THE ILLINOIS POLLUTION CONTROL BOARD

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STATE OF ILLINOIS
Pollution Control Board

FREEDOM OIL COMPANY,	)	
	)	
Petitioner,	)	PCB 03-54
	)	PCB 03-105
vs.	)	PCB 03-179
	)	PCB 04-02
ILLINOIS ENVIRONMENTAL	)	(LUST Fund)
PROTECTION AGENCY,	)	PCB 03-56
	)	(UST Appeal)
Respondent.	)	(Consolidated)

MOTION FOR SUMMARY JUDGMENT

NOW COMES the Petitioner, FREEDOM OIL COMPANY, an Illinois corporation ("Freedom"), by its attorneys, Howard and Howard Attorneys, P.C., and in support of its Motion for Summary Judgment pursuant to 35 Ill. Admin. Code §101.516, states as follows:

INTRODUCTION

This case raises a relatively simple question regarding the Illinois Leaking Underground Storage Tank Fund, established at 415 ILCS 5/57.8 ("Fund"). Can the Illinois Environmental Protection Agency ("IEPA") direct or compel, by court order, corrective action with regard to Fund eligible tank releases, and then deny Fund reimbursement because Fund ineligible tanks are discovered during implementation of the ordered corrective action?

As discussed below, IEPA has improperly apportioned costs to ineligible tanks. IEPA imposed cost apportionment despite an absence of evidence demonstrating the Fund ineligible tanks created any conditions requiring remediation. More importantly,

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IEPA imposed cost apportionment despite the fact the agency specifically ordered the corrective action at issue based on releases from Fund eligible tanks.

IEPA's apportionment and denial of reimbursement is either arbitrary or capricious or a misapplication of the law. Moreover, IEPA is judicially estopped from apportioning costs to Fund ineligible tanks based on its representations in Edgar County Circuit Court that the corrective action was immediately necessary to address releases from Fund eligible tanks.

Freedom cannot cite to the record in support of this motion because IEPA did not timely file the record. In lieu of the record, Petitioner has attached and cites to reports, letters and applications filed with IEPA or in IEPA's possession. It would be unfair to prohibit Freedom from seeking summary judgment because of IEPA delays in filing the record. *See, E&L Trucking Company v. IEPA*, PCB 02-53, April 18, 2002. Further, as the IEPA has not responded to discovery requests or Petitioner's draft Statement of Agreed Facts, despite orders to do so, a presumption the agency does not dispute the facts outlined below is warranted[1].

Petitioner previously filed a Motion for Default Judgment or in the Alternative to Bar IEPA Evidence at Hearing. Based on a motion by the agency, the April 6, 2005, hearing was continued. In the event the Board denies Petitioner's Motion for Default, Petitioner submits this alternative Motion for Summary Judgment.

[1] Notwithstanding this presumption, the facts cited by Freedom are supported by the exhibits to this motion.

BACKGROUND FACTS

Freedom Oil Company ("Freedom") purchased a gasoline station located at 401 S. Main Street, Paris, Illinois, in 1985 ("Freedom Station", "Site" or "Property"). Prior to 2002, eleven (11) USTs were located at the Freedom Station. (pp. 1035-1036) Six (6) USTs were owned and registered by Freedom with the Office of the State Fire Marshal ("OSFM") under 41 Ill. Admin. Code § 170.440. OSFM registration qualified these tanks for the Fund. (pp. 1032-1036) These tanks are referred to herein as the "Eligible Tanks."

The presence of the other five (5) tanks was discovered during the 2002 corrective action at issue in this case. (p. 63) Sometime prior to 1974, the prior property owner filled these tanks with sand and closed them in place. (pp. 63, 1090) Freedom never owned or operated the tanks. As the tanks were not in use after 1974, they are ineligible for OSFM registration and the Fund. (pp. 1032-1036) These tanks are referred to herein as the "Ineligible Tanks." The volume, product contents and OSFM registration status of all the tanks is set forth below:

UST #	Volume (gallons)	Product	Notes
1	4,000	Diesel	Registered with OSFM
2	4,000	Gasoline	Registered with OSFM
3	4,000	Gasoline	Registered with OSFM
4	4,000	Gasoline	Registered with OSFM.
5	1,000	Gasoline	Registered with OSFM. Removed prior to 2002.
6	1,000	Kerosene	Registered with OSFM
7	1,000	Gasoline	Not registered
8	1,000	Gasoline	Not registered
9	1,000	Gasoline	Not registered
10	1,000	Gasoline	Not registered
11	500	Heating Oil	Unregulated tank.

(pp. 1032-1036)

The Site layout is depicted in the MACTEC (formerly known as Harding ESE) map attached as Exhibit 1 (p. 1). As reflected on the map, the Eligible Tanks were located together in a cavity on the southern portion of the Property ("Eligible Tank Cavity" or "Tank Cavity"). The Ineligible Tanks were located north and west of the center of the Site. They were approximately 40 feet north of the Eligible Tank cavity. The pump islands serving the Eligible Tank cavity were in between the Eligible and Ineligible Tanks. A diesel pump island was located on the north of the Property connected to a diesel tank in the Eligible Tank cavity.

