ILLINOIS POLLUTION CONTROL BOARD
June 21, 2012

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

EVERGREEN FS, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 12-61
	)	(UST Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	(consol.)
	)	
Respondents.	)	

PATRICK D. SHAW OF MOHAN, ALEWELT, PRILLA1VIAN & ADAMI APPEARED ON BEHALF OF PETITIONER; and

MELANIE A. JARVIS OF ILLINOIS ENVIRONMENTAL PROTECTION AGENCY APPEARED ON BEHALF OF RESPONDENTS.

OPINION AND ORDER OF THE BOARD (by D. Glosser):

Petitioner Evergreen FS, Inc. (Evergreen) appeals two determinations by the Illinois Environmental Protection Agency (Agency) on two applications by Evergreen for payment from the Underground Storage Tank Fund (UST Fund). The Agency reduced the requested reimbursement amounts by 50%, apportioning the costs pursuant to Section 57.8(m) of the Environmental Protection Act (Act) (415 ILCS 5/57.8(m) (2010)). The Agency's determinations concern Evergreen's leaking underground storage tank (UST) site located at 808 North Union Street in Dwight, Livingston County.

The Board finds that the Board has jurisdiction to hear Evergreen's petitions for review of Agency determinations made in January and October 2011. Upon review of the record, the Board finds that the Agency cannot apportion costs pursuant to Section 57.8(m) of the Act (415 ILCS 5/57.8(m) (2010)). The Agency's denial is reversed because the 1991 release that the Agency deemed to be ineligible for reimbursement in 1992, was determined by the Agency not

to be an underground storage tank leak. The plain language of the Act allows apportionment only when some, but not all, tanks are eligible for reimbursement under the Act. Thus, apportionment between a 1991 spill and the 2007 leak from an underground storage tank cannot be apportioned under Section 57.8(m) of the Act. 415 ILCS 5/57.8(m) (2010). Furthermore, the Board finds that the Agency's decisions were in error because when reviewing a payment application seeking reimbursement for an approved plan or budget, the Agency's review is limited to "auditing for adherence to the corrective action measures in the proposal". *See* 415 ILCS 5/57.8(a)(1) (2010).

The Board first reviews the procedural history and factual background of the case before summarizing the statutory and regulatory background. Next, the Board will summarize Evergreen's arguments and then the Agency's response. The Board will then summarize Evergreen's reply, followed by the Board's discussion of its decision.

PROCEDURAL HISTORY

On February 23, 2011, Evergreen timely filed a petition (Pet. 1) for review of a January 20, 2011 Agency determination to deny reimbursement from the UST Fund in the requested amount and instead to reduce the payment by 50% because the incident (No. 910580) was ineligible. Pet. 1 at 2. On March 3, 2011, the Board accepted Evergreen's petition for hearing.

On November 16, 2011, Evergreen timely filed a second petition (Pet. 2) for review of an October 12, 2011 Agency determination to deny reimbursement from the same site in the requested amount and instead to reduce the payment by 50% because the incident (No. 910580) was ineligible. Pet. 2 at 2. On December 1, 2011, the Board accepted Evergreen's second petition for hearing.

On December 20, 2011 the Board granted a motion to consolidate both cases (PCB 11-51 and PCB 12-61) for the purposes of a hearing on grounds that the two requests for review and denials of reimbursement are similar. The Board today consolidates the cases for decision.

On January 23, 2012, the Agency filed a motion for leave to file a reduced number of copies of the administrative record, asking the Board to allow two hard copies and one disc; the Agency simultaneously submitted copies of the administrative record[1]. On February 15, 2012, a hearing was held before Hearing Officer Carol Webb in Springfield, Sangamon County. The transcript from that hearing will be cited as "Tr. at". Evergreen filed its brief on March 20, 2012 (Br.) and a reply was filed on April 30, 2012 (Reply). The Agency filed its brief on April 20, 2012 (Ag.Br.).

[1] The Agency's administrative record was filed with two parts, both of which are numbered consecutively starting with page one. The Board will cite "Administrative Record Part 1" as "R1 at". The Board will cite "Administrative Record Part 2" as "R2 at".

FACTS

The Board will divide the facts into three sections. The first section will describe the facts surrounding the release reported in 1991. The second section will describe the facts related to the 2007 release. The third section will summarize the testimony from hearing.

1991 Release

On March 5, 1991, Livingston Service Company (LSC), the former owners and operators of the site in question, reported "a release of an unknown quantity of diesel fuel from a 10,000 gallon diesel tank." R2 at 5. The site contained three registered underground storage tanks. R2 at 1297. The incident was assigned number 910580. R2 at 6.

Immediately following the leak, diesel fuel was seen floating in nearby Gooseberry Creek. R2 at 18. The Illinois Emergency Services and Disaster Agency (ESDA)[2] was notified of the leak and LSC removed the petroleum product from one of the USTs at the site, which was the suspected source of the release. *Id*. Petroleum absorbent booms were placed in the creek to collect the released fuel. *Id.* By March 6, 1991, the following day, there was no visual indication of diesel in the drain tile that passed by the UST site into the creek and the creek flowed clean. Based on the brief time fuel flowed along the tile drain and the 100 gallons absorbed by booms in the Creek, LSC estimated that the amount of fuel released was less than 500 gallons. *Id.* This estimate was less than the 5,300 gallons of product originally estimated to be missing. R2 at 7.

Following the 1991 incident, LSC's environmental consultants, Eldredge Engineering Associates, Inc. (EEA), developed a Work Plan to assess the environmental impact of the release, pursuant to the Agency's request. R2 at 24-60. The Work Plan concluded that "the quick response [to the leak] prevented significant environmental degradation to the creek" and that therefore, no further action was needed. R2 at 28. Additionally, the plan noted that before being put back into use, the tank suspected as the source of the leak was tested for tightness on March 7, 1991. *Id*. The tank tested tight, "but a leak was discovered and repaired where the pump was installed into the tank." *Id*. The Work Plan surmised that "this leak was the source of the petroleum release." *Id.*

The Work Plan also established procedures for further investigation of the site and surrounding area. R2 at 28. This involved examining the area around the tile drain for contamination and undertaking excavation if fuel was found; boring soil samples surrounding the USTs to analyze for contamination; and installing monitoring wells to evaluate groundwater contamination. R2 at 29-33. EEA submitted the Work Plan on LSC's behalf for Agency review on May 3, 1991. R2 at 61-62. At this time, LSC also notified the Agency of its plans to seek reimbursement under the Leaking UST Fund. R2 at 61.

