ILLINOIS POLLUTION CONTROL BOARD
February 2, 2006

FREEDOM OIL COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 03-54
	)	PCB 03-56
ILLINOIS ENVIRONMENTAL	)	PCB 03-105
PROTECTION AGENCY,	)	PCB 03-179
	)	PCB 04-2
Respondent.	)	(UST Appeal)
	)	(Consolidated)

ORDER OF THE BOARD (by A.S. Moore):

These consolidated appeals concern the cleanup of environmental contamination from leaking underground storage tanks (USTs) at a gasoline service station. Petitioner, Freedom Oil Company (Freedom Oil), has filed five petitions asking the Board to review five final determinations of respondent, the Illinois Environmental Protection Agency (Agency). All of the Agency's determinations pertain to Freedom Oil's service station at 401 South Main Street in Paris, Edgar County, which had a total of 11 USTs.

Several UST releases were reported in 2002 at the Freedom Oil station. Vapors impacted Paris High School, nearby residences, and the sewer system. Free product was found in the groundwater. At the State's request, the Edgar County Circuit Court entered an injunction requiring Freedom Oil to excavate "gross subsurface contamination" and perform air monitoring, among other things. Disputes between Freedom Oil and the Agency arose over the cleanup performed by Freedom Oil and the costs of it. Freedom Oil has appealed to the Board.

SUMMARY OF TODAY'S ACTION

Today, the Board rules on four motions: Freedom Oil's motion for default judgment or to bar the Agency from introducing evidence; the Agency's motion to strike an exhibit; Freedom Oil's motion for summary judgment; and the Agency's counter-motion for summary judgment. As detailed later, each party has prevailed on some of the issues.

Three of the five appeals (Board dockets PCB 03-105, 03-179, 04-2) involve Agency determinations to deny Freedom Oil reimbursement of cleanup costs from the State's UST Fund. The other two appeals (Board dockets PCB 03-54, 03-56) involve Agency determinations to reject aspects of Freedom Oil's cleanup activities at the site. The motions for summary judgment ruled on in this order, however, address only the UST Fund reimbursement denials.

Of the contested grounds in the three UST Fund reimbursement denials, the Agency's use of cost "apportionment" accounts for the largest dollar amount of deductions. Under Section

57.8(m) of the Environmental Protection Act (Act) (415 ILCS 5/57.8(m) (2004)), if some but not all of a site's USTs are eligible for reimbursement and the UST owner or operator fails to attribute all cleanup costs to each UST, the Agency may apportion the payment of costs between eligible and ineligible tanks.

Section 57.8(m) of the Act has not been previously interpreted by the Board or in any reported decision of the Illinois appellate court. Some of Freedom Oil's costs were incurred performing a cleanup ordered by the Edgar County Circuit Court. The court's injunctive order resulted from an action brought against Freedom Oil in 2002 by the Attorney General's Office (AGO) on behalf of the People of the State of Illinois (People), People v. Freedom Oil Co., No. 02-CH-16.

In the three reimbursement applications at issue here, Freedom Oil asked to be reimbursed a total of $1,012,240.99 in cleanup costs. In the three determinations being appealed, the Agency collectively denied $247,112.62, of which $200,645.84 was denied based on apportioning costs between tanks that are eligible for UST Fund reimbursement and tanks that are not. Both parties move for summary judgment on cost apportionment. Freedom Oil also moves for summary judgment on other miscellaneous denied costs totaling $17,518.76, but the Agency's counter-motion does not ask for summary judgment on these other costs.

As the Board finds in this order, the critical facts are as follows. There were five ineligible USTs at Freedom Oil's site, totaling 4,500 gallons in capacity. The ineligible tanks had been filled with sand in the 1960's and were not the source of the recent releases resulting in vapors and free product. However, each ineligible UST had experienced a release. Freedom Oil's excavation of the site included the areas of the ineligible tank cavities. Freedom Oil collected soil samples to test for contamination only after excavating, not sampling the soil immediately around the ineligible tanks.

For the reasons below, the Board denies Freedom Oil's motion for default judgment or to bar evidence. The Board denies the Agency's motion to strike an exhibit to Freedom Oil's motion for summary judgment. The Board also grants in part and denies in part Freedom Oil's motion for summary judgment on cost apportionment and grants in part and denies in part the Agency's counter-motion for summary judgment on cost apportionment. Specifically, the Board finds that Freedom Oil met its burden of proving that the cleanup costs documented in its first reimbursement application were in response only to a release eligible for UST Fund reimbursement. The Board holds that the Agency therefore erred in its first determination by apportioning $35,333.25 of the cleanup costs to ineligible tanks at the site.

The Board finds, however, that Freedom Oil did not meet its burden of proof to avoid cost apportionment regarding its second and third reimbursement applications. Accordingly, the Board affirms the Agency's second and third determinations, which respectively apportioned $143,123.59 and $22,189 to ineligible tanks. As for the other contested miscellaneous costs, the Board denies Freedom Oil's motion for summary judgment for the reasons provided below.

Even with today's rulings, contested issues remain in each of these five consolidated appeals. This order therefore does not constitute final action by the Board in any of the dockets.

When the Board does issue its final order, it will direct the Agency to take the steps necessary to provide UST Fund reimbursement to Freedom Oil in the amount found today to have been erroneously denied based on cost apportionment. The Board directs the parties to hearing on the remaining reimbursement and cleanup issues. The hearing officer is directed to schedule hearings expeditiously, allowing sufficient time for the Board to deliberate and decide these cases by June 1, 2006, the date of the last Board meeting before the current statutory decision deadline.

In this order, the Board first provides the general statutory framework for UST Fund appeals. The Board then addresses several procedural matters before ruling on Freedom Oil's motion for default judgment or to bar evidence. Next, the Board rules on the Agency's motion to strike portions of Freedom Oil's motion for summary judgment. The Board then turns to the parties' respective motions for summary judgment.

GENERAL STATUTORY FRAMEWORK

Under the Act, the Agency decides whether to approve proposed cleanup plans for leaking UST sites, as well as requests for cleanup cost reimbursement from the State's UST Fund. *See* 415 ILCS 5/57.7, 57.8 (2004). The UST Fund was created under the Act in the 1980's and may be accessed by eligible UST owners and operators to help pay for the environmental clean up of leaking petroleum USTs. In addition, the UST Fund is used to satisfy federal financial assurance requirements of owners and operators. *See* P.A. 84-1072 (eff. July 1, 1986); *see also* 415 ILCS 5/57.11 (2004). The UST Fund consists of monies received as per-gallon taxes and fees under the Gasoline Storage Act (430 ILCS 15/4, 5 (2004)) and the Motor Fuel Tax Law (35 ILCS 505 (2004)).

In 1993, with Public Act 88-496 (eff. Sept. 13, 1993), the General Assembly amended the Act regarding UST remediation and Fund reimbursement. Among other things, the amendments enacted new Title XVI, called the Leaking Underground Storage Tank Program (415 ILCS 5/57-57.17 (2004)). Since its enactment, Title XVI has been amended numerous times. *See, e.g.*, P.A. 92-554 (eff. June 24, 2002), P.A. 92-735 (eff. July 25, 2002). Under Title XVI, the UST owner or operator may appeal an Agency determination denying reimbursement to the Board under Section 40 of the Act (415 ILCS 5/40 (2004)), which governs Board review of Agency permit decisions. *See* 415 ILCS 5/40(a)(1), 57.8(i) (2004); 35 Ill. Adm. Code 105.Subpart D, 732.602(h).

Consistent with Section 40 of the Act, the Board must decide whether the reimbursement application, as submitted to the Agency, complies with the Act's eligibility criteria. *See* Kathe's Auto Service Center v. IEPA, PCB 96-102 (Aug. 1, 1996); *see also* Browning Ferris Industries of Illinois v. PCB, 179 Ill. App. 3d 598, 534 N.E.2d 616 (2d Dist. 1989). Further, on appeal before the Board, the Agency's denial letter frames the issue (*see* Kathe's Auto Service, PCB 96-102) and the UST owner or operator has the burden of proof (*see* Ted Harrison Oil v. IEPA, PCB 99-127 (July 24, 2003)).

The Office of the State Fire Marshal (OSFM) determines whether USTs may be registered, which is a prerequisite for UST Fund eligibility. *See* 415 ILCS 5/57.9 (2004). The

OSFM also determines whether a UST owner or operator is eligible for reimbursement and, if so, which deductible applies. OSFM eligibility and deductibility determinations may be appealed to the Board. *Id*.; *see also* 35 Ill. Adm. Code 105.Subpart E. In addition, the OSFM oversees the removal and abandonment in-place of USTs. *See* 41 Ill. Adm. Code 170.

PROCEDURAL MATTERS

Petitions for Review

PCB 03-54

On January 21, 2003, Freedom Oil filed a petition asking the Board to review a September 17, 2002 determination of the Agency regarding the Paris service station. The Agency denied Freedom Oil's request to extend the deadline for submitting a 45-day report. The Board accepted the petition for hearing in a January 23, 2003 order, and docketed the appeal as PCB 03-54.

PCB 03-56

On January 21, 2003, Freedom Oil filed another petition, this time asking the Board to review a September 20, 2002 determination of the Agency concerning the Paris station. The Agency rejected, among other things, Freedom Oil's site classification work plan. The Board accepted the petition for hearing in a January 23, 2003 order, and docketed the appeal as PCB 03-56.

PCB 03-105

On January 14, 2003, Freedom Oil filed a petition asking the Board to review a December 18, 2002 determination of the Agency regarding the station. The Agency denied UST Fund reimbursement for $102,122.34 of Freedom Oil's requested $185,644.12 in response costs. The deductions included a $20,000 deductible. The Board accepted the petition for hearing in a January 23, 2003 order, and docketed the appeal as PCB 03-105. As detailed later in this order, the parties subsequently represented that the Agency corrected a calculation error in this determination, reducing the total amount of costs denied from $102,122.34 to $55,501.01.

PCB 03-179

On April 4, 2003, Freedom Oil filed a petition asking the Board to review a March 19, 2003 determination of the Agency concerning the Paris service station. The Agency denied UST Fund reimbursement for $169,051.90 of Freedom Oil's requested $709,748.50 in response costs. In an April 17, 2003 order, the Board accepted the petition for hearing and docketed the appeal as PCB 03-179.

PCB 04-2

On July 2, 2003, Freedom Oil filed a petition asking the Board to review a May 28, 2003 determination of the Agency regarding the Paris station. The Agency denied UST Fund reimbursement for $22,559.71 of Freedom Oil's requested $116,848.37 in response costs. In a July 10, 2003 order, the Board accepted the petition for hearing and docketed the appeal as PCB 04-2.

Consolidation

In a February 20, 2003 order, the Board granted Freedom Oil's motion to consolidate the first three appeals, PCB 03-54, 03-56, and 03-105. In its April 17, 2003 order, the Board granted Freedom Oil's motion to consolidate PCB 03-179 with PCB 03-54, 03-56, and 03-105. Finally, in its July 10, 2003 order, the Board granted Freedom Oil's motion to consolidate PCB 04-2 with the four prior appeals. The Agency did not oppose any of Freedom Oil's motions to consolidate.

Decision Deadlines

On January 29, 2004, Freedom Oil filed an open waiver of the 120-day statutory deadlines for the Board to decide the five appeals. On December 19, 2005, Freedom Oil reinstated the deadlines, requiring the Board to decide the five appeals by April 18, 2006. On January 10, 2006, Freedom Oil waived this deadline to June 5, 2006. *See* 415 ILCS 5/40(a)(2) (2004); 35 Ill. Adm. Code 101.308(a), (c). The Board meeting before this latest collective deadline is presently scheduled for June 1, 2006.

Administrative Records

On April 21, 2005, the Agency filed the administrative records in these five appeals. The Agency filed a single, combined administrative record for PCB 03-54 and 03-56, the two appeals which do not concern denials of requests for UST Fund reimbursement. The other three appeals, PCB 03-105, 03-179, and 04-2, each had a separate administrative record filed.[1]

[1] The Board cites the Agency's administrative record in PCB 03-105 as "AR II at "; in PCB 03-179 as "AR III at _"; and in PCB 04-2 as "AR IV at _." Without objection from Freedom Oil, the Agency's counter-motion for summary judgment relies not only upon AR II-IV, but also upon the combined administrative record for PCB 03-54 and 03-56, which the Board cites as "AR I at _."

Motions for Partial Summary Judgment and Discovery Relief

On February 22, 2005, Freedom Oil filed a motion for partial summary judgment and a motion for discovery relief. The motion for partial summary judgment addresses a now-admitted miscalculation by the Agency concerning cost apportionment in the first of the three reimbursement determinations. The motion for discovery relief concerns the Agency missing a deadline to respond to Freedom Oil's discovery requests.

In a February 25, 2005 order, the hearing officer stated that the parties had resolved the subject of the motion for partial summary judgment. The hearing officer also established a new deadline for the Agency's discovery responses. In addition, the hearing officer order states that Freedom Oil "will file a motion to withdraw the motion for partial summary judgment and the motion for discovery relief." Hearing Officer Order, PCB 03-54, 03-56, 03-105, 03-179, 04-2 (cons.) (Feb. 25, 2005).

Freedom Oil, however, neglected to file the motion to withdraw. Nevertheless, Freedom Oil's April 4, 2004 motion for summary judgment confirms that the parties resolved the miscalculation issue that led to Freedom Oil's motion for partial summary judgment. In addition, the substance of Freedom Oil's motion for discovery relief is subsumed within its March 23, 2005 motion for default judgment or to bar evidence, which the Board rules on below. Under these circumstances, the Board denies as moot Freedom Oil's February 22, 2005 motions for partial summary judgment and discovery relief.

Motions for Default or Summary Judgment

On March 23, 2005, Freedom Oil filed a motion for default judgment or, alternatively, to prohibit the introduction of evidence. The Agency filed a response on April 7, 2005, and with the hearing officer's leave, Freedom Oil filed a reply on April 8, 2005.[2]

Should its March 23, 2005 default motion be denied, Freedom Oil filed a motion for summary judgment on April 4, 2005, as an alternative. On May 13, 2005, the Agency filed a counter-motion for summary judgment, a response to Freedom Oil's motion for summary judgment, a motion to strike portions of Freedom Oil's motion for summary judgment, and a motion for leave to file *instanter* the response and motion to strike. The Agency's motion for leave to file *instanter*, which was unopposed by Freedom Oil, is granted. *See* 35 Ill. Adm. Code 101.500(d).

On May 18, 2005, Freedom Oil filed a response to the Agency's motion to strike. With the hearing officer's leave, Freedom Oil filed a response to the Agency's counter-motion for summary judgment on May 31, 2005.[3]

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[2] The Board cites Freedom Oil's motion for default judgment or alternative relief as "Mot. Def. at _"; the Agency's response as "Def. Resp. at _"; and Freedom Oil's reply as "Def. Reply at _."

Freedom Oil states that it could not cite to the administrative record in its motion for summary judgment "because IEPA did not timely file the record." FO MSJ at 2. As noted above, the administrative records were filed over two weeks after Freedom Oil filed its motion for summary judgment. Freedom Oil asserts that it would be "unfair to prohibit Freedom from seeking summary judgment because of IEPA delays in filing the record." *Id.* Freedom Oil therefore attaches to and cites within its motion for summary judgment "reports, letters and applications filed with IEPA or in IEPA's possession." *Id.* In all, there are 19 exhibits attached to Freedom Oil's motion for summary judgment.

The Agency does not specifically object to Freedom Oil's use of the summary judgment exhibits, with the exception of Exhibit 17, which is the subject of the Agency's motion to strike ruled upon below. Indeed, even though some of the documents within Freedom Oil's exhibits "are not found in the administrative records filed by the Illinois EPA," the Agency concludes that "to the extent such documents did pre-date the final decisions under appeal, and in this instance reflected the participation of the State of Illinois in enforcement proceedings regarding the Freedom Oil site, reference to such documents is appropriate." Ag. MSJ at 8-9, n. 4. Under these circumstances and consistent with its ruling below on the Agency's motion to strike, the Board will cite to the exhibits of Freedom Oil's motion for summary judgment, in addition to the administrative records.[4]

MOTION FOR DEFAULT JUDGMENT OR TO BAR EVIDENCE

Freedom Oil Motion

Freedom Oil moves the Board for default judgment on the five appeals or, alternatively, to prohibit the Agency from introducing evidence at hearing. Freedom Oil argues that it has been financially prejudiced by significant delays in resolving these cases. Further, Freedom Oil maintains that the delays are due to the Agency's unjustified inattention to the cases, and the Agency's failure to comply with discovery rules and Board and hearing officer orders setting various deadlines. Mot. Def. at 1. Based on this alleged Agency conduct, Freedom Oil seeks the "imposition of default judgment or in the alternative an order barring [A]gency evidence at hearing." *Id*. at 2.

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[3] The Board cites Freedom Oil's motion for summary judgment as "FO MSJ at _" and the Agency's motion for summary judgment and response to Freedom Oil's motion for summary judgment as "Ag. MSJ at _." The Board cites Freedom Oil's response to the Agency's motion for summary judgment as "FO MSJ Resp. at _." The Board cites the Agency's motion to strike as "Ag. Mot. Str. at _" and Freedom Oil's response to the Agency's motion to strike as "FO Str. Resp. at _."

[4] The Board cites exhibits to Freedom Oil's motion for summary judgment at "Exh. _ at _."

Freedom Oil specifically complains that the Agency represented it would, but failed to, propose or discuss a meaningful settlement (Mot. Def. at 3-4), that the Agency was late in filing the administrative records ordered by the Board (*id*. at 5), and that the Agency failed to comply with several discovery deadlines set by Board procedural rule and hearing officer order (*id*. at 5-6). Freedom Oil suggests these purported Agency failings amount to a deliberate and continuous disregard of the Board and its authority. *Id*. at 7-8. Citing the Board's procedural rule on sanctions (35 Ill. Adm. Code 101.800), Freedom Oil seeks default judgment in its favor or, alternatively, to avoid unfair surprise, a bar on the Agency introducing evidence at hearing that the Agency should have produced (but did not) in response to Freedom Oil's written discovery. *Id*. at 6-7, 13-14.

Agency Response

In response, the Agency states that Freedom Oil's many representations about the Agency's inaction "are not what they are made out to be." Def. Resp. at 2. Counsel for the Agency states that allegations of inattention are untrue. According to the Agency, there have been repeated communications between the parties during these appeals. Over the last year, however, the time of the Agency technical staff has been largely taken up with developing a Leaking UST (LUST) regulatory proposal for submittal to the Board. *Id*.

The Agency maintains that "at no times has the Illinois EPA refused to discuss or consider reviewing information submitted by Petitioner," although "the answers have not necessarily been to the Petitioner's liking." Def. Resp. at 3. The Agency insists that these on-going discussions have been conveyed to the hearing officer, with the representation that Agency counsel is unable to make final decisions or settlement offers without approval of the Agency's LUST technical staff. *Id*.

The Agency concedes that it has not met all deadlines in these appeals, but states that the delays were not been in bad faith and resulted, at least in part, from counsel's paternity leave and from counsel's overly optimistic estimates of response times "borne purely out of a desire to keep these matters moving in a forward manner." Def. Resp. at 3. The Agency contends, moreover, that there has been "positive movement by the parties," namely the parties' agreement that the focus of the UST Fund appeals should be the issue of cost apportionment. *Id*. at 3-4.

The Agency also disputes Freedom Oil's account that no settlement offer was made by the Agency. Def. Resp. at 4. The Agency states that Freedom Oil has accepted an Agency-proposed, five-figure offer to settle some of the costs under appeal. *Id*. The Agency adds that the hearing officer granted an Agency motion for continuance "designed to facilitate the filing of the administrative records in these appeals as well as discovery responses." *Id*.

Freedom Oil Reply

Freedom Oil first replies that the Agency's "five figure" proposal was not a settlement offer but merely the Agency recognizing and correcting its undisputed mathematical mistake in apportioning reimbursement costs. Def. Reply at 3-4. Freedom Oil maintains therefore that the

proposal made by the Agency was not a "proposal to settle the central issue in the case" nor was it "the proposal IEPA committed to make during the various status hearings." *Id*. at 3.

Freedom Oil states that many of the deadlines missed by the Agency were dates agreed to by the Agency, and yet the Agency made no effort, when it could not meet deadlines, to seek an extension before the passing of the deadlines. Def. Reply at 5. According to Freedom Oil, the Agency's "approach to order deadlines reflects an attitude that Hearing Officer orders are not binding but mere suggestions." *Id*. at 6.

In addition, Freedom Oil notes that its current motion is not its first motion for sanctions in this proceeding. On February 21, 2005, Freedom Oil filed a motion for discovery sanctions based on the Agency's failure to meet a discovery and record deadline, but Freedom Oil withdrew that motion when the Agency agreed to a new deadline. When the latter deadline was missed by the Agency, Freedom Oil filed this motion. Def. Reply at 5.

Lastly, Freedom Oil emphasizes that it, like many other oil companies, depends on proper operation of and reimbursement from the UST Fund to continue in business. Def. Reply at 5, 12. Freedom Oil states that it "remains frustrated" because it now has had to file a second motion for sanctions "as relief for failure to comply with discovery requests and record filing to allow the hearing to proceed." *Id*. at 12.

Board Analysis

Under its procedural rules, the Board may sanction parties for unreasonably failing to comply with Board or hearing officer orders or the Board's procedural rules. *See* 35 Ill. Adm. Code 101.800(a); *see also* 35 Ill. Adm. Code 105.118. Potential sanctions include entering a default judgment or barring the offending party from maintaining a claim or defense or presenting a witness. *See* 35 Ill. Adm. Code 101.800(b); E&L Trucking Co. v. IEPA, PCB 02-53 (Apr. 18, 2002) (among possible sanctions for the Agency's late record filing: "the petitioner [in UST Fund appeal] may be immediately awarded the result it seeks, regardless of the Agency's position in the matter").