In 1993, Tank No. 5 experienced a release. The tank was removed. PSI, an environmental consulting firm completed remediation and closed this incident. (Exhibit 2, pp. 2-19)

In 1996, Freedom commissioned Z&R Oil and Armor Shield to upgrade its tanks (tanks 1-4 and 6) with corrosion resistant linings, new piping, and overfill protection as required by law. During the upgrade activities, vapors were detected downgradient of the Tank Cavity in the southern sewer. Z&R Oil made three excavations to investigate. Petroleum sludge was found downgradient near a tile in the southwest corner of the Site. The tile was plugged and a sump installed. A release was reported and assigned Incident 961825. Freedom retained PSI to address this release. PSI installed monitoring wells and conducted sampling to investigate this release. In early 1997 PSI submitted an investigation report to the IEPA. (Exhibit 3, pp. 391-419)

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2002 Release History

In 2002, two release incidents from USTs occurred at the Freedom Station. The MACTEC reports attached as Exhibit 4 (pp. 49-453) describe the releases and corrective action. The first release was discovered in April 2002 when Paris High School, located across the street north and upgradient of the station, reported vapors. (p. 57) An April 3, 2002 investigation revealed that a shear valve on Pump No. 1 was leaking. (p. 57) Freedom shut down the tank and retained Barnhardt Equipment Co. to immediately repair the valve. (p. 57) The shear valve leaked because it was not properly tightened by the company conducting tank and line testing. This release was assigned Incident 20020433. (p. 57)

On August 7, 2002, a tank liner failure in Tank No. 1 occurred causing a release estimated by the OSFM at approximately 1,100 gallons of gasoline. This release was discovered after vapors were reported downgradient of the tank cavity in the sewer and in homes located south of the Freedom Station. This release was assigned Incident 20021122. (p. 57)

Freedom performed corrective actions at the Site in response to these releases. From April 3, 2002 to April 10, 2002, the OSFM directed the emergency response activities. Thereafter, the Illinois Environmental Protection Agency Office of Emergency Response ("OER") directed and ordered all aspects of this corrective action. (pp. 49, 58, 62, 486, 1105) Michael J. Hoffman, a professional engineer, Richard Pletz and Terry Dixon of MACTEC, an environmental consulting firm (formerly Harding ESE), supervised the corrective action on behalf of Freedom. (*See* Exhibit 4, and pp. 1088-1091) In summary, the corrective action included multiple trench construction north and

south of the Site, collection and sampling of soil and groundwater in the trenches, collection of free product and groundwater from recovery wells, soil and groundwater sampling, sewer investigation (dye/smoke testing and terescan videotape vehicle investigation), high school investigation, high school monitoring, sewer vapor extraction and significant soil excavation.

A description of the corrective action activities associated with each Reimbursement Application is attached as Exhibit 5. The OER ordered each of the corrective actions described in this Exhibit. A review of the listed activities demonstrates the corrective action dealt with conditions created by the Eligible Tank releases, not by 30-year old tanks filled with sand that clearly did not produce the sewer vapors, free product in wells or free product oozing from soil pores addressed by the 2002 corrective action.

Agency statements during disputes between the OER and MACTEC regarding the corrective action ordered by OER confirm the agency's directives related to Fund Eligible Tanks. Freedom's consultant, MACTEC, raised concerns about the appropriateness and reimbursability of the corrective action work ordered by OER.[2] MACTEC argued many corrective action steps ordered by OER were unnecessary and

[2] OER's conduct was inconsistent with legislative policy designed not only to promote health and welfare but to also ensure that gas stations may stay in business to provide a necessary commodity. Continuing to order work on the North side of the Property and requiring disposal of uncontaminated groundwater was clearly unnecessary as the reported results demonstrated. The agency compounded its disregard of the LUST program policies by not only requiring unnecessary work but then failing to honor reimbursement for work it ordered to address leaks from clearly eligible tanks. Its disregard for the rights of Freedom to operate its business free from arbitrary actions were made more evident by the fact IEPA placed barriers to Freedom's corrective action efforts. For example, while insisting Freedom discover the pathway for the shear valve release to migrate north, the IEPA nonetheless directed the public school to deny Freedom the right to test soil and groundwater on school property. (*See* Exhibit 6, pp. 481-484, 487)

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not supported by the analytical evidence. Nonetheless, OER continued to mandate these actions to address the April and August releases. (*See* Exhibit 6)

MACTEC objected to OER's theory that the shear valve release migrated north (the upgradient direction) through the soil as "slug" to the high school sewer leaving no residual contamination. (pp. 473-478) After investigating and finding no apparent pathway for the shear valve release to have reached the high school sewer, MACTEC raised an objection to continuing the investigations upgradient of the shear valve release (e.g., the significant and continuing trench operations and sewer investigations) (p. 481-485). MACTEC also objected to OER's order that uncontaminated groundwater recovered from the northern trench be shipped off-site to a licensed disposal facility rather than allowing sewer discharge of the water. (pp. 471-473, 477-478) As reflected in the Exhibit 6 correspondence, OER continued to persist in its demands based on the Eligible Tank releases.

To ensure its control, OER requested the Attorney General pursue a Verified Complaint for Injunctive Relief, filed on April 15, 2002, in Edgar County. Exhibit 7. As set forth in the Complaint, the injunctive relief sought was an order to correct conditions caused by the April 2002 shear valve leak. *See* paragraphs 8 and 9 of Complaint. (p. 492)

Following the August release from the tank liner failure Freedom once again immediately mobilized MACTEC and emergency contractors to the Site. (p. 57) After this release, MACTEC objected to OER's orders regarding the extent of soil excavation and sampling. (pp. 458-467) In response, the Attorney General filed a Verified Motion for Immediate Injunction in the same Edgar County case seeking action to address the

tank liner release. (*See* Exhibit 8.) The Attorney General's motion specifically deals with the leak arising from the tank liner failure.

As evidenced by statements in Court during the hearings on the Motion, the relief requested by the state sought to address either the discharge from the shear valve or from the tank liner failure. In statements before the Court, counsel for the IEPA specifically stated that the requested relief related to the Eligible Tanks. For example, in discussing the time needed to address digging to determine extent of contamination, counsel stated there was no dispute regarding the source of contamination:

> THE COURT: We have moved back and forth whether or not the tank leak was the source of this August 7 gas leak. Is that a dispute or non-dispute?
>
> MR. MORGAN: We don't dispute that the tank is the source. What we don't know yet is exactly how the material entered into the sewer and then potentially in the homes.
>
> THE COURT: The path it took after it left the tank?
>
> MR. MORGAN: After it left the tank. Did it enter – it has been suggested that it has been carried by the ground water. If it has been carried by the ground water, that means there is additional contamination in the immediate vent of it.
>
> THE COURT: The problem is whether the hole is going to be big or little?
>
> MR. MORGAN: Right.
>
> THE COURT: But it got out of that tank?
>
> MR. MORGAN: Got out of that tank.

