8(a) of the Illinois Environmental Protection Act (Act), as amended by Public Act 92-0554 on June 24, 2002, and 35 Illinois Administrative Code (35 Ill. Adm. Code) 734.Subpart F.

This information is dated November 10, 2010 and was received by the Illinois EPA on November 12, 2010. The application for payment covers the period from January 15, 2010 to November 1, 2010. The amount requested is \$26,500.40.

On November 12, 2010, the Illinois EPA received your complete application for payment for this claim. As a result of Illinois EPA's review of this application for payment, a voucher for \$13,250.20 will be prepared for submission to the Comptroller's Office for payment as funds become available based upon the date the Illinois EPA received your complete request for payment of this application for payment. Subsequent applications for payment that have been/are submitted will be processed based upon the date complete subsequent application for payment requests are received by the Illinois EPA. This constitutes the Illinois EPA's final action with regard to the above application(s) for payment.

The deductible amount for this claim is \$10,000.00, which was previously withheld from your payment(s). Pursuant to Section 57.8(a)(4) of the Act, any deductible, as determined pursuant to the Office of the State Fire Marshal's eligibility and deductibility final determination in

Rockford • 4302 N. Main St., Rockford, IL 61103 • (815) 987-7760
Des Plaines • 9511 W. Harrison St., Des Plaines, IL 60016 • (847) 294-4000
Elgin • 597 S. State St., Elgin, IL 60120 • (847) 698-3131
Peoria • 3413 N. University St., Peoria, IL 61614 • (309) 693-5463
Bureau of Land - Peoria • 7820 N. University St., Peoria, IL 61614 • (309) 693-5462
Champaign • 2123 S. First St., Champaign, IL 61820 • (217) 278-3800
Collingsville • 4009 Mall Street, Collinsville, IL 62234 • (618) 546-5100
Marion • 2309 W. Main St., Suite 116, Marion, IL 62959 • (618) 993-7200

Printed on Recycled Paper

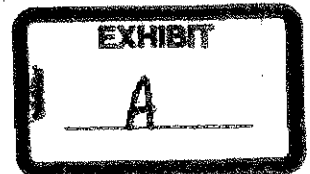


Exhibit 1

Page 2

accordance with Section 57.9 of the Act, shall be subtracted from any payment invoice paid to an eligible owner or operator.

There are costs from this claim that are not being paid. Listed in Attachment A are the costs that are not being paid and the reasons these costs are not being paid.

An underground storage tank system owner or operator may appeal this decision to the Illinois Pollution Control Board. Appeal rights are attached.

If you have any questions or require further assistance, please contact Catherine S. Elston of my staff at 217-785-9351.

Sincerely,



John Sherrill, Manager
Financial Management Unit
Bureau of Land

JS:CSE

ATTACHMENT

c: Leaking UST Claims Unit
Cathy Elston

Appeal Rights

An underground storage tank owner or operator may appeal this final decision to the Illinois Pollution Control Board pursuant to Sections 40 and 57.7(c)(4) of the Act by filing a petition for a hearing within 35 days after the date of issuance of the final decision. However, the 35-day period may be extended for a period of time not to exceed 90 days by written notice from the owner or operator and the Illinois EPA within the initial 35-day appeal period. If the owner or operator wishes to receive a 90-day extension, a written request that includes a statement of the date the final decision was received, along with a copy of this decision, must be sent to the Illinois EPA as soon as possible.

For information regarding the filing of an appeal, please contact:

Dorothy Gunn, Clerk
Illinois Pollution Control Board
State of Illinois Center
100 West Randolph, Suite 11-500
Chicago, IL 60601
312/814-3620

For information regarding the filing of an extension, please contact:

Illinois Environmental Protection Agency
Division of Legal Counsel
1021 North Grand Avenue East
Post Office Box 19276
Springfield, IL 62794-9276
217/782-5544

Attachment A
Accounting Deductions

Re: LPC #1050255113 – Livingston County
Dwight / Dwight Fuel 24
808 North Union Street
Incident-Claim No.: 20070479 – 59466
Queue Date: November 12, 2010
Leaking UST FISCAL FILE

Citations in this attachment are from the Environmental Protection Act (Act), as amended by Public Act 92-0554 on June 24, 2002, and 35 Illinois Administrative Code (35 Ill. Adm. Code).