The Board has broad discretion in determining the imposition of sanctions. *See* IEPA v. Celotex Corp., 168 Ill. App. 3d 592, 597, 522 N.E.2d 888, 891 (3d Dist. 1988); Modine Manufacturing Co. v. PCB, 192 Ill. App. 3d 511, 519, 548 N.E.2d 1145, 1150 (2d Dist. 1989). In exercising this discretion, the Board considers such factors as "the relative severity of the refusal or failure to comply; the past history of the proceeding; the degree to which the proceeding has been delayed or prejudiced; and the existence or absence of bad faith on the part of the offending party or person." 35 Ill. Adm. Code 101.800(c).

In these consolidated appeals, the Agency concedes it has missed several deadlines, but the Agency has also often sought and received extensions and continuances, providing the hearing officer with justifications for delay. The Agency has now filed the administrative records for these five appeals. The Agency has also submitted discovery responses. It is nowhere apparent that the Agency has ever simply refused to provide this information.

Presumably in its own self-interest, Freedom Oil has filed numerous waivers of the Board's statutory decision deadlines in these appeals, ultimately filing open waivers, and only very recently reinstating the deadlines. *See* 35 Ill. Adm. Code 101.300(c). No matter how promising settlement discussions may appear, they simply do not always bear fruit. Further, the Board is mindful that both parties, in filing the counter-motions for summary judgment, are representing that the major reimbursement issue on appeal can be resolved short of hearing, despite the discovery and record-filing difficulties.

On this record, the Board cannot find that the Agency's behavior warrants the drastic sanctions requested by Freedom Oil. Freedom Oil has not persuaded the Board that the Agency's handling of these consolidated appeals, while at times tardy, amounts to bad faith, deliberate non-compliance with rules or orders, or a dilatory pattern or scheme designed to stall these proceedings. Nor can the Board find that Freedom Oil established material prejudice. *See* Celotex Corp., 168 Ill. App. 3d at 597-98, 522 N.E.2d at 891-92; Modine Manufacturing, 192 Ill. App. 3d at 517-18, 548 N.E.2d at 1149-50.

Considering all of the circumstances, the Board denies Freedom Oil's motion for default judgment and the company's alternative sanction request of precluding Agency evidence at hearing. *See* 35 Ill. Adm. Code 101.800(a), (c). The Board strongly cautions Agency counsel, however, that if extensions or continuances are needed in the future, they must be sought *before* the applicable deadline passes. Failure to do so may subject the Agency to sanctions. *See* 35 Ill. Adm. Code 101.800(a).

AGENCY'S MOTION TO STRIKE EXHIBIT

The Agency moves to strike one of the exhibits to Freedom Oil's motion for summary judgment. Specifically, the Agency moves to strike Exhibit 17 and "any and all references to that Exhibit [and] the information therein as such references may exist within the Petitioner's motion." Ag. Mot. Str. at 2.

Exhibit 17 of Freedom Oil's motion for summary judgment contains two affidavits. The first affidavit is from Michael J. Hoffman, a professional engineer with MACTEC (formerly Harding ESE), the company retained by Freedom Oil to remediate UST releases at the Paris service station site in 2002. The second affidavit is from Richard Pletz, a project scientist with MACTEC.

The Agency, in its motion to strike, argues that because the affiants' representations were made *after* the final determinations currently under appeal, the Board cannot consider them. Ag. Mot. Str. at 1-2. The Agency emphasizes that the Board's review in UST appeals is generally limited to information that was before the Agency at the time of the Agency determination, and is not based on information developed after that determination. *Id*. at 2.

In response, Freedom Oil argues that the Board's procedural rules (35 Ill. Adm. 101.516(b)) specifically permit the use of affidavits in summary judgment motions. Freedom Oil further asserts that the Agency's position is based not on the Exhibit 17 affidavits containing "new evidence," but rather the affiants' representations being "post record." FO Str. Resp. at 1.

Freedom Oil maintains that the Board's rules "clearly contemplate testimony by the parties at hearing," which is necessarily "post record." *Id*. at 2.

According to Freedom Oil, under the Agency's position, testimony logically could not be presented at hearing because the testimony "would not be part of the record." FO Str. Resp. at 2. Indeed, Freedom Oil continues, the Agency's position suggests that "the only thing that could be presented at the hearing would be the record," which is "absurd." *Id*. Freedom Oil asserts that affidavits in summary judgment motions are "a mere substitute for testimony that would occur at trial" and their availability permits the Board to "avail itself of a useful alternative to a hearing." *Id*.

Freedom Oil states that it is "not attempting to introduce a new study or testing" but rather affidavits that "contain testimony that would be admissible at hearing." FO Str. Resp. at 4. According to Freedom Oil, the Agency has cited nothing in the affidavits as being "new matter." *Id*. Freedom Oil maintains that the testimony in the affidavits is "based entirely upon matters in the record and represents the opinion of these experts concerning such material." *Id*. In this way, Freedom Oil concludes, the affidavit testimony is "testing the conclusions of IEPA from the matters in the record." *Id*.

The Board agrees with Freedom Oil that the Agency's statement of what the Board may consider on appeal is unduly restrictive. The appellate court precedent relied upon by the Agency, Alton Packaging Corp. v. PCB, 162. Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987), actually supports Freedom Oil. It is well-settled that the Board's review in permit-type appeals, like this one, is generally limited to the information that was before the Agency during the Agency's statutory review period, and is not based on information developed by the applicant, or the Agency, after the Agency's determination. *See* Alton Packaging, 162 Ill. App. 3d at 738, 516 N.E.2d at 280; *see also* 415 ILCS 5/40(a), 57.8(i) (2004); 35 Ill. Adm. Code 105.412. It is the hearing before the Board, however, that affords the petitioner the opportunity "to challenge the reasons given by the Agency for [the denial] by means of cross-examination and the Board the opportunity to receive testimony which would 'test the validity of the information (relied upon by the Agency)'." Alton Packaging, 162 Ill. App. 3d at 738, 516 N.E.2d at 280, quoting IEPA v. PCB, 115 Ill. 2d 65, 70 (1986); *see also* Community Landfill Co. & City of Morris v. IEPA, PCB 01-170 (Dec. 6, 2001), *aff'd sub nom.* 331 Ill. App. 3d 1056, 772 N.E.2d 231 (3d Dist. 2002).

Accordingly, under Alton Packaging, petitioners before the Board in appeals of this nature cannot introduce new matters outside the Agency administrative record, but they may cross-examine and present testimony to challenge the information relied on by the Agency for the denial. The Agency does not allege that the Exhibit 17 affidavits contain impermissible new matters. On the contrary, according to Freedom Oil, the affidavits contain only testimony that is based on matters in the record and that tests the Agency's reasons for apportioning cleanup costs to ineligible tanks. The Board therefore denies the Agency's motion to strike.

COUNTER-MOTIONS FOR SUMMARY JUDGMENT

Below, the Board sets forth the undisputed facts for purposes of ruling on the counter-motions for summary judgment. The Board then provides the standard it applies when considering motions for summary judgment. Next, the Board takes up the UST Fund deductions based on cost apportionment, describing the parties' arguments and ruling on the counter-motions for summary judgment. Lastly, the Board addresses the other miscellaneous costs deductions at issue.

Facts

Gasoline Station Site

In 1985, Freedom Oil purchased a gasoline station located at 401 S. Main Street in Paris, Edgar County. The site is situated on the southwest corner of the intersection of Main Street and Crawford Street in a mixed commercial/residential area. The site had a gasoline station/convenience store building, along with a canopy covering two pump islands. The gasoline station/convenience store building was located roughly in the center of the site, with the canopy located in front of the building and to the east of it. A third pump island, on the northern edge of the site, was not under the canopy. Freedom Oil no longer uses the site as a gasoline station. Exh. 1; Exh. 2 at 15; Exh. 3 at 394, 408; Exh. 4 at 57; Exh. 6; Exh. 16; Exh. 17.

Along the site's northern border is Crawford Street. Immediately north of Crawford Street and across from the station is the Paris High School. Along the site's southern border is an alley. Residences are located across the alley to the south. Along the site's eastern border is Main Street. An alley and Central Avenue are west of the site, and residences are located across Central Avenue to the west. Exh. 1; Exh. 2 at 15; Exh. 3 at 394, 408; Exh. 4 at 57.

Underground Tanks

Before 2002, 11 USTs were located at the station (Tanks 1-11). Exh. 12 at 1035-36. Tanks 1-6, which were installed in 1980, were used by Freedom Oil. Freedom Oil removed Tank 5 in 1993. In 2002 and 2003, the OSFM determined that Tanks 1-4 and 6 were eligible for reimbursement from the UST Fund. Exh. 2 at 1, 3; Exh. 12 at 1032-36; AR II at 11.

In October 2002, during the LUST response activities at issue in these consolidated appeals, Freedom Oil discovered Tanks 7-11. In the early 1960's, the prior owner of the station filled these five tanks with sand and closed them in place. Ultimately, all of the remaining underground tanks (Tanks 1-4, 6-11) were removed by Freedom Oil during the 2002 LUST response activities. Exh. 4 at 63; Exh. 17 at 1090.

The volumes and product contents of all 11 underground tanks are listed below:

Tank No.	Volume in Gallons	Product
1	4,000	Diesel
2	4,000	Gasoline
3	4,000	Gasoline
4	4,000	Gasoline
5	1,000	Gasoline
6	1,000	Kerosene
7	1,000	Gasoline
8	1,000	Gasoline
9	1,000	Gasoline
10	1,000	Gasoline
11	500	Heating oil

Exh. 12 at 1032-36.

Tank 5 was located behind and west of the gasoline station/convenience store building. Exh. 2 at 13; Exh. 3. Tanks 1-4 and 6 were located together in a cavity (eligible tank cavity) on the southern part of the site, in front of and east of the gasoline station/convenience store building, but south of the canopy. Tanks 7-10 were located in one cavity approximately 40 feet north of the eligible tank cavity, northeast of the store and at the northern edge of the canopy. Tank 11 was located north of the eligible tank cavity, just northeast of the store, between the store and the canopy, due west of Tanks 7-10. Exh. 1; Exh. 16; Exh. 17; AR II at 14-16.

The three pump islands served the eligible tank cavity. The two pump islands under the canopy were located north of the eligible tank cavity and just south of Tanks 7-10. Exh. 1. The third pump island (this one for diesel fuel) was located north of Tanks 7-10, just off of Crawford Street. *Id*. The product dispensing line from the eligible tank cavity to this northern-most pump island ran north-south, just to the west of Tanks 7-10. *Id*. In addition, a kerosene pump was located immediately west of the eligible tank cavity, between that cavity and the gasoline station/convenience store building. *Id*.; AR I at 31, 43.

Release Reported in 1993 (Incident No. 930540)

In 1993, a release from Tank 5 was discovered and the tank was removed. On March 3, 1993, Freedom Oil reported the release to the Illinois Emergency Management Agency (IEMA), formerly the Illinois Emergency Services and Disaster Agency. IEMA assigned Incident No. 930540 to the release. An environmental consulting firm retained by Freedom Oil, Professional Services Industries (PSI), excavated 100 cubic yards of contaminated soil for landfilling. Exh. 2 at 1, 3; AR I at 12, 29.

The Agency received a "Site Closure Report" from PSI on March 19, 1993. AR I at 12. According to PSI's report, six soil samples of the excavation sidewalls and floor were collected and analyzed for benzene, ethylbenzene, toluene, and xylene (BTEX), in accordance with the

Agency's Fall 1991 "LUST Manual." Exh. 2 at 4. PSI's analytical results showed the concentration levels of benzene and total BTEX in the samples were below the Agency's "Generic Soil Cleanup Objectives." *Id*. at 5-6. PSI also stated that "[s]hallow groundwater at the site was not encountered during the UST removal operations." *Id*. at 6. On July 12, 1993, the Agency issued a "No Further Remediation" letter for Incident No. 930540. *Id*.; AR II at 58.

Release Reported in 1996 (Incident Nos. 961825 and 962059)

In 1996, Freedom Oil contracted to upgrade Tanks 1-4 and 6 with corrosion-resistant liners and new piping. Exh. 3. During the upgrade, vapors were detected in a sanitary sewer located in the alley that runs along the southern edge of the site. The vapors were detected downgradient or southwest of the eligible tank cavity. Investigative excavations revealed petroleum sludge near an old drainage tile in the southwest corner of the site. Freedom Oil reported the release to IEMA on October 3, 1996, and IEMA assigned the release Incident No. 961825. Exh. 1; Exh. 3 at 391-419; AR I at 1, 7, 29.

On November 4, 1996, the Paris Fire Department, citing tank failure, reported a release to IEMA for the Freedom Oil site, and IEMA assigned the release Incident No. 962059. Petroleum odors were detected in the sewer and a tank failed a tightness test. AR I at 2, 7, 166. Residents complained of gasoline odors in their homes. *Id*. at 30. The release reported to IEMA in November may have been the same release that was reported one month earlier. *Id*. at 7, 166; AR II at 11.

Freedom Oil retained PSI to address the release. In December 1996, PSI drilled four soil borings at the site and converted each of them into a monitoring well. One boring was located at the northern property boundary, near the diesel pumps, and three borings were located along the southern property boundary. In its January 1997 investigation report, PSI confirmed the presence of petroleum products in the site's soil and groundwater at levels above the "IEPA TACO cleanup objectives" for migration to Class I groundwater.[5] PSI detected soil and groundwater contamination both at the northern and southern part of the site at levels above these cleanup objectives, but PSI stated that the groundwater to the north appeared only minimally impacted compared to that of the south. PSI found the highest levels of groundwater contamination in the southwestern part of the site, downgradient of the eligible tank cavity. Exh. 3 at 393, 404, 408; AR I at 26-60.

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[5] "TACO" refers to the "Tiered Approach to Corrective Action Objectives," which became codified in Board rules in July 1997 and may be found at 35 Ill. Adm. Code 742. Generally, the TACO rules provide procedures for developing remediation objectives based on risks to human health and the environment and consideration of the proposed land use at a contaminated site. Leaking UST cleanups are subject to TACO. *See*, *e.g.*, 35 Ill. Adm. Code 732.408, 742.105(b)(1). "Class I Groundwater" means "groundwater that meets the Class I: Potable Resource Groundwater criteria set forth in 35 Ill. Adm. Code 620." 35 Ill. Adm. Code 742.200.

Shear Valve Release—Reported April 2002 (Incident No. 20020433)

The first release reported in 2002 was discovered in early April of that year when petroleum vapors were detected at Paris High School, across Crawford Street to the north of the station. The release was reported to IEMA on April 3, 2002, and assigned Incident No. 20020433 by IEMA. Exh. 4 at 57; AR I at 76, 195.

Vapors were detected inside one of the high school buildings and in a sewer manhole located in an alley between high school buildings. The manhole was vented as part of the emergency response activities conducted by Freedom Oil. Exh. 4 at 57. An investigation revealed that a shear valve on a pump at the Freedom Oil station was leaking.[6] The failed pump was located at the western-most pump island under the canopy. Freedom Oil shut down the associated tank and retained Barnhardt Equipment Co. to repair the shear valve. *Id*.; Exh. 1.

Tank Liner Release—August 2002 (Incident No. 20021122)

The second release reported in 2002 was discovered in August of that year when petroleum vapors were detected downgradient of the eligible tank cavity, in the sewer to the southwest of the site and in one or more homes to the west of the site. Several residents complained of petroleum odors in their basements. The release was reported to IEMA on August 7, 2002. This release was assigned Incident No. 20021122. Exh. 4 at 57; AR I at 194.

Freedom Oil's emergency response activities included venting the sewer manhole and installing an interceptor trench along the south side of the site between the UST suspected of leaking (Tank 1) and the impacted sewer. Exh. 4 at 57-58. An investigation revealed that a release occurred because the liner in Tank 1 failed. Exh. 4 at 57. The OSFM estimated that 1,100 gallons of gasoline were released. *Id*.

2002 Cleanup

Overview. The OSFM directed Freedom Oil's emergency response to the April 2002 shear valve release and supervised Freedom Oil's emergency response to the August 2002 tank liner release. The Agency's Office of Emergency Response (Agency OER) directed the cleanup of both releases after the initial response to the shear valve release. Exh. 4 at 49, 57-58, 62, 486, 1105. Michael Hoffman, a professional engineer, Richard Pletz, and Terry Dixon, all with MACTEC, an environmental consulting firm (formerly Harding ESE), supervised the cleanup for Freedom Oil. *Id*. at 1088-91.

Numerous response activities were mandated by the Agency OER after the 2002 release reports were made. Freedom Oil argued with the Agency and the AGO that many of the steps

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[6] Generally, if there is a fire or dispenser impact, shear valves are designed to automatically shut off the fuel flow from the UST to prevent a fire or explosion.

insisted upon by the Agency OER were unnecessary and not supported by the analytical evidence. In particular, MACTEC objected to the extent of response activities required to the north and upgradient of the shear valve release after MACTEC felt its investigations revealed no apparent pathway or conduit for the shear valve release to have reached the high school. Exh. 6 at 471-78; 481-85.

Eventually, in August 2002, at the People's request, the Edgar County Circuit Court entered an injunction against Freedom Oil, requiring the company to perform remediation at the site. Exh. 10, 11. By the middle of October 2002, Freedom Oil had removed the other ten underground tanks from the site (Tanks 1-4, 6, and newly-discovered Tanks 7-11) and excavated and disposed of almost 12,000 tons of soil. Exh. 4.

April and May 2002. After the shear valve release was reported to IEMA on April 3, 2002, Freedom Oil dispatched Bodine Environmental to initiate emergency manhole-venting in the alley at the high school. Exh. 4 at 57. Harding ESE surveyed the area with a photoionization detector (PID) for vapor levels. *Id*. On April 5, 2002, Harding ESE, on behalf of Freedom Oil, conducted groundwater sampling of existing wells. Free product was observed in well RW-1 (to the north of the site) and well MW-3 (to the south of the site). Vacuum recovery of free product was performed from April 5-9, 2002. *Id*. at 58-59. Recovery wells and additional monitoring wells were installed by April 10, 2002. *Id*. A free product recovery system was installed in RW-2 on April 9, 2002, immediately adjacent to MW-3 on the south side of the site. *Id*.

On April 10, 2002, the Agency LUST Section issued a letter to Freedom Oil stating that Incident No. 20020433 (April 2002 shear valve release) is not subject to the Board's petroleum UST regulations at 35 Ill. Adm. Code 731 or 732 and therefore the "IEPA Leaking Underground Storage Tank Section has no reporting requirements regarding this incident."[7] AR I at 66. Citing the definition of UST system in OSFM regulations at 41 Ill. Adm. Code 170.400(jj), the Agency letter concludes that the "cause of the release was that the fire (shear) valve was leaking, and this by definition . . . is not part of the underground storage tank system." *Id*.

At the Agency OER's request, an investigative trench was completed by Freedom Oil on April 11, 2002, on the site's north property boundary, in an attempt to identify utilities that might act as a contaminant pathway to the high school. Exh. 4 at 59. Further samples included water

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[7] 35 Ill. Adm. Code Parts 731 and 732 are the Board's petroleum UST rules. Generally, Part 731 applies to releases reported to IEMA before mid-September 1993, while Part 732 applies to releases reported afterwards. In a Board rulemaking proceeding presently pending, the Board has proposed for second notice petroleum UST regulations at a new Part 734, which generally would apply to releases reported on or after June 24, 2002, the effective date of Public Act 92-554. *See* Proposed Amendments to Regulation of Petroleum Leaking Underground Storage Tanks (35 Ill. Adm. Code 732), R04-22(A), Proposed Amendments to Regulation of Petroleum Leaking Underground Storage Tanks (Proposed New 35 Ill. Adm. Code 734), R04-23(A) (cons.) (Dec. 1, 2005); *see also* related dockets R04-22(B) and R04-23(B) (cons.).

infiltrating the base of the vented manhole to the north. *Id*. at 59-60. At the Agency OER's direction, a groundwater recovery trench was completed by Freedom Oil on April 15-16, 2002, on the northern boundary of the station site. *Id*. at 60. On the northwest side of the site, a second investigative trench was installed by Freedom Oil on April 23, 2002. Id.

The Agency OER requested that the AGO pursue an injunction against Freedom Oil. The People filed a "Verified Complaint for Injunctive Relief" in the Edgar County Circuit Court on April 15, 2002. Exh. 7. The People's complaint refers to the petroleum vapors in the high school and sewer to the north. The complaint refers specifically to the April 2002 valve leak, but also generally to Freedom Oil's "facility" being confirmed as the source of gasoline contamination and vapors. *Id*. at 492-93. The only release referred to in the AGO's proposed "Agreed Preliminary Injunction Order," attached to the verified complaint, is the valve leak. *Id*. at 503. There is no indication in the record that a court order was ever entered specifically in response to this April complaint.

In May 2002, the southern extension of the sewer between the high school and Freedom Oil station was videotaped. Exh. 4 at 61. In addition, at the Agency OER's request, a vadose zone soil sampling investigation was completed next to the groundwater recovery trench. *Id*. Correspondence from the AGO to Freedom Oil dated May 14, 2002, inquires about whether Freedom Oil's work "will include efforts to finally cleanup the contamination remaining from the 1996 release." Exh. 6 at 486.

On May 23, 2002, the Agency OER received from Freedom Oil a "Response Activities Report" dated May 22, 2002, and referring to Incident No. 20020433 (the April 2002 shear valve release). AR I at 73-163; Exh. 4 at 338. The report, by Harding ESE, concluded that Freedom Oil's investigations to date, including soil and groundwater testing and trenches, found no connection between the station, vapors detected at the high school, and low concentrations of gasoline constituents in the sewer at the high school. The report added, however, that further groundwater flow investigation is needed to evaluate whether groundwater migration "might have been the transport vehicle to a conduit connected to the north-south sewer." Exh. 4 at 345, 353; AR I at 73-163.

