BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

PAK-AGS, Inc,	)	
Petitioner,	)	
	)	
v.	)	PCB 2015-014
	)	(UST Appeal)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
Respondent.	)	

NOTICE

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PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board an **RESPONDENT'S POST-HEARING BRIEF** copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

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Dated: October 20, 2014

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Respondent.	)	

RESPONDENT'S POST-HEARING BRIEF

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. 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. *See* generally, 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 (or, as is the case here, the site investigation plan reimbursement package) 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).

In short, PAK-AGS ("Petitioner") has the burden of proof in this proceeding and it must demonstrate to the Board that it has satisfied its burden before the Board can enter an order reversing or modifying an Illinois EPA's decision. The record in front of the Board clearly supports the Illinois EPA decision. At hearing in this matter, Petitioner presented no evidence to contradict the information provided in the Administrative Record, which was relied upon by the Illinois EPA when making its decision. As such, Petitioner simply failed to meet their burden of proof. And, as demonstrated below, when the Board reviews Petitioner arguments, it will conclude that Petitioner has offered no credible argument for review.

II. 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. *See* generally: Freedom Oil Company v. IEPA, PCB 03-54, 03-56, 03-105, 03-179 and 04-02 (consld) (February 2, 2006), p.11. 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. 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 September 17, 2014, in this matter.[1]

Petitioner offers two theories for reversal. Firstly, Petitioner attempted to present information at the hearing on this matter – which Petitioner conceded was not before the Illinois EPA. Thus, according to settled Board decisions, Petitioner's proffer will fail. Secondly, Petitioner attempts to distract the Board's attention of the main issue by presenting arguments that a release which it itself knew about somehow never existed or should be marginalized legally due to a strained argument of impossibility. These arguments should also fail. Based on the information within the Record along with the relevant law, the Illinois EPA respectfully requests that the Board enter an order affirming the Illinois EPA's decision.

III. INTRODUCTION

The information submitted to the Illinois EPA by Petitioner that led to the issuance of the final decision under appeal fully supports the content and conclusion of the final decision, in that the Petitioner failed to demonstrate that the information they submitted to the Illinois EPA and upon which the Illinois EPA based its decision supported any other conclusion than that reached by the Illinois EPA when it issued its June 23, 2014 decision letter.

In 2005, a release occurred on-site. Incident number 20050545 ("2005 release") was issued by the Illinois Emergency Management Agency ("IEMA"). Although the Petitioner itself acknowledges the 2005 release in all of the documents its submitted to the Illinois EPA, it now attempts to offer argument that no information from the 2005 release is necessary for review.

Initially, Petitioner suggests that a quit claim deed should be considered. This argument fails for a number of reasons. Firstly, as Petitioner's counsel noted at hearing, this document, nor

[1] Citations to the Administrative Record will hereinafter be made as, "AR, p. ___." References to the transcript of the hearing will be made as, "TR, p. ___."

the information it purports to suggest, was ever before the Illinois EPA. As such, the document or what it suggests to Petitioner (which the Illinois EPA does not concede) could not have formed the basis of the Illinois EPA's decision. At very least the document would have had to be before the Illinois EPA for it to form the basis of a decision. Secondly, the document (nor what Petitioner may suggest that it purports) was not relied upon by the Illinois EPA. Once again, the deed could not have formed the basis for an Illinois EPA decision. Simply stated, it is highly unlikely that the Board would take the time to consider a non-decision by the Illinois EPA.

Finally, where the Illinois EPA has not considered a document or argument, the Board may be without jurisdiction to consider it, and it is intuitively unreasonable to suggest that such matter is appropriate for a Board review, until, at very least, the Illinois EPA has considered the matter/issue/argument and made some final determination. Illinois EPA asks that this document and the argument associated with it be struck.

Additionally, as presented below, Petitioner's arguments are not persuasive. 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.

IV. STATEMENT OF FACTS

The facts in the Illinois EPA record supporting this motion are as follows:

1. Petitioner submitted a February 24, 2014 Application for Payment from the Leaking Underground Storage Tank Fund ("LUST fund") that was received by the Illinois EPA on February 24, 2013. (AR, p.2 & 15)

2. LUST Incident Numbers 20110945 and 20050545 – 64222 were assigned by IEMA to incidents on-site. The site was assigned Illinois EPA site identification number: LPC #1190405073 – Madison County. (AR, p.2)

3. The Application for Payment covered the period from August 1, 2012 to February 3, 2014 and the amount requested was $17,562.48. (AR p. 2)

4. The deductible amount for LUST Incident Number 20110945 is $5,000, which was previously withheld from early action payments. (AR, p. 2)

5. Illinois EPA issued a June 23, 2014 decision letter that deducted $17,562.48 for costs for Stage 1 Site Investigation, which lacked supporting documentation. (AR, p. 4)

6. According to the Illinois EPA decision letter, due to the lack of supporting information, Illinois EPA could not determine if the costs were used for activities in excess of those necessary to meet the minimum requirements of the Act. See Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.630(cc). (AR, p. 4)

7. Specifically, an eligibility determination for incident 20050545 has not been submitted to the Illinois EPA. The Illinois EPA in its denial stated as follows:

> "Costs associated with any corrective action activities, services, or materials that were not accompanied by a copy of the eligibility and deductibility decision(s) made for the above-referenced occurrence(s) (20050545 and 20110945) for accessing the Fund pursuant to Section 57.8 of the Act and 35 Ill. Adm. Code 734.135(a), 734.605(b)(3), and 734.630(s) are not eligible for payment from the Fund.
>
> The application for payment is not complete, a complete application for payment consists of a copy of the OSFM or Agency eligibility determination, 35 Ill. Adm. Code 734.605(b)(3). An eligibility determination for 20050545 has not been submitted to the Agency.