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 last incident number 910580 was deemed ineligible.

cse

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

1021 NORTH GRAND AVENUE EAST, P.O. BOX 19276, SPRINGFIELD, ILLINOIS 62784-9276 - (217) 782-2828
JAMES R. THOMPSON CENTER, 100 WEST RANDOLPH, SUITE 11-300, CHICAGO, ILLINOIS 60601 - (312) 814-6026

PAT QUINN, GOVERNOR

LISA BONNETT, INTERIM DIRECTOR

217/782-6762

CERTIFIED MAIL #

7009 3410 0002 3751 7191

OCT 19 2011

Evergreen FS, Inc.
Attn: Environmental Management, Inc.
1154 North Bradfordton Road
Springfield, IL 62711

Re: LPC #1050255113 -- Livingston County
Dwight / Dwight Fuel FS
808 North Union Street
Incident-Claim No.: 20070479 - 60412
Queue Date: July 21, 2011
Leaking UST Fiscal File

Dear Mr. Eichelberger:

The Illinois Environmental Protection Agency (Illinois EPA) has completed the review of your application for payment from the Underground Storage Tank (UST) Fund for the above-referenced Leaking UST incident pursuant to Section 57.8(a) of the Illinois Environmental Protection Act (Act), as amended by Public Act 92-0554 on June 24, 2002, and 35 Illinois Administrative Code (35 Ill. Adm. Code) 734.Subpart F.

This information is dated July 21, 2011 and was received by the Illinois EPA on July 21, 2011. The application for payment covers the period from February 20, 2011 to July 14, 2011. The amount requested is \$12,303.26.

On July 21, 2011, the Illinois EPA received your complete application for payment for this claim. As a result of Illinois EPA's review of this application for payment, a voucher for \$6,151.63 will be prepared for submission to the Comptroller's Office for payment as funds become available based upon the date the Illinois EPA received your complete request for payment of this application for payment. Subsequent applications for payment that have been/are submitted will be processed based upon the date complete subsequent application for payment requests are received by the Illinois EPA. This constitutes the Illinois EPA's final action with regard to the above application(s) for payment.

The deductible amount for this claim is \$10,000.00, which was previously withheld from your payment(s). Pursuant to Section 57.8(a)(4) of the Act, any deductible, as determined pursuant to the Office of the State Fire Marshal's eligibility and deductibility final determination in

ROCKFORD - 4302 N. MAIN ST., ROCKFORD, IL 61103 - (815) 967-7700

ELGIN - 208 SOUTH STATE, ELGIN, IL 60123 - (847) 605-3131

CHAMPAIGN - 2125 S. FIRST ST., CHAMPAIGN, IL 61820 - (217) 276-3500

DES PLAINES - 8811 HARRISON ST., DES PLAINES, IL 60016 - (847) 394-4000

PEORIA - 5407 N. UNIVERSITY, ANFOS HALL #113, PEORIA, IL 61614 - (309) 693-8463

MARRON - 2309 W. MAIN ST., SUITE 118, MARRON, IL 62958 - (618) 393-7200

COLLINGSVILLE - 2008 HALL STREET, COLLINGSVILLE, IL 62234 - (618) 346-8120

PRINTED ON RECYCLED PAPER



Exhibit 2

Page 2

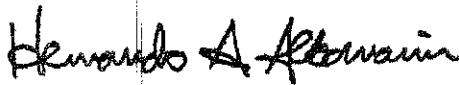
accordance with Section 57.9 of the Act, shall be subtracted from any payment invoice paid to an eligible owner or operator.

There are costs from this claim that are not being paid. Listed in Attachment A are the costs that are not being paid and the reasons these costs are not being paid.

An underground storage tank system owner or operator may appeal this decision to the Illinois Pollution Control Board. Appeal rights are attached.

If you have any questions or require further assistance, please contact Catherine S. Elston of my staff at 217-785-9351.