The May 22, 2002 report notes that PSI determined groundwater flow direction at the site to be to the southwest and that Harding ESE similarly found it to be westerly. According to the report, free product and elevated BTEX levels were detected in groundwater in the southwest area of the site, "consistent with the 1996 incident." Exh. 4 at 352. The report further notes that groundwater and soil samples from the northern part of the property were below TACO Tier I remediation objectives based on Class II groundwater.[8] *Id*. at 348-62. The "remedial approach" set forth in the report was as follows:

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[8] "Class II" means "groundwater that meets the Class II: General Resource Groundwater criteria set forth in 35 Ill. Adm. Code 620." 35 Ill. Adm. Code 742.200.

> The contamination at the site will be addressed and remediated, as appropriate, in accordance with the applicable [UST] regulations (35 IAC 732). Further investigations are warranted south and west of the storage tanks and dispensers to define the extent of the plume. It appears likely that the station will be classified as a high priority site based upon the impact to groundwater in the southwestern portion of the site. *Id*. at 353.

July 2002. In a July 30, 2002 letter from the AGO to Freedom Oil, the AGO addresses UST Fund reimbursement and the April 2002 shear valve release, among other things:

> The linch [sic] pin for the [court] order is a commitment to address the contamination at the site as a whole rather than as two (or more) releases. Illinois EPA has revisited the issue of whether shear valves are included within the extent of the UST system and has reached the conclusion that defining the system to include the shear valve is consistent with the goals and standards of the Environmental Protection Act and the associated State and federal regulations. Illinois EPA will issue Freedom a letter to that effect in the near future. This determination would make reasonable costs (meeting the requirements of the regulations) of responding to the April 2002, release eligible for reimbursement and eliminate the perceived need for further investigation to tie prior releases from the UST system to the documented impacts on the Paris High School and City sewer system. Exh. 6 at 468.

August 2002. After the tank liner release was reported on August 7, 2002, Bodine Environmental was mobilized by Freedom Oil to initiate emergency response activities in the form of manhole-venting in the alley southwest of the property and installing an interceptor trench. Exh. 4 at 57. By the Agency OER's request, an interceptor trench was dug on August 7 and 8, 2002, along the southern property boundary, to prevent free product from entering the sewer. An investigation revealed free product in existing wells MW-3 and RW-2 (to the south of the site) and in the newly-constructed interceptor trench (south of the eligible tank cavity). *Id*. at 57-58, 62. Several times a day, Bodine Environmental removed free product from the affected wells and trench using a vacuum tanker truck. *Id*. at 58. Vapor extraction systems were operated in the sewer manhole and in the recovery trench. *Id*. at 62.

Freedom Oil objected to the extent of soil excavation and sampling being required by the Agency OER. Freedom Oil also argued to the AGO that an injunctive order was neither necessary nor appropriate. Exh. 6 at 458-67. On August 15, 2002, the AGO filed a "Verified Motion for Immediate Injunction" in the same Edgar County Circuit Court case previously brought against Freedom Oil (No. 02-CH-16) on April 15, 2002. Exh. 8. The People's motion refers to the petroleum vapors in at least one home and a sewer near the station. The motion refers to the August 2002 UST leak, the only release specifically identified in the motion. The motion calls this the "latest leak" in a "series of gasoline releases at this facility," and refers to "Tank #1" as "the leaking tank." *Id*. at 508-09, 516.

In an August 15, 2002 hearing before the court, AGO counsel stated that there is no dispute that "the tank is the source" of the gasoline leak resulting in vapors in the sewer and one or more homes to the south. Exh. 9 at 542-43. After the hearing, the court, on August 15, 2002, entered an "Immediate Injunction Order" against Freedom Oil, enjoining any further violation of the Act at the Paris station through August 21, 2002. AR I at 198-99. Among other things, the order required Freedom Oil to, by August 19, 2002, commence preparing for "excavation and removal of all gross soil contamination." *Id*. at 199. The order set a hearing for August 20, 2002. *Id*. at 203.

In an August 16, 2002 letter to Freedom Oil, AGO counsel stated:

> I am writing to confirm discussions at the August 15th hearing regarding Freedom's concern about avoiding expenses for removal of contaminated soil beyond 4 feet from the outside diameter of the leaking [UST] as an early action measure because those costs may not be reimbursed by the LUST Fund without an approved budget for corrective action.[9] As was stated, because of the documented threat to human health and the environment, IEPA's OER and LUST Section have determined that OER should take the lead and direct performance by Freedom of both early action and corrective action measures pursuant to 35 Ill. Adm. Code 732.105. It is the Agency's practice that any action directed by OER as necessary to abate an emergency situation will be reimbursed by the Fund if it does not exceed the reasonable and customary charges for such activity. AR II at 27.

The August 16, 2002 letter from the AGO continues that because soil removal is likely to extend beyond four feet from the tank, the State sought to accommodate Freedom Oil's reimbursement concerns "by combining early action and corrective action": "hence the use of the phrase grossly contaminated soil rather than just visible contaminated soil, the term [used in] the four-foot rule." AR II at 27. According to the AGO, "OER's characterization . . . of the soil removal effort as both early action and corrective action should smooth over Freedom's monetary concerns. Requests for reimbursement would have to satisfy the other applicable requirements set forth in Subpart F." *Id*. (referring to Subpart F ("Payment or Reimbursement") of 35 Ill. Adm. Code 732).

At the August 20, 2002 hearing before the court, AGO counsel referred to the threat of vapors and off-site groundwater impacts if "that gross contamination" from "the release that has occurred at [Freedom Oil's] site" is allowed to remain in place. AR I at 553-54. AGO counsel also stated:

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[9] Under Section 57.6 of the Act, "visibly contaminated fill material" may be removed by the owner or operator as part of "early action." However, removal of fill material beyond "4 feet from the outside dimensions of the tank" are not reimbursable as "early action costs." 415 ILCS 5/57.6 (2004); *see also* 35 Ill. Adm. Code 732.606(a).

> Now, we've proposed that this excavation should chase that contamination, wherever it is, to the greatest extent possible. *** 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. *** Freedom's given us their word they'll take care of the problem. 1996 they had a release. Did they do anything about it? No. April, 2002, they spent $167,000 trying to point the finger at someone else. Today they're asking to be given carte blanche to do what they want, when they want, without any opportunity for this court or the Environmental Protection Agency to direct their actions, to control their actions, make sure they put their money where their mouth is and get the job done. *Id*. at 555-62.

On August 23, 2002, the Edgar County Circuit Court entered another "Immediate Injunction Order." Exh. 11. The order was amended on July 19, 2004, but entered "*nunc pro tunc*" for the original order entered August 23, 2002. Exh. 10 ("Amended Immediate Injunction Order").[10] The injunctive order, as amended, is therefore referred to as the August 23, 2002 order. Like the August 15, 2002 order, the August 23, 2002 order finds that gasoline has leaked from one of Freedom Oil's USTs, and that the release was reported to IEMA on August 7, 2002. *Id*. at 579. In the order, the court identifies "Tank #1" as "the leaking tank" and refers to the release as the "latest release" as "[t]here have been prior leaks from [Freedom Oil's] underground storage tank system which have not been completely remediated." *Id*. at 579-81.

The order further finds that the "leaked gasoline from the latest release contaminated the soil in the vicinity of [Freedom Oil's] facility and gasoline and gasoline vapors have infiltrated into a sanitary sewer adjacent to the facility and into one or more nearby homes." Exh. 10 at 580. The order states that the Agency OER has directed Freedom Oil to "undertake certain early action and corrective action measures to address the latest release" and that Freedom Oil has operated the ventilation system installed by the City of Paris Fire Department for the sanitary sewer impacted by the release, arranged "lodging for residents of homes impacted by the release," and shut down and emptied Tank 1. *Id*. at 567. According to the order, however, Freedom Oil's "verbal proposals for response activities to Illinois EPA OER were rejected because they were incomplete" and Freedom Oil's proposed response "would have left significant contamination in the vicinity of the leaking tank untouched." *Id*.

The August 23, 2002 court order enjoins Freedom Oil from any further violations of the Act. The order requires that Freedom Oil immediately implement specified "early action measures and corrective action measures to abate the impacts resulting from the release." Exh. 10 at 567. By August 24, 2002, Freedom Oil was required to:

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[10] *Nunc pro tunc* is a Latin phrase meaning "now for then" and is generally used to give timely or retroactive effect to acts performed after their original deadlines. *See Black's Law Dictionary*, 5th Ed.

> initiate the excavation and removal of all gross subsurface contamination (as identified utilizing either a photionization detector ("PID") . . . or visual identification or field instrument documentation as approved by the Illinois EPA OER on-scene representative) from the UST system. *Id*. at 567

The order further provided that:

> the excavation shall include removal of the recently installed interceptor trench [along the southern property line] and Tank #1 (the leaking tank), at a minimum, to reach all gross subsurface contamination. *** During the course of or at completion of excavation, representative samples shall be collected from the sidewalls of the excavation every 20 linear feet at mid-depth and from every 400 square feet of the excavation floor and analyzed for BTEX, PNAs [polynuclear aromatic hydrocarbons], MTBE [methyl tertiary butyl ether], and TCLP [Toxicity Characteristic Leaching Procedure] Lead with the results evaluated to determine if they exceed the Illinois EPA Tier I Remediation Objectives under 35 Ill. Adm. Code Part 742 and to identify what further work will be required; *** To prevent the migration of any remaining contamination, [Freedom Oil] shall implement appropriate measures such as extending the existing interceptor trench or installing a new interceptor trench . . . as approved by the Illinois EPA OER . . . . Exh. 10 at 567-68; Exh. 11 at 580-81.

The order required Freedom Oil to complete the excavation by October 31, 2002 (this deadline was originally October 1, 2002, before the order was amended in July 2004). Exh. 10 at 568; Exh. 11 at 581.

The order also required Freedom Oil to continue operating ventilation systems in the sanitary sewer running south along the alley and any other structures determined to be impacted by gasoline vapors "until such time as a permanent remedy has been approved by the Illinois EPA and implemented by [Freedom Oil]." Exh. 10 at 568. Freedom Oil was also required to monitor conditions in the sewer and any homes and other structures determined to be impacted at least twice daily and to notify the Agency OER of all results daily. *Id*.

The court's order required Freedom Oil to "properly collect, sample, and dispose of all petroleum product and petroleum product contaminated water that collects in the interceptor trenches, wells, and/or the gross subsurface contamination excavation." Exh. 10 at 569. Beginning on August 24, 2002, Freedom Oil had to sample southern monitoring wells every four days. Analytical results had to be provided to the Agency OER within eight days of sample collection. *Id*. at 569.

In addition, the order required Freedom Oil to submit to the Agency's LUST Section:

> a proposal and budget for investigation of the full nature and extent of the areas and media impacted by the residual subsurface contamination from the petroleum product release, including, but not limited to, the pathways of migration of the petroleum product vapors, free phase and/or dissolved product into the sanitary

> sewer and impacted structures for Illinois EPA review and approval (this submittal may be in the form of an amendment to the plan submitted in May, 2002, to address other releases at the facility). Exh. 10 at 569.

Under the order, this submittal was due by February 20, 2004 (the deadline was originally December 1, 2002, before the order was amended in July 2004). *Id*.; Exh. 11 at 583.

Finally, the court order required Freedom Oil to provide the Agency OER with 24-hour notice of "all work to be done at the site" and daily written updates describing all work performed and all information generated as a result of the activities required under the order. Further, Freedom Oil had to give the Agency "unrestricted access" to the site to allow the Agency "to investigate and subsequently report to the Court compliance or noncompliance with this Order." Exh. 10 at 570.

On August 15, 2002, the Agency LUST Section issued the letter, referenced above, in which it tells Freedom Oil that:

> Upon further examination of the regulatory status of the shear valve, it is the Illinois EPA's interpretation that shear valves are considered part of the [UST] system, regulated by the [LUST] program and are eligible for reimbursement from the UST Fund as long as all other eligibility requirements under the [Act], and the regulations adopted there under, have been met.
>
> Please disregard the Illinois EPA letter dated April 10, 2002. Freedom Oil Company is required to adhere to all Illinois EPA LUST rules and regulations in accordance with [35 Ill. Adm. Code 732] and the [Act]. AR I at 196.

On August 27, 2002, the Agency received from Freedom Oil a "20-Day Certification" for Incident No. 20021122, noting that contaminated soil and free product removal had been initiated. AR I at 204-06. On August 30, 2002, the Agency received from Freedom Oil a "Free Product Removal Report" for Incident No. 20021122. This report stated that the UST system monitor reported that up to 1,049 gallons of product may have been released; that two to three feet of free product was observed in recovery and monitoring wells located southwest of the "failed UST"; and that a collection trench with multiple sumps was installed between the failed UST and the "affected sewer." *Id*. at 207-11; Exh. 4 at 58.

September and October 2002. On September 5 and 6, 2002, Tanks 1-4 and 6 were removed. Exh. 4 at 62. A release:

> was confirmed from the gasoline UST located on the south end of the UST bed. After the USTs had been removed, gross contaminated soil removal began around the UST excavation and proceeded south and east. Soil removal activities were monitored using a photoionization detector with a 10.2 lamp. All soil removal was completed under the direction of the IEPA OER representatives as directed in the IEPA and Office of the Attorney General's order.

> In order to access all gross contaminated soil, Harding ESE and its contractors, under the approval of the IEPA, removed the station building and canopy. Following the removal of the station structures, contaminated soil removal continued to the south along the alley and west toward the neighboring properties. *Id*.

The OSFM log of these UST removals notes that the lining material had separated from the tanks in many areas, that all five tanks had leaked, that the release was "major," and that groundwater was contaminated. AR II at 13-16.

In a September 6, 2002 letter from Harding ESE to the Agency LUST Section, Harding ESE asks on behalf of Freedom Oil for a "deadline extension for the submittal of Early Action Reports for LUST Incident No. 20020433 [April 2002 shear valve release]." AR I at 213. After referring to various letters in which the State provided different positions on whether the shear valve release was subject to the Board UST regulations, Harding ESE asks that the 45-day period be deemed to have started on August 8, 2002, and that Freedom Oil receive a 60-day extension "for the completion of Early Action activities and reporting requirements." *Id*.

In a September 17, 2002 determination by the Agency concerning Incident No. 20020433, the Agency stated that the "initial 45-day period for which early action costs shall be considered reimbursable is extended to October 7, 2002." AR I at 215. The Agency letter noted, however, that the Agency cannot extend the date on which the "45-Day Report" is due.[11] *Id*. In a September 20, 2002 Agency letter, the Agency determined, among other things, that for Incident No. 20020433, "the Early Action time period ended 45 days following the April 3, 2002 notification to [IEMA]."[12] *Id*. at 219-21.

A September 27, 2002 letter from Harding ESE to the Agency notes that early action and free product removal activities "will extend beyond the October 7, 2002 date" and that "[e]xcavation of grossly contaminated soil is continuing under the direction of the Emergency Response Unit and in response to the injunction." Exh. 4 at 296. The letter refers to the two 1996 Incident Nos., the April 2002 Incident No., and the August 2002 tank liner failure Incident No. The Harding ESE letter requests an early action time extension to December 31, 2002, after stating that Freedom Oil is required to submit a report to the Agency by December 1, 2002 "documenting investigation of Early Action activities: Free Product Removal and gross soil excavation at the site." *Id*.

In October 2002, as Freedom Oil's excavation of soil moved north from the southern part of the property, Freedom Oil discovered Tanks 7-11, located north of the eligible tank cavity.

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[11] This Agency determination is the subject of Freedom Oil's pending appeal docketed as PCB 03-54.

[12] This Agency determination, among others made in the September 20, 2002 letter, is being reviewed in Freedom Oil's pending appeal docketed as PCB 03-56.

Exh. 4 at 63. Tanks 7-10 were discovered on October 2, 2002, and Tank 11 was discovered on October 7, 2002. Exh. 16 at 1096, 1099. Tanks 7-11:

> were reported as pre-1974 tanks and had been closed in-place in the early 1960s. The tanks consisted of one 500-gallon heating oil tank and four 1,000-gallon gasoline and/or diesel fuel tanks. The 1,000-gallon tanks were located just north of the easternmost pump island and the heating oil tank that serviced the old station was located west of the western pump island. A permit was issued by the OSFM and the USTs were removed. An incident was reported due to holes in the 1,000-gallon USTs and incident number 20021420 was issued.[13] Exh. 4 at 63.

Accordingly, a release was reported for Tanks 7-10 and IEMA assigned Incident No. 20021420. Tanks 7-10 were removed on October 2, 2002. No release was reported to IEMA for Tank 11, though it was designated by Freedom Oil as having had a release. Tank 11 was removed on October 8, 2002. After Tanks 7-11 were removed, the excavation continued north to the northern boundary of the site: "Contaminated soil removal continued north to the existing investigation trench and the northern property boundaries. Per the IEPA's OER field personnel, Trench #1 was removed." Exh. 4 at 63; Exh. 16; Exh. 17; AR II at 18-21; AR III at 485. From August 2002 to October 2002, approximately 12,000 tons of "gross contaminated subsurface contamination was excavated and disposed of." Exh. 4 at 63.

November and December 2002. A November 27, 2002 "Corrective Action Plan (High Priority)," also identified as "Corrective Action Activities Report," was submitted by MACTEC to the Agency in early December 2002. The submittal documents cleanup activities at the site from early April 2002 through the fall of 2002, including the site excavation and removal of Tanks 7-11. Exh. 4 at 50-51, 62-63; AR II at 54. The cleanup ultimately included constructing interceptor and recovery trenches along the northern and southern boundaries of the site, extracting vapors from the sewers, investigating sewers with dye and smoke tests and a terescan videotape vehicle, investigating and monitoring the high school, sampling soil and groundwater, collecting and disposing of free product and groundwater from recovery wells and trenches, and excavating and disposing of upwards of 12,000 tons of soil. Exh. 4.

On the November corrective action plan form, Freedom Oil identifies both 1996 IEMA Incident Numbers and the April and August 2002 Incident Numbers. Under "Proposed Methods of Remediation" on the form, Freedom Oil states that the excavation was completed on October 16, 2002, and that "[n]o groundwater [was] observed during soil removal." Exh. 4 at 52. The excavation eventually covered the entire site from border to border, with the exception of the site's northwest corner. The excavation included the former locations of the eligible tank cavity and the cavities of Tanks 7-10 and Tank 11. The gasoline station/convenience store building, canopy, and three pump islands were also removed as part of the excavation. Exh. 4; Exh. 16.

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[13] The OSFM generally refers to "pre-'74 tanks" as USTs taken out of operation before January 2, 1974. *See* 41 Ill. Adm. Code 170.672.

During the excavation, soil samples were collected from the sidewalls every 20 linear feet and from the floor every 400 square feet. A total of 84 closure samples was collected and analyzed for BTEX, PNAs, MTBE, and TCLP lead. Following excavation and soil sampling, the excavation was backfilled with a fine-grained sand. Of the 84 closure samples, only four samples, all along the southern property boundary in the alley right-of-way, exceeded TACO Tier I remediation objectives for the soil component of the groundwater ingestion route value for Class II groundwater (three were elevated for benzene and one was elevated for MTBE). The November submittal states that permission will be sought from the City of Paris to excavate this remaining impacted soil exceeding the TACO standards. Exh. 4 at 63.

A December 13, 2002 letter from MACTEC to the Agency LUST Section, referring to Incident Nos. 20020433 and 20021122 (the April and August 2002 releases), requests an extension to February 28, 2003, for the completion of early action activities after stating:

> OER has approved the completion of additional soil excavation, transportation and disposal from the alley located south of the subject site. Please recall that pursuant to court ruling, the OER has mandated that the remediation activities at the subject site are under the direction of the OER. Exh. 4 at 49.

Soil and Groundwater Sampling Results

1996 Sampling. With the 1996 release reportings, vapors were detected in the southern alley sewer and petroleum sludge was discovered near an old drainage tile in the site's southwest corner. PSI drilled four soil borings: B-1 along the northern property boundary, west of the northern-most pump island; B-2 in the southeast corner of the site; and B-3 and B-4 in the southwest corner of the site, southwest of the eligible tank cavity. These four borings were converted into four monitoring wells (MW-1 through MW-4). Exh. 3.

As noted, PSI determined that the site's groundwater flow direction was to the southwest. As for sampling to the north, PSI's BTEX B-1 soil analytical results were generally below the current TACO Tier I remediation objectives for the soil component of the groundwater ingestion route value for Class II groundwater. Similarly, PSI's BTEX MW-1 groundwater analytical results were below the current TACO Tier I groundwater remediation objectives for Class II groundwater. Exh. 3 at 402. BTEX levels from B-2 and MW-2 in the southeastern corner of the site were lower than the values from the northern sampling. *Id*. The highest levels of BTEX were detected in the southwestern part of the site, exceeding these TACO remediation objectives for soil in B-3 and B-4 and for groundwater in MW-3 and MW-4. *Id*.

2002 Sampling. In 2002, MACTEC investigated the northern portion of the site for contamination with soil borings and monitoring wells. Analytical results of the soil and groundwater samples taken nearest the ineligible tank cavities either did not detect BTEX or detected low levels of these petroleum constituents. Exh. 4 at 57-64, 72-76, 354-58. No soil borings or groundwater monitoring wells were established between the ineligible tank cavities and the eligible tank cavity or in the immediate vicinity of Tanks 7-10 or Tank 11. Exh. 1.