The Agency cannot make the applicable determination concerning deductibles applicable to this occurrence pursuant to 35 Ill. Adm. Code 734.615(b)." (AR, p.4)

8. While reviewing the claim, Illinois EPA sent a request to Petitioner on April 3, 2014 for a copy of the eligibility and deductibility determination. No reply was received. Illinois EPA checked with the Office of State Fire Marshal ("OSFM") to see if there was an application in house, and was informed that one had not been filed. (AR, p. 9 & 13)

9. The Petitioner referenced incident 20050545 in their February 24, 2014 submittal for payment and in other submittals. (AR, pgs. 16, 102, 103, 114, 185, 186, 197, 221, 222, 327, 329, and 384)

10. The Petitioner filed an appeal from the June 23, 2014 decision letter on July 25, 2014. (See, Petition)

V. ISSUE

The issue before the Board is framed by the Illinois EPA decision letter and is as follows:

> Whether the Petitioner's application was incomplete for lacking supporting documentation or information relative to incident 20050545?

VI. ARGUMENT

The Petitioner **fails** to meet its burden of proof. There is nothing in the Administrative Record, nor was anything presented at hearing, that demonstrates that the final decision of the Illinois EPA is in error. Based upon the record it is clear that the Petitioner acknowledges the 2005 release. (AR, pgs. 16, 102, 103, 114, 185, 186, 197, 221, 222, 327, 329, and 384) It is clear from the record that, Petitioner was aware of the 2005 release when it:

- Purchased the gas station;

- Registered the tanks;
- Dispensed gasoline;
- Applied for a tank pull permit;
- Reported the newer release;
- Pulled the tanks;
- Submitted a 45 day report;
- Submitted an Early Action permit application; and
- Requested reimbursement for a Phase I early action costs.

It is also clear that in 2011 the Office of State Fire Marshal when issuing a permit to Petitioner to remove the tanks was aware that there was a prior incident number and listed both on the permit. (AR, 384) The Petitioner is the registered owner/operator of the tanks. (AR, 43, 324, and 384) So, at the time of its 2014 application, the 2005 release was known to former owners, Petitioner, OSFM, Illinois EPA and anyone else who looked up this site on either the OSFM database or Illinois EPA files. Only now does Petitioner offer that somehow the Board should not consider the 20050545 incident.

And, according to regulations, without determining eligibility and deductibility of the 2005 release, the Illinois EPA is unable to determine if the scope of work completed for the 2011 incident included the area of the prior LUST release. This lack of supporting documentation results in the Illinois EPA being unable to determine if the work exceeds the minimum requirements of the Act under 35 Ill. Adm. Code 734.630(cc). Further, issues of applying the correct deductible to the site and whether apportionment needs to be used are issues that cannot be determined without, at the very least, OFSM's determination for incident number 20050545. Simply put, Petitioner did not submit a complete application. Without the supporting documentation requested by the Illinois EPA, the State is unable to determine how much, if anything, should be reimbursed at this, the corrective action phase.

VII. PETITIONER'S BRIEF

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. Petitioner did not call any witnesses to provide any information whatsoever to rebut the Illinois EPA's final decision. Petitioner did attempt to present a quit claim deed that purportedly showed that it no longer owns the property. No evidence was shown that the next party took ownership of the property. As they say, a person could quit claim you their interest in the Brooklyn Bridge, but that doesn't mean that they had any interest to begin with. Without more, the quit claim deed doesn't really prove much. Either way, it is irrelevant whether the Petitioner no longer owns the property. The property ownership is not at issue when we apply the Act to LUST sites. It is the ownership and operation of the tanks that matters. It is clear from the Administrative Record that the Petitioner is the current owner/operator of the tanks subject to incident numbers 20050545 and 20110945. As such, the Petitioner is responsible for the remediation on the site. It matters not that they are not the current owner of the property. They don't need to be the property owner to get an eligibility determination from OSFM. They just need to own or operate the tanks, which the record shows they clearly do.