On September 9, 1992, EEA formally submitted application for reimbursement from the leaking UST Fund on behalf of LSC for incident number 910580. R2 at 64. In it, EEA indicated

[2] ESDA is a predecessor of the Illinois Emergency Management Agency (IEMA).

that LSC did not plan to initiate soil and groundwater investigation as outlined in the March 1991 Work Plan until receiving the Agency's approval of the reimbursement application because LSC intended to use UST funds for the remedial investigation. *Id*. EEA noted that it had been informed that the Agency would not review the Work Plan until the application for reimbursement has been submitted and approved. R2 at 65. EEA informed the Agency that upon receipt of the Agency's approval LSC would begin corrective action. R2 at 65.

After several applications for reimbursement from the UST fund were rejected by the Agency for incompleteness, the Agency finally determined on December 23, 1992 that LSC was "ineligible to seek reimbursement for corrective actions costs." R2 at 1289. The basis for this rejection was because "the contamination resulted from personnel pumping fuel into a monitoring well instead of the UST system," and not from a leaking UST itself. R2 at 1290. The Agency indicated that this was a final decision. *Id*.

In a March 16, 1993 letter to LSC, the Agency stated it had reviewed LSC's application for reimbursement for UST incident number 910580 and "had determined that remediation has not been completed." R2 at 66. Accordingly, the Agency required further investigation be conducted to determine the extent of the contamination from the incident and requested that LSC submit a 45-day report and corrective action plan by May 1, 1993. *Id.* The Agency reiterated that the corrective action plan must be approved before LSC implemented it; however, no Agency approval for further investigation or installation of groundwater monitoring wells was needed. *Id.*

On May 7, 1993, Midwest Engineering Services submitted its subsurface exploration and limited petroleum hydrocarbon site assessment to LSC. R2 at 69-123. The purpose of the assessment was "to initially evaluate the extent of impacted subsurface soils and groundwater within the site boundaries that may have been affected by a release of petroleum products." R2 at 74. The assessment consisted of soil borings and installation of groundwater monitoring wells, which revealed concentrations in excess of Board standards. R2 at 74-75. The assessment recommended further exploration to determine the extent of groundwater contamination and the gradient flow of groundwater in addition to more soil borings and groundwater monitoring wells. R2 at 87. Additionally, the assessment speculated as to the cause of the 1991 release. R2 at 75-76. The report suggested that the tanker truck driver mistook an observation well on the northwest corner of the UST cavity as a diesel fuel pump during UST re-fueling, and that subsequently, an undetermined amount of diesel was pumped into the well. *Id*.

LSC submitted a 45-day report pursuant to the Agency's March 16, 1993 request. R2 at 124-33. In it, LSC identified the UST that was the source of the 1991 incident and the cause of the release as "[s]uspected truck driver unloaded some product into observation well instead of UST." R2 at 124. This suspicion developed because, according to the 45-day report, both the tanks and piping tested tight after the release, and because "a skim of diesel fuel was noted to periodically be forming on the water within the UST cavity observation well." R2 at 132. In the UST technical review notes following the Agency's review of the 45-day report, the Agency again stated that the 1991 incident was "not a tank release but a major spill in which gas (diesel) was pumped into an observation well." R2 at 134.

Upon reviewing LSC's 45-day report, the Agency requested on June 17, 1993, that LSC further expand its soil and groundwater investigation efforts in order to define the perimeter of the contamination plume before submitting a corrective action plan for remediation. R2 at 137. Again, the Agency emphasized that reimbursement from the UST fund might be contingent on the Agency's approval of a corrective action plan. *Id.* LSC sought several deadline extensions to complete further soil and groundwater contamination investigations.

2007 Release

The record contains no information from June 17, 1993, to July 24, 2007, when the Office of the State Fire Marshal (OSFM) determined that Evergreen, LSC's successor, was eligible to seek payment from the leaking UST Fund in response to Evergreen's reimbursement eligibility and deduction application. R2 at 153-54. The OSFM stated that eligibility to access the Fund was contingent upon registration of the USTs and the owner and operator of the UST notifying the Illinois Emergency Management Agency (IEMA) of any release. *Id*.

On April 4, 2007, Environmental Management, Inc. (EMI) performed a limited subsurface soil investigation in the area of four 10,000 gallon USTs, including two gasoline tanks, one diesel tank and one E-85 tank. R2 at 155. Moderate petroleum odors were noted during advancement of probes as well as pooled water exhibiting an oily sheen. On April 19, 2007, IEMA was notified of the release based on analytical results. *Id*. IEMA assigned incident number 20070479 to the site. *Id*.

On June 13-15, 2007, Petroleum Tank Removal, Inc. (PTR) removed four tanks at the facility. R2 at 155. EMI observed the tanks and measured the excavation area. An official from OSFM was on site during removal and requested a second reporting to IEMA. *Id*; R2 at 219. Soil samples taken during tank removal revealed contamination levels exceeding the Board's Tier 1 remediation objectives. On June 13, 2007, IEMA was again contacted and a second incident number, 20070804 was assigned. R2 at 155-56. At the time the second incident number was issued, "[n]o estimation as to the quantity of the release could be made." *Id.*

On July 24, 2007, OSFM issued a determination that the tanks were eligible for reimbursement after a $10,000 deductible was applied. R2 at 153-54.

On August 15, 2007, EMI submitted an amended 45-day report and corrective action completion report to the Agency on behalf of Evergreen. R2 at 143-245. The Agency rejected the plan noting certain issues should be addressed including the 1991 spill. R2 at 395-96; 398-400. On December 24, 2007, EMI submitted a Stage 2 Investigation Plan, which the Agency approved. R2 at 403-95; R2 at 498-99.

The investigation revealed significant contamination near the location of the former pump islands extending west towards the highway. R2 at 507-08. The full extent of the contamination could not be determined and further investigation was undertaken. R2 at 502-619. On July 31, 2008, a Stage 3 Site Investigation Plan was filed (*Id*.), which the Agency approved with modifications (R2 at 622-26). An amended Stage 3 Site Investigation Plan was filed on

April 1, 2009 (R2 at 629-718), addressing the Agency's modifications. The Agency approved the second plan, which included the budget. R2 at 723-29.

While conducting the Stage 3 investigation, further contamination was discovered and a second amended Stage 3 investigation and plan were submitted on October 19, 2009, to address the contamination. R2 at 740-840. The October 19, 2009 submittal included an amended budget. *Id*. The budget was revised and then approved by the Agency on February 17, 2010. R2 at 845-55; R2 at 856-58.