Specifically, the boring and well locations to the north of and closest to Tanks 7-10 were: B-02-1 (approximately 30 feet north-northwest of the Tank 7-10 cavity, south of the northern pump island); and MW-02-4 (approximately 50 feet northwest of the Tank 7-10 cavity, southwest of the northern pump island). Exh. 1. The scale map (Exh. 1) does not depict Tank 11, but it is apparent from the record that the boring and well locations to the north of and closest to the Tank 11 cavity are also B-02-1 and MW-02-4, which, by rough approximation, are respectively 30 feet northeast and 30 feet northwest of the Tank 11 cavity. Exh. 1; Exh. 16.

Analytical results of soil samples from B-02-1 and MW-02-4 for BTEX were below TACO Tier I remediation objectives for the soil component of the groundwater ingestion route value for Class II groundwater. Exh. 4 at 354. Tests performed on soil samples collected from other borings advanced farther north, along the northern boundary of the site (RW-1, MW-02-3, B-02-6, B-02-7, B-02-2, B-02-3, B-02-4, B-02-5), similarly either did not detect BTEX or revealed levels below these TACO remediation objectives. Exh. 1; Exh. 4 at 354-55.

Analytical results of groundwater samples from MW-02-4 were below TACO Tier I groundwater remediation objectives for Class II groundwater. Exh. 4 at 357. Tests performed on groundwater samples collected from other monitoring wells and two interceptor/collection trenches located farther north, along the northern boundary of the site (MW-1, MW-02-3, sumps), likewise either did not detect BTEX or revealed levels below these TACO remediation objectives. Exh. 1; Exh. 4 at 356-59.

MACTEC detected elevated levels of petroleum contamination in soil and groundwater to the south and west (*i.e.*, downgradient) of the eligible tank cavity and the ineligible tank cavities. Conditions in the southwest area of the site were indicative of a recent release. These conditions included sheen on sewer water, petroleum vapors in the sewer, and free product in wells. Exh. 4 at 58-63, 68-71, 356-58; Exh. 17.

To confirm the remedial excavation at the site was complete, MACTEC took numerous grab samples of soil in the excavation, including soil in the general vicinities of where Tanks 7-10 and Tank 11 had been. These closure samples were subject to a PID, and were tested in a laboratory for BTEX, among other petroleum constituents. Grab samples were collected to the north (samples 55 and 60), east (samples 54 and 57), and west (sample 59) of where Tanks 7-10 had been, as well as to the south between the former locations of that ineligible tank cavity and the eligible tank cavity (samples 50, 51, 52, 53, and 58). These samples were collected from the sidewalls and floors of the excavation. MACTEC similarly sampled around the excavation of Tank 11, collecting grab samples to the northwest (sample 72) and to the southwest (sample 70) of where Tank 11 had been. Exh. 1; Exh. 4 at 62-63, 131-46; Exh 16; Exh. 17 at 1091-92; AR III at 466, 473.

Below are specific soil closure samples (I.D. No.), locations (bottom, sidewall, and direction and distance from either ineligible tank cavity), PID readings, and BTEX test results. Sample location estimates for distances from the ineligible tank cavities are rough approximations based on comparing the scale map (Exh. 1) with the depiction of grab sample locations (Exh. 16, Exh. 17).

Grab Sample No. & Location	PID Value	Laboratory Analytical Result for BTEX
50 (bottom of excavation, approximately 30 feet southeast of Tank 7-10 cavity)	Background (0.0 to 0.1 mg/kg[14])	Non-detect
51 (bottom of excavation, approximately 30 feet southwest of Tank 7-10 cavity)	Background (0.0 to 0.1 mg/kg)	Non-detect
52 (bottom of excavation, approximately 10 feet southeast of Tank 7-10 cavity)	3.4 mg/kg	Non-detect
53 (wall of excavation, approximately 20 feet southeast of Tank 7-10 cavity)	None reported	Non-detect
54 (wall of excavation, approximately 20 feet east of Tank 7-10 cavity)	1.6 mg/kg	Non-detect
55 (wall of excavation, approximately 35 feet northeast of Tank 7-10 cavity)	0	Non-detect
57 (bottom of excavation, immediately east of Tank 7-10 cavity)	0	Non-detect
58 (bottom of excavation, approximately 20 feet southwest of Tank 7-10 cavity)	None reported	Non-detect
59 (wall of excavation, approximately 10 feet west of Tank 7-10 cavity)	None reported	Non-detect
60 (bottom of excavation, approximately 20 feet northwest of Tank 7-10 cavity)	None reported	Non-detect
70 (bottom of excavation, approximately 10 feet southwest of Tank 11 cavity)	1.9 mg/kg	Non-detect except for benzene at 0.026 mg/kg
72 (bottom of excavation, approximately 10 feet northwest of Tank 11 cavity)	5.3 mg/kg	Non-detect except for toluene at 0.005 mg/kg and total xylenes at 0.036 mg/kg

[14] Milligrams per kilogram is abbreviated as “mg/kg.”

As shown, PID readings ranged from background level to 5.3 mg/kg. Laboratory test results of the closure samples were non-detect for BTEX in the general vicinity of the former Tank 7-10 cavity. The only BTEX detections in the general vicinity of the former Tank 11 cavity were below the TACO Tier I remediation objectives for the soil component of the groundwater ingestion route value for Class II groundwater. Exh. 1; Exh. 4 at 62-63, 131-46; Exh 16; Exh. 17 at 1091-92; AR III at 466, 473.

UST Fund Reimbursement Applications

Freedom Oil submitted three UST Fund reimbursement applications to the Agency for cleanup activities undertaken primarily in 2002. Exh. 5. The three applications (dated September 17, 2002, December 24, 2002, and February 11, 2003) requested a total of $1,012,240.99. Exh. 12. The specific activities covered in each application are described below.

Reimbursement Application 1. Freedom Oil's September 17, 2002 reimbursement submittal lists six USTs as having been at or presently located at the site, namely Tanks 1-6. The reimbursement form states that Tanks 2-5 had a release, but Tanks 1 and 6 had not. Exh. 12 at 586; AR II at 70. Freedom Oil supplemented its first application and the Agency stated that it received Freedom Oil's complete application on December 12, 2002. Exh. 13 at 1074; AR II at 1. In the reimbursement request, Freedom Oil described the work as "early action." AR II at 63-66, 69, 71.

The application covered the billing period of April 3, 2002 to August 16, 2002, and requested $185,644.12 in reimbursement. Exh. 13 at 1074; AR II at 1. Activities associated with reimbursement application 1 included:

- Emergency response (mitigating sewer conditions, including fan installation and continuous monitoring);
- Investigating conditions at the high school, including air monitoring;
- Investigating to identify the shear valve release pathway and to determine sewer conditions, including investigating the sewer between the high school and gasoline station with dye and smoke testing and a remote controlled vehicle with a camera;
- Installing two groundwater recovery trenches along the northern boundary of the station, twice daily pumping and collecting groundwater and sampling groundwater from the trenches, and disposing of collected groundwater at a licensed disposal facility;
- Exploratory excavating along Crawford Street on the northwest corner of the station in an effort to identify a pathway for the shear valve release to reach the high school;
- Groundwater sampling from four existing monitoring wells (MW 1-4), installing two groundwater recovery wells (RW 1-2), recovering product from MW 3 by vacuum,

installing four groundwater monitoring wells, completing seven soil borings, sampling soil and groundwater collected from new and existing wells. Exh. 4; Exh. 5 at 454-55; Exh. 12 at 585-752.

Reimbursement Application 2. The December 24, 2002 application claims to include work consisting of "site soil remediation as required by the IEPA and Office of the Attorney General's Office representative." Exh. 12 at 753. The reimbursement form lists 11 USTs as having been at or presently located at the site, namely Tanks 1-11. The form states that Tanks 2-5 and 7-11 had a release, but Tanks 1 and 6 had not. Exh. 12 at 755. Freedom Oil supplemented its second application and the Agency stated that it received Freedom Oil's complete application on February 7, 2003. Exh. 14 at 1078; AR III at 1. In the reimbursement request, Freedom Oil described the work as "early action." Exh. 12 at 754.

The application covered the billing period of June 30, 2002 to November 22, 2002, and requested $709,748.50 in reimbursement. Exh. 14 at 1078; AR III at 1. Activities associated with reimbursement application 2 included:

- Constructing an interceptor trench on the south alley boundary to intercept free product and to prevent free product from entering the southern sewer;
- Removing free product from the trench directly south of the eligible tank cavity;
- Constructing and operating a vapor extraction system in the sewer;
- Investigating the eligible tank cavity, which revealed that the liner in the southernmost tank (Tank 1) had failed, and removing all of the tanks present (Tanks 1-4, 6);
- Excavating 5,000 to 6,000 tons of soil in the southern part of the site, beginning in the eligible tank cavity and moving south (a clay tile was discovered, a potential migration pathway for vapor and free product to the sewer);
- Excavating an additional 5,000 to 6,000 tons of soil by proceeding north from the eligible tank cavity (a total of 11,811 tons of soil were removed as part of the southern and northern excavations);
- Demolishing the station building and canopy to allow removal of northern soil;
- Removing Tanks 7-11;
- Closure sampling taken every 20 linear feet of the excavation wall and every 400 square feet of excavation floor;
- Backfilling the excavation. Exh. 5 at 455-56; Exh. 12 at 753-1028.

Reimbursement Application 3. The February 13, 2003 application claims that it includes work consisting of "site soil remediation as required by the IEPA and a representative of the Attorney General's Office." Exh. 12 at 1030. The submittal also states that MACTEC had been recently notified that "the OSFM has determined that all the USTs at the site were characterized to have had a leak" and that this determination "affects the cost allocation calculations for the corrective action at the site." Exh. 12 at 1030. The reimbursement form lists 11 USTs as having been at or presently located at the site, namely Tanks 1-11. The form states that all 11 tanks had a release. Exh. 12 at 1047-48.

Freedom Oil supplemented its third application and the Agency stated that it received Freedom Oil's complete application on March 3, 2003. Exh. 15 at 1083; AR IV at 1. In the reimbursement request, Freedom Oil described the work as "early action." Exh. 12 at 1047. The third application covered the billing period of March 1, 2002 to January 24, 2003 and requested $116,848.37 in reimbursement. Exh. 15 at 1083; AR IV at 1. Response activities or costs associated with reimbursement application 3 included:

- Continuing to ventilate the southern sewer system;
- Continuing air monitoring at the site and surrounding properties;
- Final disposal of contaminated groundwater;
- Final excavation subcontractor costs for bulldozer, concrete removal, and trackhoe;
- Costs related to the final 19 closure samples;
- Finish backfilling the excavation. Exh. 5 at 456-57; Exh. 12 at 1030-73.

Agency Reimbursement Determinations

December 18, 2002. On December 18, 2002, in response to Freedom Oil's reimbursement application 1, the Agency denied UST Fund reimbursement for $102,122.34 of Freedom Oil's requested $185,644.12. Among other things, the Agency partially denied Freedom Oil's requested reimbursement by applying a $20,000 deductible. In addition, by calculating the "total gallonage of tanks eligible to access the LUST Fund" and the "total gallonage of tanks not eligible to access the LUST Fund," the Agency deducted $81,954.58 of otherwise eligible costs by apportioning them to ineligible tanks. The Agency's "technical deductions," of which apportionment is a part, refer to the three 2002 Incident Nos. (April shear valve; August tank liner; and October Tanks 7-10). Exh. 5; Exh. 13; AR II at 1-4.

In making its December 2002 determination, the Agency by its own admission erroneously: failed to include Tank 11, with its 500-gallon capacity, in the calculation of the volume of eligible to ineligible tanks at the site; included Tank 5's volume (1,000 gallons) in the calculation, though Tank 5 was removed and had its release remediated in 1993; and calculated Tank 7 with a volume of 500 gallons rather than the correct 1,000 gallons. AR II at 3-4; Ag. MSJ at 9, n.5. The Agency relied upon the then-most recent OSFM eligibility and deductible determination (August 1, 2002, discussed below), in which the OSFM found only Tanks 2-4 eligible (4,000 gallons each). The Agency therefore calculated the ratio of total Fund eligible tank volume (12,000 gallons for Tanks 2-4) to total tank volume (21,500 gallons) to be 0.55814. The Agency therefore approved 55.814% of eligible costs, deducting 44.186% of eligible costs based on apportionment. AR II at 3-4; Ag. MSJ, Att. at 1.

Freedom Oil, however, filed a motion for partial summary judgment with the Board on February 22, 2005, arguing that even if the reimbursable amount is reduced for ineligible tanks, the Agency made a calculation error in its December 2002 determination. The Agency subsequently made an allocation adjustment, attributing $35,333.25 to ineligible tanks (instead of $81,954.58). FO MSJ at 11-12. The Agency therefore approved 80.95% of eligible costs rather than 55.814%. In an order of February 25, 2005, the hearing officer stated that Freedom Oil's motion for partial summary judgment "is now moot, having been resolved by the parties." Hearing Officer Order, PCB 03-54, 03-56, 03-105, 03-179, 04-2 (cons.) (Feb. 25, 2005).

As for miscellaneous cost deductions other than apportionment, the Agency made two "technical deductions" in the December 18, 2002 letter:

1. $27.76 for the dye for dye tracing the sewer because the cost is "not [] related to Early Action activities; therefore it is not reasonable," citing 35 Ill. Adm. Code 732.606(ii);

2. $140.00 to publish notice of smoke testing in the newspaper because the cost is "not [] related to Early Action activities; therefore it is not reasonable," citing 35 Ill. Adm. Code 732.606(ii). Exh. 13 at 1076; AR II at 3.

March 19, 2003. On March 19, 2003, in response to Freedom Oil's reimbursement application 2, the Agency denied UST Fund reimbursement for $169,051.90 of Freedom Oil's

requested $709,748.50. Among other things, the Agency partially denied Freedom Oil's requested reimbursement by apportioning $143,123.59 of otherwise eligible costs to ineligible tanks. The Agency's "technical deductions" refer to the three 2002 Incident Nos., while its "accounting deductions" refer only to Incident No. 20020433, the shear valve release. Exh. 5; Exh. 14; AR III at 1-5.

With the Agency's March 2003 determination, as with the Agency's December 2002 determination, the Agency by its own admission erroneously: failed to include Tank 11; included Tank 5; and miscalculated Tank 7's volume as 500 gallons. AR III at 4; Ag. MSJ at 9, n.5. The Agency relied upon the then-most recent OSFM eligibility and deductible determination (February 26, 2003, discussed below), in which the OSFM found Tanks 1-4 and 6 eligible. By including the volumes of Tanks 1 and 6 (totaling 5,000 gallons) as eligible tanks, the Agency calculated the ratio of total Fund eligible tank volume (17,000 gallons) to total tank volume (21,500 gallons) to be 0.7907. The Agency therefore approved 79.07% of eligible costs, deducting 20.93% of eligible costs based on apportionment. AR III at 4; Ag. MSJ, Att. at 1.

As for miscellaneous cost deductions other than apportionment, the Agency made numerous "accounting deductions," three of which Freedom Oil contests:

1. $226.76 in costs deemed "unreasonable as submitted," citing Section 57.7(c)(4)(C) of the Act and 35 Ill. Adm. Code 732.606(hh). The deduction was made from the cell phone rental for October 28, 2002 to November 27, 2002, because "staff was at the site for 5 days of this billing period; the costs have been pro-rated." AR III at 3.

2. $103.96 in costs deemed "unreasonable as submitted," citing Section 57.7(c)(4)(C) of the Act and 35 Ill. Adm. Code 732.606(hh). The deduction was made from the cell phone rental for September 28, 2002 to October 27, 2002, because "staff was at the site for 4 days; the costs have been pro-rated." *Id*.

3. $24,638.82 for handling charges that exceed the handling charge limits set forth in Section 57.8(f) of the Act and 35 Ill. Adm. Code 732.607.[15] *Id*. at 5.

May 28, 2003. On May 28, 2003, in response to Freedom Oil's reimbursement application 3, the Agency denied UST Fund reimbursement for $22,559.71 of Freedom Oil's requested $116,848.37. Among other things, the Agency deducted from Freedom Oil's requested reimbursement by apportioning $22,189 of otherwise eligible costs to ineligible tanks. The Agency's "technical deductions" refer to the three 2002 Incident Nos. Exh. 5; Exh. 15; AR IV at 1-5.

[15] Freedom Oil does not challenge this entire amount but argues that it is entitled to an additional $16,987.03 in handling charges. FO MSJ at 30.

With its May 2003 determination, as with its two prior determinations, the Agency by its own admission erroneously calculated Tank 7 with a volume of 500 gallons. AR IV at 3-4; Exh. 15; Ag. MSJ at 9, n.5. The Agency therefore calculated the ratio of total eligible tank volume (17,000 gallons) to total tank volume (21,000 gallons, including Tank 11, but excluding Tank 5) to be 0.8095. The Agency accordingly approved 80.95% of eligible costs, deducting 19.05% of eligible costs based on apportionment. AR IV at 3-4; Ag. MSJ, Att. at 1.

As for miscellaneous costs deductions other than apportionment, the Agency deducted $33.25 for VHS copies because the cost is "not [] related to Early Action activities; therefore it is not reasonable," citing 35 Ill. Adm. Code 732.606(jj). AR IV at 3.

Total Amounts Denied Reimbursement. In all, of Freedom Oil's requested $1,012,240.99, the Agency denied UST Fund reimbursement for $247,112.62, including the $20,000 deductible applied in the December 2002 determination. The denied costs being challenged by Freedom Oil in its motion for summary judgment are:

Amount Denied & Contested	Type of Cost	Agency Denial Basis
$16,987.03	Handling	Exceed handling charge limits
$330.72	Cell phone rental	Unreasonable as submitted
$27.76	Dye for tracer testing	Not related to Early Action activities
$140	Newspaper notice of smoke testing	Not related to Early Action activities
$33.25	VHS tape copies of sewer investigation	Not related to Early Action activities
$200,645.84[16]	Corrective action	Attributed to ineligible tanks

Exh. 5, 12-15; FO MSJ at 11.

In apportioning $200,645.84 of the costs to ineligible tanks, the Agency, in its three determinations, stated that the deductions reflect:

> costs for corrective action activities for underground storage tanks for which the owner or operator was deemed ineligible to access the fund (Section 57.8(m)(1) of the Act and 35 IAC 732.608). Exh. 13-15.

The Agency also stated in each determination that each of the "ten tanks" at the station "was determined by the Office of the State Fire Marshal to have had a significant release."[17] *Id.*

[16] This figure reflects the Agency's allocation correction to its December 18, 2002 determination, *i.e.*, reducing the cost apportionment deduction by attributing $35,333.25 to ineligible tanks rather than $81,954.58.

OSFM Eligibility and Deductibility Determinations

On July 11, 2002, for Incident No. 20020433 (the April 2002 shear valve release), the OSFM received an "Eligibility and Deductibility Application" (EDA) from Freedom Oil. In the EDA, Freedom Oil represented that the site had six USTs (Tanks 1-6), that Tank 5 had been removed in 1993, and that only Tanks 2 through 5 (*i.e.*, all but Tanks 1 and 6) had experienced a release. AR II at 8-9. The OSFM issued a determination on August 1, 2002, for Incident No. 20020433, finding that a $10,000 deductible applied and that Tanks 2, 3, and 4 were eligible for UST Fund reimbursement. *Id*. at 5-6.

On October 31, 2002, Freedom Oil submitted another EDA to the OSFM. This EDA, which identifies the occurrence as Incident No. 20021122 (the August 2002 tank liner failure), notes that the site had 11 USTs, including Tanks 7-11. In the EDA, Freedom Oil stated that 9 USTs had a release (all but Tanks 1 and 6). IEMA Incident Numbers are associated with all of the tanks that had a release, except for Tank 11, the 500-gallon heating oil tank. According to the EDA, Tanks 7-11 were taken out-of-service before 1974, and each had experienced a release. AR II at 18-21. On February 26, 2003, the OSFM issued a "revised" determination, identifying only Incident No. 20021122. In this letter, the OSFM found that a $10,000 deductible applied and that Tanks 1-4 and 6 were eligible for reimbursement, and listed a total of 11 tanks for the site. AR III at 35-36.

On March 25, 2003, the OSFM issued a "revised" eligibility and deductible determination. This determination was nearly the same as its February 2003 determination, but the OSFM noted that Tank 11 contained heating oil rather than used oil. AR IV at 79-82.

Standard for Considering Motions for Summary Judgment

Summary judgment is appropriate when the pleadings, depositions, admissions, affidavits, and other items in the record, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *See* Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998); *see also* 415 ILCS 5/26 (2004); 35 Ill. Adm. Code 101.516. When ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370.

Summary judgment "is a drastic means of disposing of litigation," and therefore the Board should grant it only when the movant's right to the relief "is clear and free from doubt." Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370, citing Putrill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986). "Even so, while the nonmoving party in a summary judgment motion is

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[17] Unlike the Agency's first and second determinations, the third one included the eleventh tank, Tank 11, in the Agency's calculations. The reference to "ten tanks" in the third Agency letter is presumably an oversight.

not required to prove [its] case, [it] must nonetheless present a factual basis, which would arguably entitle [it] to a judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2d Dist. 1994).

Cost Apportionment Deductions

Statutory and Regulatory Provisions

Section 57.8(m) of the Act reads:

> (m) The Agency may apportion payment of costs for plans submitted under Section 57.7 if:
>
> (1) the owner or operator was deemed eligible to access the Fund for payment of corrective action costs for some, but not all, of the underground storage tanks at the site; and
>
> (2) the owner or operator failed to justify all costs attributable to each underground storage tank at the site. 415 ILCS 5/57.8(m) (2004) (as amended by P.A. 92-554, eff. June 24, 2002).