Not only did the Petitioner fail to present any credible evidence at hearing by which the Board could base a decision, Petitioner failed to proffer any persuasive argument in its brief that meets their burden of proof. Petitioner attempts to allude to the fact that the Illinois EPA did not mention in its technical letter regarding its Site Investigation approvals that the 2005 incident existed. However, it is clear, even from the Petitioner's recitation of facts that during Early Action, the Illinois EPA noted that the determination was needed. As the Board is aware, Early Action is highly regulated and paid almost automatically from the fund. The Illinois EPA has not

paid any moneys to the Petitioner outside of what Petitioner claimed were Early Action Costs. This issue may not have been raised in this instance because the Petitioner already received a letter informing them of the requirement. The Petitioner argues without incontrovertible evidence that it "sold" the property. However, it apparently was able to continue to perform work at the site as the owner/operator of the tanks. Illinois EPA believes it is important to note that nowhere in the record is a change of ownership in the property reported to the Illinois EPA, not that it would be relevant to the discussion, as Illinois EPA is only concerned about who the owner/operator of the tanks is. And, for that matter, Petitioner never argued that it was **NOT** the owner/operator of the tanks. The owner/operator of the tanks is clearly the Petitioner. The Petitioner continues to act as the owner/operator of the tanks to this day.

A. Petitioner's First Argument

The Petitioner appears to offer, without witness or documentation, quite a bit more information on the 2005 release than is presented in the Administrative Record. It is important to note, that most of the Petitioner's arguments were **NEVER** presented to either the Illinois EPA or the OSFM. The Board will not find support for the Petitioner's arguments either within the Administrative Record or the Hearing Transcript. These arguments did not form the basis for the Illinois EPA decision, and therefore should be struck from the record and not considered by the Board. That being the case, Illinois EPA feels compelled to respond.

Petitioner's first argument is that there was no release from an Underground Storage Tank. The second page of the 20050545 incident report indicates that the release was from "rupture at a shear valve". (AR, 517) The Illinois EPA has determined that the shear valve is part of the UST system and eligible. While Petitioner attempts to minimize the release, the incident report indicates that the amount released was 100 gallons. (AR, 516) Was the 2005

release an accident? Most likely, yes. Just because the release was most likely caused by an accident and Petitioner argues without supporting documentation that it may have been covered by the driver's auto insurance, which there is no indication in the Administrative Record that this indeed was the case, there still is a requirement to provide the technical documentation to the Illinois EPA.

Petitioner again requests the Illinois EPA discuss an argument that was never presented to it. Now, arguendo, let's discuss the shear valve. The shear valve is that piece of equipment installed at the point where a pressurized UST system joins with the dispensing unit. It is intended to breakaway, or shear off into two parts, and seal in the event of severe impact or collision damage to the dispensing unit. Its purpose is to be the point of failure in order to prevent the release of petroleum product stored within the pressurized UST system. In the case of the 2005 incident, according to all information within the administrative record, the shear valve failed resulting in a release from the UST.

Previously, the Illinois EPA and Office of State Fire Marshal ("OSFM") had taken the position that a release from a faulty or damaged shear valve is not subject to regulation under the LUST program and thus not reimbursable from the UST Fund. In two cases before the Illinois Pollution Control Board ("Board") relating to releases from the dispenser hose nozzle, the Board had determined that only releases from UST systems are regulated under the LUST program and subject to UST Fund reimbursement. The Board held that the dispensing unit – the installation, operation and maintenance of which is regulated by the OSFM separately from UST systems – is not a part of the UST System, and thus a release through, or caused by a failure of, the dispensing unit is not reimbursable.

However, upon further examination of the issue, it appeared that the shear valve was not separate and distinct from the UST system. The regulatory definition of "UST system" includes "any one or combination of tanks (including … ancillary equipment … connected thereto)." The shear valve appears to fall squarely within the definition of "ancillary equipment." Additionally, the OSFM regulations support this view. For example, 41 Ill. Adm. Code 170.428, General Requirements for UST Fuel Dispensing Systems, provides in part that:

> "(k) Pressurized piping systems require a listed rigidly anchored emergency shut-off valve installed in the supply line at the base of each individual dispenser. Such valve shall incorporate a fusible link or other thermally activated device, designed to close automatically in the event of severe impact or fire exposure."

The pressurized piping systems and the supply line, referred to above, are clearly a part of the UST system, as defined by the regulations. The OSFM regulations require a shear valve to be installed in the supply line at the base of each dispenser. 41 Ill. Adm. Code 170.400 defines the underground pipes connected to a UST as "including valves, elbows, joints, flanges and flexible connectors attached to a tank system through which regulated substances flow." It seems apparent, then, that the shear valve is ancillary equipment affixed to the UST supply line, thus making it a part of the UST system. Was there a release from an UST system? Clearly the answer is yes.

B. Petitioner's Second Argument

Once again, the Board is baited into reviewing information and argument that was not presented to a regulatory authority first. The Petitioner's second argument is that the 2005 incident was not a confirmed release. This argument expands on its first argument that the release was not from an underground storage tank system. The Illinois EPA considers a release

to have been confirmed when the incident report is created, i.e., the release is called in to IEMA. However, OSFM regulations do have more detail on how a release is considered confirmed. Illinois EPA does not administer the OSFM regulations. Therefore, Illinois EPA will never know whether OSFM considers the 2005 incident a confirmed release, because the Petitioner claims an inability where none exists and **refuses** to ask for an Eligibility and Deductible determination. Illinois EPA cannot be asked to determine how OSFM would decide, hence the State's need for OFSM's determination. The Petitioner appears to want the Board to step in to OSFM's role and make the decision on their behalf when it would be much simpler and legally correct to just ask OSFM themselves.