On July 6, 2010, EMI submitted the Site Investigation Completion Report and a second amended Stage 3 Actual Costs Budget. R2 at 866-1054. On October 26, 2010, the Agency approved the report and budget. R2 at 1056-59. The Agency approved a budget for reimbursement of $25,500.40. R2 at 1058.

As of October 26, 2010, Evergreen had submitted four payment applications for site work that had been approved for a total of $153,934.64. R1 at 11, 16. On November 10, 2010, EMI submitted a leaking UST billing package for the Stage 3 Site Investigation Activities, seeking $25,500.40, which had been approved, and an additional $911.65 for handling charges. R1 at 18. On January 20, 2011, the Agency approved payment but reduced the amount by 50%.[3] Pet. 1 at Exh. A. Specifically, the Agency stated, as its reason for the reduction:

> $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 UST incident number 910580 was deemed ineligible. *Id*.

On March 11, 2011, EMI submitted a Corrective Action Plan and Budget , which the Agency approved with some modifications. (R2 at 1080-276. The Agency approved a budget of $18,297.22. R2 at 1283. On July 21, 2011 EMI applied for payment of $12,303.26. R1 at 55-67. On October 12, 2011, the Agency again reduced the requested amount by 50% stating[4]:

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[3] The Board notes that the record submitted by the Agency does not include the second page or the attachment from the January 20, 2011Agency denial letter. Therefore, citations will be to the copy of the January 20, 2011 letter attached to the petition for review of PCB 11-51.

[4] The Board was unable to locate the Agency's denial letter in the Agency record. Therefore, citations will be to the copy of the October 12, 2011 letter attached to the petition for review of PCB 12-61.

$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.

The release for UST incident number 910580 was deemed ineligible. Pet. 2 at Exh. A.

Testimony

Mr. Mike Keebler, president of EMI, testified at hearing. Tr. at 12. Mr. Keebler testified that there are generally four observation wells placed around a UST and they are very distinctive compared to a UST fill pipe. Tr. at 14-15. The openings are usually 9-inches in diameter and about 20 feet deep. Tr. at 15. Mr. Keebler offered an opinion on the record that the 1991 release was not the result of an inadvertent fill into the observation well, but rather a leak in the piping of the UST system. Tr. at 19-20.

Mr. Keebler described the 1991 release noting that contamination was found in a nearby creek on the east side of the property. Tr. at 21. The investigation found very low levels of contamination in the soil and groundwater. *Id.* By contrast the 2007 release contamination is to the south and west of the tank pit and involves four tanks. Tr. at 21-22.

No other witnesses testified at hearing.

STATUTORY AND REGULATORY BACKGROUND

Section 57.8(a)(1) of the Act provides:

The owner or operator may submit an application for payment for activities performed at a site after completion of the requirements of Sections 57.6 and 57.7, or after completion of any other required activities at the underground storage tank site.

1) In the case of any approved plan and budget for which payment is being sought, the Agency shall make a payment determination within 120 days of receipt of the application. Such determination shall be considered a final decision. The Agency's review shall be limited to generally accepted auditing and accounting practices. In no case shall the Agency conduct

> additional review of any plan which was completed within the budget, beyond auditing for adherence to the corrective action measures in the proposal. If the Agency fails to approve the payment application within 120 days, such application shall be deemed approved by operation of law and the Agency shall proceed to reimburse the owner or operator the amount requested in the payment application. However, in no event shall the Agency reimburse the owner or operator an amount greater than the amount approved in the plan. 415 ILCS 5/57.8(a)(1) (2010).

Section 57.8(m) of the Act provides:

> 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; 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) (2010).

The Board's rules also address apportionment of costs in Section 734.640, which provides:

> 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 734.640.

EVERGREEN'S POST-HEARING BRIEF

Evergreen sets forth several arguments. First, Evergreen argues that there was a release from a UST system in 1991 that was eligible for reimbursement. Next, Evergreen maintains that any release through the monitoring well was a release from the UST system and was a *de minimis* release. Evergreen then argues that apportionment is not authorized and the application for payment is not subject to apportionment. The Board will summarize each of these arguments in turn.

There Was a UST Release in 1991

Evergreen asserts that the Agency erroneously denied Evergreen reimbursement from the UST fund based on an incorrect statement that the 1991 release was due to overfill in an observation well rather than from a leaking UST pipe. Br. at 1. Evergreen claims that despite evidence in the form of a bill for repair showing the 1991 incident originated from the leaking piping system connected to the registered diesel fuel tank, the owner/operator indicated that the incident was likely attributed to an overfill in the monitoring well of the UST. *Id.* Based on this claim, Evergreen alleges the Agency erroneously determined that "the release had not originated from the underground storage tank, and therefore was ineligible for reimbursement." *Id.* That conclusion led to the Agency's determination that only half of the cleanup costs from the 2007 release are eligible for reimbursement. *Id.* at 1-2.

Evergreen argues that the 1991 release did in fact occur from the UST, namely, the leaking underground piping system, and is therefore eligible for reimbursement. Br. at 2. Furthermore, Evergreen argues in the alternative that "[e]ven if the release originated through the monitoring well, the monitoring well was part of the required underground storage tank system and thus eligible." *Id*. Furthermore, Evergreen argues that under Section 57.8(m) of the Act (415 ILCS 5/57.8(m) (2010)), apportionment of UST funds is not appropriate when all of the USTs at the site were registered. *Id.* Finally, Evergreen claims that "the Agency is not authorized to make an apportionment at the payment stage." *Id.*

In its statement of facts, Evergreen recounts the initial response and investigative activities after the 1991 release, noting that on March 7, 1991, tanks and UST piping system were tested and a small leak was discovered and repaired. Br. at 4. After the repair was made, the tanks and piping passed the tightness test. *Id.* Evergreen contends that LSC's own estimate was that no more than 500 gallons were released during the 1991 incident. *Id.* Evergreen also offers EEA's assessment that "a leak was discovered and repaired where the pump was installed into the tank" and that this leak was the likely source of the 1991 release. *Id.* at 5. Evergreen states that the Agency never reviewed or approved EEA's Work Plan for soil and groundwater investigation despite EEA's requests to approve the plan so that LSC could receive UST reimbursement. *Id.* According to Evergreen, in an apparent "catch-22", the Agency's response to LSC's request for review and approval of the Work Plan could not be granted "at a site where the owner intends to access the UST fund until an application for reimbursement is submitted and approved." *Id.*

Evergreen contends that LSC attempted to garner the Agency's approval for reimbursement by submitting an application first on September 9, 1992; however, the application was rejected as incomplete twice. Br. at 6. After the first submission, the Agency contacted LSC's consultant inquiring as to the likely cause of the release, at which point both the consultant and Agency determined the cause of release was fuel overflow during pumping, ruling out a UST leak based on the results of the tank tightness test. *Id.* Evergreen states that this speculation was the first appearance of the "product overfill theory." *Id.*