Section 732.608(a) of the Board's leaking UST rules provides:

> a) The Agency may apportion payment of costs if:
>
> 1) THE OWNER OR OPERATOR WAS DEEMED ELIGIBLE TO ACCESS THE FUND FOR PAYMENT OF CORRECTIVE ACTION COSTS FOR SOME, BUT NOT ALL, OF THE UNDERGROUND STORAGE TANKS AT THE SITE; AND
>
> 2) THE OWNER OR OPERATOR FAILED TO JUSTIFY ALL COSTS ATTRIBUTABLE TO EACH UNDERGROUND STORAGE TANK AT THE SITE. (Derived from Section 57.8(m) of the Act) 35 Ill. Adm. Code 732.608(a).

Section 732.608(b) of the Board's rules further addresses apportionment of costs:

> b) The Agency will determine, based on volume or number of tanks, which method of apportionment will be most favorable to the owner or operator. The Agency will notify the owner or operator of such determination in writing. 35 Ill. Adm. Code 732.608(b).

Section 57.5(g) of the Act provides:

> The owner or operator of an underground storage tank taken out of operation before January 2, 1974, or an underground storage tank used exclusively to store heating oil for consumptive use on the premises where stored and which serves other than a farm or residential unit 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) (2004); *see also* 35 Ill. Adm. Code 732.100(b).

As noted, one of the conditions of UST Fund eligibility under the Act is that the leaking UST be registered with the OSFM under the Gasoline Storage Act. *See* 415 ILCS 5/57.9(a)(4) (2004). Generally, USTs taken out of operation before January 2, 1974, cannot be registered and therefore are not eligible for reimbursement from the UST Fund. *See* 41 Ill. Adm. Code 170.440, 170.672. OSFM decisions on tank registration and whether to issue a corrective action order requiring tank removal are not reviewable by the Board. Though OSFM determinations of Fund eligibility and deductibility for UST releases may be appealed to the Board, no such OSFM determination noted in this order has been appealed by Freedom Oil to the Board.

Parties' Arguments for Summary Judgment on Apportionment

Freedom Oil's Motion for Summary Judgment. Freedom Oil argues that the Agency was wrong to apportion any cleanup costs to Fund ineligible tanks. It is Freedom Oil's position that "[*a*]*ll* of the corrective actions taken relate to the shear valve release . . . or the tank liner failure" and there is "no evidence that any corrective action involved the Ineligible Tanks." FO MSJ at 23 (emphasis in original). Freedom Oil makes several related but discrete arguments:

- First, Freedom Oil argues that the Agency is judicially estopped from apportioning costs because the AGO represented in circuit court that the releases necessitating the injunction were from Fund eligible tanks.

- Second, Freedom Oil asserts that because the ineligible tanks were closed in-place before 1974, any release from them requires remediation only if the OSFM finds a threat to human health and the environment and orders corrective action, which did not happen here.

- Third, Freedom Oil argues that the cleanup was carried out under the circuit court order and direction of the Agency OER solely in response to releases from Fund eligible tanks. No order was issued to address the ineligible tanks, and so no cost may be attributed to them, according to Freedom Oil.

- Fourth, Freedom Oil maintains that the analytical evidence and field observations confirm that the ineligible tanks did not contribute to conditions requiring remediation or to the costs of the corrective action performed, and there is no evidence to the contrary.

- Fifth, the Agency has misinterpreted the statutory provision on apportionment, Section 57.8(m) of the Act. *Id*. at 1-2.

Judicial Estoppel. Freedom Oil asserts that the Agency 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." FO MSJ at 2. According to Freedom Oil, the "[A]gency cannot offer a specific reason for corrective action in one venue and another reason in a different venue" and "the OER's actions and representations in court preclude a separate finding" that "any corrective action involved the Ineligible Tanks." *Id*. at 16, 23.

Before discovery of the ineligible tanks, explains Freedom Oil, the Agency OER demanded installation of trenches, sewer investigations, and soil excavation. According to Freedom Oil, because MACTEC and the Agency 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." FO MSJ at 27. Freedom Oil states that at the injunctive hearing, the Agency 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." *Id*.

Because of these events, Freedom Oil asserts, "IEPA obtained a judicial order requiring Freedom to make expenditures." FO MSJ at 28. As the ineligible tanks were not discovered until the excavation ordered by the court was underway, the Agency OER's request to the court "was not based on any allegation or even suspicion of contamination from tanks taken out of service prior to 1974 and filled with sand." *Id*. at 27. The "resulting injunctive relief, by its own terms," continues Freedom Oil, "indicates that the action ordered was to address the releases from these events." *Id*. at 29. Freedom Oil asserts that it did not appeal the circuit court order because the order was "dependent upon" addressing the releases from these failures, "as to which there was no question to the right of reimbursement." *Id*.

In Freedom Oil's view, the Agency "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." FO MSJ at 28. Freedom Oil maintains that under these circumstances, judicial estoppel applies against the Agency. According to Freedom Oil, judicial estoppel applies:

> 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. *Id*. (citing Chicago

Alliance for Neighborhood Safety v. City of Chicago, 348 Ill. App. 3d 188, 808 N.E.2d 56 (1st Dist. 2004)).

Freedom Oil states that 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" (citing Barack Ferrazzano Kirschbaum Perlman & Nagelberg v. Loffredi, 342 Ill. App. 3d 453, 795 N.E.2d 779 (1st Dist.2003)) and that unlike equitable estoppel, the doctrine applies equally to the State as a party as to any non-governmental party (citing Johnson v. DuPage Airport Authority, 268 Ill. App. 3d 409, 644 N.E.2d 802 (2d Dist. 1994)). FO MSJ at 28.

Having obtained the court order "to take action to correct a problem caused by an eligible tank," the Agency, Freedom Oil insists, is now judicially estopped from taking the position that "the costs incurred as a result of this order must also be attributable in part to the Ineligible Tanks." FO MSJ at 29. In other words, Freedom Oil argues, the Agency is judicially estopped from "changing its position that remedial action was necessary to address the valve release and the tank liner failure." *Id*.

Pre-'74 Tanks. Freedom Oil states that the "obligation to conduct corrective action is not the same for Ineligible Tanks (pre-1974) and Eligible Tanks." FO MSJ at 14. Citing Section 57.5(g) of the Act (415 ILCS 5/57.5(g) (2004)), Freedom Oil maintains that:

> 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. *Id*.

Freedom Oil states that the OSFM "did not issue an order requiring removal or remediation of the Ineligible Tanks" and moreover, the field observations and analytical results, discussed below, "reflect no factual basis for such an order." FO MSJ at 15. Freedom Oil concludes therefore that "as a matter of law, no actions can be deemed to have incurred with respect to these tank and none of the costs may be attributed to these tanks." *Id*.

Circuit Court Order/Agency OER Directives. Freedom Oil asserts that the "[A]gency specifically ordered the corrective action" at issue here "based on releases from Fund eligible tanks." FO MSJ at 1-2. Specifically, according to Freedom Oil, "the OER ordered the corrective action to address Eligible Tank conditions (the valve release and tank liner failure)." *Id*. at 15. That the Agency OER's orders were based on the valve release and tank liner failure is documented in the circuit court pleadings and transcripts, insists Freedom Oil. *Id*. at 15-16. It is Freedom Oil's position that "[t]here is no evidence that any order, and thus any action or cost, was made to address a problem due to the Ineligible Tanks." *Id*. at 24.

Freedom Oil argues that the work for which reimbursement application 1 was submitted "clearly related to the shear valve release" because 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." FO MSJ at 16. None of this work, asserts Freedom Oil, "related in any way to the Ineligible Tanks." *Id*.

Freedom Oil argues that reimbursement applications 2 and 3 were likewise linked only to eligible releases. This work "consisted initially of emergency response to address conditions in the southern sewer and homes due to the tank liner failure" and included trench construction "to evaluate and abate the flow from the release to the south." FO MSJ at 16. According to Freedom Oil, 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." *Id*.

Freedom Oil states that the cleanup work performed at the site "was ordered by OER before the Ineligible Tanks were even discovered." FO MSJ at 17. Freedom Oil continues:

> 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 tank liner failures—not to address the Ineligible Tanks. *Id*.

Site Conditions. According to Freedom Oil, "field conditions and analytical evidence confirm that the Eligible Tanks, not the Ineligible Tanks caused the contamination requiring remediation" and therefore all costs are attributable to eligible tanks. FO MSJ at 6. First, Freedom Oil notes that the ineligible tanks had been filled with sand and closed in-place "at least 30 years before the 2002 events." *Id*. at 17. Therefore, Freedom Oil states:

> 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. *Id*.

MACTEC found that these conditions were "indicative of a recent release." *Id*. at 22. Freedom Oil further asserts that "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," the Agency OER ordered excavation of soil at the site in August 2002. *Id*.

Second, Freedom Oil argues that analytical results from sampling done in 1993, 1996, and 2002 "demonstrate the Ineligible Tanks did not give rise to a remediation obligation or create conditions necessitating the corrective action conducted." FO MSJ at 17. Freedom Oil maintains that the 1993 and 1996 sampling "did not identify contamination in the vicinity of the Ineligible Tanks suggesting a need for remediation." *Id*. at 18. According to Freedom Oil, PSI's 1996 sampling found only "minor detections of petroleum constituents" to the north, which "might have been associated with a leaking fuel line serving the diesel pump islands." *Id*. Freedom Oil contrasts these results with the "significant levels of contamination" found by PSI in 1996 in the southwestern part of the site, "downgradient of the Tank cavity where the upgrades were underway." *Id*. at 18-19.

MACTEC's 2002 sampling results "revealed similar conditions," according to Freedom Oil:

> 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. FO MSJ at 19.

Specifically, Freedom Oil asserts that the April 2002 investigation of the north end of the property, ordered by the Agency OER to ascertain a pathway for the shear valve release to result in vapors at the high school, "did not identify any significant soil or groundwater contamination in the vicinity of or associated with the Ineligible Tanks." FO MSJ at 20. Likewise, Freedom Oil maintains, analytical results of samples taken by MACTEC from borings and monitoring wells "closest to the Ineligible Tanks did not identify contamination caused by the tanks requiring remediation." *Id*. Those results differ greatly, according to Freedom Oil, from the "grossly contaminated soil and groundwater indicating a recent release . . . found south and west downgradient of the shear valve and tank liner releases." *Id*. at 21-22.

In addition, Freedom Oil argues that the "[s]ampling in connection with the excavation ordered also demonstrates the corrective action at the Site was not necessitated by the Ineligible Tanks." FO MSJ at 22. Freedom Oil maintains that the 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." *Id*. Pointing to the laboratory analysis of samples "taken in the area of the Ineligible Tanks during removal and excavation," Freedom Oil asserts that this "confirms an absence of contamination in the vicinity of the pre-74 tanks." *Id*.

Freedom Oil argues that the affidavits of the environmental professionals it retained to address the 2002 releases demonstrate that "the corrective action conducted at the Site was caused by releases from the shear valve and tank liner failure, not the Ineligible Tanks." FO MSJ at 22. Michael Hoffman, a registered professional engineer with MACTEC, supervised Freedom Oil's remediation. Hoffman opines as follows in his affidavit:

> In my professional opinion, based on the information in the submitted reports, the corrective action conducted at the site to meet the TACO standards (35 IAC 732 and/or 742) in 2002 and/or remove "gross" contaminated soil (soil in excess of TACO criteria) was not necessitated by the Ineligible Tanks. In my professional opinion the corrective action at the site to meet TACO standards and/or remove gross contaminated soil was necessitated by the IEPA OER Order in response to the April 2002 shear valve release and August 2002 releases from the Tank Cavity holding Tanks 1-4 and 6 caused by liner failure in at least one tank and other leaks from that Tank Cavity over the years. Exh. 17 at 1088-89.

Hoffman states that his opinion is based on the following:

- Analytical results from samples collected north of the Tank Cavity did not reveal contamination requiring remediation under the TACO Standards.

- Groundwater and soil samples collected in the interceptor trenches did not reveal contamination requiring remediation under the TACO standards.

- Soil and groundwater in the Tank Cavity and downgradient (south) of the Tank Cavity exhibited gross contamination and contamination significantly in excess of the TACO Standards.

- The Ineligible Tanks had been filled with sand and closed in place prior to 1974. There is no evidence that product releases occurred after the tanks were filled with sand over thirty years ago.

- No analytical evidence supports a conclusion that releases from the Ineligible Tanks caused contamination requiring remediation under the TACO standards.

- The Ineligible Tanks, although properly closed in place, were removed so the soil excavation ordered by the OER could be completed. Exh. 17 at 1089.

Richard Pletz is a project scientist with MACTEC and has a B.A. in geology. Pletz assisted in implementing the remediation. Pletz states in his affidavit that his observations "are set forth in various reports, letters and applications filed with the [Agency]." Exh. 17 at 1090. Pletz was present at the station when the ineligible tanks were discovered and removed. *Id.* Pletz states as follows in his affidavit:

> In my professional opinion, the soil surrounding the Ineligible Tank cavity did not show signs of "gross contamination" requiring remediation under the TACO standards (35 IAC Parts 732 and 742). The appearance and odor of the soil surrounding the Ineligible Tank Cavity was consistent with soil conditions observed on the north end of the property to the boundary of the interceptor trenches. Analysis of soil and groundwater samples from the northern trenches did not exhibit levels of contamination requiring remediation under the TACO standards. PID readings of soil surrounding the Ineligible Tank cavity similarly reveal readings consistent with the readings from the north end of the property indicating consistency with the soil collected from the soil borings and trenches. The PID readings ranged from background level to 5.3 mg/kg. The PID levels recorded were consistently lower than readings observed from the southern portion of the Property. *** Conditions in the vicinity of the Tank Cavity causing the 2002 releases showed significant evidence of contamination including brown liquids with a fresh petroleum odor oozing out of soil pore space and high PID readings. *Id.* at 1090-91.

Freedom Oil surmises therefore that 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." FO MSJ at 23.

Additionally, Freedom Oil argues that the Agency erred because there was "an absence of evidence demonstrating the Fund ineligible tanks created any conditions requiring remediation." FO MSJ at 1. According to Freedom Oil, "IEPA has submitted no evidence of any condition created by the Ineligible Tanks that required remediation under Illinois law." *Id*. at 17. Freedom Oil asserts that in fact "[n]o available analytical evidence documents conditions or contaminant levels associated with the Ineligible Tanks warranting remediation." *Id*.

More precisely, there is "no evidence," Freedom Oil continues, that "any condition associated with the Ineligible Tanks presented a threat sufficient under Illinois law to compel corrective action." FO MSJ at 23. Freedom Oil concedes that a release was reported for the ineligible tanks based on the OSFM's observation of tank holes. *Id*. at 15. However, Freedom Oil argues that the Agency denial letters are incorrect to base apportionment on the OSFM's observations and release finding. According to Freedom Oil, "the OSFM did not, and does not, determine whether corrective action is required." *Id*. Freedom Oil maintains that Illinois "abandoned the color and odor test to mandate corrective action years ago in favor of analytical evidence" and "OSFM characterizations, therefore, do not constitute evidence that the corrective action, and associated costs, here were attributable to Ineligible Tanks." *Id*.

According to Freedom Oil, "[c]onstituents at the levels detected, particularly when associated with pre-74 tanks, do not necessitate corrective action under TACO" and "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." FO MSJ at 23. In the "absence of evidence of such conditions," Freedom Oil maintains it has "amply justified the corrective action costs as associated with the Eligible Tanks." *Id*. Freedom Oil concludes that the Agency cannot be allowed to apportion corrective action costs "[i]n the absence of scientific evidence indicating the Ineligible Tanks necessitated the corrective action." *Id*. at 17.

Section 57.8(m) of the Act. The Agency's application of apportionment, according to Freedom Oil, reflects "a clear misreading of the statute." FO MSJ at 24. "Although Section 57.8(m) has yet to be interpreted by a court," Freedom Oil argues, "its meaning is plain." *Id*. at 23. In Freedom Oil's view, apportionment cannot be used to deny reimbursement "merely based on the presence of ineligible tanks." *Id*.

Freedom Oil insists that Section 57.8(m) of the Act "permits apportionment only if [] ineligible tanks are present *and* the owner cannot attribute the costs to eligible [USTs]." FO MSJ at 23-24 (emphasis in original). Freedom Oil argues that the Agency's application of apportionment indicates that it is reading Section 57.8(m) in one of two ways, either of which is wrong. First, the Agency, maintains Freedom Oil, appears to improperly negate the conjunctive "and" at the end of subsection (m)(1) by holding that "the mere presence of Ineligible Tanks justifies apportionment," without giving effect to subsection (m)(2). *Id*. at 24. Freedom Oil argues that the legislative intent behind Section 57.8(m) was "clearly conjunctive"; that is,

"apportionment is appropriate only when there are both ineligible and eligible tanks *and* an inability to determine which tanks caused the corrective action." *Id*. (emphasis in original).

The Agency's second or alternative position, according to Freedom Oil, could be "that a mere statement of the [OSFM] that all tanks had a release was sufficient" to apply apportionment. FO MSJ at 24. This position, maintains Freedom Oil, is also erroneous because it "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." *Id*. (emphasis in original). Freedom Oil insists that even if the OSFM determined that each tank had a significant release, that is "irrelevant to the issue" because the Act allows apportionment "only if the costs of the response were attributable to Ineligible Tanks." *Id*. at 25. The "relevant question is not whether releases were ever attributable to Ineligible Tanks," Freedom Oil argues, but instead "whether the costs of the actions set forth in the applications were attributable to Ineligible Tanks." *Id*. at 26.

At this site, insists Freedom Oil, "no costs are apportionable to the Ineligible Tanks" because "none of the corrective actions were ordered to address releases from the Ineligible Tanks," but rather "all actions were ordered solely because of the leaking shear valve and tank liner failure." FO MSJ at 25. It is Freedom Oil's position that the mere existence of a release from an ineligible tank does not justify apportionment, especially where the OSFM did not issue an order based on a "threat to health" from the release and the "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." *Id*.

Freedom Oil further argues that to permit apportionment "merely based upon a finding of a release premised on an observation of tank holes . . . subverts the clear legislative protection of Section 57.5(g)." FO MSJ at 25. According to Freedom Oil, Section 57.5(g) of the Act "permits corrective action" only where a release from a pre-'74 tank poses a sufficient threat and the OSFM issues an order to that effect. *Id*. Because that did not happen here and could not based on the facts, Freedom Oil asserts, it is improperly being forced to incur costs, through apportionment, for pre-'74 tanks that do not pose a threat, depriving Freedom Oil of the protection of Section 57.5(g) intended by the legislature. *Id*. at 25-26.

Freedom Oil believes that its interpretation of Section 57.8(m) is supported by the Board's decision in Martin Oil Marketing v. IEPA, PCB 92-53 (Aug. 13, 1992), a decision that pre-dates the enactment of Section 57.8(m). That case involved whether the removal of unregistered tanks was considered corrective action and therefore whether the costs of removal could be reimbursed by the Fund. FO MSJ at 26. Freedom Oil explains that the Board in Martin Oil "upheld apportionment because it was not possible to determine the cause of contamination that necessitated the remediation." *Id*.

According to Freedom Oil, Martin Oil stands for the proposition that complete reimbursement is required where the corrective action is "related to the remediation of a leak from a registered tank." FO MSJ at 26 (quoting Martin Oil). Freedom Oil argues that the Board upheld the Agency's apportionment in Martin Oil because the petitioner failed to demonstrate "that the corrective action cost of removing the unregistered tanks *was a corrective action*

related to the remediation of a leak from a registered tank." *Id*. (quoting Martin Oil, emphasis by Freedom Oil). In fact, adds Freedom Oil, the petitioner in Martin Oil "did not offer any evidence that indicates that the leak of petroleum was not from any of the abandoned tanks." *Id*. at 26-27 (quoting Martin Oil). Freedom Oil asserts that, unlike the Martin Oil petitioner, Freedom Oil has "unequivocally demonstrated" that all of the corrective action was related to remediation of leaks from the shear valve release or the tank liner failure. *Id*. at 27.

Agency's Response to Freedom Oil and Agency's Counter-Motion for Summary Judgment. The Agency opposes Freedom Oil's motion for summary judgment and counters with its own motion for summary judgment.

The Issue on Appeal. The Agency first recites what Freedom Oil describes as the "relatively simple" question on appeal: "Specifically, can the Illinois EPA direct or compel, by court order, corrective action with regard to releases from tanks eligible for reimbursement from the [UST Fund], and then deny such reimbursement because ineligible tanks are discovered during implementation of the corrective action[?]" Ag. MSJ at 2 (paraphrasing FO MSJ at 1). The Agency's answer to Freedom Oil's question is that "[s]imply put, the Illinois EPA can clearly take the action described by the Petitioner." *Id*.

The Agency maintains that Freedom Oil's statement of the issue on appeal "is really a two-part question." Ag. MSJ at 2. The first part, according to the Agency, is "can the Illinois EPA direct or compel, by court order, corrective action with regard to releases from tanks (either eligible or ineligible for reimbursement from the UST Fund)?" *Id*. The Agency answers this question in the affirmative, and clarifies that it was not the Agency but rather the People of the State of Illinois through the AGO that acted as plaintiff in the circuit court action. *Id*. at 2-3. The second part of the question, according to the Agency, is "whether the Illinois EPA can deny reimbursement of costs paid from the UST Fund on the basis that ineligible tanks are discovered during remediation of a site in which at least one eligible UST has experienced a release." *Id* at 3. According to the Agency, "[a]gain, the answer is clearly yes, as provided for in Section 57.8(m)." *Id*.

The Agency argues that Freedom Oil "attempts to tie the performance of ordered corrective action with the possibility of resulting costs being reimbursed in full from the UST Fund," but "[t]here is no such condition in the Act, and the court here recognized no such connection." Ag. MSJ at 3. The "true issue here," according to the Agency, "is whether the Illinois EPA properly apportioned costs submitted for reimbursement by the Petitioner, given that there were indisputably ineligible tanks at the site and the Petitioner failed to properly justify all costs attributable to each UST at the site." *Id*.