Transcript, Hearing August 15, 2002. (Exhibit 9, pp. 542-543)

In connection with the hearing, counsel for the parties marked up an immediate injunction order, which order specifically recognized tank 1 as the tank in issue. (Exhibit

10, p. 567) In fact, the original proposed order of the IEPA specifically identifies Tank 1 as the leaking tank.

On August 23, 2003, despite objections from Freedom, another Immediate Injunction Order was entered following disputes about the necessity to remove the Eligible Tanks, and the necessity for soil excavation destabilizing the Tank Cavity and the station building which would put Freedom out of business. *See* Exhibit 11. Once again, paragraph 1 of the order is clear that the excavation is attributable to Fund eligible tank 1, identifies tank 1 as the leaking tank, and orders its removal. (p. 574) The entire order is related to the "latest release" which counsel for the IEPA represented to be Fund eligible tank 1.

The state's argument to the Court in support of its requested order follows:

> MR. MORGAN: The touchstone of this order is the first provision: "The defendant shall cease and desist from any further violations of the Environmental Protection Act." Our motion, the testimony today, has demonstrated ongoing violations of the Environmental Protection Act for as long as that contamination, that gross contamination, remains in place.
>
> There is a threat of release into the sewer. As we noted in our Memorandum, the regulations specifically provide, at 35 Illinois Administrative Code 307.1101, Paragraph 21 of our motion: "No person shall introduce the following types of pollutants into a POTW:"
>
> That's Public-Owned Treatment Works.
>
> "General Requirements.
>
> Pollutants which shall interfere with the operation or performance of the POTW; or
>
> Pollutants which create a fire or explosion hazard within the POTW;

> Pollutants which would cause safety hazards to the personnel operating the treatment works;
>
> Pollutants which would be injurious in any other way to sewers, treatment works or structures."
>
> Chief Taylor testified that indeed the vapors from this release, as well as the contamination itself, pose just such a threat: pollutants which create a fire or explosion hazard within the POTW.
>
> Hearing Transcript. (Exhibit 9, pp. 553-554)

The state argued as follows regarding Freedom's concerns the excavation ordered by the agency would put Freedom out of business by destabilizing the tank cavity and building structure.

> MR. MORGAN: Now, we've proposed that this excavation should chase that contamination, wherever it is, to the greatest extent possible. What we've gotten is, "If we do that, it may affect our tank system. But we haven't looked at the measures available to protect that tank system. It may affect our building. But we haven't looked at the measures available to protect that building. We just don't want to do it, because it may."
>
> The only certainty we have is that that contamination is going to continue to adversely affect this community as long as it stays in place. This is a situation where there are ongoing violations of the Environmental Protection Act and ongoing substantial danger to this community. This order will put a stop to that. We believe the order should be entered. We believe the order must be entered. And we ask the court to do so. Thank you.
>
> (p. 555)

The orders entered in the Circuit Court mandated corrective action because of the leaking valve and tank liner failure. Furthermore, the argument and representations made by the state in Circuit Court reflect that IEPA sought the corrective actions because of these releases. As explained in the argument section, IEPA is judicially estopped from

arguing that these actions, and the costs associated therewith, can now be attributable to the Ineligible Tanks.

LUST Fund Reimbursement Requests

Freedom submitted three reimbursement applications requesting a total of $1,012,240.99 in costs incurred to remediate the 2002 releases incidents. (Exhibit 12) IEPA denied Fund reimbursement to Freedom in the amount of $225,848.51. On December 18, 2002, IEPA denied $35,501.01[3]. (Exhibit 13) On March 19, 2003, IEPA denied $169,051.90 (Exhibit 14). On May 28, 2003, IEPA denied $22,559.71 (Exhibit 15). (Collectively, the "Denied Costs.") The Denied Costs relevant to this appeal fall within the following categories:

Amount	Type of Cost
$24,638.82	Handling costs
$362.84	cell phone and mileage
$27.76	dye for tracer testing
$140.00	notice of smoke testing costs
$33.25	VHS tape copies of sewer investigation
$200,645.84	Corrective action – ineligible tanks

IEPA's Denial of Corrective Action Cost Reimbursement

As reflected in the above chart, IEPA denied $200,645.84 in corrective action costs under 415 ILCS 5/57.8(m)(1) based on the presence of Ineligible Tanks. IEPA determined 80.95% of the corrective action costs were associated with the Eligible Tanks and, therefore, reimbursable. IEPA determined 19.05% of the corrective action costs were associated with the Ineligible Tanks and, therefore, not reimbursable.

[3] This number is based on the allocation adjustment made by IEPA following Freedom's Motion for Partial Summary Judgment.

In reaching this payment allocation, IEPA found tanks 1-4 and 6 eligible for Fund reimbursement, and tanks 7 through 10 ineligible for reimbursement. IEPA did not include in its calculations tank 5 which had been removed, or tank 11 based on its unregulated status.

IEPA reached the 80.95% allocation based on the ratio of 17,000 gallons eligible tank volume (tanks 1-4, and 6) to 21,000 gallons total tank volume (tanks 1-4, 6 and 7-10). (*See* Exhibit 15) IEPA's calculation is based on the following formula:

17,000 eligible gallons ÷ 21,000 total gallons = 80.95%.

(pp. 1085-1086)

The chart below depicts the corrective action costs paid for eligible tanks based on IEPA's allocation.

