BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

PRIME LOCATION PROPERTIES, LLC, Petitioner,	)	
v.	)	PCB 09-67
	)	(LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

NOTICE OF FILING AND PROOF OF SERVICE

To: John T. Therriault, Acting Clerk
Illinois Pollution Control Board
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PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board, pursuant to Board Procedural Rule 101.302 (d), a PETITIONER'S BRIEF, a copy of which is herewith served upon the hearing officer and upon the attorneys of record in this cause.

The undersigned hereby certifies that a true and correct copy of this Notice of Filing, together with a copy of the document described above, were today served upon the hearing officer and counsel of record of all parties to this cause by enclosing same in envelopes addressed to such attorneys and to said hearing officer with postage fully prepaid, and by depositing said envelopes in a U.S. Post Office Mailbox in Springfield, Illinois on the 29th day of June, 2009 and to counsel of record via email.

Respectfully submitted,
PRIME LOCATION PROPERTIES, LLC, Petitioner

BY: MOHAN, ALEWELT, PRILLAMAN & ADAMI

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PETITIONER'S BRIEF

NOW COMES Petitioner, Prime Location Properties, LLC, by its undersigned counsel, and for its brief, states as follows:

I. INTRODUCTION

The Agency has denied the subject corrective action plan and budget solely based upon its unsupported finding that the work entails a new release reported in 2006, and not a re-reporting of a 2001 release that has been and continues to be the subject of remediation efforts at the site. Since the Agency's record shows,[1] and the Agency has previously found, that product had been removed from the tanks in 2001, the Agency's finding is factually erroneous. The Agency's decision is also not supported by the Board's regulations and is contrary to the Board's decision in Swif-T-Food Mart v. IEPA, PCB 03-185 (May 0, 2004). Since the Agency's decision is erroneous as a matter of fact and law, it's denial should be overruled.

[1] All citations herein are to the Agency's record admitted at the hearing. A list of the documents in the record are attached hereto, and the citations are to these documents. For example, document 1 in the record is cited as (R.1)

II. STATEMENT OF FACTS

A. Release and Site Investigation.

On August 1, 2001, a release from the underground storage tanks at the subject site was reported and assigned incident number 2001-1314. (R.2) In addition to filing the twenty day report (R.3) and forty-five day report (R.4), the owner applied for permission from the Office of the State Fire Marshall to remove all seven of the USTs from the site on August 21, 2001. (R.4) The permit to remove the tanks indicated that none of the tanks had been used since May 17, 1987. (R.4) The consultant visited the property on August 13, 2001 and reported that based upon a visual inspection and petroleum odors, a release had occurred, the extent and nature of which was still unknown. (R.4)

A subsequent visit to the site revealed problems with the location of some of the tanks:

> **[Consultants] were at the site on Wednesday, October 24, 2001, to uncover the tanks in preparation for their removal the following day. Upon the unveiling of the tanks it was determined that removal of them would jeopardize the integrity of the building, because one tank was close to the foundation while another was almost completely under the foundation. The foundation was in poor condition further jeopardizing safety of removal activities. Additionally, the other tanks were inaccessible due to the location of a low canopy. Tanks were also positioned next to footings for the canopy and pump island structure. The tanks could not be removed at this time to ensure the integrity of the property building and the connected business. The position of one fill cap indicated that the tanks location could be in the right-of-way, the removal of this tank would have to be coordinated with the city. While the tanks were uncovered odor and discoloration were present, which provided evidence a release had occurred.**

(R.5)

The consultant cancelled the tank pull that had been scheduled for October 25, 2001, and began the process of preparing a site classification work plan to determine the severity of contamination at the site. (R.6) On February 4, 2002, OSFM issued a determination that the

owner was eligible to seek payment of costs in excess of $15,000 for all seven tanks. (R.6)

A site investigation plan was ultimately approved and performed, after which the consultants reported that the site should be classified as high priority because contamination had migrated to the boundary of the site. (R.12) The Agency accepted the site classification. (R.15) However, because site obstacles prevented the consultant from advancing some of the planned boring and monitoring wells, the Agency approval was conditioned on additional investigation and testing activities being conducted as a part of corrective action. (R.15)