Additionally, the Agency argues that Freedom Oil attempts to "cloud the issues" with repeated protestations over the manner in which the court-ordered remediation was obtained, as well as the scope of the remediation. Ag. MSJ at 15, n. 7. The Agency asserts that these comments of Freedom Oil are irrelevant as the Board cannot "second-guess injunctive orders issued by a circuit court" and, moreover, Freedom Oil's "complaints regarding the circuit court action could have been dealt with in a different forum." *Id*. The discovery of the ineligible tanks following the issuance of the court injunction, according to the Agency, "is something that

cannot be ignored or discounted simply because Freedom Oil disagreed with having to perform the remediation in the first place." *Id*. at 15-16, n.7.

Burden of Proof. In the Agency's view, Freedom Oil "states that the Illinois EPA imposed the apportionment despite an absence of evidence demonstrating the ineligible tanks created any conditions requiring remediation." Ag. MSJ at 3. This statement by Freedom Oil, asserts the Agency, "twists the interpretation of Section 57.8(m), since it is the owner/operator that is required to justify that costs are attributable to each UST at the site" to "avoid the possible imposition of apportionment of costs." *Id*. at 3, 19.

The Agency argues that Freedom Oil "failed to demonstrate" that the requested reimbursement costs at issue "were all attributable only to eligible, and not in any way to any of the ineligible, tanks at the site." Ag. MSJ. at 3-4. Because of this failure, the Agency continues, Freedom Oil "did not satisfy its obligation pursuant to Section 57.8(m) of the Act, and the action taken by the Illinois EPA in response was correct." *Id*. at 4.

The Agency states the relevant facts apply to each of the three consolidated reimbursement appeals, except that from the time of the initial release reporting until the last Agency determination, "there were new facts that came to light and also there were a sequence of different eligibility and deductibility decisions issued by the [OSFM]." Ag. MSJ at 4. The Agency further states that the "parties generally agree upon the facts here, but the conclusions to be drawn from those facts are not agreed upon" because:

> the parties have polar-opposite positions on the fundamental question of whether the Petitioner has satisfied its burden to demonstrate that all costs are attributable to each UST at the site. Freedom Oil believes it has met that burden such that apportionment is not appropriate, while the Illinois EPA argues no such burden has been met. *Id*.

It is the Agency's view that Freedom Oil makes three arguments against being subjected to Section 57.8(m) apportionment. First, according to the Agency, Freedom Oil argues that OSFM field observations and the requirement that suspected releases be reported "are not determinative of whether corrective action was required" because "there was no basis for such an [OSFM] order." Ag. MSJ at 4. Second, the Agency states that according to Freedom Oil, the Agency "has taken different positions in circuit court and in its final decisions now under appeal." *Id*. at 5. Third, the Agency explains, Freedom Oil argues that field conditions and analytical evidence confirm that the eligible tanks, not the ineligible tanks were the source of the contamination at the site." *Id*.

OSFM Observation of Release. As to Freedom Oil's first argument, the Agency maintains that the OSFM's "involvement . . . in this situation was correct in all respects." Ag. MSJ at 6. According to the Agency, the role of the OSFM in UST removal oversight, as Freedom Oil notes, "is not to determine whether corrective action (or what type of corrective action) is needed based upon site conditions at the time of the tank removal." *Id*. Instead, the Agency argues, the OSFM inspector determines, as was done here, whether site or tank

conditions indicate that a UST release is suspected and, if so, directs the UST owner or operator to report the release to IEMA. *Id*.

What was "more telling" here than the OSFM's conduct, the Agency maintains, "were the actions of the Petitioner in filing applications for eligibility/deductible determinations." Ag. MSJ at 7. The Agency notes that in Freedom Oil's late October 2002 EDA submitted to the OSFM, Freedom Oil represented that Tanks 7-11 had a release. *Id*. at 8-9. The Agency argues:

> The on-site inspector from OSFM properly noted that there were conditions regarding the ineligible tanks such that a suspected release should be reported. The related information contained in the [EDA] submitted to OSFM by Freedom Oil must be taken as true, as the information was certified as such by Freedom Oil (or a designated agent thereof). *** Therefore, as was certified by Freedom Oil, Tanks #7 through #11 did experience releases." *Id*. at 10.

Judicial Estoppel. The Agency also disagrees with Freedom Oil's second argument—that because the State represented in circuit court that corrective action was needed "due to discharges from eligible tanks," the State is now judicially estopped from "taking a different position in this forum." Ag. MSJ at 10. The Agency notes that it is undisputed that at the time of the August 2002 representations in circuit court, the ineligible tanks had not yet been discovered and were accordingly unknown to the parties in court. The ineligible tanks were not discovered until October 2002, after the court issued its order. *Id*. The Agency argues therefore that Freedom Oil:

> cannot show that the State made inconsistent statements, since the facts relied upon which any such statements would be based were different from August 2002 (when the statements were made in court) to December 2002 (when the first of the reimbursement decisions was issued). The contravening discovery in October 2002 of the ineligible tanks more than justifies the Illinois EPA acting on the most recent set of facts. *Id*. at 10-11.

The Agency maintains that if Freedom Oil is correct, parties would not be able to conform arguments with the discovery of new evidence. Moreover, the Agency continues, it would be "extremely prejudicial to hold any party to a position based on facts that all parties later agree do not accurately reflect conditions at a site." *Id*. at 10.

The Agency makes several other arguments for why judicial estoppel does not apply here. The Agency argues that when the State made statements in court, "it was an opinion based on the facts as then known," and so was not sufficient to meet the "inconsistency" element of the judicial estoppel doctrine. Ag. MSJ at 11 (citing Ceres Terminals, Inc. v. Chicago City Bank & Trust Co., 259 Ill. App. 3d 836, 851, 635 N.E.2d 485, 496 (1st Dist 1994)). The "change in opinions, if any," according to the Agency, "is due to the change in facts." *Id*.

Also, the Agency argues that the State did not assert any inconsistent positions in separate "proceedings" because the Agency gave its current position in final determination letters, none of which were offered by the Agency "in any court or administrative proceeding in

order to obtain a favorable ruling." Ag. MSJ at 11. The Agency continues that Freedom Oil cannot show that the Agency "somehow benefited from the decisions under appeal." *Id*. The Agency emphasizes that the deduction of costs based on apportionment "does not in turn allow the Illinois EPA any access to that money." *Id*. at 12. According to the Agency, it is merely defending its determinations, which "conceivably may not have ever been the subject of any judicial or quasi-judicial review." *Id*. The Agency concludes that comparing its position in seeking injunctive relief with its final determination in responding to a reimbursement claim is "a classic 'apples and oranges' comparison." *Id*.

Field Conditions and Analytical Results. The Agency also disagrees with Freedom Oil's third argument, which is that "field conditions and analytical results from the site demonstrate that only the eligible tanks were the source of contamination, and therefore the costs associated with corrective action should be considered without any regard to the ineligible tanks." Ag. MSJ at 12. The Agency notes that "the two requirements of Section 57.8(m) must be in place" before the Agency can "apportion costs as was done in the final decisions under appeal." *Id*. at 13. According to the Agency, the first requirement, as the parties agree, has been met because the OSFM determined that Freedom Oil was eligible to seek reimbursement for some, but not all, USTs at the site. *Id*.

The Agency notes that the parties disagree on whether the second prerequisite of Section 57.8(m) has been met. The Agency states that in Freedom Oil's view, the Agency cannot apportion costs here because Freedom Oil "has not failed to justify all costs attributable to each [UST] at the site." Ag. MSJ at 13. The Agency argues that:

> It is the owner or operator of the UST, not the Illinois EPA, that carries the responsibility of justifying all costs attributable to each UST at the site. The Illinois EPA is not required to prove . . . that there is information that demonstrates ineligible tanks were contributory to contamination at the site. Even if the Illinois EPA were required to offer some information to that end, the analytical results and site conditions would demonstrate the clear likelihood that the ineligible tanks were responsible for at least part of the contamination at the site. *Id*. at 14.

The Agency maintains that MACTEC admitted "it did not take any samples that would verify whether or not the ineligible tanks contributed to the site conditions." Ag. MSJ at 14-15. The Agency refers to a January 8, 2003 letter from MACTEC to the Agency, in which Hoffman states:

> Since this emergency response action was under the direction of the IEPA Emergency Response Unit with a deadline mandated by the injunction obtained by the state, Freedom was not afforded the opportunity to stop work to collect and analyze soil samples to verify the orphan tanks were not contributing to the site condition. *Id*. at 14 (citing AR III at 466).

According to the Agency, "[r]egardless of the fact that Freedom Oil was under a court order to perform the remediation," Hoffman's statement makes clear that Freedom Oil failed to take

samples that would establish "whether the ineligible tanks were responsible in any way for the contamination at the site." *Id*. at 15. The Agency maintains that this "lack of pre-excavation sampling shows that Freedom Oil did not justify all costs attributable to each UST at the site." *Id*.

As for the analytical results that Freedom Oil did provide, the Agency argues they "do not rule out the possibility of the ineligible tanks contributing to the contamination." Ag. MSJ at 15. The Agency first points out that the May 22, 2002 report from Harding ESE, Freedom Oil's consultant, states that groundwater flow direction at the site was determined by PSI in 1996 to be to the southwest and confirmed by Harding ESE to be westerly. *Id*. The Agency states that given groundwater flow direction, the 1996 PSI data, as expected, shows more significant contamination to the southwest, which is "consistent with the site conditions and all UST locations, including the ineligible tanks." *Id*. at 16-17.

Regarding MACTEC's 2002 sampling points cited by Freedom Oil, the Agency states that "each and every one of those points is located to the north of the Pre-74 USTs (ineligible tanks)." Ag. MSJ at 17-18. Therefore, the Agency continues, with the groundwater flow to the west or southwest, there would be no reason to expect any contamination from the ineligible tanks to be evidenced in these samples. Because these northern samples were "taken in a direction opposite to the groundwater flow," they provide no support to Freedom Oil's "claim that it has justified the costs associated with each UST at the site," according to the Agency. *Id*.

The Agency is similarly unpersuaded by Freedom Oil's reliance on PID readings. Looking at where the readings were taken, the Agency states that "only one PID reading is in the approximate area of any of the Pre-74 (ineligible) tanks." Ag. MSJ at 18. The Agency insists that "[j]ust one reading is far too scant to draw any substantive conclusions as are being made by the Petitioner." *Id*. Likewise, regarding samples taken during removal and excavation, the Agency emphasizes that all of those were *post-excavation* bottom and sidewall samples, so "there were no samples taken prior to excavation to test whether the ineligible tanks were contributing to the contamination." *Id*.

The Agency concludes:

> none of the sampling data presented by the Petitioner demonstrates that the ineligible tanks were not contributory to the contamination at the site, and there is no showing of any kind by the Petitioner that it justified the costs attributable to each UST at the site. *** If anything, there is a dearth of sampling information that would allow Freedom Oil to make any kind of claim to justify the costs at the site on a UST-by-UST basis. Ag. MSJ at 18-19.

Freedom Oil's Response to the Agency. Freedom Oil argues that the Agency's counter-motion for summary judgment "reflects two glaring errors." FO MSJ Resp. at 1. First, according to Freedom Oil, the Agency incorrectly states the burden of proof that a UST owner or operator must satisfy under the Act to avoid apportionment:

> Freedom is not required to prove the absence of contamination from ineligible tanks. The statute requires only that Freedom prove the costs for which it seeks reimbursement were incurred due to releases from eligible tanks. Because these costs were specifically ordered for releases from eligible tanks, Freedom met its burden. *Id*.

Second, Freedom Oil asserts that the Agency's counter-motion for summary judgment fails to include any "supporting document or affidavit . . . to support any IEPA analysis of the material submitted by Freedom or which rebuts the conclusions that these costs were ordered to remediate releases from eligible tanks." FO MSJ Resp. at 2. There is "no IEPA statement under oath that these ineligible tanks were in any way tied to the costs of the corrective action." *Id*. at 3. Instead, according to Freedom Oil, the Agency apportioned costs merely because the OSFM "declared a release from the ineligible tanks during tank removal." *Id*. at 2.

In doing only that, argues Freedom Oil, the Agency failed to consider any of the following: whether ineligible tank releases "necessitated cleanup costs"; that the ineligible tanks had been "filled with sand for over thirty years"; that "clean up costs for ineligible tanks would only be ordered by the OSFM based on risk of imminent harm, a finding never made and an order never issued"; that the ineligible tanks "were found as a mere fortuity during cleanup ordered for specifically identified releases from eligible tanks"; that had the ineligible tanks not been found, "the same clean up costs would have been incurred because of a court order to remediate releases from eligible tanks and have been fully reimbursable." FO MSJ Resp. at 2-3.

Summary Judgment Evidence. Freedom Oil asserts that once a motion for summary judgment is made and supported by sworn testimony in affidavits, "a respondent is required to show a material issue of fact by counter-affidavit." FO MSJ Resp. at 3. Freedom Oil states that the Agency offered no counter-affidavit to Freedom Oil's affidavits of two experts, which provided that "the corrective actions in this case as described in the record were not attributable to the ineligible tanks." *Id*. at 3-4. Freedom Oil argues, therefore, that "as a matter of law, this Board must accept the affidavits as true" and grant Freedom Oil summary judgment. *Id*. at 4 (citing Carruthers v. B.C. Christopher & Co., 57 Ill. 2d 376, 313 N.E.2d 457, 459-60 (1974)).

The OSFM's Release Observation. After conceding that "[w]e must accept that releases from ineligible tanks occurred," Freedom Oil argues nevertheless that an OSFM release determination cannot be "bootstrapped into a clean up obligation." FO MSJ Resp. at 6. Freedom Oil agrees with the Agency that the OSFM's role is not to determine whether or what type of corrective action is needed based on site conditions at the time of tank removal. *Id*. at 5-6. Freedom Oil maintains that:

> An OSFM release determination does not mean the corrective actions which are the subject of Freedom's applications had anything to do with these ineligible tanks or any releases therefrom. Whether compensation is awarded depends upon whether costs of a corrective action are attributable to eligible tanks. *** The statute concerning apportionment of costs permits apportionment only if '*corrective action* costs' (emphasis added) sought are the result of addressing problems with ineligible tanks. By IEPA's own admission, the OSFM does not

> make determinations regarding the need for corrective action. IEPA, therefore, cannot simply assume that any corrective action is attributable to these tanks merely because of an initial release determination by the OSFM. *Id*. at 6.

The emphasis in Section 57.8(m), according to Freedom Oil, is on "corrective action" and "costs," neither of which is addressed by an OSFM release determination. FO MSJ Resp. at 7. Freedom Oil argues that unless there is "corrective action associated with a release, the mere listing of a release by the OSFM has no bearing on a decision under Section 57.8(m)." *Id*.

Costs of the Plan. Freedom Oil argues that it has demonstrated that "*100%* of the costs here were incurred as corrective action ordered with regard to eligible tanks." FO MSJ Resp. at 8 (emphasis in original). Freedom Oil maintains that it has justified each cost as associated with an eligible tank "because each cost was specifically ordered to be undertaken due to a release from eligible tanks." *Id*. Despite the fact that the "costs were not ordered for any other purpose," continues Freedom Oil, the Agency never considered "whether the *costs* of the plan were attributable to ineligible tanks" and instead "only considered the OSFM release determination." *Id*.

Freedom Oil states that in the Agency's view, Freedom Oil "must prove that no contamination at the site was due to ineligible tanks." FO MSJ Resp. at 8. Freedom Oil disagrees and maintains that the Act requires only that Freedom Oil "justify attributing costs of a particular clean up to eligible tanks." *Id*. Freedom Oil believes it has met this burden because, in its opinion, "the plan required these actions to remediate specific releases from eligible tanks." *Id*.

Freedom Oil notes that Section 57.8(m) allows the Agency to "apportion payment of *costs for plans*" submitted under Title XVI. FO MSJ Resp. at 9 (quoting the Act, emphasis added). Freedom Oil states that here the "plan mandated by IEPA was specifically to address these releases, not releases from ineligible tanks" and the Agency, though authorized to do so, "did not demand a revised corrective action plan after discovery of the tanks . . . to address possible releases from these tanks." *Id*. at 9-10. Instead, Freedom Oil continues, the "plan ordered to remediate the two releases remained in place and cannot now be deemed a plan to remediate releases of the ineligible tanks." *Id*. at 10.

According to Freedom Oil, to avoid apportionment, a UST owner or operator "need only justify that a cost arose in connection with remediation of a release attributable to an eligible tank." FO MSJ Resp. at 9. Freedom Oil believes that it "need not prove the absence of all contamination from any other source at the site if the purpose of the clean up was related to a release from an eligible tank." *Id*. Here, according to Freedom Oil, the "action was required regardless of whether ineligible tanks were discovered" and the Agency:

> is using the mere fortuity of discovering such tanks to deny payment of costs that would have been incurred absent such discovery and, but for such discovery, would be unquestionably reimbursable. *Id*. at 9-10.

Burden of Production. Freedom Oil asserts that the Agency "misunderstands the concept of burden of proof." FO MSJ Resp. at 10. According to Freedom Oil, the Agency "does have a burden of production in this matter" and therefore cannot just "sit silently and simply argue that Freedom's evidence is not perfect." *Id*. at 11.

Freedom Oil argues that its evidentiary burden is not to present "perfect proof that ineligible tanks did not contribute to contamination at the site." FO MSJ Resp. at 19. Rather, according to Freedom Oil, it "must only prove that the costs of the correction actions it took were not attributable to such tanks." *Id*. "As those actions were specifically required to remediate releases from eligible tanks," Freedom Oil maintains that it met this burden of proof. *Id*. Having done so, Freedom Oil argues, "IEPA now has some burden of showing that *these corrective actions* were the result of conditions of the ineligible tanks." *Id*. at 19-20 (emphasis in original). Freedom Oil concludes that the Agency did not satisfy this burden through "mere speculation of contamination generally at the site that may have come from ineligible tanks." *Id*. at 20.

Specifically, mindful that "the standard for corrective action of ineligible tanks is not simply contamination, but imminent harm," Freedom Oil maintains that "before [the Agency] can argue that ineligible tanks contributed to the costs, there must be evidence of a release from these tanks necessitating cleanup costs." FO MSJ Resp. at 11. Freedom Oil asserts that it is:

> ridiculous to demand that Freedom prove no corrective action was necessary regarding the ineligible tanks. IEPA should be required to offer some evidence that these tanks required the corrective action which Freedom performed. *Id*.

Freedom Oil concedes that the Act "does place a burden on Freedom" and

> Unfortunately, it is a burden to prove a negative, *i.e.*, Freedom must prove that the costs of the corrective action are not attributable to the ineligible tanks. Proving a "not" typically is difficult. As a result, courts have stated that such proof need not be "plenary," that is the proof need not be "full, entire, complete, absolute, perfect, or unqualified." FO Resp. at 11 (quoting *Black's Law Dictionary*, 5th Ed., definition of "plenary").

Instead of plenary or perfect proof, argues Freedom Oil, its burden should be met when it provides "reasonable grounds for the allegation that the facts do not exist." FO MSJ Resp. at 12. Having offered such evidence here, according to Freedom Oil, "it is incumbent that the opposing party counter the evidence." *Id*. Freedom Oil quotes from an Illinois Appellate Court divorce law decision addressing the burden of a plaintiff charging mental cruelty to prove that the defendant acted without provocation, *i.e.*, to prove a negative:

> Further, there is authority in Illinois that a party is not required to make plenary proof of a negative averment. It is enough that he introduces such evidence as, in the absence of counter testimony, will afford reasonable ground for presuming the allegation is true; and when this is done the *onus probandi* will be thrown on his

adversary. *Id*. (quoting Shumak v. Shumak, 30 Ill. App. 3d 188, 332 N.E.2d 177, 180 (2d Dist. 1975)).

Here, Freedom Oil states that it has provided evidence, summarized below, that "none of the costs of corrective action is attributable to the ineligible tanks," and that having done so, the burden shifts to the Agency:

- The court ordered the corrective action for "releases specifically related to eligible tanks," namely the "tank liner failure on Tank 1 and a leaky valve of Tank 1." FO MSJ Resp. at 12. The ineligible tanks were discovered only after the order issued, and "none of the specified requirements in the plan can be attributed to such tanks." *Id*. The "same work would have been done even if the ineligible tanks had not been discovered (except for the minimal cost of removing the tanks itself)." *Id*. "Corrective action was ordered for [the tank liner failure] release and the costs would have been incurred *whether or not* other tanks were found." *Id*. at 13 (emphasis in original).

- The ineligible tanks were filled with sand and "clearly did not contribute to the 1,100 gallons of gasoline released nor to the vapors in the Paris High School." *Id*. As supported by "[e]xpert testimony supplied in the affidavits," it is "simply not possible that the ineligible tanks produced the sewer vapors, gasoline in the sewer, free product found in wells or product oozing from the soil." *Id*. at 12.

- The Act requires corrective action for the ineligible tanks "only if a release from such tanks gives rise to an imminent danger." *Id*. Because no such finding was made here, no corrective action costs can be associated with the ineligible tanks. *Id*.

- Sampling from "soil borings in the vicinity of the ineligible tanks" showed that there was no contamination "requiring clean up from the tanks." *Id*.

Freedom Oil argues that this evidence, as detailed in its motion for summary judgment, "was more than sufficient to place a burden of production on IEPA." FO MSJ Resp. at 13. The Agency, according to Freedom Oil, has "completely failed in its responsibility to produce counter evidence," instead just resorting to "rank speculation that the ineligible tanks could have produced contamination." *Id*.