Reimbursement Application	Date of IEPA Action	Corrective Action Costs Incurred	Amount Denied for Ineligible Tanks	Percentage Paid
1 - Costs between April 3, 2002 and August 2, 2002	December 18, 2002	$185,644.12	$35,333.25	80.95%
2- Costs between August 2, 2002 and December 24, 2002	March 19, 2003	$709,748.50	$143,123.59	79.07%
3 - Costs between December 24, 2002 and February 11,2003	May 28, 2003	$116,848.37	$22,189.00	80.95%
TOTAL		$1,012,240.99	$200,645.84	

The IEPA Fund denial notifications to Freedom explain in an attachment entitled "Technical Deductions" "that there were ten tanks at the subject facility, each of which was determined by the Office of State Fire Marshal to have had a significant release." (pp. 1076, 1082, 1085)

STATEMENT OF ISSUES

IEPA denied $200,645.84 in corrective action costs under 415 ILCS 5/57(m)(1) due to the presence of tanks ineligible for Fund coverage. IEPA also denied $24,638.82

in handling costs, $362.84 in cell phone costs, $27.76 in sewer dye tracer costs, $140.00 for publishing notice of the sewer smoke testing, and $33.25 for VHS tape copies of the sewer investigation. The issues presented are whether allocation of 19.05% of corrective costs to the Ineligible Tanks (7, 8 9 and 10) and denial of the other costs listed above is appropriate under the facts of this case. Additionally, this case raises an issue whether IEPA is judicially estopped from asserting that costs are attributable to tanks other than the Eligible Tanks based on its pleadings and arguments advanced in the Edgar County Circuit Court.

RELEVANT LEGAL PROVISIONS

The legal provisions set forth below are relevant to the relief requested by Freedom through this motion.

Basis for Apportionment of LUST Fund Costs to Ineligible Tanks

415 ILCS 5/57.8(m) provides the authority and prerequisites for apportionment of LUST Fund Reimbursement Costs based on the presence of Ineligible Tanks. This provision provides in pertinent part:

> (m) The Agency may apportion payment of costs for plans submitted under Section 57 if:
>
> (1) The owner or operator was deemed eligible to access the Fund or 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.

35 IAC §732.608 the regulation implementing this provision provides in pertinent part:

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. (Derived from Section 57.8(m) of the Act)

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.

Circumstances under which Corrective Action is Required for Pre-74 Tanks

The obligation to conduct corrective action is not the same for Ineligible Tanks (pre-1974) and Eligible Tanks. Under Illinois law, removal of pre-74 tanks and remediation of contamination from the tanks is required only if the tank and/or release pose a current or potential threat to human health and the environment and the OSFM issues an order requiring removal and/or remediation. The Illinois legislature enacted this provision because corrective action for pre-1974 tanks is not eligible for reimbursement from the Fund. As a compromise to petroleum distributors for eliminating Fund eligibility for pre-1974 tanks, the legislature clarified that corrective action for pre-1974 tanks and releases was required only if a current or potential threat to human health or the environment was present. The law provides as follows:

> The owner or operator of an underground storage tank taken out of operation before January 2, 1974, shall not be required to remove or abandon in place such underground storage tank except in the case in which the Office of the State Fire Marshal has determined that a release from the underground storage tank poses a current or potential threat to human health and the environment. In that case, and upon receipt of an order from the Office of the State Fire

> Marshal, the owner or operator of such underground storage tank shall conduct removal and, if necessary, site investigation and corrective action in accordance with this Title and regulations promulgated by the Office of State Fire Marshal and the Board.

415 ILCS 5/57.5(g).

ARGUMENT

FREEDOM IS ENTITLED TO SUMMARY JUDGMENT BASED ON THE FACTS

IEPA's Fund denial letter bases its cost allocation to the Ineligible Tanks on the OSFM's report of a release from all tanks at the Site. (pp. 1076, 1082, 1085) This explanation fails to support IEPA's action. The OSFM did determine that there were ten tanks at the facility and advised MACTEC a release should be reported based on observation of tank holes. (p. 1030) However, the OSFM did not, and does not, determine whether corrective action is required. Illinois abandoned the color and odor test to mandate corrective action years ago in favor of analytical evidence. OSFM characterizations, therefore, do not constitute evidence that the corrective action, and associated costs, here were attributable to Ineligible Tanks.

The OSFM did not issue an order requiring removal or remediation of the Ineligible Tanks in this case. The field observations and analytical results from the Site reflect no factual basis for such an order to have been ordered. Thus, as a matter of law, no actions can be deemed to have incurred with respect to these tanks and none of the costs may be attributed to these tanks.

Furthermore, the OER ordered the corrective action to address Eligible Tank conditions (the valve release and tank liner failure). The Edgar Circuit Court pleadings

and transcripts document this basis for OER's orders. The agency cannot offer a specific reason for corrective action in one venue and another reason in a different venue.

Finally, field conditions and analytical evidence confirm that the Eligible Tanks, not the Ineligible Tanks caused the contamination requiring remediation. Thus, all costs are attributable to the Eligible Tanks, regardless of any initial OSFM release declarations.

Freedom justified its costs as attributable to releases from Eligible USTs. The ineligible tanks did not create environmental conditions requiring remediation.

The work done in connection with Reimbursement Application No. 1 was clearly related to the shear valve release from Pump No. 1. (Exhibit 4, Exhibit 5 - pp. 454-455, and Exhibit 12 - pp. 585-752) As explained in the MACTEC reports, the work focused exclusively on emergency response to address the shear valve release and investigation into whether that release caused the vapors identified at the high school. None of the work conducted related in any way to the Ineligible Tanks. (pp. 57-61, 346-353)

Similarly, the work done in connection with Reimbursement Applications No. 2 and 3 was precipitated by the tank liner failure. (Exhibit 4, Exhibit 5 - pp. 455-456, and Exhibit 12 - pp. 753-1073) The work consisted initially of emergency response to address conditions in the southern sewer and homes due to the tank liner failure. Thereafter, the work included trench construction and related activities to evaluate and abate the flow from the release to the south. The final aspects of the work included soil excavation ordered by OER to remove "gross" soil contamination caused by the shear valve and tank liner releases. (pp. 62-64) Once again, none of the work related to the Ineligible Tanks.