Evergreen states that upon second review of the reimbursement application, "the Agency noted a discrepancy between a 'product spill' theory and evidence previously submitted of a line leak," recalling that a technical report indicated the diesel fuel line failed a tightness test on March 7, 1991, and was then repaired. Br. at 7. The Agency again rejected the revised application, requesting a more detailed description of the cause of the spill, but did not cite the discrepancy between the product spill theory and the failed tightness test. *Id.* Ultimately, the Agency rejected the application for reimbursement because the release was not from the leaking UST but from a product overfill. *Id.* at 8. According to Evergreen, the product spill theory was a speculative and inaccurate assumption accepted by the Agency "while knowing that the diesel fuel line had in fact failed a tightness test." *Id.*

Following the 2007 UST incident, Evergreen engaged in investigative and corrective action, and submitted four payment applications that were approved for a total of $153,934.64. Br. at 8. Evergreen states that the issue of apportionment for the 1991 incident was never discussed by the Agency. *Id.* On November 10, 2010, Evergreen applied for payment of $26,063.15 from the UST fund based on the Agency approved budget. *Id.* at 12. However, the Agency denied full reimbursement for Evergreen's request and instead assessed a 50% apportionment pursuant to Section 734.640 of the Board's rules (35 Ill. Adm. Code 734.640). Br. at 12. The Agency found that UST incident number 910580 was ineligible for reimbursement from the Fund. *Id.* On March 11, 2011, Evergreen submitted a corrective action plan and budget, which was approved by the Agency for $18,297.22 "with no reference to apportionment." *Id.* at 13. However, when Evergreen applied for reimbursement for the amount of the approved budget, the payment was also subject to 50% apportionment. *Id.*

Evergreen argues that "[t]he 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." Br. at 14. Evergreen claims that this evidence was ignored, which led to the Agency erroneously apportioning Evergreen's reimbursement. *Id.* Instead, Evergreen states that the Agency falsely assumed the tanks were tight and speculated that an overfill or spill was the cause of the 1991 incident. *Id.* This version of the facts was supported by observations of an oily sheen in the observation well. *Id.* at 15.

Evergreen counters the Agency's position by providing the opinion of a professional engineer who stated that the information from the 1991 incident was inconsistent with an overfill of an observation well and that a sheen in the well "is evidence of a tank release, not a release into the observation well." Br. at 15. The engineer further opined on the unlikelihood of a diesel fuel truck driver pumping gas directly into the well. *Id.* at 16.

Evergreen opines that the Agency will likely argue that the decision made by the Agency in 1992 was a final and appealable order, which was not appealed and cannot now be challenged. Br. at 16. Evergreen argues however that the 1992 decision relates only to the issues raised to the Agency at that time. *Id*. Evergreen notes that the Agency cannot change eligibility determinations, and the finality protects the applicant. *Id*., citing Hillsboro Glass Co. v. IEPA, PCB 93-9 (Mar. 11, 1993). Stated another way, the purpose of finality is "to protect the interests of the applicant, who has relied on prior determinations". *Id*. Evergreen argues that in this instance, Evergreen relied on the Agency's approval of budgets and payments that were not

apportioned. Br. at 16. Evergreen asserts that a better practice would be that when "new" evidence is discovered, the Agency be required to notify the applicant to afford the applicant the opportunity to address the information. *Id*.

Any Release Through the Monitoring Well Was a Release From the UST System

Evergreen argues that any release into the monitoring or observation well was a release from the UST, and not from an overfill. Br. at 17. Because of evidence of a leak in the piping system during the initial tightness test, Evergreen reasons that the release was due to a leaking pipe connecting the tank to the pump, and that the connecting pipe is part of the UST system. Br. at 17. Furthermore, Evergreen claims that the monitoring well itself is part of the tank system. *Id*; citing Harlem Township v. Illinois Environmental Protection Agency, PCB 92-83 (Oct. 16, 1992), and R2 at 18. Evergreen states that Section 57.9(a) of the Act (415 ILCS 5/57.9(a) (2010)) makes the UST fund available to owners and operators who have confirmed a release from a UST system, which Evergreen maintains includes the piping and monitoring systems. *Id.* Therefore, because the leak was likely from the piping system, Evergreen contends it should be granted reimbursement from the Fund, and in the alternative, even if the leak was contained in the observation well, reimbursement should be granted because either situation constitutes a release from the UST system under Section 57.9(a) of the Act (415 ILCS 5/57.9(a) (2010)). *Id.*

Evergreen concedes that the issue of whether a dispensing pump is a part of the UST system has been contested and the Illinois Appellate Court resolved the issue. Br. at 18, citing, Harlem Township v. IEPA, PCB 92-83 (Oct. 16, 1992) (affirmed Harlem Township v. IEPA, 265 Ill. App. 3d 41; 637 N.E.2d 1252 (2n Dist. 1994); Ramada Hotel, O'Hare, v. IEPA, PCB 92-87 (Oct. 29, 1992); and Greenville Airport Authority, v. IEPA, PCB 92-157 (Feb. 4, 1993). Evergreen argues that many of the considerations in these cases favor treating the monitoring well as a part of the UST system. Those considerations include that the monitoring well is below ground. Br. at 18.

Any Release Through the Monitoring Wells Was *De Minimis*

Evergreen contends that the Board has decided that if the amount of the release is *de minimis*, apportionment should not be required. Br. at 21, citing Freedom Oil v. IEPA, PCB 03-54; PCB 03-56; PCB 03-105; PCB 03-179; PCB 04-2 (consol) (Feb. 2, 2006). Evergreen emphasizes its belief that "there was no release through the monitoring well and none of the cleanup costs are attributable to ineligible tanks". *Id.* However, if such theory were considered, Evergreen opines that very little of the cost incurred arose from the 1991 release. *Id*. Evergreen points out that the 1991 incident was believed not to have exceeded 500 gallons; a visible spill was not reported; the monitoring wells were small; and the incident was probably a result of spills and overfills. *Id*. In contrast the 2007 incident involved a major release from four tanks.

Apportionment Not Authorized

Evergreen argues that under Section 57.7 of the Act (415 ILCS 5/57.7 (2010)), the Agency may only apportion payments when some but not all of the USTs at a site have been

registered. Br. at 19. Because all of the tanks at the site were registered, Evergreen argues that such a situation does not exist and therefore the Agency was unable to lawfully apportion payments. *Id.*

Evergreen notes that the Board has addressed the issue of apportionment and stated:

> 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. Br. at 19, *quoting* Freedom Oil, PCB 03-54 (consol.).