B. Site Investigation Corrective Action

The consultants proposed the first corrective action plan in August of 2002. (R.16) The plan reiterated that all product had been removed from the USTs after the incident had been reported, and that the previous attempt to remove the USTs had been blocked by the presence of structures at the site. (R.16) The Consultant proposed removing all of the tanks, the contaminated backfill surrounding the tanks, and if necessary, "the building, canopy, and possibly underground retaining walls will be required." (R.16)

The first corrective action plan was partly rejected on October 22, 2002 because the Agency concluded that removing "the USTs, contaminated backfill, the building, canopy, and underground retaining walls . . . are not required for corrective action at this time." (R.18) Instead, the Agency required "further investigation to determine which, if any, of the USTs had a release" and "[a]fter further investigation has been performed and the full extent defined, some or all of the above activities may be approved." (R.18)

On May 14, 2003, the consultants performed part of the high priority site investigation

corrective action plan approved by the Agency. (R. 19) Specifically, the consultant sampled as near as possible to the USTs and pump island locations. (R.19) However, site obstacles obstructed the investigation required by the Agency, so on July 30, 2003, the consultant filed a Phase I Corrective Action Plan, which sought to remove the USTs and site obstacles, and perform the investigation activities that would permit definition of the plume of contamination. (R.19) Upon removing the building and underground storage tanks, sampling would be performed and if the soil surrounding the tanks were found to be uncontaminated, corrective action would be deemed complete. (R.19)

On October 3, 2003, the Agency denied the Phase I Corrective Action Plan to the extent it planned to remove site obstacles in order to define the extent of contamination. (R.22) The reason given was that "[t]he full extent of soil and groundwater contamination has not been defined to date," and thus "the removal of the USTs, contaminated backfill, the building, canopy, and underground retaining walls . . . are not required for corrective action at this time." (R.22) Furthermore, the budget for disposing of liquid in the tanks was rejected by the Agency because "as much of the regulated substance as possible had been removed so . . . not much, if any, liquid should remain in the USTs." (R. 22)

The consultant then proceeded to gain access to adjoining properties as apparently "the only way to define the plume." (R.23) Even this approach was complicated by the lack of room to conduct testing on one of the properties to the West. (R. 23) Based upon this additional testing, the consultant defined the plume of contamination, but reported that it was "impossible" to identify which tanks had experienced a release without removing the tanks. (R.23) The consultant proposed doing so under the observation of the on-site OSFM representative, who

would determine which tanks had had a release. (R. 23) Access to the tanks would still require removal of the building and canopy. (R. 23)

The Agency rejected any cleanup activities beyond the area of two of the seven tanks. (R. 24) These are the tanks closest to the property line where contamination had flowed. (R.23) While the consultant indicated that it was impossible to determine which tanks had had a release from the information gathered to date, the Agency reviewer's notes indicate that he had determined that "[f]rom the information submitted to date only UST #2 & #3 have shown evidence of a possible release. Only the plume around soil borings Bay-2 & MW-6 will be reimbursable under this incident." (R.1)

C. Corrective Action

In response to the Agency's restrictions on performing corrective action at this time, the consultant submitted a plan and budget: "While we disagree with the Agency's contention that only USTs #2 & #3 have shown evidence of a possible release, in order to move the site forward, the budget has been modified so that nothing beyond the proposed excavation and removal of USTS #2 & #3 is included in this budget. Furthermore, if other USTs are found to have released while on-site, they will be appropriately addressed." (R.25) This plan was approved by the Agency on February 24, 2006. (R.27)

In 2006, the ownership of the property changed and the new owner, Prime Location Properties, LLC, notified the Agency. (R.28) The Agency accepted the notice, informing Prime Location that it is now responsible to finish the clean-up of the property, but it may be eligible for reimbursement from the LUST Fund, if OSFM determines that it is eligible. (R.29) Prime

Location submitted an amended budget for the approved corrective action plan on July 18, 2006, with a letter from OSFM, indicating that Prime Location was eligible for reimbursement from the fund for costs associated with cleaning up releases from all seven tanks. (R.30)

In December of 2006, corrective action activities were performed at the site, and in the presence of a representative of the OSFM, all seven tanks were removed. "The OSFM official on-site during tank removal activities confirmed that all seven (7) tanks on-site had releases. As a result, Incident No. 20061558 was issued on December 13, 2006 and was noted as being a re-reporting of the 20011314 incident." (R.36) The IEMA Hazmat Report received by the Agency indicated that holes in the tanks at the site had caused a release, but that the release had been discovered "8/15/01 9:00 AM." (R.34)