Freedom Oil maintains that the Agency "cannot possibly argue that any of the ineligible tanks were responsible for the 1,100 gallons of gasoline released from the tank liner failure in Tank No. 1." FO MSJ Resp. at 13. As for the vapors in the Paris High School, Freedom Oil asks whether the Agency is "seriously contending that these vapors could have been caused by tanks filled with sand over thirty years ago?" *Id*. According to Freedom Oil, the Agency "virtually concedes that the ineligible tanks cannot be responsible for the vapors in the Paris High School." *Id*. at 14. This is so, urges Freedom Oil, because the Agency now argues that Freedom Oil's samples are unpersuasive, having been collected to the north, upgradient of the ineligible tanks. *Id*.

Freedom Oil insists that the evidence it provided was "more than sufficient . . . to reasonably conclude that the eligible tanks were the sole source given the absence of *any* counter testimony by IEPA." FO MSJ Resp. at 14 (emphasis in original). According to Freedom Oil, it:

> did not have to prove the absence of any contamination at the site from ineligible tanks. It only had to justify the costs as being costs incurred to remediate releases from eligible tanks. Freedom was ordered to incur these costs to remediate releases from eligible tanks. The mere fortuity of discovering ineligible tanks should not change this result absent evidence that they caused these corrective actions to be undertaken. *Id*. at 15.

Judicial Estoppel. Freedom Oil asserts that none of the Agency's reasons for eschewing judicial estoppel is persuasive. First, Freedom Oil asserts that the statements made in court on behalf of the Agency were not opinion but representations of fact. FO MSJ Resp. at 15. The AGO attorney "stated as fact that the release came from a tank," which is "either true or not." *Id*. at 15-16. Freedom Oil insists that:

> This is not a matter of opinion, but a matter of fact. IEPA urged as fact that eligible tanks created two specified releases. Now, IEPA urges a different set of facts. This it cannot do. *Id*. at 19.

If the Agency, argues Freedom Oil, is "permitted to recharacterize fact as opinion merely by alleging the fact was mistaken, the created exception would swallow the rule," the purpose of which is to "prevent a party from urging *different positions* in two separate proceedings." FO MSJ Resp. at 16 (emphasis in original). Moreover, Freedom Oil continues, the discovery of the ineligible tanks, which had been filled with sand over 30 years earlier, in no way renders the Agency's "earlier position that the releases were attributable to Tank 1 as a mistake." *Id*.

Freedom Oil maintains that the plan the Agency sought to enforce in court was for no reason other than remediation of the releases from the leaking valve and tank liner failure. According to Freedom Oil then, judicial estoppel prevents the Agency from "taking *inconsistent positions*" by barring the Agency from now arguing that "the plan also was for the ineligible tanks." FO MSJ Resp. at 16 (emphasis in original).

As for the Agency's second argument against judicial estoppel, Freedom Oil concedes that the Agency's final determination "may not have amounted to an administrative proceeding, but matters before this Board clearly constitute an administrative proceeding." FO MSJ Resp. at 17. Freedom Oil states that the Agency adopted one position in circuit court and now seeks to take a different position *before the Board*, and it is the Agency's urging of the latter position that Freedom Oil argues is estopped. *Id*.

Regarding the Agency's third argument, Freedom Oil states that judicial estoppel's "requirement of a favorable judgment" does not mean that the Agency has to receive money. FO MSJ Resp. at 17. According to Freedom Oil, the Agency "used the releases specifically attributable to eligible tanks to win an injunction requiring corrective action." *Id*. Having done so, continues Freedom Oil, the Agency cannot now argue that the corrective action was not just

for those releases to obtain a favorable ruling upholding the reimbursement denial. *Id*. Freedom Oil maintains that judicial estoppel exists to preclude such inequity:

> Freedom did not appeal the judgment in the judicial proceeding because the action was specifically sought to remediate eligible tanks and, thus, reimbursable. The action required far exceeded what was necessary as is evidenced now by IEPA's own admission that there was no possibility of contamination to the north. However, rather than spend further funds to appeal, Freedom proceeded to take such action based upon the reasons given for such action in Court and in letters from IEPA that these actions, being ordered to address these releases, were indeed reimbursable. *Id*. at 18.

Board's Analysis and Ruling on Cost Apportionment

If a site has more than one petroleum UST and some but not all of the tanks are eligible for UST Fund reimbursement, Section 57.8(m) of the Act (415 ILCS 5/57.8(m) (2004)) allows the Agency to "apportion" payment of cleanup costs from the Fund. When applying cost apportionment, the Agency may allocate costs to ineligible tanks, proportionately reducing the reimbursement to the tank owner or operator. However, under Section 57.8(m), the Agency can apportion only if the owner or operator has "failed to justify all costs attributable to each underground storage tank at the site." 415 ILCS 5/57.8(m)(2) (2004).

On appeal before the Board, the Agency's denial letter frames the issue. *See* Kathe's Auto Service, PCB 96-102. In each of the three denial letters issued to Freedom Oil, the Agency cited the cost apportionment provision, Section 57.8(m), and the corresponding Board regulation, 35 Ill. Adm. Code 732.608. On that authority, the Agency denied Freedom Oil "costs for corrective action activities for [USTs] for which the owner or operator was deemed ineligible to access the fund." The Agency denial letters state that each of the eligible and ineligible tanks at the Freedom Oil service station was "determined by the [OSFM] to have had a significant release." The Agency apportioned what it considered otherwise reimbursable costs to ineligible tanks at the Freedom Oil site.

In filing counter-motions for summary judgment on cost apportionment, each party represents that there are no genuine issues of material fact and that judgment may be entered as a matter of law. The Board agrees. But first, Freedom Oil asserts that the Agency is judicially estopped from even arguing before the Board that cost apportionment was proper. Accordingly, the Board will address Freedom Oil's judicial estoppel claim before turning to Section 57.8(m) of the Act.

For the reasons below, the Board finds that the Agency is not judicially estopped. The Board also finds that Freedom Oil met its burden of proof to avoid cost apportionment on its first reimbursement application, but not on its second and third applications.

Judicial Estoppel. The parties dispute whether representations made by the AGO in the injunctive proceedings before the Edgar County Circuit Court require that the Agency now be judicially estopped. Specifically, Freedom Oil asserts that the Agency should be estopped from

arguing to the Board that Freedom Oil failed to demonstrate that cleanup costs were not incurred on releases from ineligible tanks.

Based on representations by the AGO to the court, the court was aware not only of the August 2002 tank liner failure, but also of the 1996 and April 2002 releases at the Freedom Oil station. In fact, the court order found that the site had "prior leaks from [Freedom Oil's] underground storage tank system which have not been completely remediated." Further, the order required Freedom Oil to eventually submit a plan to fully investigate residual subsurface contamination at the site, which submittal could come in the form of "an amendment to the plan submitted in May, 2002, to address other releases at the facility."

The AGO's representations, cited by Freedom Oil for judicial estoppel, were that a tank release had occurred at the Freedom Oil site, that the release was reported in August 2002 and believed to be from Tank 1, and that a cleanup was needed to address it. However, no one contests that the August 2002 release came from a liner failure in one or more of the eligible tanks. The *impetus* for the August 23, 2002 injunction clearly was the release reported in August 2002, the vapors from which put residents out of their homes.

The Board finds that the State has not changed its position—that cleanup was necessary to address the tank liner failure. To the extent any facts are "urged" here by the Agency, as Freedom Oil contends, they are not inconsistent with the representations made to the court. The AGO did not represent to the court that *all* cleanup to follow, regardless of site conditions, necessarily would in fact be the result of a release from the tank liner failure. At the time of the order, the extent of cleanup was yet to be determined and the ineligible tanks had not even been discovered.

Never on this record did the AGO ask the court to find Freedom Oil eligible to be reimbursed by the Fund. On this ground alone, and contrary to Freedom Oil's argument, the State never "urged different positions" in two separate proceedings. The court proceeding addressed UST cleanup. This proceeding is addressing UST Fund reimbursement. The court certainly did not make its remedial order conditional on Freedom Oil getting reimbursed. If Freedom Oil believed it was being forced by the Agency OER to excavate soil beyond the scope of the court's order, Freedom Oil should have returned to the court and complained about the Agency OER. Further, that Freedom Oil chose not to appeal the circuit court order because it believed it would get reimbursed was Freedom Oil's own business decision and has no bearing on the Board's ruling today.

Neither the AGO nor the Agency made a statement that *all* of Freedom Oil's costs *would be* reimbursed. Freedom Oil cites to no such statement, yet argues that assurances were given by the State that the costs were reimbursable. These so-called assurances were not made to the court, so they are irrelevant to the judicial estoppel issue. Moreover, before the court order issued, each of the several cited letters from the State regarding reimbursement cautioned Freedom Oil that claims would still have to otherwise comply with the Board's Part 732 regulations. Those regulations, of course, include Section 732.608 on cost apportionment.

The subsequent discovery of unforeseen site conditions does not render the AGO's statements to the court misleading, inconsistent, or mistaken. Based on this record, the Board finds that the Agency is not judicially estopped from arguing that Freedom Oil failed to meet its burden under Section 57.8(m) of the Act.

Section 57.8(m) of the Act. Initially, the Board notes that the parties quote different versions of Section 57.8(m). Section 57.8(m) was amended *after* the April 2002 shear valve release was reported but *before* the August 2002 tank liner failure release was reported. With Public Act 92-554, which became effective on June 24, 2002, Section 57.8(m) reads:

> (m) The Agency may apportion payment of costs for plans submitted under *Section 57.7* if:
>
> (1) the owner or operator was deemed eligible to access the Fund for payment of corrective action costs for some, but not all, of the underground storage tanks at the site; and
>
> (2) the owner or operator failed to justify all costs attributable to each underground storage tank at the site. 415 ILCS 5/57.8(m) (2004) (as amended by P.A. 92-554, eff. June 24, 2002) (emphasis added).

This is the version of Section 57.8(m) quoted by Freedom Oil. Absent Public Act 92-554, Section 57.8(m) provides that the Agency "may apportion payment of costs for plans submitted under the *Section 57.7(c)(4)(E)(iii)*." This is the version quoted by the Agency in its pleadings.[18] For today's summary judgment ruling on cost apportionment, however, it is of no consequence which version of Section 57.8(m) the Board applies.

Under Title XVI, in very general terms, leaking UST cleanups proceed in three phases: "early action," followed by some form of site assessment, followed by corrective action. The first phase, "early action," is addressed under Section 57.6 of the Act, while the latter two phases are addressed under Section 57.7 of the Act. *See* 415 ILCS 5/57.6, 57.7 (2004). All three phases, however, fall within the Act's definition of "corrective action" and therefore, subject to different restrictions, the costs of performing them are potentially eligible for UST Fund reimbursement. *See* 415 ILCS 5/57.2 (2004) ("Corrective action" means "activities associated with compliance with the provisions of Sections 57.6 and 57.7 of this Title.").

Numerous submittals from Freedom Oil characterize its cleanup as "early action." Early action is generally conducted *before* any "plan" is submitted to the Agency, and includes tasks such as eliminating explosion concerns from vapors and beginning free product removal. *See* 35 Ill. Adm. Code 732.Subpart B. *Reimbursable* soil excavation under early action is limited to

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[18] Public Act 92-735 (eff. July 25, 2002) retains the "old" version of Section 57.8(m), referring to Section 57.7(c)(4)(E)(iii).

four feet of fill material around the outside dimensions of the UST. *See* 415 ILCS 5/57.6 (2004); 35 Ill. Adm. Code 732.202, 732.606(a); *see also* Rezmar Corp. v. IEPA, PCB 02-91 (Apr. 17, 2003) (affirming Agency reimbursement denial for early action excavation beyond four feet). Nowhere, however, does Freedom Oil argue that the Agency lacked authority to apply Section 57.8(m) because Freedom Oil was performing only early action and thus not under a "plan."

Public Act 92-554's replacement of "Section 57.7(c)(4)(E)(iii)" with "Section 57.7" in Section 57.8(m) reflects broader amendments to Section 57.7 made by Public Act 92-554. Illinois shifted from a process of "site classification" followed by "high priority" or "low priority" corrective action, to a process of "site investigation" followed by corrective action. Generally, the older "site classification" process with "high priority" and "low priority" corrective action sites still applies to releases reported before the June 24, 2002 effective date of Public Act 92-554.[19] The referenced "Section 57.7(c)(4)(E)(iii)" addresses "high priority" corrective action plans. "Section 57.7" under Public Act 92-554 addresses both "site investigation" and corrective action. Public Act 92-554 generally applies to releases reported on or after June 24, 2002.

Freedom Oil does not dispute that the costs for which it requested reimbursement were "costs for plans" within the meaning of Section 57.8(m). Though Freedom Oil never identifies the "plan" to which it refers, it does accuse the Agency of failing to demand a revised "plan" to accommodate the ineligible USTs. However, after the court injunction and site excavation, Freedom Oil did submit to the Agency a November 2002 "Corrective Action Plan (High Priority)," which specifically documented the ineligible tanks and their removal, along with the site excavation. The Board finds that this submittal qualifies as a "plan" under the Act. *See* 415 ILCS 5/57.7 (2004). Moreover, the UST regulations permit such plans to be filed with the Agency *after* performance of the work, as was done here. *See* 35 Ill. Adm. Code 732.405(d).[20]

As for subsections (m)(1) and (m)(2) of Section 57.8(m), the parties do not dispute that the former has been met here: that Freedom Oil is "eligible to access the Fund for payment of corrective action costs for some, but not all, of the [USTs] at the site." 415 ILCS 5/57.8(m)(1)

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[19] As noted, the Board is presently in the rulemaking process to codify the new requirements of Public Act 92-554. *See* R04-22(A) Proposed Amendments to Regulation of Petroleum Leaking Underground Storage Tanks (35 Ill. Adm. Code 732), R04-23(A), Proposed Amendments to Regulation of Petroleum Leaking Underground Storage Tanks (Proposed New 35 Ill. Adm. Code 734) (cons.) (Dec. 1, 2005); *see also* related dockets R04-22(B) and R04-23(B) (cons.).

[20] The Board regulation on apportionment at 35 Ill. Adm. Code Section 732.608(a), in effect since its adoption in 1994, provides that the Agency "may apportion payment of costs if . . . ," without reference to "plan" submittal. *See* Regulation of Petroleum Leaking Underground Storage Tanks 35 Ill. Adm. Code 732, R94-2(A) (Aug. 11, 1994). In its denial letters, the Agency cites both the Board's and the Act's provisions on apportionment.

(2004). The OSFM found Tanks 1-4 and 6 eligible, but not Tanks 7-11. What is contested is subsection (m)(2): whether Freedom Oil has "failed to justify all costs attributable to each [UST] at the site." 415 ILCS 5/57.8(m)(2) (2004). Resolving this disagreement turns on the nature of the burden of proof imposed under Section 57.8(m)(2) to avoid cost apportionment.

Burden of Proof. In appeals like this one, the Act and the Board's procedural rules place the burden of proof on the petitioner, here, Freedom Oil. *See* 415 ILCS 5/40(a), 57.8(i) (2004); 35 Ill. Adm. Code 105.112(a). Even more specifically to this proceeding, under Section 57.8(m)(2), the General Assembly made cost apportionment available to the Agency only if the "owner or operator" failed to justify costs attributable to each UST. *See* 415 ILCS 5/57.8(m)(2) (2004).

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

Statutory terms are considered ambiguous if more than one interpretation of the terms is reasonable. *See* People v. Holloway, 177 Ill. 2d 1, 8, 682 N.E.2d 59, 63 (1997). The Board then must give the ambiguous terms a construction that is reasonable and that will avoid absurd, unjust, or unreasonable results, which the legislature could not have intended. *See* County Collector of DuPage County v. ATI Carriage House, Inc., 187 Ill. 2d 326, 332, 718 N.E.2d 164, 168 (1999). In doing so, the Board may consider the purpose of the law being interpreted. *See* Williams v. Staples, 208 Ill. 2d 480, 487, 804 N.E.2d 489, 493 (2004).

The Board finds no ambiguity in Section 57.8(m)(2) of the Act. It clearly places the burden on the UST owner or operator, and that burden is to demonstrate the costs of corrective action attributable to each tank. That burden may be met by showing that all of the costs of corrective action are attributable solely to releases from eligible tanks, or that no costs of cleanup were spent on releases from ineligible tanks. The Board finds that this interpretation comports with the plain meaning of the words in Section 57.8(m)(2).

The Agency's suggestion, in its counter-motion for summary judgment, that the owner or operator must show costs on a "UST-by-UST" basis goes too far. Section 57.8(m)(2) does refer to "costs attributable to *each underground storage tank* at the site." 415 ILCS 5/57.8(m)(2) (2004) (emphasis added). However, the Board concludes that this burden can surely be met without the UST owner or operator having to assign costs *between eligible* tanks for which a release occurs. To apportion costs in such an instance would be absurd and unjust, a result the General Assembly could not have intended. Section 57.8(m) instead allows the Agency to apportion costs when the record is *not* clear how much was spent on eligible versus ineligible releases.

Further, contrary to the Agency's suggestion, Freedom Oil does not have to "rule out the possibility" that costs were incurred on the ineligible tanks. Under the Administrative Procedure Act and Board case law, the "preponderance of the evidence" standard applies in contested cases, including UST Fund appeals. *See* 5 ILCS 100/10-15 (2004) ("the standard of proof in any contested case hearing under this Act by an agency shall be the preponderance of the evidence"); Reichhold Chemicals, Inc. v. IEPA, PCB 92-98 (Dec. 17, 1992) ("The Board has held the Section 40 standard of proof to be preponderance of the evidence. Accordingly, Fund eligibility should be accorded if it can be proven, by a preponderance of the evidence . . . ."). "A proposition is proved by a preponderance of the evidence when it is more probably true than not." McHenry County Landfill, Inc. v. County Bd. Of McHenry County, PCB 85-86 (Sept. 20, 1985). The Board therefore holds that Freedom Oil must show by a preponderance of the evidence that no corrective action costs were incurred on releases from the ineligible tanks. Stated alternately, Freedom Oil must demonstrate that it is more probably true than not that all corrective action costs were incurred solely as a result of releases from the eligible tanks.

The Board finds that, though the Agency would set too high a hurdle on a petitioner to avoid cost apportionment, Freedom Oil pushes too far the other way. In its demands of what evidence the *Agency* must produce, Freedom Oil would turn the burden of proof on its head. Ultimately, Freedom Oil argues that in this case, it is the Agency's burden to prove that there were releases from the ineligible tanks and that those releases required corrective action under Illinois law. The Board disagrees.

The Board first notes the Agency is not arguing that costs *were* incurred on releases from the ineligible tanks. What the Agency is arguing is that *Freedom Oil failed to show* that no costs were incurred on ineligible releases. The Board finds, as Freedom Oil argues, that the question on appeal is not simply "was there a release from an ineligible tank?" as the Agency suggests. However, contrary to Freedom Oil's arguments, the question is also not "why was corrective action ordered?"

The Board observes that Freedom Oil's reasoning here is somewhat circular. Freedom Oil argues it has proven that it cleaned up only a release from an eligible tank because that is all the court ordered it to clean up. Logically, however, even if the only *reason* the cleanup was ordered was the tank liner failure, that does not mean all activities that followed were, in fact, in response to only that release, regardless of actual site conditions. UST Fund reimbursement is based on actual costs incurred. Costs from ineligible tanks do not become Fund reimbursable simply because an eligible release triggered the cleanup in the first place. Likewise, work directed by the Agency OER is not automatically reimbursable or somehow exempt from Section 57.8(m) of the Act. Freedom Oil cites no authority holding or even suggesting otherwise.

Nor is the question on appeal properly framed as "was corrective action *required* under Illinois law?" for the ineligible tanks. It is true that releases from certain heating oil USTs and pre-'74 tanks, like Tanks 7-11, are not subject to mandatory leaking UST program corrective action, absent an OSFM order under Section 57.5(g) of the Act based on a current or potential threat to health and the environment. *See* 415 ILCS 5/57.5(g) (2004); 35 Ill. Adm. Code 732.100(b). It is undisputed that no such OSFM order issued here.

As Freedom Oil correctly notes, however, Section 57.8(m) focuses on "costs." Regardless of whether Freedom Oil, in the abstract, had an independent legal duty to remove Tanks 7-11 and remediate releases from them, Freedom Oil either did or did not, in fact, incur costs excavating soil impacted by the ineligible tanks. The limits of Freedom Oil's excavation did, in fact, include both ineligible tank cavities. Accordingly, just because the OSFM did not issue a corrective action order does not mean that Freedom Oil did not, in fact, incur costs excavating soil contaminated by Tanks 7-11.

Freedom Oil's position, taken to its logical conclusion, would open the UST Fund up to paying for remediations of pre-'74 tanks, which clearly contradicts the General Assembly's stated purposes behind Title XVI. *See* 415 ILCS 5/57, 57.5, 57.9 (2004). Specifically, it would follow from Freedom Oil's stance that the costs of cleaning up ineligible releases from pre-'74 tanks to TACO standards would be reimbursable, as long as the cleanup also involved eligible tanks and no OSFM corrective action order issued.

Moreover, any probative value of the OSFM failing to issue a corrective action order here is largely undercut by the unusual circumstances then at hand: the ineligible tanks were being removed in any event and the site was already in mid-remediation under a court injunction and the Agency OER's active supervision. The Board concludes that the question here then is "did Freedom Oil show by a preponderance of the evidence that of the costs *actually incurred*, none were incurred on any contamination from the ineligible tanks?"[21]

Site Conditions. When the shear valve release was reported in early April 2002, Freedom Oil responded to petroleum vapors at the high school and in the sewer to the north with ventilation and monitoring, installed recovery trenches, and began free product removal. Freedom Oil's reimbursement application 1 consists of the costs of these actions. The costs were incurred before site soil excavation began in late August 2002.

The Board finds that Freedom Oil provided reasonable grounds to conclude that the ineligible tanks were in no way responsible for the costs of responding to vapors and free product documented in the first reimbursement application. These conditions were not reasonably attributable to the ineligible tanks, which had been filled with sand over thirty years earlier. The Agency does not specifically argue otherwise and raises no genuine issues of material fact concerning the first reimbursement application.