Sincerely,



Hermando A. Albarracin, Manager
Leaking Underground Storage Tank Section
Division of Remediation Management
Bureau of Land

HAA:CSE 

ATTACHMENT

c: Leaking UST Claims Unit
Cathy Elston



Appeal Rights

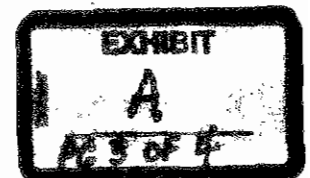
An underground storage tank owner or operator may appeal this final decision to the Illinois Pollution Control Board pursuant to Sections 40 and 57.7(c)(4) of the Act by filing a petition for a hearing within 35 days after the date of issuance of the final decision. However, the 35-day period may be extended for a period of time not to exceed 90 days by written notice from the owner or operator and the Illinois EPA within the initial 35-day appeal period. If the owner or operator wishes to receive a 90-day extension, a written request that includes a statement of the date the final decision was received, along with a copy of this decision, must be sent to the Illinois EPA, as soon as possible.

For information regarding the filing of an appeal, please contact:

Dorothy Gunn, Clerk
Illinois Pollution Control Board
State of Illinois Center
100 West Randolph, Suite 11-500
Chicago, IL 60601
312/814-3620

For information regarding the filing of an extension, please contact:

Illinois Environmental Protection Agency
Division of Legal Counsel
1021 North Grand Avenue East
Post Office Box 19276
Springfield, IL 62794-9276
217/782-5544



Attachment A
Accounting Deductions

Re: LPC #1050255113 -- Livingston County
Dwight / Dwight Fuel 24
808 North Union Street
Incident-Claim No.: 20070479 -- 60412
Queue Date: July 21, 2011
Leaking UST FISCAL FILE

Citations in this attachment are from the Environmental Protection Act (Act), as amended by Public Act 92-0554 on June 24, 2002, and 35 Illinois Administrative Code (35 Ill. Adm. Code).

Item # Description of Deductions

1. \$6,151.63, 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.

Last incident number 910580 is not eligible for reimbursement.

csc





Office of the Illinois
State Fire Marshal
"Partnering With the Fire Service to Protect Illinois"

CERTIFIED MAIL - RECEIPT REQUESTED #7011 0110 0001 4649 2883

January 10, 2012

Evergreen FS, Inc.
P.O. Box 1367
Bloomington, IL 61702

In Re: Facility No. 4-013031
IEMA Incident No. 91-0580
Dwight Fuel 24
Rt 47 & Old 166
Dwight, Livingston Co., IL

Dear Applicant:

The Reimbursement Eligibility and Deductible Application received on November 23, 2011 for the above referenced occurrence has been reviewed. The following determinations have been made based upon this review.

It has been determined that you are ineligible to seek payment of costs of corrective action or indemnification associated with the following tanks:

Ineligible Tanks

Tank 3 10,000 gallon Diesel Fuel

An owner or operator is eligible to access the Underground Storage Tank Fund if the eligibility requirements are satisfied:

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 of any of the following substances:

"Fuel", as defined in Section 1.19 of the Motor Fuel Tax Law

Aviation fuel

Heating oil

Kerosene

Used oil, which has been refined from crude oil used in a motor vehicle, as defined in Section 1.3 of the Motor Fuel Tax Law.

RECEIVED

JAN 18 2012

IEPA / BOL
LEAKING UST
Exhibit 3

Electronic Filing - Received, Clerk's Office, 04/20/2012

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 Illinois Emergency Management Agency 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. Costs of corrective action or indemnification incurred before providing that notification shall not be eligible for payment.
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".

You are ineligible for reimbursement from the fund for the following reason(s):

Tank 3 10,000 gallon Diesel Fuel - **Non UST related release** - (415 ILCS 5/57.9)

This constitutes the final decision as it relates to your eligibility and deductibility. We reserve the right to change the deductible determination should additional information that would change the determination become available. An underground storage tank owner or operator may appeal the decision to the Illinois Pollution Control Board (Board), pursuant to Section 57.9 (c) (2). An owner or operator who seeks to appeal the decision shall file a petition for a hearing before the Board within 35 days of the date of mailing of the final decision, (35 Illinois Administrative Code 105.504(b)).