In fact, the work described above was ordered by OER before the Ineligible Tanks were even discovered. The discovery of the Ineligible Tanks was merely a coincidental finding during the excavation already ordered. In sum, OER ordered the trenches, sewer investigations, soil excavations and other corrective action to address the releases caused by the shear valve and the tank liner failures -- not to address the Ineligible Tanks.

Moreover, IEPA has submitted no evidence of any condition created by the Ineligible Tanks that required remediation under Illinois law. No available analytical evidence documents conditions or contaminant levels associated with the Ineligible Tanks warranting remediation. In the absence of scientific evidence indicating the Ineligible Tanks necessitated the corrective action, allocation of corrective action costs to these tanks is arbitrary and capricious.

This is particularly true given that field conditions and analytical evidence refute any argument the Ineligible Tanks created environmental conditions necessitating the corrective action conducted at the Property. The tanks had been filled with sand and closed in place at least thirty years before the 2002 events. (p. 63) Thus, it's not possible the Ineligible Tanks caused the sewer vapors, gasoline in the sewer, free product found in wells or product oozing from soil pores – the conditions that formed the factual basis for the work ordered by OER.

In addition, analytical results from sampling in connection with the 1993 and 1996 release and in 2002 demonstrate the Ineligible Tanks did not give rise to a remediation obligation or create conditions necessitating the corrective action conducted at the Property. Specifically:

Sampling conducted in connection with the 1993 and 1996 Incidents did not identify contamination in the vicinity of the Ineligible Tanks suggesting a need for remediation. No contamination was found following the 1993 excavation. (p. 495) The 1996 sampling showed minor detections of petroleum constituents to the north and west in the vicinity of the Ineligible Tanks. According to the PSI report, soil and groundwater sampling from these areas revealed the following:

Parameter	Boring 1- Soil - (ppm)	Clean up Objective
Benzene	<1,000 ppb	.17
Toluene	6.6	29
Ethylbenzene	13	19
Xylene	8.9	150

Parameter	MW-1 Groundwater - (ppm)	Clean up Objective
Benzene	0.038	.025
Toluene	0.005	2.5
Ethylbenzene	0.035	1.0
Xylene	0.014	10.0

Parameter	Boring 2 – Soil - (ppm)	Clean up Objective
Benzene	0.027	.17
Toluene	0.047	29
Ethylbenzene	0.011	19
Xylenes	0.050	15

Parameter	MW-2 Groundwater – (ppm)	Clean up Objective
Benzene	.025	.025
Toluene	.0091J	2.5
Ethylbenzene	<1 ppb	1.0
Xylene	.0018J	10.0

(p. 402)

PSI noted that diesel pump islands were present at the north of the Site and that the constituents detected in borings 1 and 2 might have been associated with a leaking fuel line serving the diesel pump islands. PSI also concluded that the contamination in the area of Borings 1 and 2 might not be as extensive as near borings 3 and 4 as the groundwater from MW-1 appeared only minimally impacted. (p. 403) In contrast, the

sampling to the south and east at borings 3 and 4 downgradient of the Tank cavity where the upgrades were underway revealed significant levels of contamination associated with the 1996 Incident.

Parameter	Boring 3 - Soil - (ppm)	Clean up Objective
Benzene	.77	.17
Toluene	2.9	29
Ethylbenzene	6.3	19
Xylene	19	150

Parameter	MW-3 Groundwater - (ppm)	Clean up Objective
Benzene	5.9	.025
Toluene	20	2.5
Ethylbenzene	3.5	1.0
Xylene	19	10.0

Parameter	Boring 4 - Soil - (ppm)	Clean up Objective
Benzene	1.4	.17
Toluene	6.8	29
Ethylbenzene	4.6	19
Xylenes	13	15

Parameter	MW-4 Groundwater - (ppm)	Clean up Objective
Benzene	0.71	.025
Toluene	1.1	2.5
Ethylbenzene	0.17	1.0
Xylene	1.0	10.0

(p. 402)

MACTEC's 2002 sampling revealed similar conditions – no "gross" contamination or contaminants requiring remediation under TACO standards in the central and north portion of the Property and gross soil and groundwater contamination south and west, downgradient of the pump islands and Eligible Tank Cavity. Consistent with the 1993 and 1996 data, the 2002 data indicated the Ineligible Tanks did not create conditions mandating remediation under Illinois law.

In April 2002 OER ordered significant investigation and soil excavation on the north end of the Property to identify a potential pathway for the shear valve release to

reach the high school to the north. The basis for this work was the vapors reported in the sewer to the north near the high school. The results of this work did not identify any significant soil or groundwater contamination in the vicinity of or associated with the Ineligible Tanks. (p. 57-64) Analysis of soil and groundwater samples from the north end of the property nearest to the Ineligible Tanks revealed benzene at levels from less than .025 ppm to .037 ppm in soil and less than .05 ppm in groundwater.

As depicted in the charts below, the analytical results of samples taken closest to the Ineligible Tanks did not identify contamination caused by the tanks requiring remediation:

Soil Sampling (ppm)

Parameter	**RW-1**	**Clean-Up Objective**
Benzene	<.005	0.17
Toluene	0.012	29
Ethylbenzene	<.005	19
Xylene	<.01	150
Parameter	**B-02-1**	**Clean-Up Objective**
Benzene	<.025	0.17
Toluene	<.085	29
Ethylbenzene	<.5	19
Xylene	.082	150
Parameter	**MW-02-4**	**Clean-Up Objective**
Benzene	<.005	0.17
Toluene	.012	29
Ethylbenzene	.013	19
Xylene	.04	150
Parameter	**MW-02-3**	**Clean-Up Objective**
Benzene	<.005	0.17
Toluene	.005	29
Ethylbenzene	.005	19
Xylene	.010	150
Parameter	**B-02-6**	**Clean-Up Objective**
Benzene	<.025	0.17
Toluene	<.025	29
Ethylbenzene	1.7	19
Xylene	0.11	150