Evergreen further notes that the Board also discussed apportionment in Martin Oil v. IEPA, PCB 92-53 (Aug. 13, 1992) justifying apportionment due to the presence of unregistered tanks. Br. at 19-20.

Evergreen points out that the Board's rules require the Agency to base apportionment on the number of tanks. Here, Evergreen argues it is not clear how the Agency determined that a 50% apportionment was appropriate. Br. at 20. Evergreen asserts that the Agency's position is inherently contradictory, because "a release into the monitoring well is not a release attributable to a tank and therefore [the Agency] will treat it as a release from multiple ineligible tanks." *Id*.

Application For Payment is Not a Plan Subject to Apportionment

Evergreen claims that the Agency may only apportion payments for USTs under Section 57.7(c) of the Act (415 ILCS 5/57.7(c) (2010)), which relates to the authorization of site investigation and corrective action plans. Br. at 22. Evergreen maintains that its application for reimbursement was not such a plan, but was instead an application for payment from the UST Fund governed by Section 57.8 of the Act, and therefore not subject to apportionment. *Id.* at 23. Evergreen states that "there is no legal basis for directing an apportionment at the application for payment stage," and that by doing so, the Agency has violated the Act. *Id.* at 24.

AGENCY'S ARGUMENTS

The Agency puts forth several arguments in support of its decision to reduce Evergreen's reimbursements by 50% in its brief. However, first, the Agency argues that these matters should be dismissed. The Agency then sets forth the law regarding the burden of proof and standard of review. Next, the Agency argues that the Agency's decision on the 1991 release is not appealable and the record supports the Agency's decision. The Agency then argues that the monitoring well is not a part of the UST system. Finally, the Agency discusses apportionment of the reimbursement amounts. The Board will summarize each of these arguments below.

Petition Should Be Dismissed

The Agency argues that the Board should dismiss the petition because the Board does not have jurisdiction. Ag.Br. at 2. The Agency notes that challenges to jurisdiction may be raised at

any point in the proceeding. *Id*., citing Concerned Boone Citizens, Inc. v. M.I.G. Investments, Inc., 144 Ill. App. 3d 334, 494 N.E.2d 180 (2nd Dist. 1986); Ogle County Board v. IPCB, 272 Ill. App. 3d 84, 649 N.E.2d 545 (2nd Dist. 1995). The Agency concedes that the petition seeks review of two Agency decisions, one from January 20, 2011 and one from October 12, 2011. However, the Agency maintains that Evergreen's appeal, testimony presented at hearing, and its brief make clear that Evergreen is actually seeking to appeal the Agency's decision related to the 1991 release. Ag.Br. at 3. The Agency argues that the Board must consider in reviewing the Agency's decision to apportion reimbursement whether or not Evergreen is actually seeking appeal of the Agency's decision on the 1991 release. *Id*.

The Agency contends that the law is clear that the Agency has no statutory authority to reconsider a final decision. Ag.Br. at 3, citing Reichhold Chemicals, Inc. v. IPCB, 204 Ill. App. 3d 674, 561 N.E.2d 1343 (3rd Dist 1999). A final decision is one that terminates a proceeding before the administrative body. Ag.Br. at 3, citing Taylor v. State Universities Retirement, 159 Ill. App. 3d 372, 512 N.E.2d 399 (4th Dist 1987). Further, the Agency points out that the Board has found that the Board lacked jurisdiction to review an Agency decision when that decision was not timely appealed. Ag.Br. 4, citing Mick's Garage v. IEPA, PCB 03-126 (Dec. 18, 2003). Also, the Agency notes that the Board has expressed concern with a petitioner's attempt to misuse the submittal process to remedy a failure to properly appeal. Ag.Br. at 4, citing Kean Oil v. IEPA, PCB 97-146 (May 1, 1997).

The Agency asserts that it made a final and appealable decision concerning the 1991 release on December 23, 1992. Ag.Br. at 4. The Agency determined that the 1991 release was not eligible for reimbursement. *Id*. The Agency argues that it does not have the authority to reconsider a decision, and the time for which an appeal can be filed has passed. *Id*. Therefore, the Agency opines that the Board lacks jurisdiction to hear an appeal of the determination relating to the 1991 release.

Burden of Proof and Standard of Review

The Agency notes that the burden of proof is on the petitioner and the petitioner must demonstrate that costs are related to corrective action, properly accounted for and reasonable. Ag.Br. at 5, citing Rezmar Corporation v. IEPA, PCB 02-91 (Apr. 17, 2003); 35 Ill. Adm. Code 105.112(a). The Agency argues that the Board's primary focus "must remain on the adequacy of the permit application and the information submitted by the applicant." Ag.Br. at 5.

As to the standard of review, the Agency notes that Section 57.8(i) of the Act (415 ILCS 5/57.8(i) (2010)) allows for the appeal of the Agency's determination pursuant to Section 40 of the Act (415 ILCS 5/40 (2010)). Ag.Br. at 6. The Agency opines that the Board must determine whether or not the corrective action plan or budget if approved would not violate the Act or Board regulations. *Id*. Furthermore, the Board should not consider new information that was not before the Agency when the Agency made its decision. *Id*.

Evergreen is Seeking Review of the December 23, 1992 Agency Decision

The Agency asserts that what Evergreen is appealing, based on Evergreen's own filings, is the 1991 release. Ag.Br. at 13. The Agency points to the petition and argues that Evergreen "twice" indicates that it is seeking review of whether or not the 1991 release was ineligible for reimbursement. *Id*. The Agency opines that this is not a petitioner who is arguing that more work had been done to respond to the more recent incident nor does Evergreen assert that more funds should be paid on one incident over another. *Id*. Instead, the Agency maintains that Evergreen is seeking full payment for all costs regardless of which incident is being responded to by Evergreen. *Id*.

The Agency also maintains that Evergreen does not argue that the apportionment is incorrect; rather Evergreen argues that the 1991 incident should be reimbursed. Ag.Br. at 13. The Agency asserts that "[t]his is an all or nothing argument." *Id*. The Agency maintains that there is no "reasonable interpretation" of Evergreen's argument that establishes that Evergreen challenges the 50% apportionment[5]. *Id*.

The Agency opines that the "reality of the" determination concerning the 1991 release became more important when the Agency apportioned the reimbursement requests at issue here. Ag.Br. at 14. The Agency asserts that its 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." *Id*. The Agency asserts that Evergreen is re-inventing the issue on the 1991 release; however, that does not mean that the Board can review the determination on the 1991 release.