The Board finds that Freedom Oil has demonstrated by a preponderance of the evidence that the costs of reimbursement application 1 were not incurred in response to releases from the ineligible tanks. That was the only reason given by the Agency in its December 18, 2002

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

determination for this denial, and the Board is therefore limited to reviewing the merits of that denial ground. *See* Kathe's Auto Service, PCB 96-102. Accordingly, the Board holds that Freedom Oil is entitled to judgment as a matter of law and that the Agency erred in apportioning costs of the first reimbursement application to ineligible tanks.[22]

Reimbursement applications 2 and 3, unlike reimbursement application 1, include the costs of and related to the site excavation, during which the ineligible tanks were discovered. Freedom Oil eventually concedes that releases from the ineligible tanks occurred. Freedom Oil's experts, Hoffman and Pletz, never say in their affidavits that no cleanup costs were incurred on releases from the ineligible tanks. Instead, they indicate that conditions around the ineligible tanks did not *require* corrective action. As discussed above, whether cleanup was independently required for the ineligible tanks and whether cleanup costs were actually incurred on ineligible releases are two different questions. Only the latter is relevant here.

Specifically, in Hoffman's affidavit, he opines that the cleanup conducted to meet TACO standards was not "necessitated by the Ineligible Tanks" but rather it was "necessitated by the IEPA OER Order." The Board must construe this affidavit strictly against the movant, Freedom Oil. *See* Dowd, 181 Ill. 2d at 483, 693 N.E.2d at 370. Though Hoffman opines what "necessitated" the cleanup, the Board cannot find that Hoffman is opining that there was no release from any ineligible tank that resulted in soil exceeding TACO standards. Hoffman simply does not say that.

Freedom Oil's position all along has been that the cleanup was necessitated by the "order," and that TACO exceedences alone would not necessitate a pre'74 tank release cleanup. It was Hoffman who tellingly admitted, between the Agency's first and second determinations, that Freedom Oil did not "collect and analyze soil samples to verify the orphan tanks [*i.e.*, ineligible tanks] were not contributing to the site condition." AR III at 466.

The Board cannot infer that what Hoffman intended by his affidavit is that there were no exceedences of TACO remediation objectives in the immediate vicinity of the ineligible tanks. More importantly, even if that is Hoffman's opinion, the Board would find it unpersuasive given the lack of supporting analytical evidence, as discussed below.

The Pletz affidavit comes closer to actually saying that there were no TACO exceedences in the soil surrounding the ineligible tanks. He opines that the "soil surrounding the Ineligible

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[22] As noted, the Agency concedes that in apportioning costs to ineligible tanks, it made a calculation error in its December 2002 determination. Based on this admitted error, the parties represent in their pleadings that the Agency subsequently made an allocation adjustment, attributing $35,333.25 to the ineligible tanks instead of the original $81,954.58 (*i.e.*, approving 80.95% of eligible costs rather than 55.814%). Of course, it is Freedom Oil's position, with which the Board agrees, that there should have been no apportionment at all for the costs requested in reimbursement application 1.

Tank cavity did not show signs" of contamination "requiring remediation under the TACO standards." Pletz bases this opinion, however, on the "appearance and odor" of the soil being similar to other soils to the north that met TACO standards. It was Freedom Oil itself, in trying to discount the OSFM's field observations, that argued Illinois "abandoned the color and odor test to mandate corrective action years ago in favor of analytical evidence." The difference is that unlike Pletz, the OSFM field inspector was not attempting to ascertain whether TACO levels were exceeded.

Pletz also refers to "PID readings of soil surrounding the Ineligible Tank cavity" as being similar to PID readings from northern soil borings and trenches. A PID is a soil-screening instrument used in the field to detect aromatic hydrocarbons or vapors. It provides only an initial indication of potential petroleum contamination. Neither visual and olfactory observations nor PID readings are determinative of whether soil meets TACO standards. Only *laboratory* testing of soil samples can reveal whether soil meets TACO remediation objectives. *See* 35 Ill. Adm. Code 732, 742.

Under these circumstances, the absence of counter-affidavits is not fatal to the Agency. The Agency need not provide an expert to opine that costs *were* incurred on ineligible tank releases. The Board reiterates that the burden of proof is *not* on the Agency. The shortcomings of Freedom Oil's sampling, as pointed out in the Agency's pleadings, are plainly evident in the record.

The Board finds that even if it were to accept the material facts of the Hoffman and Pletz affidavits as true, neither states that no costs were incurred on releases from ineligible tanks. The facts supplied by Freedom Oil, even though not contradicted by an Agency affidavit, do not entitle Freedom Oil to summary judgment as a matter of law. Freedom Oil has failed to prove that its allegation demonstrates that it incurred no costs removing any soil impacted by the ineligible tanks.

Hoffman bases his opinion in part on his conclusion that "[n]o analytical evidence supports a conclusion that releases from the Ineligible Tanks caused contamination requiring remediation under the TACO standards." This statement rings especially hollow when it was Freedom Oil that failed to gather that analytical evidence. Freedom Oil cannot fail to collect evidence and then cite to its absence to prevail. The facts admitted by Hoffman, that Freedom Oil took no samples to verify whether ineligible tanks were contributory, are apparent from the record even without the admission. On this record, Freedom Oil took only post-excavation samples in the general vicinity of the ineligible tanks. These samples were taken only to confirm that no further cleanup was needed under the court order. Not surprisingly, the test results met TACO standards. The soils nearest the ineligible tanks, where resulting contamination would be expected, were not tested.

To rule on the counter-motions for summary judgment, the Board does not have to determine whether there were migration pathways to the north or whether aspects of the cleanup performed under the Agency OER's supervision were excessive. Nor is any OSFM decision under review here by the Board. The Board's focus, in ruling on the propriety of the Agency's cost apportionment, is on the ineligible tanks and whether Freedom Oil met its burden of proof.

Freedom Oil does not dispute that it took no pre-excavation samples in the immediate vicinity of the ineligible tanks. The record shows that Freedom Oil advanced no soil borings near Tanks 7-10 or Tank 11. Specifically, the closest borings (B-02-1 and MW-02-4) were roughly 30 to 50 feet away, and they were to the north or upgradient of the ineligible tank cavities. No borings were taken between the ineligible cavities and the eligible cavity. Borings showing the most elevated levels of petroleum constituents were to south and west, downgradient of both the ineligible and eligible tank cavities.

Freedom Oil does not assert that any of the grab samples collected were taken from the soils that immediately surrounded the ineligible tanks. Instead, what the record contains are post-excavation grab samples in the general areas of where the ineligible tanks had been (grab samples 50-55, 57-60, 70, 72). These samples were laboratory-tested for BTEX. One sample location (sample 57) appears to have been collected quite near the former location of the Tank 7-10 cavity. Other sample locations appear to range from 10 to 35 feet away from where the ineligible tanks had been. All of these grab samples, however, were closure samples, taken to show TACO levels had been achieved and thus that no further remedial excavation was warranted. Because these samples were taken *after* the excavation, the results showing TACO levels had been met simply do not persuade the Board that any ineligible tank releases did not contribute to actual cleanup costs.

The Board finds, as Freedom Oil urges, that Freedom Oil need not show an absence of *any* contamination from the ineligible tanks. The court's injunction required closure samples to be tested for petroleum constituents and compared to TACO standards:

> During the course of or at completion of excavation, representative samples shall be collected from the sidewalls of the excavation every 20 linear feet at mid-depth and from every 400 square feet of the excavation floor and analyzed for BTEX, PNAs, MTBE, and TCLP Lead with the results evaluated to determine if they exceed the Illinois EPA Tier I Remediation Objectives under 35 Ill. Adm. Code Part 742 and to identify what further work will be required. Exh. 10 at 568.

Accordingly, Freedom Oil was remediating to TACO levels under the court order. TACO remediation objectives are therefore a logical yardstick for determining whether cleanup costs were incurred on releases from the ineligible tanks.[23] The problem with Freedom Oil's evidence is not that it fails to be perfect. Far from it. The Board underscores that the problem is that Freedom Oil's evidence does not prove that it is more probably true than not that no cleanup costs in reimbursement applications 2 and 3 were actually incurred cleaning up releases from the ineligible tanks.

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[23] The cleanup of certain heating oil or pre-'74 tanks under the Part 732 LUST Program, by OSFM corrective action order or election, or under the Part 740 Site Remediation Program, would be subject to Part 742 TACO remediation objectives. *See* 35 Ill. Adm. Code 742.105(b)(1), (2).

The Board's decision in Martin Oil predates Section 57.8(m), but it is nevertheless instructive. There the Board stated:

> Where active UST systems are operated near closed tanks or in multi-tank systems it can be difficult to accurately determine which tanks caused the contamination or what degree of contamination is related to each leaking tank. Where registered and unregistered tanks are located at a common site it may be necessary to apportion the costs of corrective action accordingly. Martin Oil, PCB 92-53.

Such is the case here. In Martin Oil, the petitioner was unable to determine the source of the leak as "[t]he abandoned tanks contained holes as did the tanks in use." *Id.* Freedom Oil has likewise failed to demonstrate that all of the costs were "associated with leakage *exclusively* from a registered tank." *Id.* (emphasis added).

According to Freedom Oil, "[h]ad no ineligible tanks ever been found, there would be no doubt that each action and resulting cost would have occurred." FO MSJ Resp. at 19. Freedom Oil makes this claim for the first time in its response to the Agency's counter-motion for summary judgment. Freedom Oil does so without citing to the record for evidentiary support, even though the Agency had filed the record before Freedom Oil filed its response. Moreover, in the absence of soil sampling in the immediate vicinity of the ineligible tanks, Freedom Oil's claim is dubious.

Similarly, in a footnote of its response, Freedom Oil asserts that the Agency "prevented" it from conducting sampling around the ineligible tanks that would have been dispositive of the nature of any contamination from those tanks. FO MSJ Resp. at 14, n. 2. This claim too is unsupported by citation to the record. That Freedom Oil was under a court-ordered deadline to complete the excavation was not the Agency's fault. In fact, when Tanks 7-10 were discovered on October 2, 2002, the original October 1, 2002 court-ordered deadline for completing excavation had already passed. The excavation was actually not finished for a couple more weeks. Nowhere does Freedom Oil substantiate that, under these circumstances, it could not have taken samples of soils immediately surrounding Tanks 7-11 for laboratory testing.

The court order did not address UST Fund reimbursement, let alone the as-yet-undiscovered ineligible tanks. Preserving evidence and records to support maximum reimbursement for the site work was no one's responsibility but Freedom Oil's. Even if Freedom Oil lacked the opportunity to mobilize a drill rig for soil borings around the ineligible tanks, direct-push technology allows for relatively fast pre-excavation sampling. Alternatively, Freedom Oil at least could have collected grab samples in greater number and closer to the ineligible tanks upon their removal.

The Board recognizes that there almost certainly are reimbursable costs in Freedom Oil's applications 2 and 3 that were incurred to address conditions resulting solely from the eligible tanks and that were reduced by cost apportionment. For example, when the tank liner failure release was reported in early August 2002, Freedom Oil responded to vapors in residences and in the sewer, dug a trench to intercept gasoline, and began free product removal.

Tank monitoring equipment indicated that over 1,000 gallons of gasoline was released into the environment. With appropriate segregation of such costs by a UST owner or operator, which is not apparent in applications 2 and 3, apportionment might have been properly limited. It is not the Agency's duty, however, and surely not the Board's, to ferret through reimbursement applications in an effort to arrive at such an accounting.

"Facts," to quote John Adams, "are stubborn things." *Argument in Defense of the Soldiers in the Boston Massacre Trials* (Dec. 1770). The salient facts of this case are: there were five ineligible USTs in the middle of Freedom Oil's site; they totaled 4,500 gallons in capacity; each one had experienced a release; Freedom Oil's site excavation included the areas of the ineligible tank cavities; and Freedom Oil took only post-excavation samples, failing to test the soil immediately surrounding the ineligible tanks. There are no disputed issues of material fact here.

The Board finds that Freedom Oil has not demonstrated by a preponderance of the evidence that none of the cleanup costs incurred were attributable to the ineligible tanks. In other words, Freedom Oil has not shown that it is more probably true than not that all costs incurred were attributable solely to the eligible tanks. Accordingly, the Board finds that the Agency is entitled to judgment as a matter of law. The Agency was right to apportion the costs of reimbursement applications 2 and 3. The Agency's determinations of March 19, 2003 and May 28, 2003, concerning cost apportionment are therefore affirmed.

Miscellaneous Cost Deductions

Freedom Oil's Motion for Summary Judgment

Freedom Oil moves for summary judgment on miscellaneous denied costs totaling $17,518.76. This dollar amount represents $201.01 denied as not related to early action, $16,987.03 denied as excessive handling charges, and $330.72 denied as unreasonable cell phone rental charges. FO MSJ at 29-31.

Early Action. Specifically, $27.76 for the dye to trace the sewer was denied in the December 18, 2002 Agency determination as not related to early action activities. Freedom Oil asserts:

> MACTEC completed dye tracer testing of [the] 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. FO MSJ at 29-30.

$140.00 for publication of newspaper notice of the smoke testing of the sewer was also denied in the Agency's December 2002 determination as unrelated to early action. Freedom Oil argues the Agency OER ordered that notice be published in the Paris Beacon "so residents would not be alarmed by the testing." FO MSJ at 30. Freedom Oil adds that the City of Paris also required the notice before it would grant permission for MACTEC to perform the test.

Additionally, according to Freedom Oil, smoke testing, like the dye tracer testing, was ordered by the Agency OER to determine if there was a sewer connection between the service station and sewers in the area. *Id*. Freedom Oil insists that the newspaper publication fees are within early action and should be reimbursed. *Id*.

In its May 28, 2003 determination, the Agency denied $33.25 in VHS copies of MACTEC's sewer investigation as not related to early action activities. Freedom Oil responds that the Agency OER ordered the videotaping of the sewer. In addition, Freedom Oil states that both the AGO and the Agency OER specifically requested copies of the resulting video. Freedom Oil maintains that it is entitled to be reimbursed for the VHS copies of the sewer investigation because they are related to early action. FO MSJ at 30.

Handling Charges. The Agency denied $24,638.82 for handling charges in its March 19, 2003 determination because, according to the Agency, the charges exceeded the handling charge limits set forth in Section 57.8(f) of the Act and 35 Ill. Adm. Code 732.607. Freedom Oil argues that handling charges are specifically permitted under the Board regulations within specified limits. FO MSJ at 30. Consistent with the caps set forth in those regulations, according to Freedom Oil, it is entitled to an additional $16,987.03 in handling charges. *Id*.; Exh. 19.

Cell Phone Rental Charges. In its March 19, 2003 determination, the Agency denied $226.76 in cell phone rental charges for October 28, 2002 to November 27, 2002, and $103.96 in cell phone rental charges for September 28, 2002 to October 27, 2002. In each instance, the Agency indicates that staff was at the site for only part of these respective billing periods. To arrive at these deductions, the Agency prorated the rental charges based on how many days staff was on-site. Freedom Oil claims that its time sheets "verify[] ESE staff were on Site for these time periods submitted to IEPA." FO MSJ at 31.

Agency's Response to Freedom Oil

The Agency did not counter-move for summary judgment on any of the miscellaneous deductions challenged by Freedom Oil. In response to Freedom Oil's motion for summary judgment, the Agency simply states that the miscellaneous costs "are contested from a factual standpoint and therefore are not suitable for resolution via a motion for summary judgment." Ag. MSJ at 19, n. 8.

Board Analysis and Ruling on Miscellaneous Costs

Responding to Freedom Oil's motion for summary judgment on miscellaneous costs, the Agency makes a cursory reference in a footnote that there are contested facts. The Agency does not state what these contested facts are. The Agency's naked assertion therefore does not itself raise any genuine issues of material fact that would preclude a grant of summary judgment for Freedom Oil on the miscellaneous costs. *See* Gauthier, 266 Ill. App. 3d at 219, 639 N.E.2d at 999; *see also* O'Brien Co. v. Highland Lake Construction Co., 9 Ill. App. 3d 408, 412, 292 N.E.2d 205, 208 (1st Dist. 1972) ("Mere denials of fact in pleadings, however, do not create a genuine issue which will preclude the entry of summary judgment."). For the reasons below,

however, the Board cannot find that summary judgment is appropriate for any of the challenged miscellaneous costs.

First, for the items denied as not related to early action, the pending consolidated appeal docketed as PCB 05-56 presents the issue of the applicable early action period. There, Freedom Oil appeals the Agency's decision not to extend the early action period as requested. To avoid potentially pre-judging issues in that appeal or rendering a ruling now that could later prove incongruous, the Board declines to rule on summary judgment for these alleged early action costs.

As to handling charges, the Board cannot glean from Freedom Oil's Exhibit 19 precisely how Freedom Oil claims the Agency erred in applying Section 732.607 on eligible handling charge limits for subcontracting and field purchase costs. Therefore, even if there were no genuine issues of material fact, the Board cannot find that Freedom Oil is entitled to judgment as a matter of law.

For the challenged cell phone rental charges, Freedom Oil claims that it "[a]ttached" to the motion for summary judgment "time sheets" verifying that Harding ESE staff were on-site during the time periods in question. FO MSJ at 31. No such time sheets were attached, however. Without them, the Board cannot determine whether the time sheets may be impermissible new matters outside of the administrative record (*see* Alton Packaging, 162 Ill. App. 3d at 738, 516 N.E.2d at 280; 35 Ill. Adm. Code 105.412), let alone find that there are no genuine issues of material fact. The Board accordingly denies Freedom Oil's motion for summary judgment on these charges.

CONCLUSION

In three separate determinations, the Agency applied Section 57.8(m) of the Act to apportion cleanup costs between eligible and ineligible USTs at Freedom Oil's Paris service station. In doing so, the Agency denied UST Fund reimbursement by allocating costs to ineligible tanks. Regarding cost apportionment, the Board finds that there are no genuine issues of material fact on the record and that the parties are entitled to judgment as a matter of law.

The Board finds that Freedom Oil proved that the costs documented in its first reimbursement application were in response solely to releases from tanks that were eligible for UST Fund reimbursement. Accordingly, the Agency's first determination, appealed in PCB 03-105, erroneously apportioned $35,333.25 of the cleanup costs to ineligible tanks at the site. The Board therefore grants Freedom Oil's motion for summary judgment in part and denies the Agency's counter-motion for summary judgment in part.

The Board finds, however, that Freedom Oil failed to meet its burden of proof to avoid apportionment of the costs in its second and third reimbursement applications. The Board affirms the Agency's second determination concerning cost apportionment, appealed in PCB 03-179, which apportioned $143,123.59 to ineligible tanks. The Board also affirms the Agency's third determination concerning cost apportionment, appealed in PCB 04-2, which apportioned

$22,189 to ineligible tanks. The Board therefore denies Freedom Oil's motion for summary judgment in part and grants the Agency's counter-motion for summary judgment in part.

As for the other contested miscellaneous costs, which total $17,518.76 and which are appealed in dockets PCB 03-105, 03-179, and 04-2, the Board denies Freedom Oil's motion for summary judgment for the reasons provided above. In addition, the Board denies Freedom Oil's motion for default judgment or, in the alternative, to bar the Agency from introducing evidence. The Board also denies the Agency's motion to strike the affidavits of Freedom Oil's experts.

With numerous issues still pending and an absence of relevant documentation, the Board will not at this time address the issue of "legal fees," which Freedom Oil requests in its petitions for review should it prevail. *See* 415 ILCS 5/57.8(l) (2004); *see also* Swif-T-Food Mart v. IEPA, PCB 03-185 (Aug. 19, 2004); Illinois Ayers Co. v. IEPA, PCB 03-214 (Aug. 5, 2004). The Board directs the parties to proceed expeditiously to hearing on the remaining issues in these consolidated appeals.

SUMMARY OF RULINGS

1. The Board denies Freedom Oil's motion for default judgment or, alternatively, to bar Agency evidence.

2. The Board denies the Agency's motion to strike Exhibit 17 of, and references to that exhibit in, Freedom Oil's motion for summary judgment.

3. The Board grants Freedom Oil's motion for summary judgment in part and denies it in part as follows:

   A. The Board grants Freedom Oil's motion for summary judgment on cost apportionment regarding the Agency's December 18, 2002 determination, appealed in docket PCB 03-105.

   B. The Board denies Freedom Oil's motion for summary judgment on cost apportionment regarding the Agency's determinations of March 18 and May 28, 2003, appealed in dockets PCB 03-179 and 04-2, respectively.

   C. The Board denies Freedom Oil's motion for summary judgment on miscellaneous cost deductions set forth in the Agency's determinations of December 18, 2002, March 18 2003, and May 28, 2003, appealed in dockets PCB 03-105, 03-179, and 04-2, respectively.

4. The Board grants the Agency's counter-motion for summary judgment in part and denies it in part as follows:

   A. The Board grants the Agency's counter-motion for summary judgment on cost apportionment regarding the Agency's March 18 and May 28, 2003 determinations, appealed in dockets PCB 03-179 and 04-2, respectively.

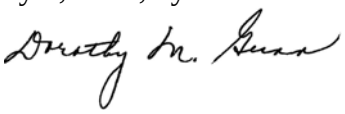
   B. The Board denies the Agency's counter-motion for summary judgment on cost apportionment regarding the Agency's determination of December 18, 2002, appealed in docket PCB 03-105.

5. The Board directs the parties to proceed expeditiously to hearing on the remaining issues in the consolidated appeals PCB 03-54, 03-56, 03-105, 03-179, and 04-2.

IT IS SO ORDERED.

Board Member T.E. Johnson concurred.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on February 2, 2006, by a vote of 4-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board