Parameter	B-02-7	Clean-Up Objective
Benzene	<.025	0.17
Toluene	<.025	29
Ethylbenzene	<.025	19
Xylene	<.05	150
Parameter	**B-02-2**	**Clean-Up Objective**
Benzene	.034	0.17
Toluene	.049	29
Ethylbenzene	5.2	19
Xylene	.52	150
Parameter	**B-02-3**	**Clean-Up Objective**
Benzene	<.037	0.17
Toluene	<.027	29
Ethylbenzene	3.0	19
Xylene	.15	150
Parameter	**B-02-4**	**Clean-Up Objective**
Benzene	<.025	0.17
Toluene	.068	29
Ethylbenzene	<.025	19
Xylene	<.05	150
Parameter	**B-02-5**	**Clean-Up Objective**
Benzene	<.025	0.17
Toluene	<.025	29
Ethylbenzene	<.025	19
Xylene	<.05	150

(p. 354-355)

Groundwater Sampling

Parameter	MW-1	Clean-Up Objective
Benzene	<.005	.025
Toluene	<.005	2.5
Ethylbenzene	<.005	1.0
Xylene	<.010	10.0
Parameter	**MW-02-3**	**Clean-Up Objective**
Benzene	<.005	.025
Toluene	<.005	2.5
Ethylbenzene	<.005	1.0
Xylene	<.010	10.0
Parameter	**MW-02-4**	**Clean-Up Objective**
Benzene	<.005	.025
Toluene	<.005	2.5
Ethylbenzene	<.005	1.0
Xylene	<.010	10.0

(p. 356-358, *See also* pp. 72-76)

In contrast, grossly contaminated soil and groundwater indicating a recent release was found directly south and west downgradient of the shear valve and tank liner

releases. (pp. 70-71) MACTEC also reported other conditions indicative of a recent release including sheen on sewer water, sewer vapors, free product in wells and product oozing from soil pores.

In August 2002, the EPA OER ordered excavation of soil at the Site. This work was ordered based on vapors in the sewer and free product found in wells and soil on the south portion of the Site downgradient of the Eligible Tanks. Sampling in connection with the excavation ordered also demonstrates the corrective action at the Site was not necessitated by the Ineligible Tanks. PID readings taken around the Ineligible Tanks during the removal of the tanks and excavation of surrounding soil in October 2002 were very low indicating no releases requiring remediation from these tanks. The PID readings were 0.0, 1.0, 1.6, 1.8, 1.8, 3.4, and 8.5. The exact locations at which these PID readings were taken are depicted on Exhibit 16.

Lab analysis of soil samples taken in the area of the Ineligible Tanks during removal and excavation in October 2002 also confirms an absence of contamination in the vicinity of the pre-74 tanks. The sample results were non-detect for BTEX. The exact locations at which these samples were taken are depicted on Exhibit 16. (pp. 131-146) (Samples 52, 53, 54, 55, 57, 58, 59, 60)

Field observations and evaluation of the analytical data by the environmental professionals retained by Freedom demonstrate the Ineligible Tanks did not create the need for the corrective action ordered by OER. According to the MACTEC reports and affidavits of Michael Hoffman and Richard Pletz, the corrective action conducted at the Site was caused by releases from the shear valve and tank liner failure, not the Ineligible Tanks. (Exhibit 17)

Based on the analytical information and field observations set forth above, there is no evidence that remediation of conditions associated with the Ineligible Tanks was legally required. There is no evidence any condition associated with the Ineligible Tanks presented a threat sufficient under Illinois law to compel corrective action. Constituents at the levels detected, particularly when associated with pre-74 tanks, do not necessitate corrective action under TACO. These levels do not give rise to an imminent hazard such that corrective action for pre-74 UST releases may be ordered, particularly of the dramatic nature mandated by OER. In the absence of evidence of such conditions, Freedom has amply justified the corrective action costs as associated with the Eligible Tanks and that the Ineligible Tanks were merely a coincidental discovery during the excavation.

As Freedom justified all costs to Eligible Tanks, IEPA has no authority to apportion costs.

All of the corrective actions taken relate to the shear valve release on pump 1, which was duly registered, or the tank liner failure in a registered tank. Not only is there no evidence that any corrective action involved the Ineligible Tanks, OER actions and representations in court preclude a separate finding as discussed more fully below. The environmental professionals involved in the release investigations concur that corrective action here was solely related to the specific underground tanks eligible for compensation by the Fund, not the Ineligible Tanks.

Although Section 57.8(m) has yet to be interpreted by a court, its meaning is plain. Apportionment to deny LUST Fund reimbursement may not occur merely based on the presence of ineligible tanks. The Section permits apportionment only if such

ineligible tanks are present and the owner cannot attribute the costs to eligible underground storage tank(s). The costs here have been specifically attributed to Fund eligible tanks (tank 1). Not only do the facts support this conclusion, but the IEPA's own orders were based on the discharges related to the eligible tanks. There is no evidence that any order, and thus any action or cost, was made to address a problem due to the Ineligible Tanks.

Instead, the IEPA appears either to (1) hold the view that the mere presence of Ineligible Tanks justifies apportionment or (2) that a mere statement of the Fire Marshall that all tanks had a release was sufficient. This is a clear misreading of the statute. The first position negates the use of the conjunctive "and." The second position fails to recognize that apportionment is based on costs attributable to the tanks, not that a release was deemed to have occurred based on an observation of holes.

In Illinois, one may not read the conjunction "and" as an "or" unless the use of the word "and" in its literal meaning would defeat legislative intent. *People v. ex rel Dept. of Registration and Ed. v. D.R.G., Inc.*, 62 Ill. 2d 401, 342 N.E.2d 380 (1976). *See also City of Carbondale v. Bower*, 32 Ill. App. 3d 928, 173 N.E.2d 182, 265 Ill. Dec. 820 (2002) (Generally, principles of statutory construction interpret the term "and" as conjunctive rather than disjunctive.") Here, the intent is clearly conjunctive. Otherwise, IEPA could apportion whenever one fails to attribute costs to particular tanks even if there are no ineligible tanks. The clear intent is that apportionment is appropriate only when there are both ineligible and eligible tanks and an inability to determine which tanks caused the corrective action.