1991 Release Was Not a *De Minimis* Release

The Agency maintains that Evergreen's argument that the release from 1991 is *de minimis* is made before the Board for the first time; Evergreen did not raise this issue with the Agency. Ag.Br. at 15. The Agency asks that the arguments be stricken from the record for this reason. Ag.Br. at 16.

The Agency argues that Evergreen can point to no information in the record to support the position that the release was *de minimis*. Ag.Br. at 15. The Agency maintains that the record in fact establishes that the 1991 release was significant, indicating that 5,300 gallons of fuel went missing. *Id*. Further, when the 45-day report was submitted on the 1991 release, it indicated that there was a petroleum sheen on a nearby creek and product traced the length of the 20-acre property that was adjacent. Ag.Br. at 16. The Agency argues that Evergreen's argument is disingenuous. *Id*.

[5] The Agency presents several paragraphs of argument concerning filings by Evergreen with the OSFM that were filed after the Agency had made its determination. Ag.Br. at 13-14. Evergreen takes issue with the Agency's reliance on documents not a part of the Board's record. Reply at 5. The Board did not consider these arguments or the documents, but will not strike them from the record.

Record Supports the Agency's Decision on the 1991 Release

The Agency argues that the record fully supports the Agency's decision in that the record establishes that the apportionment of the reimbursement was appropriate. Ag.Br. at 16. The Agency notes that it relies on the owner or operator and their consultant to provide full information to the Agency. Ag.Br. at 17. The Agency asserts that Evergreen presents no "tangible or persuasive argument" for the Board to rely on to overturn the Agency's decision. *Id*. Rather, the Agency contends that Evergreen provides speculation about a final decision rendered 20 years ago. *Id*. The Agency argues that speculation cannot overcome the record and the record demonstrates that the 1991 release was from the filling of a monitoring well. Ag.Br. at 18.

A Monitoring Well Release Is Not From a UST System

The Agency argues that the monitoring well is not a part of the UST System and thus, the Agency properly found the 1991 release was ineligible for reimbursement. Ag.Br. at 19. The Agency points to the definition of "UST System" found in the Board's rules that provide: "an underground storage tank, connected underground piping, underground ancillary equipment and containment system, if any." Ag.Br. at 19, quoting 35 Ill. Adm. Code 734.115. The Agency opines that monitoring wells are part of the release detection system and not a part of the UST system. Ag.Br. at 19.

Apportionment Was Correct

The Agency asserts that Evergreen did not appeal the apportionment of the reimbursement. Ag.Br. at 20. Further, the Agency maintains that Evergreen did not present any argument or attempt to dispute how apportionment was done by the Agency. *Id*. The Agency contends that the only evidence before the Board is in the record that supports apportionment. *Id*.

The Agency concedes that several requests for payment have been reimbursed without the Agency apportioning the reimbursement. Ag.Br. at 19. The Agency indicates that it will "take steps" to "recover the amounts paid in error". *Id*.

EVERGREEN'S REPLY

Evergreen agrees that the issue on appeal is defined by the Agency's denial letters. However, Evergreen contends that the Agency is mischaracterizing Evergreen's position as a request for reconsideration. Reply at 1. Evergreen acknowledges that some of its arguments relate to the 1991 release; however those arguments are made because the Board has indicated that the application of Section 57.8(m) of the Act (415 ILCS 5.57.8(m) (2010)) may change based on new information. *Id*., citing Freedom Oil, PCB 03-54 (consol.), slip op. at 65.

Furthermore, Evergreen argues that it is not required to submit evidence at hearing with respect to every issue. Reply at 1. Evergreen contends that three of the issues presented in its brief are legal with no need for evidence. *Id*.

Evergreen takes issue with the Agency's presentation of the facts and clarifies the difference between itself and Evergreen's predecessor. Reply at 2.

Evergreen is not seeking reconsideration of the eligibility determination. Reply at 3. Evergreen states it has been cleaning up a major release from all four tanks on the property, and the Agency interjected the 1991 release to "arbitrarily cut reimbursement". *Id.* Evergreen asserts that a final decision can be revised on the basis of new or additional information. *Id.*, citing Reichhold, 203 Ill. App. 3d 674.

Evergreen argues that the Agency generally "refuses to respond" to the arguments in Evergreen's brief. Reply at 4. Evergreen notes that the Agency's denial letter frames the issue on appeal and nothing in the record indicates why the Agency changed its position on reimbursement. Reply at 5. Evergreen argues that the petition for appeal was sufficient. *Id.*

STANDARD OF REVIEW AND BURDEN OF PROOF

The Board must decide whether the petitioner's submittal to the Agency demonstrated compliance with the Act and the Board's regulations. *See, e.g.*, Illinois Ayers Oil Co. v. IEPA PCB 03-214, slip op. at 8 (April 1, 2004); Kathe's Auto Service Center v. IEPA, PCB 96-102, slip op. at 13. The Board's review is generally limited to the record before the Agency at the time of its determination. *See, e.g.*, Freedom Oil, PCB 03-54 (consol.), slip op. at 11; *see also* Illinois Ayers, PCB 03-214, slip op. at 15 ("the Board does not review the Agency's decision using a deferential manifest-weight of the evidence standard," but "[r]ather the Board reviews the entirety of the record to determine that the [submittal] as presented to the Agency demonstrates compliance with the Act").

Further, on appeal before the Board, the Agency's denial letter frames the issue (*see, e.g.*, Karlock v. IEPA, PCB 05-127, slip op. at 7 (July 21, 2005)) and the UST owner or operator has the burden of proof (*see, e.g.*, Ted Harrison Oil v. IEPA, PCB 99-127, slip op. at 5-6 (July 24, 2003); *see also* 35 Ill. Adm. Code 105.112). The standard of proof in UST appeals is the "preponderance of the evidence" standard. Freedom Oil, PCB 03-54, slip op. at 59; *see also* McHenry County Landfill, Inc. v. County Bd. of McHenry County, PCB 85-56, 85-61, 85-62, 85-63, 85-64, 85-65, 85-66 (consol.), slip op. at 3 (Sept. 20, 1985) ("A proposition is proved by a preponderance of the evidence when it is more probably true than not.").

DISCUSSION

The Board's discussion will begin by defining the issues in this proceeding. The Board will then discuss those issues, beginning with the Agency's motion to dismiss and the effect of the 1991 release on this proceeding. Next the Board will examine the statutory language and conclude with a discussion of whether or not a 50% reduction is supported by the record.