Beside the attempt to remove all official reference to the 2005 release, the Illinois EPA reminds the Board that the UST release at issue was assigned IEMA Incident Number 20050545 on April 19, 2005. The incident has a release number and is documented at OSFM, IEPA and within Petitioner's own submittals to the Illinois EPA; it is not some phantom release unknown to Petitioner. Petitioner itself noted incident 2005-0545 within its Feb 2014 and November 2013 Lust Billing Package; March 2012 Early Action report as well as its Amended 45 day report of March 2012. To claim almost a decade after the release that it is being subject to a review of some unrelated incident is unreasonable.

C. Petitioner's Third Argument

Petitioner argues that there is no requirement that they submit an eligibility determination for the incident 20050545. As stated in Illinois EPA's response to the Petitioner's prior arguments, there are several reasons why the Illinois EPA requires the eligibility determination for all incidents at a site. First, Section 57.8 of the Act and Section 734.605(b)(3)

of the regulations both require that eligibility determinations for all releases at the site be submitted. An application is incomplete without it. Will the Illinois EPA properly apply any and all deductibles according to the Act and regulations? Absolutely yes! The Illinois EPA will apply the deductibles according to the Act and regulations regardless of whether it is to the benefit or detriment of the applicant. However, Petitioner is getting the cart before the horse, again. OSFM has not made a determination as to what, if any, deductible should be assessed. Therefore, how can Petitioner speculate on how Illinois EPA would apply one? Once again, the Petitioner would like the Illinois EPA and the Board to make a finding as to what OSFM may determine. Simply put, it is not in Illinois EPA's purview to usurp OSFM's role. And, it is just conjecture at this point as to what determination OSFM would make. This speculation can be resolved by simply asking the agency that makes these determinations – OSFM.

D. Petitioner's Fourth Argument

Regarding the quit claim deed, the Illinois EPA renews its objections proffered at hearing. The document is not relevant to the IEPA's determination. It is a self-serving/self-executed document used to purport a defense not in existence at law or equity. No testimony was presented on issues such as; whether property was for sale, how long it was on the market, asking price, price paid, and who took actual title?

What is absolutely clear from the record, and, indeed what has not been rebutted by the Petitioner is that Petitioner is the registered owner/operator of the tanks. As such, it does not need to "elect" to proceed. Ownership of the real property is irrelevant. The only ownership right that matters is the ownership of the tanks. Petitioner is the person, according to OSFM and applicable law and regulations, who owns/operates the tanks and no one has elected to proceed in lieu of them. As stated above, OSFM issued a permit to remove the tanks and listed both

incident numbers on the permit. The whole notion of their argument alleging that the Illinois EPA is somehow forcing them to elect to proceed is a red herring at best, since OSFM and the Illinois EPA both consider them to be the current owner/operator of the tanks. The only thing missing is the eligibility determination the Petitioner needs from OSFM, which the Petitioner, in their fear over what, if any, deductible they could be assessed, has not obtained or submitted to either the Illinois EPA or the Board.

VIII. SUMMARY

Petitioner's main contention, when distilled down to its essence is that there is some sort of impossibility associated with the 2005 incident. Petitioner claims, the release was not from a UST, or it was not confirmed, or it no longer holds title to the property as such, it can't provide information, isn't able to proceed, can't verify etc. However, the Board need not entertain some form of impossibility defense where Petitioner itself acknowledges the incident exists, that they purchased the site aware of the release, they registered the tanks, they operated the UST system and they are responsible for such releases that were reported. In summary:

1. Petitioner fails to meet burden of proof.
2. Sheer valves are a part of the UST system.
3. IEPA considers the released confirmed at reporting of release. We will never know what OSFM's determination will be without submittal by Petitioner.
4. Section 57.8 of the Act and Section 734.605(b)(3) of the regulations both require that the eligibility determinations for releases at a site be submitted for an application to be complete.
5. Only ownership or operation of the tanks is relevant in LUST cases in Illinois. Ownership of the real property is irrelevant. OSFM and Illinois EPA both

consider Petitioner the owner/operator of the tanks in question, therefore an election to proceed is unnecessary.

IX. CONCLUSION

For all the reasons and arguments included herein, the Illinois EPA respectfully requests that the Board affirm the Illinois EPA's June 23, 2014 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

_____

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Dated: October 20, 2014

ATTACHMENT A

Relevant Law

415 ILCS 5/57.7(c)(3) Leaking underground storage tanks; site investigation and corrective action.

(c) Agency review and approval.

3) In approving any plan submitted pursuant to subsection (a) or (b) of this Section, the Agency shall determine, by a procedure promulgated by the Board under Section 57.14, that the costs associated with the plan are reasonable, will be incurred in the performance of site investigation or corrective action, and will not be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of this Title. The Agency shall also determine, pursuant to the Project Labor Agreements Act, whether the corrective action shall include a project labor agreement if payment from the Underground Storage Tank Fund is to be requested.