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As to the second position, whether or not the Fire Marshal determined each tank had a significant release, even if true, is also irrelevant to the issue. The statute permits apportionment only if the costs of the response actions were attributable to Ineligible Tanks. As previously discussed, none of the corrective actions were ordered to address releases from the Ineligible Tanks. Rather, all actions were ordered solely because of the leaking shear valve and tank liner failure. Thus, no costs are apportionable to the Ineligible Tanks. The IEPA may not simply apportion costs based upon a finding of a release, especially if under applicable law no action would be taken. As we previously discussed, applicable law would not require any action with respect to pre-1974 tanks given the analytical evidence at the Site in the areas nearest these tanks. No order was ever issued regarding these tanks based upon a finding that these tanks ever presented a threat to health.

To permit apportionment merely based upon a finding of a release premised on an observation of tank holes not only exceeds the authority of the IEPA under Section 57.8(m), it subverts the clear legislative protection of Section 57.5(g). That section clearly permits corrective action only upon a specific finding of the State Fire Marshal that the release from such tank posed a threat. No such finding occurred here nor is there any factual evidence such an order would have been legitimately issued. Thus, no corrective action was required, and Freedom was to be fully protected from losses by reimbursement from the Fund. However, by now apportioning costs to Ineligible Tanks, the IEPA is in fact forcing Freedom to incur costs associated with these tanks despite the fact that the requisite findings were never made. The legislation's protection afforded by

Section 57.5(g) becomes meaningless, and Freedom nonetheless becomes saddled with unreimbursed costs due to tanks not posing a threat.

Therefore, the relevant question is not whether releases were ever attributable to Ineligible Tanks. The question is whether the costs of the actions set forth in the applications were attributable to Ineligible Tanks. They were not. These actions were a direct result of orders to address conditions caused by Eligible Tanks. They cannot be apportioned to the Ineligible Tanks.

This Board has already concurred with this interpretation in a previous matter. In *Martin Oil Marketing v. IEPA*, case PCB 92-53 (August 13, 1992), this Board ruled upon a similar issue of apportionment. The matter involved whether the removal of non-registered tanks was reimbursable. In that matter, the Board upheld apportionment because it was not possible to determine the cause of contamination that necessitated the remediation. However, this Board made it very clear that the presence of ineligible tanks and even the costs of their removal will not prevent complete reimbursement where the action being performed arose from a leak from a registered tank:

> The removal of the tanks satisfies the definition of corrective action in that the tanks were removed to clean up a release of petroleum. To be eligible for reimbursement the corrective action must be related to a leak from a registered tank. The removal of the unregistered tanks would need to be corrective action to clean up a release of petroleum from the seven registered tanks to be eligible for reimbursement.

However, in that matter, the Board noted that the petitioner failed to demonstrate "that the corrective action cost of removing the unregistered tanks <u>was a corrective action related to the remediation of a leak from a registered tank</u>" and further that the petitioner "did not offer any evidence that indicates that the leak of petroleum was not from any of

the abandoned tanks." Had the petitioner demonstrated the corrective action occurred because of a leak from a registered tank, even the removal of unregistered tanks would be reimbursable.

Here, Petitioner has unequivocally demonstrated that all the corrective action was not related to remediation of leaks from the shear valve release or the tank liner failure. Thus, unlike the petitioners in *Martin*, it has shown that the corrective action was "related to the remediation of a leak from a registered tank." In fact, in Court, the IEPA specifically admitted that the leak was indisputably from Fund eligible tank 1. As this Board concluded in the *Martin* matter, once one demonstrates that the action ordered arose to address a leak from a registered tank, it is reimbursable regardless of the presence of other tanks or even if such tanks must be removed as part of such action.

The State represented in Court that corrective action was needed due to discharges from eligible tanks and is judicially estopped from taking a different position in this forum.

Prior to the discovery of the Ineligible Tanks, OER demanded installation of trenches, sewer investigations and excavation of soil at the Site. As MACTEC and OER disagreed as to the extent of soil excavation warranted at the Site, OER obtained an Injunctive Order from the Paris Circuit Court on August 23, 2002, for excavation of grossly contaminated soil. At the injunctive hearing, Illinois OER advised the court such excavation was necessary based on vapors discovered at the high school from the shear valve release and the vapors discovered in the southern sewer from the tank liner failure. The request was not based on any allegation or even suspicion of contamination from tanks taken out of service prior to 1974 and filled with sand. In fact, the Ineligible Tanks were not even discovered until the excavation ordered was underway. As discussed

below, IEPA should not be allowed to demand a judge order excavation of soils for one reason and then offer a different reason for the work in another forum to deny Fund reimbursement.

In seeking injunctive relief, the IEPA specifically argued to a court of law that action was needed to address the shear valve release and the tank liner failure. It is because of these events that the IEPA obtained a judicial order requiring Freedom to make expenditures. The IEPA is collaterally estopped from presenting evidence about a coincidental discovery to refute such allegations.[4]

Judicial estoppel arises whenever a party attempts to take (1) two positions, (2) that are factually inconsistent, (3) in separate judicial or quasi-judicial proceedings (4) intending for the trier of fact to accept the truth of the facts alleged and (5) have succeeded in the first proceeding and received some benefit from it. *Chicago Alliance for Neighborhood Safety v. City of Chicago*, 348 Ill. App. 3d 188, 808 N.E.2d 56, 283 Ill. Dec. 506 (2004). The purpose of judicial estoppel is to protect the integrity of judicial proceedings by preventing litigants from deliberately shifting positions to suit the exigencies of the moment. *Barack Ferrazzano Kirschbaum Perlman & Nagelberg v. Loffredi*, 342 Ill. App. 3d 453, 795 N.E.2d 779, 277 Ill. Dec. 111 (2003). The doctrine of judicial estoppel, as opposed to equitable estoppel, applies equally to the State as a party as to any other party that is non governmental. *See e.g. Johnson v. DuPage Airport Authority*, 268 Ill. App. 3d 409, 644 N.E.2d 802, 206 Ill. Dec. 34 (1994).