For information regarding the filing of an appeal, please contact:

Clerk
Illinois Pollution Control Board
State of Illinois Center
100 West Randolph, Suite 11-500
Chicago, Illinois 60601
(312) 814-3620

The following tanks are also listed for this site:

Tank 1 6,000 gallon Gasoline
Tank 2 10,000 gallon Gasoline
Tank 4 10,000 gallon Gasoline
Tank 5 10,000 gallon E-85

Your application indicates that there has not been a release from these tanks under this incident number. You may be eligible to seek payment of corrective action costs associated with these tanks if it is determined that there has been a release from one or more of these tanks. Once it is determined that there has been a release from one or more of these tanks you may submit a separate application for an eligibility determination to seek corrective action costs associated with this/these tanks.

If you have any questions, please contact our Office at (217) 785-1020 or (217) 785-5878.

Sincerely,



Deanne Lock
Administrative Assistant
Division of Petroleum and Chemical Safety

cc: IEPA
Facility File

4-013031
11-23-11

Leaking Underground Storage Tank Fund
Eligibility and Deductible Application

All underground storage tank owners or operators planning to seek reimbursement of corrective action costs from the Leaking Underground Storage Tank (LUST) Fund must submit this application. Instructions and definitions to aid in completing the application are attached.

The application must be completed in its entirety. Answers of unknown are not accepted and may be grounds for returning your application. All signatures and seals must be originals signed in ink. Incomplete applications will be returned to the Applicant. Any revisions to the original application must be dated and initialed by the person entering the new information. This must be the same person who signs the application. If a facility is not in compliance with registration requirements, the application will be returned.

Do not submit IEPA reports or bills with the application. A duplicate copy of the application is not required. Following the review of the application, the Applicant will receive a certified letter of eligibility stating the deductible amount.

OSFM Facility ID #: 4-013031
U6027569

RECEIVED
NOV 23 2011
DIV. OF PETROLEUM
CHEMICAL SAFETY

1. Name of Applicant: Evergreen FS, Inc.

Current Tank Owner: Current Tank Operator: _____ Former Tank Owner: _____ Former Tank Operator: _____

Mailing Address of Applicant: PO Box 1367

City: Bloomington State: IL Zip: 61702

Contact Person: Bob Eichelberger

2. Current Owner: Evergreen FS, Inc.

Tank Property: _____ Lessee: _____ (check all that currently apply)

Mailing Address: PO Box 1367

City: Bloomington State: IL Zip: 61702

Phone: (309) 662-9321

a) Date Facility Property Purchased: _____ Leased: 9-1-00

b) Were tanks in the ground on date of purchase/lease? Yes No _____

c) If answer to 2b is no, were tanks installed after your purchase/lease? Yes _____ No _____

d) Have you ever operated these tanks; pumped product in or out during the ordinary course of operation? Yes No _____

The OSFM is requesting disclosure of information to process your Eligibility and Deductible Application in order to accomplish the statutory purpose as stated in 415 ILCS, Act 5, Environmental Protection Act. This is REQUIRED because failure to provide the requested information will result in this form not being processed, and there will be no eligibility or deductible determination for purposes of the LUST Fund. This form has been approved by the Forms Management Center.

3. Previous owner/operator: Livingston Service Co.

Tank: Property: _____ Lessee: _____ (check all that apply)

Previous owner/operator current mailing address: 320 N. Plum

City: Pontiac State: IL Zip: 61764

Phone: (815) 844-7185

RECEIVED
NOV 23 2011

4. Facility Name: Dwight Fuel 24

Facility Address: Rt. 47 & Old Route 66 DIV. OF PETROLEUM
CHEMICAL SAFETY

City: Dwight County: Livingston

5. Occurrence for which you intend to seek reimbursement: Incident # 91-0580

6. Name and official title of the person who notified IEMA of the occurrence: Tom Sarlin

Date Reported: 3/5/91

7. Other incident numbers reported at the site: (A separate application must be filed for each occurrence. Please indicate if any of the additional incident numbers are erroneously reported incidents, or a second reporting of the same occurrence for which you intend to seek reimbursement.)