415 ILCS 5/57.8. Underground Storage Tank Fund; payment; options for State payment; deferred correction election to commence corrective action upon availability of funds.

If an owner or operator is eligible to access the Underground Storage Tank Fund pursuant to an Office of State Fire Marshal eligibility/deductible final determination letter issued in accordance with Section 57.9, the owner or operator may submit a complete application for final or partial payment to the Agency for activities taken in response to a confirmed release. An owner or operator may submit a request for partial or final payment regarding a site no more frequently than once every 90 days.

* * *

(4) Any deductible, as determined pursuant to the Office of the State Fire Marshal's eligibility and deductibility final determination in accordance with Section 57.9, shall be subtracted from any payment invoice paid to an eligible owner or operator. Only one deductible shall apply per underground storage tank site.

(5) In the event that costs are or will be incurred in addition to those approved by the Agency, or after payment, the owner or operator may submit successive plans containing amended budgets. The requirements of Section 57.7 shall apply to any amended plans.

(6) For purposes of this Section, a complete application shall consist of:

(A) A certification from a Licensed Professional Engineer or Licensed Professional Geologist as required under this Title and

acknowledged by the owner or operator.

(B) A statement of the amounts approved in the budget and the amounts actually sought for payment along with a certified statement by the owner or operator that the amounts so sought were expended in conformance with the approved budget.

(C) A copy of the Office of the State Fire Marshal's eligibility and deductibility determination.

(D) Proof that approval of the payment requested will not result in the limitations set forth in subsection (g) of this Section being exceeded.

(E) A federal taxpayer identification number and legal status disclosure certification on a form prescribed and provided by the Agency.

(F) If the Agency determined under subsection (c)(3) of Section 57.7 of this Act that corrective action must include a project labor agreement, a certification from the owner or operator that the corrective action was (i) performed under a project labor agreement that meets the requirements of Section 25 of the Project Labor Agreements Act and (ii) implemented in a manner consistent with the terms and conditions of the Project Labor Agreements Act and in full compliance with all statutes, regulations, and Executive Orders as required under that Act and the Prevailing Wage Act.

* * *

35 Ill. Adm. Code Section 734.135 Form and Delivery of Plans, Budgets, and Reports; Signatures and Certifications

a) All plans, budgets, and reports must be submitted to the Agency on forms prescribed and provided by the Agency and, if specified by the Agency in writing, in an electronic format.

b) All plans, budgets, and reports must be mailed or delivered to the address designated by the Agency. The Agency's record of the date of receipt must be deemed conclusive unless a contrary date is proven by a dated, signed receipt executed by Agency personnel acknowledging receipt of documents by hand delivery or messenger or from certified or registered mail.

c) All plans, budgets, and reports must be signed by the owner or operator and list the owner's or operator's full name, address, and telephone number.

d) All plans, budgets, and reports submitted pursuant to this Part, excluding Corrective Action Completion Reports submitted pursuant to Section 734.345 of this Part, must contain the following certification from a Licensed Professional Engineer or Licensed Professional Geologist.

Corrective Action Completion Reports submitted pursuant to Section 734.345 of this Part must contain the following certification from a Licensed Professional Engineer.

> I certify under penalty of law that all activities that are the subject of this plan, budget, or report were conducted under my supervision or were conducted under the supervision of another Licensed Professional Engineer or Licensed Professional Geologist and reviewed by me; that this plan, budget, or report and all attachments were prepared under my supervision; that, to the best of my knowledge and belief, the work described in the plan, budget, or report has been completed in accordance with the Environmental Protection Act [415 ILCS 5], 35 Ill. Adm. Code 734, and generally accepted standards and practices of my profession; and that the information presented is accurate and complete. I am aware there are significant penalties for submitting false statements or representations to the Agency, including but not limited to fines, imprisonment, or both as provided in Sections 44 and 57.17 of the Environmental Protection Act [415 ILCS 5/44 and 57.17].

e) Except in the case of sites subject to Section 734.715(c) or (d) of this Part, reports documenting the completion of corrective action at a site must contain a form addressing site ownership. At a minimum, the form must identify the land use limitations proposed for the site, if land use limitations are proposed; the site's common address, legal description, and real estate tax/parcel index number; and the names and addresses of all title holders of record of the site or any portion of the site. The form must also contain the following certification, by original signature, of all title holders of record of the site or any portion of the site, or the agent(s) of such person(s):

> **I hereby affirm that I have reviewed the attached report entitled and dated, and that I accept the terms and conditions set forth therein, including any land use limitations, that apply to property I own. I further affirm that I have no objection to the recording of a No Further Remediation Letter containing the terms and conditions identified in the report upon the property I own.**