[4] The State's written promises, although possibly a separate ground for estoppel, serve to confirm that the State took the legal position in the injunction actions that the corrective action was needed to address problems from eligible tanks and that the work would be reimbursed. (*See* Exhibit 18)

Judicial estoppel applies here. To obtain injunctive relief, the Attorney General on behalf of the IEPA, represented to a court of law that extensive corrective action was needed because of the valve release and the tank failure. The IEPA sought an order demanding the corrective action to address these problems. The resulting injunctive relief, by its own terms, indicates the action ordered was to address the releases from these events. Based upon the fact that the order was dependant upon addressing these failures, as to which there was no question to the right of reimbursement, Freedom decided not to appeal. Had Freedom believed otherwise, it may have appealed what amounted to many unnecessary actions.

Here, the IEPA seeks to maintain in this separate quasi-judicial proceeding that the costs incurred as a result of this order must also be attributable in part to the Ineligible Tanks. This the IEPA cannot do. It cannot seek an order to take action to correct a problem caused by an eligible tank and then later, when convenient, assert the action was attributable to ineligible tanks.

IEPA is judicially estopped from changing its position that remedial action was needed to address the valve release and the tank liner failure. As a result, the IEPA must be deemed in agreement that all costs are solely attributable to eligible tanks.

Freedom is entitled to Reimbursement of the Miscellaneous Costs denied by IEPA

OER ordered dye testing, smoke testing and telescan investigation of the sewer between the high school and the Station in April 2002. IEPA denied $27.76 in Fund reimbursement for dye for tracer testing the sewer on the basis it "has been determined to not be related to Early Action Activities. Therefore, it is not reasonable . . . ." MACTEC completed dye tracer testing of sewer in order to determine if a sewer connection existed

between the Freedom Oil station and sewers in the vicinity of the Site. The dye testing of the sewer was completed at the direction of OER as part of Early Action/Emergency Response activities. Therefore, this cost should be eligible for reimbursement.

OER ordered that notice of the smoke testing be published in the Paris Beacon so residents would not be alarmed by the testing. IEPA also denied $140.00 for publication fees associated with the notice of smoke testing. MACTEC completed smoke testing of sewer in order to determine if a sewer connection existed between the Freedom station and sewers in the vicinity of the Site. Public notice was required by the City of Paris and OER in order for permission to be granted to MACTEC to complete the test. Therefore, this cost should be eligible for reimbursement.

IEPA also denied $33.25 for VHS copies. These charges were for VHS tape copies of the sewer investigation conducted by MACTEC. The Illinois Attorney General's Office and OER specifically requested copies of these videos. Therefore, this cost should be eligible for reimbursement.

Accordingly, the $27.76 for sewer dye testing, $140 for publication of the sewer smoke testing, and $33.25 for VHS tape copies of the sewer investigation were all early action activities directly ordered by OER and Freedom is entitled to reimbursement of these costs totaling $201.01.

Freedom's Reimbursement applications contained handling costs, a charge permitted under the regulations. IEPA's denial of $24,638.82 in handling costs was in error. As illustrated in the chart attached as Exhibit 19, based on handling charges allowable under the law, Freedom is entitled to an additional $16,987.03 in handling charges.

IEPA also denied $362.84 for cell phone and mileage handling costs. $226.76 was deducted for cell phone rental from 10/28/2002 - 11/27/2002. Apparently, IEPA made this deduction based on a belief MACTEC staff were on Site for five days, not nine days. A similar deduction of $103.96 was made for the period 09/28/2002 - 10/27/2002. Attached are time sheets verifying ESE staff were on Site for these time periods submitted to IEPA.

CONCLUSION

MACTEC's report and affidavits demonstrate the need for corrective action at the Site was caused by recent releases from the shear valve and tank liner failure not the Ineligible Tanks. MACTEC's conclusions are based on their field observations about the Ineligible Tanks and the analytical evidence, all of which appears in the reports filed with the IEPA. IEPA did not collect any analytical evidence refuting Freedom's analytical results. Nor was IEPA present during removal of the Ineligible Tanks.

Moreover, IEPA ordered the corrective actions because of problems due to Eligible Tanks and further represented in Court that the problems were from these tanks. IEPA, therefore, cannot offer testimony factually supporting a conclusion the Ineligible Tanks created conditions mandating remediation. Accordingly, there is no genuine issue of disputed fact. The corrective action was associated with recent releases from Fund Eligible Tanks and Freedom is entitled to judgment in its favor for reimbursement of $200,645.84 in corrective action costs denied based on improper allocation to Ineligible Tanks.

The $27.76 for sewer dye testing, $140 for publication of the sewer smoke testing, and $33.25 for VHS tape copies of the sewer investigation were all early action activities

directly ordered by OER. As such, Freedom is entitled to reimbursement of these costs totaling $201.01. Finally, Freedom is entitled to the handling costs allowable under the regulations in the amount of $16,987.03.

In total, Freedom is entitled to $210,853.64. Freedom should also be awarded its attorneys' fees.

WHEREFORE, Petitioner, Freedom Oil Company, an Illinois corporation, requests this Board enter summary judgment in its favor pursuant to 35 Ill. Admin. Code §101.516(b) as the reports, pleadings, admissions, and affidavits presented herein demonstrate there is no genuine issue of material fact and that Freedom is entitled to judgment as a matter of law and against IEPA.

Respectfully submitted,

HOWARD & HOWARD ATTORNEYS, P.C.

By: _____
Diana M. Jagiella

Dated: March 31, 2005

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 31th day of March 2005, I have served the attached Motion for Summary Judgment by depositing same via first-class U.S. mail delivery to:

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