Issues

The law is well settled that the Agency's denial letters frame the issues on appeal. In this instance, the January 20, 2011 Agency letter states that there would be a:

> $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 . . ..
>
> * * *
>
> The release for lust incident number 910580 was deemed ineligible. Pet. 1 at Exh. A.

The October 12, 2011 Agency letter states that there would be a:

> $6,151.63, deduction for costs that require a 50% apportionment of costs pursuant to 35 Ill. Adm. Code 734.640. Pursuant to Section S7.8(m) of the Act. the Illinois EPA may apportion payment of costs . . ..
>
> * * *
>
> The release for lust incident number 910580 was deemed ineligible. Pet. 1 at Exh. A. Pet. 2 at Exh. A.

Thus, the Board must decide if the record supports the Agency's decision to reduce the payment of costs by 50%.

In making that determination, there are three issues the Board must address. First, the Agency has filed a motion to dismiss the petitions for review, arguing that Evergreen is actually attempting to appeal the Agency's decision on a 1991 release. The Agency's motion leads to a discussion of what relation the Agency's 1991 decision has to the releases in 2007.

A second issue is whether or not the Agency can in this case apportion payments under the provisions of Section 57.8(m) of the Act (415 ILCS 5/57.8(m) (2010)).

If the Board finds that the Agency can apportion payments in this case, then the third issue is whether or not the record supports the Agency's 50% reduction.

Motion to Dismiss

The Board will first summarize the arguments of the parties and then address the motion to dismiss. The Board will then discuss the relevance of the 1991 release.

Summary of Arguments

The Agency argues that a motion to dismiss alleging jurisdictional deficiencies is appropriate at any time in a proceeding. In this case, the Agency argues that the Board lacks jurisdiction to review the Agency's final determination on the 1991 release and Evergreen is actually appealing the 1991 release. The Agency cites to paragraphs in the petition, Evergreen's brief, and testimony at hearing to support the Agency's argument. The Agency points out that it cannot reconsider its decisions and therefore the decision on the 1991 release is final.

In the reply, Evergreen argues that the petition for review was sufficient. Evergreen acknowledges that some of its arguments relate to the 1991 release; however those arguments are necessary when reviewing a decision based on Section 57.8(m) of the Act (415 ILCS 5/57.8(m) (2010)).

Board Finding on Motion to Dismiss

The petition for review filed on February 23, 2011, in PCB 11-51 specifically states that Evergreen "hereby appeals the LUST decision issued on January 20, 2011, by Respondent Illinois Environmental Protection Agency, in which the Agency refused to pay the approved amount . . .." Pet. 1 at 1. The first seven paragraphs of the petition address activities surrounding the 2007 release. *See* Pet. 1 at 1-2. Finally, the Agency decision attached to the petition is dated January 20, 2011. *See* Pet. 1 at Exh. A.

The petition for review filed on November 16, 2011, specifically states that Evergreen "hereby appeals the LUST decision issued on October 12, 2011, by Respondent Illinois Environmental Protection Agency, in which the Agency refused to pay the approved amount . . .." Pet. 2 at 1. The first seven paragraphs of the petition address activities surrounding the 2007 release. *See* Pet. 2 at 1-2. Finally, the Agency decision attached to the petition is dated October 12, 2011. *See* Pet. 2 at Exh. A.

Section 57.8(i) of the Act (415 ILCS 5/57.8(i) (2010)) allows an applicant to appeal an Agency decision on payment of reimbursements pursuant to Section 40 of the Act (415 ILCS 5/40 (2010)). Section 40 of the Act (415 ILCS 5/40 (2010)) allows an applicant to file a petition for review of the Agency's decision within 35 days of the date that the Agency decision is served. The Board consistently requires strict adherence to these statutory procedures, dismissing petitions filed after the jurisdictional 35-day appeal period of Section 40. *See, e.g.*, Illinois Ayers Oil Co. v. IEPA, PCB 05-48, slip op. at 5 (March 17, 2005); DuPage Enterprises, Inc. v. IEPA, PCB 93-143, slip op. at 1-2 (August 5, 1993).

The Board recently reviewed an Agency motion to dismiss in another UST case where the Agency's arguments were very similar to those raised here. In A & H Implement Company v. IEPA, PCB 12-53 (May 17, 2012), the Agency argued that the decision being appealed referenced two earlier decisions that were final and no longer appealable. A & H, PCB 12-53, slip op. at 3. The Agency urged the Board to dismiss the case for lack of jurisdiction because the decision being appealed contained no new decisions. *Id*. slip op. at 5. The Board found that the

petition was properly filed with the Board having been filed within 35 days of the date of the Agency's decision. *Id*. slip op. at 7.

Likewise, the petitions filed by Evergreen were petitions for review filed within the statutory timeframe. The petitions met the content requirements of the Board rules and were properly accepted for hearing. The Board finds it does have jurisdiction to review the Agency's decisions from January 20, 2011 and October 12, 2011. Therefore, the Agency's motion to dismiss is denied.

Board Finding on Relevance of 1991 Release

The Agency lacks authority to change or reconsider its final determinations. A & H, slip op. at 7, citing Reichhold, 204 Ill. App. 3d at 677-78, 561 N.E.2d at 1345-46, *appeal denied* 136 Ill.2d 554, 567 N.E.2d 341 (1991). The Board previously has held that the Board does not have jurisdiction to review Agency final determinations that are not appealed to the Board within the 35 day period prescribed by Section 40 of the Act. *See* A & H, PCB 12-53, slip op. at 7 (Board held that it lacked jurisdiction to review prior budget relating to UST site, not timely appealed); *see also* Mick's Garage, PCB 03-126, slip op. at 6-7 (Board did not have jurisdiction to review a 1992 Agency deductibility determination which was reaffirmed in a 2003 Agency determination); Panhandle Eastern Pipe Line Co. v. IEPA, PCB 98-102, slip op. at 13 (Jan. 21, 1999), *aff'd* Panhandle Eastern Pipe Line Co. v. PCB, 314 Ill. App. 3d 296, 734 N.E.2d 18 (4th Dist. 2000) (Board 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).

The Agency's decision on the 1991 release was issued on December 23, 1992, and stated that the release was "ineligible for reimbursement for corrective action costs". R2 at 1289. No appeal of that decision was made by LSC, the former owner and operator of the site. Therefore, the decision that the 1991 release is ineligible for reimbursement is final, and neither the Board nor the Agency can revisit that decision. *See* A & H, PCB 12-53, slip op. at 7; *see also* Mick's Garage, PCB 03-126, slip op. at 6-7; Panhandle Eastern Pipe Line Co. v. IEPA, PCB 98-102, slip op. at 13 (Jan. 21, 1999), *aff'd* Panhandle Eastern Pipe Line Co. v. PCB, 314 Ill. App. 3d 296, 734 N.E.2d 18 (4th Dist. 2000).