35 Ill. Adm. Code Section 734.605 Applications for Payment

a) An owner or operator seeking payment from the Fund must submit to the Agency an application for payment on forms prescribed and provided by the Agency and, if specified by the Agency by written notice, in an electronic format. The owner or operator may submit an application for partial payment or final payment. Costs for which payment is sought must be approved in a budget, provided, however, that no

budget must be required for early action activities conducted pursuant to Subpart B of this Part other than free product removal activities conducted more than 45 days after confirmation of the presence of free product.

b) A complete application for payment must consist of the following elements:

1) A certification from a Licensed Professional Engineer or a Licensed Professional Geologist acknowledged by the owner or operator that the work performed has been in accordance with a technical plan approved by the Agency or, for early action activities, in accordance with Subpart B of this Part;

2) A statement of the amounts approved in the corresponding budget and the amounts actually sought for payment along with a certified statement by the owner or operator that the amounts so sought have been expended in conformance with the elements of a budget approved by the Agency;

3) A copy of the OSFM or Agency eligibility and deductibility determination;

4) Proof that approval of the payment requested will not exceed the limitations set forth in the Act and Section 734.620 of this Part;

5) A federal taxpayer identification number and legal status disclosure certification;

6) Private insurance coverage form(s);

7) A minority/women's business form;

8) Designation of the address to which payment and notice of final action on the application for payment are to be sent;

9) An accounting of all costs, including but not limited to, invoices, receipts, and supporting documentation showing the dates and descriptions of the work performed; and

10) Proof of payment of subcontractor costs for which handling charges are requested. Proof of payment may include cancelled checks, lien waivers, or affidavits from the subcontractor.

c) The address designated on the application for payment may be changed only by subsequent notification to the Agency, on a form provided by the Agency, of a change in address.

d) Applications for payment and change of address forms must be mailed or delivered to the address designated by the Agency. The Agency's record of the date of receipt must be deemed conclusive unless a contrary date is proven by a dated, signed receipt from certified or registered mail.

e) Applications for partial or final payment may be submitted no more frequently than once every 90 days.

f) Except for applications for payment for costs of early action conducted pursuant to Subpart B of this Part, other than costs associated with free product removal activities conducted more than 45 days after confirmation of the presence of free product, in no case must the Agency review an application for payment unless there is an approved budget on file corresponding to the application for payment.

g) In no case must the Agency authorize payment to an owner or operator in amounts greater than the amounts approved by the Agency in a corresponding budget. Revised cost estimates or increased costs resulting from revised procedures must be submitted to the Agency for review in accordance with Subpart E of this Part using amended budgets plans as required under this Part.

h) Applications for payment of costs associated with a Stage 1, Stage 2, or Stage 3 site investigation may not be submitted prior to the approval or modification of a site investigation plan for the next stage of the site investigation or the site investigation completion report, whichever is applicable.

i) Applications for payment of costs associated with site investigation or corrective action that was deferred pursuant to Section 734.450 of this Part may not be submitted prior to approval or modification of the corresponding site investigation plan, site investigation completion report, or corrective action completion report.

j) All applications for payment of corrective action costs must be submitted no later than one year after the date the Agency issues a No Further Remediation Letter pursuant to Subpart G of this Part. For releases for which the Agency issued a No Further Remediation Letter prior to March 1, 2006, all applications for payment must be submitted no later than March 1, 2007.

35 Ill. Adm. Code Section 734.615 Authorization for Payment; Priority List

a) Within 60 days after notification to an owner or operator that the application for payment or a portion thereof has been approved by the Agency or by operation of law, the Agency must forward to the Office of the State Comptroller in accordance with subsection (d) or (e) of this Section a voucher in the amount approved. If the owner or operator has filed an appeal with the Board of the Agency's final decision on an application for payment, the Agency must have 60 days after the final resolution of the appeal to forward to the Office of the State Comptroller a voucher

in the amount ordered as a result of the appeal. Notwithstanding the time limits imposed by this Section, the Agency must not forward vouchers to the Office of the State Comptroller until sufficient funds are available to issue payment.

b) The following rules must apply regarding deductibles:

1) Any deductible, as determined by the OSFM or the Agency, must be subtracted from any amount approved for payment by the Agency or by operation of law, or ordered by the Board or courts;

2) Only one deductible must apply per occurrence;

3) If multiple incident numbers are issued for a single site in the same calendar year, only one deductible must apply for those incidents, even if the incidents relate to more than one occurrence; and

4) Where more than one deductible determination is made, the higher deductible must apply.

c) The Agency must instruct the Office of the State Comptroller to issue payment to the owner or operator at the address designated in accordance with Section 734.605(b)(8) or (c) of this Part. In no case must the Agency authorize the Office of the State Comptroller to issue payment to an agent, designee, or entity that has conducted corrective action activities for the owner or operator.

d) For owners or operators who have deferred site classification or corrective action in accordance with Section 734.450 of this Part, payment must be authorized from funds encumbered pursuant to Section 734.450(a)(6) of this Part upon approval of the application for payment by the Agency or by operation of law.

e) For owners or operators not electing to defer site investigation or corrective action in accordance with Section 734.450 of this Part, the Agency must form a priority list for payment for the issuance of vouchers pursuant to subsection (a) of this Section.