<u>Other Incident Numbers</u>	<u>Date Reported</u>
1) <u>2007 0479</u>	<u>4/18/07</u>
2) <u>2007 0804 (2nd reporting)</u>	<u>6/13/07</u>
3) _____	_____

8. Total number of USTs at the site: 5 (include USTs presently at the site and USTs that have been removed or abandoned in place)

9. Total number of USTs at the site that have had a release: 1 (An UST release includes a leak from an underground tank, a release from underground piping associated with the tank, plus overfills of the UST during filling.)

10. Type of release: (check all that apply) Answers of unknown will not be accepted.

- UST leak
- Overfill of an UST during filling
- Underground piping leak
- Other (detailed description required)

a) How was the release discovered? (check all that apply)

- Inventory Loss
- Subsurface Investigation
- Product in Observation Well
- Significant Event (i.e., overfill, vandalism, etc.)
- Subsurface Work/Repair
- Other (detailed description required)

b) Date release discovered: 3/5/91

- 11. Is the UST owner or operator the U.S. government? Yes _____ No
- 12. Is the UST owner or operator a rail carrier registered pursuant to Section 18c-7201 of the Illinois Vehicle Code? Yes _____ No
- 13. Is the UST located at an airport with over 300,000 operations per year, for years prior to 1991, and over 170,000 operations per year beginning in 1991, located in a city of more than 1,000,000 inhabitants? Yes _____ No
- 14. Date corrective action work began or scheduled to begin: ~~03-05-11~~ 3-5-91
- 15. Date corrective action work completed: In progress

The following certification must be completed by the UST owner/operator:

I, Michael Kebler (circle the following that apply) the Owner, Operator or designated agent of Evergreen FS Inc. leaking underground storage tank site, do hereby certify under penalty of law, that this application and the supporting documentation attached hereto were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gathered and evaluated the information submitted therein. I affirm that the information is, to the best of my knowledge and belief, true, accurate and complete. Such affirmation is made under penalty of perjury as defined in Section 32-2 of the Criminal Code, 720 ILCS 5/32-2. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowingly committing violations. The "Eligibility and Deductible Determination" decided pursuant to this document is subject to the costs defined in Title 35: Environmental Protection Illinois Administrative Code (IAC) 731, 732, 742 and Public Act 92-0554.

Signature (owner, operator or designated agent)

Michael Kebler

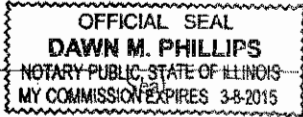
Title: Agent

Date: 11-22, 20 11

RECEIVED
NOV 23 2011
DIV. OF PETROLEUM
CHEMICAL SAFETY

Subscribed and sworn to before me this 22 day of November, 20 11
(application must be notarized when the certificate is signed)

Dawn M. Phillips
Notary Public



Note: Original signatures in ink and seals are required for the certification and notarization. Attach the UST information sheet behind this page. This form may be copied on a photocopier but may not be altered in any way. DO NOT reproduce on a computer; this will be grounds for rejection.

UST Information Sheet

The information below must be provided for each UST at the site. (USTs presently at the site and USTs that have been removed or abandoned)

All spaces must be completed for each tank. Answers of unknown will not be accepted.

You may photocopy this page if more space is needed.

OSFM Facility ID #: 4-013031

Circle one under each column.