However, the 1991 release and the facts surrounding that release are relevant in this case when determining whether or not apportionment is appropriate, as well as how much apportionment is to be applied. Therefore, the Board may examine the facts surrounding the 1991 release in deciding the issues of apportionment below.

Apportionment Under Section 57.8(m) of the Act

The Board has previously reviewed and applied the provisions of Section 57.8(m) of the Act (415 ILCS 5/57.8(m) (2010)). *See* Freedom Oil, PCB 03-54 (consol.), slip op. at 56-60. The Board reviewed the statutory language and found "no ambiguity in Section 57.8(m)(2) of the Act". Freedom Oil, PCB 03-54 (consol.), slip op. at 58. In Freedom Oil, the Board ultimately found that apportionment of costs between eligible and ineligible tanks was appropriate. *Id*., at slip op. 65.

When construing a statutory provision, the Board's primary task is to ascertain and give effect to the intent of the legislature. *See* Vicencio v. Lincoln-Way Builders, Inc., 204 Ill. 2d 295, 301, 789 N.E.2d 290, 294 (2003). "The best indication of legislative intent is the statutory language, given its plain and ordinary meaning." Krohe v. City of Bloomington, 204 Ill. 2d 392, 395, 789 N.E.2d 1211, 1212 (2003). If the statutory language is "clear and unambiguous," then the Board "must apply the statute without resort to further aids of statutory construction." *Id*. If, however, the statutory language is ambiguous, the Board "may look to other sources to ascertain the legislature's intent." *Id*.

Statutory terms are considered ambiguous if more than one interpretation of the terms is reasonable. *See* People v. Donoho, 204 Ill. 2d 159,172, 788 N.E.2d 707, 715 (2003). The Board then must give the ambiguous terms a construction that is reasonable and that will avoid absurd, unjust, or unreasonable results, which the legislature could not have intended. *See* County Collector of DuPage County v. ATI Carriage House, Inc., 187 Ill. 2d 326, 332, 718 N.E.2d 164, 168 (1999). In doing so, the Board may consider the purpose of the law being interpreted. *See* Williams v. Staples, 208 Ill. 2d 480, 487, 804 N.E.2d 489, 493 (2004).

As stated above, the Board has found that Section 57.8(m) of the Act is unambiguous and therefore the Board need not look to further aids in construing the language. Section 57.8(m) of the Act allows the Agency to "apportion payment of costs for *plans* submitted under Section 57.7 if" (emphasis added) two criteria are met. The first criterion is that the owner or operator is deemed eligible to seek reimbursement for "some, but not all, of the *underground storage tanks* at the site" (emphasis added). The second criterion is that the owner or operator failed to justify all costs attributable to each tank at the site.

The Agency's denial letters state that: "[t]he release for lust incident number 910580 was deemed ineligible." Pet. 1 at Exh. A; Pet. 2 at Exh. A. The decision on the 1991 release states that the release is ineligible because the release "resulted from personnel pumping fuel into a monitoring well instead of the UST system." R2 at 1290. As was stated above, neither the Board nor the Agency can review the Agency's final decision from 1991. Therefore, taking that final decision into consideration, the 1991 release did not involve an *underground storage tank* that was deemed ineligible to seek reimbursement.

The plain language of Section 57.8(m) of the Act (415 ILCS 5/57.8(m) (2010)) allows the Agency to apportion payment of costs when some but not all tanks at the site are deemed eligible. The record contains no information that some but not all the tanks are deemed eligible. In fact the record indicates that four tanks are eligible to seek reimbursement. R2 at 153-54. Therefore, the Board finds that under the plain language of Section 57.8(m) of the Act (415 ILCS 5/57.8(m) (2010)), apportionment of payment is not appropriate.

In addition to the plain language of Section 57.8(m) of the Act (415 ILCS 5/57.8(m) (2010)), the Board notes that Section 57.8(a)(1) of the Act (415 ILCS 5/57.8(a)(1) (2010)) also supports a finding that the Agency's decision was in error. Section 57.8(a)(1) of the Act (415 ILCS 5/57.8(a)(1) (2010)) specifically limits that Agency's review when payment is sought for an approved plan or budget to "auditing for adherence to the corrective action measures in the

proposal." *Id*. Here, when Evergreen submitted a billing package for work done consistent with plans and budgets that the Agency had approved, only then did the Agency determine that apportionment was required. The Board finds that the Act dictates that such a decision is beyond the scope of review that the Agency may undertake when payment is sought for "any approved plan and budget". Any Agency apportionment determination would be appropriate at the time of approval of the plan and budget, not at the payment stage. Therefore, the Board finds that the Agency's decision to apply apportionment of the payment when the billing package was submitted is not supported by law and was in error.

CONCLUSION

The Board finds that the Board has jurisdiction to hear Evergreen's petitions for review of Agency determinations made in January and October 2011. Upon review of the record, the Board finds that the Agency cannot apportion costs pursuant to Section 57.8(m) of the Act (415 ILCS 5/57.8(m) (2010)). The Agency's denial is reversed because the 1991 release that the Agency deemed to be ineligible for reimbursement in 1992, was determined by the Agency not to be an underground storage tank leak. The plain language of the Act allows apportionment only when some, but not all, tanks are eligible for reimbursement under the Act. Thus, apportionment between a 1991 spill and the 2007 tank leak from an underground storage tank cannot be apportioned under Section 57.8(m) of the Act (415 ILCS 5/57.8(m) (2010)). Furthermore, the Board finds that the Agency's decisions were in error because when reviewing a payment application seeking reimbursement for an approved plan or budget, the Agency's review is limited to "auditing for adherence to the corrective action measures in the proposal". *See* 415 ILCS 5/57.8(a)(1) (2010).

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

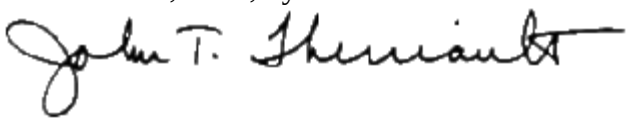
ORDER

The Illinois Environmental Protection Agency's denial of Evergreen FS, Inc. two requests for payment for corrective action at an underground storage tank site at 808 North Union Street in Dwight, Livingston County is reversed. The Agency is directed to make payments in the amounts requested consistent with the above opinion.

IT IS SO ORDERED.

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

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on June 21, 2012, by a vote of 5-0.



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John T. Therriault, Assistant Clerk
Illinois Pollution Control Board