1) All such applications for payment must be assigned a date that is the date upon which the complete application for partial or final payment was received by the Agency. This date must determine the owner’s or operator's priority for payment in accordance with subsection (e)(2) of this Section, with the earliest dates receiving the highest priority.

2) Once payment is approved by the Agency or by operation of law or ordered by the Board or courts, the application for payment must be assigned priority in accordance with subsection (e)(1) of this Section. The assigned date must be the only factor determining the priority for payment for those applications approved for payment.

35 Ill. Adm. Code Section 734.630 Ineligible Corrective Action Costs

Costs ineligible for payment from the Fund include, but are not limited to:

a) Costs for the removal, treatment, transportation, and disposal of more than four feet of fill material from the outside dimensions of the UST, as set forth in Appendix C of this Part, during early action activities conducted pursuant to Section 734.210(f) of this Part, and costs for the replacement of contaminated fill materials with clean fill materials in excess of the amounts set forth in Appendix C of this Part during early action activities conducted pursuant to Section 734.210(f) of this Part;

b) Costs or losses resulting from business interruption;

c) Costs incurred as a result of vandalism, theft, or fraudulent activity by the owner or operator or agent of an owner or operator, including the creation of spills, leaks, or releases;

d) Costs associated with the replacement of above grade structures such as pumps, pump islands, buildings, wiring, lighting, bumpers, posts, or canopies, including but not limited, to those structures destroyed or damaged during corrective action activities;

e) *Costs of corrective action incurred by an owner or operator prior to July 28, 1989* [415 ILCS 5/57.8(j)];

f) Costs associated with the procurement of a generator identification number;

g) Legal fees or costs, including but not limited to legal fees or costs for seeking payment under this Part unless the owner or operator prevails before the Board and the Board authorizes payment of such costs;

h) Purchase costs of non-expendable materials, supplies, equipment, or tools, except that a reasonable rate may be charged for the usage of such materials, supplies, equipment, or tools;

i) Costs associated with activities that violate any provision of the Act or Board, OSFM, or Agency regulations;

j) Costs associated with investigative action, preventive action, corrective action, or enforcement action taken by the State of Illinois if the owner or operator failed, without sufficient cause, to respond to a release or substantial threat of a release upon, or in accordance with, a notice issued by the Agency pursuant to Section 734.125 of this Part and Section 57.12 of the Act;

k) Costs for removal, disposal, or abandonment of a UST if the tank was removed or abandoned, or permitted for removal or abandonment, by the OSFM before the owner or operator provided notice to IEMA of a release of petroleum;

l) Costs associated with the installation of new USTs, the repair of existing USTs, and removal and disposal of USTs determined to be ineligible by the OSFM;

m) Costs exceeding those contained in a budget or amended budget approved by the Agency;

n) Costs of corrective action incurred before providing notification of the release of petroleum to IEMA in accordance with Section 734.210 of this Part;

o) Costs for corrective action activities and associated materials or services exceeding the minimum requirements necessary to comply with the Act;

p) Costs associated with improperly installed sampling or monitoring wells;

q) Costs associated with improperly collected, transported, or analyzed laboratory samples;

r) Costs associated with the analysis of laboratory samples not approved by the Agency;

s) Costs for any corrective action_activities, services, or materials unless accompanied by a letter from OSFM or the Agency confirming eligibility and deductibility in accordance with Section 57.9 of the Act;

t) Interest or finance costs charged as direct costs;

u) Insurance costs charged as direct costs;

v) Indirect corrective action costs for personnel, materials, service, or equipment charged as direct costs;

w) Costs associated with the compaction and density testing of backfill material;

x) Costs associated with sites that have not reported a release to IEMA or are not required to report a release to IEMA;

y) Costs related to activities, materials, or services not necessary to stop, minimize, eliminate, or clean up a release of petroleum or its effects in accordance with the minimum requirements of the Act and regulations;

z) Costs of alternative technology that exceed the costs of conventional technology;

aa) Costs for activities and related services or materials that are unnecessary, inconsistent with generally accepted engineering practices or principles of professional geology, or unreasonable costs for justifiable activities, materials, or services;

bb) Costs requested that are based on mathematical errors;

cc) Costs that lack supporting documentation;

dd) Costs proposed as part of a budget that are unreasonable;

ee) Costs incurred during early action that are unreasonable;

ff) Costs incurred on or after the date the owner or operator enters the Site Remediation Program under Title XVII of the Act and 35 Ill. Adm. Code 740 to address the UST release;

gg) Costs incurred after receipt of a No Further Remediation Letter for the occurrence for which the No Further Remediation Letter was received. This subsection (gg) does not apply to the following:

1) Costs incurred for MTBE remediation pursuant to Section 734.405(i)(2) of this Part;

2) Monitoring well abandonment costs;

3) County recorder or registrar of titles fees for recording the No Further Remediation Letter;

4) Costs associated with seeking payment from the Fund;

5) Costs associated with remediation to Tier 1 remediation objectives on-site if a court of law voids or invalidates a No Further Remediation Letter and orders the owner or operator to achieve Tier 1 remediation objectives in response to the release; and