Tank ID #	Product Code	Size (Gallons)	Date Installed	Date Registered	Date Out of Service	Date Removed	IEMA Number	Date IEMA Notified	Registration Fees Paid	Has UST Had a Release	Is UST Legally Abandoned In-Place?
1	G	6,000	9/1/81	9/1/87	10/87	10/27/87	NA	NA	<input checked="" type="radio"/> Y <input type="radio"/> N	Y <input type="radio"/> N	Y <input type="radio"/> N
2	G	10,000	9/1/81	9/1/87	4/1/07	6/13/07	20070479	4/18/07	<input checked="" type="radio"/> Y <input type="radio"/> N	<input checked="" type="radio"/> Y <input type="radio"/> N	Y <input type="radio"/> N
3	D	10,000	9/1/81	9/1/87	4/1/07	6/13/07	910580 20070479	3/5/91 4/18/07	<input checked="" type="radio"/> Y <input type="radio"/> N	<input checked="" type="radio"/> Y <input type="radio"/> N	Y <input type="radio"/> N
4	G	10,000	11/2/87	11/2/87	4/1/07	6/13/07	20070479	4/18/07	<input checked="" type="radio"/> Y <input type="radio"/> N	<input checked="" type="radio"/> Y <input type="radio"/> N	Y <input type="radio"/> N
5	N(E85)	10,000	1995	12/4/95	10/10/02	6/13/07	20070479	4/18/07	<input checked="" type="radio"/> Y <input type="radio"/> N	<input checked="" type="radio"/> Y <input type="radio"/> N	Y <input type="radio"/> N
									<input type="radio"/> Y <input type="radio"/> N	<input type="radio"/> Y <input type="radio"/> N	<input type="radio"/> Y <input type="radio"/> N
									<input type="radio"/> Y <input type="radio"/> N	<input type="radio"/> Y <input type="radio"/> N	<input type="radio"/> Y <input type="radio"/> N
									<input type="radio"/> Y <input type="radio"/> N	<input type="radio"/> Y <input type="radio"/> N	<input type="radio"/> Y <input type="radio"/> N
									<input type="radio"/> Y <input type="radio"/> N	<input type="radio"/> Y <input type="radio"/> N	<input type="radio"/> Y <input type="radio"/> N

RECEIVED
NOV 23 2011
DIV. OF PETROLEUM
CHEMICAL SAFETY

Product Codes - (refer to instructions for definitions): G - Gas, D - Diesel, A - Aviation fuels, K - Kerosene, M - New Motor Oil or U - Used oil; H - Heating oil, HAZ - Hazardous Substance (description required); N - Any product not included under another code. (description required)

Comments: _____



State Fire Marshal

"Partnering With the Fire Service to Protect Illinois"

March 29, 2012

Evergreen FS, Inc.
P.O. Box 1367
Bloomington, IL 61702

Re: Facility No. 4-013031
IEMA Incident No. 91-0580
Dwight Fuel 24
Rt. 47 & Old 166
Dwight, Livingston Co., IL

Dear Applicant,

Your request for reevaluation of a Reimbursement Eligibility and Deductible Application, as received by the Office of the State Fire Marshal ("OSFM") on or about February 2, 2012, for the above-referenced occurrence has been reviewed. As you will recall, the request sought the OSFM's reevaluation of its Reimbursement Eligibility and Deductible Application decision dated January 10, 2012.

In response to your request, the OSFM has determined that it lacks any authority to reevaluate or reconsider a prior eligibility decision. Nothing in the applicable statute authorizes or empowers the OSFM to reevaluate such a decision once it has become final. See 415 ILCS 5/57.9. Rather, parties aggrieved by any eligibility determination have the option to appeal. As no timely appeal of the OSFM's January 10, 2012 decision related to Incident No. 91-0580 was received, the initial determination of eligibility must stand.

An underground storage tank owner or operator may appeal this decision to the Illinois Pollution Control Board (Board), pursuant to 415 ILCS 5/57.9(c)(2). An owner or operator who seeks to appeal the decision shall file a petition for a hearing before the Board within 35 days of the date of mailing of the final decision. 35 Illinois Administrative Code 105.504(b). For information regarding the filing of an appeal, please contact:

Clerk
Illinois Pollution Control Board
State of Illinois Center
100 West Randolph, Suite 11-500
Chicago, IL 60601
(312) 814-3620

If you have any questions, please contact our Office at (217) 785-1020 or (217) 785-5878.

Sincerely,

A handwritten signature in cursive script, appearing to read "Deanne Lock".

Deanne Lock
Administrative Assistant
Division of Petroleum and Chemical Safety

cc: Facility File
Environmental Management, Inc.

Enclosure

RECEIVED
Division of Legal Counsel
APR 02 2012
Environmental Protection
Agency