6) Costs_associated with activities conducted under Section 734.632 of this Part;

hh) Handling charges for subcontractor costs that have been billed directly to the owner or operator;

ii) Handling charges for subcontractor costs when the contractor has not submitted proof of payment of the subcontractor costs;

jj) Costs associated with standby and demurrage;

kk) Costs associated with a corrective action plan incurred after the Agency notifies the owner or operator, pursuant to Section 734.355(b) of this Part, that a revised corrective action plan is required, provided, however, that costs associated with any subsequently approved corrective action plan will be eligible for payment if they meet the requirements of this Part;

ll) Costs incurred prior to the effective date of an owner's or operator's election to proceed in accordance with this Part, unless such costs were incurred for activities approved as corrective action under this Part;

mm) Costs associated with the preparation of free product removal reports not submitted in accordance with the schedule established in Section 734.215(a)(5) of this Part;

nn) Costs submitted more than one year after the date the Agency issues a No Further Remediation Letter pursuant to Subpart G of this Part. This subsection (nn) does not apply to costs associated with activities conducted under Section 734.632 of this Part;

oo) Costs for the destruction and replacement of concrete, asphalt, or paving, except as otherwise provided in Section 734.625(a)(16) of this Part;

pp) Costs incurred as a result of the destruction of, or damage to, any equipment, fixtures, structures, utilities, or other items during corrective action activities, except as otherwise provided in Sections 734.625(a)(16) or (17) of this Part;

qq) Costs associated with oversight by an owner or operator;

rr) Handling charges charged by persons other than the owner's or operator's primary contractor;

ss) Costs associated with the installation of concrete, asphalt, or paving as an engineered barrier to the extent they exceed the cost of installing an engineered barrier constructed of asphalt four inches in depth. This subsection does not apply if the concrete, asphalt, or paving being used as an engineered barrier was replaced pursuant to Section 734.625(a)(16) of this Part;

tt) The treatment or disposal of soil that does not exceed the applicable remediation objectives for the release, unless approved by the Agency in writing prior to the treatment or disposal;

uu) Costs associated with the removal or abandonment of a potable water supply well, or the replacement of such a well or connection to a public water supply, except as otherwise provided in Section 734.625(a)(19) of this Part;

vv) Costs associated with the repair or replacement of potable water supply lines, except as otherwise provided in Section 734.625(a)(20) of this Part;

ww) Costs associated with the replacement of underground structures or utilities, including but not limited to septic tanks, utility vaults, sewer lines, electrical lines, telephone lines, cable lines, or water supply lines, except as otherwise provided in Sections 734.625(a)(19) or (20) of this Part;

xx) (Reserved);

yy) Costs associated with the maintenance, repair, or replacement of leased or subcontracted equipment, other than costs associated with routine maintenance that are approved in a budget;

zz) Costs that exceed the maximum payment amounts set forth in Subpart H of this Part;

aaa) Costs associated with on-site corrective action to achieve remediation objectives that are more stringent than the Tier 2 remediation objectives developed in accordance with 35 Ill. Adm. Code 742. This subsection (aaa) does not apply if Karst geology prevents the development of Tier 2 remediation objectives for on-site remediation, or if a court of law voids or invalidates a No Further Remediation Letter and orders the owner or operator to achieve Tier 1 remediation objectives on-site in response to the release;.

bbb) Costs associated with groundwater remediation if a groundwater ordinance already approved by the Agency for use as an institutional control in accordance with 35 Ill. Adm. Code 742 can be used as an institutional control for the release being remediated;.

ccc) Costs associated with on-site corrective action to achieve Tier 2 remediation objectives that are more stringent than Tier 1 remediation objectives;

ddd) Costs associated with corrective action to achieve remediation objectives other than industrial/commercial property remediation objectives, unless the owner or operator demonstrates that the property being remediated is residential property or is being developed into residential property. This subsection (ddd) does not prohibit the payment of costs associated with remediation approved by the Agency pursuant to Section 734.360(c) or (d) of this Part to remediate or prevent groundwater contamination at off-site property;

eee) Costs associated with groundwater remediation if a groundwater ordinance must be used as an institutional control under Section 734.360(c) of this Part. This subsection (eee) does not prohibit the payment of costs associated with remediation approved by the Agency pursuant to Section 734.360(c) of this Section to remediate or prevent groundwater contamination at off-site property;

fff) Costs associated with on-site groundwater remediation if an institutional control is required to address on-site groundwater remediation under Section 734.360(d) of this Part. This subsection (fff) does not prohibit the payment of costs associated with remediation approved by the Agency pursuant to Section 734.360(d) to remediate or prevent groundwater contamination at off-site property.

(Source: Amended at 36 Ill. Reg. 4898 effective March 19, 2012)

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on **October 20, 2014**, I served true and correct copies of an **RESPONDENT'S POST-HEARING BRIEF** via the Board's COOL system 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
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Carol Webb, Hearing Officer
Illinois Pollution Control Board
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P. O. Box 19274
Springfield, IL 62794-9274

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

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

_____

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