As a result of the confirmation of releases from all seven of the tanks and additional soil samples taken in the vicinity of the removed tanks, the consultant's licensed professional engineers at Environmental Management, Inc., proposed the corrective action plan that is the subject of this Board appeal:

> **EMI is enclosing a Corrective Action Investigation Plan and Budget to delineate the contamination on the east side of the property in the vicinity of the other five tanks. Earlier site investigation activities conducted did not properly define the soil contamination at this facility. Confirmation samples collected during the corrective action excavation activities are also included. Confirmation sampling was also conducted during tank removal activities on the east side of the property. Based on these confirmation samples, it is evident that the other tanks on-site were in fact responsible for contributing to the release initially reported.**

(R.36)

The Agency review notes conclude to the contrary that this is "NOT a re-reporting of Incident #200111314. There was not any evidence of contamination in this area until the USTs were removed 3 years later. There will have [to be] a new deductible. It was also a planned tank

pull." (R. 37) The Agency denial letter states that

> **During the investigation activities associated with Incident #20011314 soil and groundwater contamination were not identified in the vicinity of USTs #3 through #7. However, three years later during the removal of these USTs, soil contamination was identified in these areas. Therefore, Incident #20061558 is a new release and is not considered a re-reporting of Incident #20011314.**

(R.38)

As a result of finding that there has been a new release, which is not a re-reporting of the 2001 release, the Agency denial letter further requires 20-day and 45-day reporting requirements be fulfilled, a site investigation plan, and early action reports. (R. 38) The budget was denied solely for the reason that the plan was being denied. (R.38) In summary, the Agency's denial of corrective action is based solely upon a finding that the corrective action is not for the 2001 release.

III. ARGUMENT

A. BURDEN OF PROOF AND SCOPE OF REVIEW

The burden of proof is on the petitioner in these proceedings to show that the application would not violate the Act or Board regulations. "The standard of review under Section 40 of the Act is whether the application, as submitted to the Agency, would not violate the Act and Board regulations." Swif-T-Food Mart v. IEPA, PCB 03-185 (May 0, 2004). This standard reflects the principle that the Agency does not dictate means and methods of remediating contamination; it is the obligation of the owner to retain a licensed professional engineer to design and certify the plans. Furthermore, the Agency's denial letter frames the issues on appeal. Id. The letter should contain "an explanation of the Sections of this Act [and regulations promulgated thereunder]

which may be violated if the plans were approved" and "a statement of specific reasons why the Act and the regulations might not be met if the plan were approved." (415 ILCS 5/57.7(c)(4)(D))

B. THE 2006 INCIDENT WAS A RE-REPORTING OF THE 2001 INCIDENT.

The Agency record indicates that all seven tanks were taken out of service prior to 2001. (R.4) When a release was reported in 2001 from the seven tanks, the consultant removed as much free product from the tanks as possible. (R.4) Indeed, the Agency rejected a budget item in 2003 for costs to remove remaining free product in the tanks because there was no longer any product in the tanks. (R.22)[2] There is simply no evidence in the record to support the Agency's finding that there was an additional release from tanks that had clearly been abandoned prior to 2001 and drained in 2001.

The only thing that happened at the site since 2001 is that the Agency has been taking its customary role of protecting the LUST fund by precluding the type of activities that would be mandated by any other division of the Agency. The presence of tanks next to crumbling building foundations and under canopies caused the Agency to be concerned that the LUST fund would have to pay demolition costs. Consequently, the Agency directed site investigation activities in hopes of ruling out the need for site demolition. (R.15; R.18) However, the investigation directed by the Agency was not completed because site obstacles precluded making soil borings in locations near the tanks. (R.15; R.19) Despite repeated requests for approval to remove site

[2] The consultant explained that although "[t]he tanks were inspected to ensure as much substance as possible had been removed . . ., these are tanks that have leaked contamination into the environment and if regulated substance can get out, water can get in through the same pathways, and may need to be disposed of at the time of removal." (R.23)

obstacles, the Agency imposed a classic Catch-22 on the project:

1. Removal of site obstacles is necessary to investigate the extent of contamination;

2. Site obstacles cannot be removed without first investigating the extent of contamination.

Despite the Agency's efforts to try and rule out a release from the tanks that might trigger expensive demolition costs, it was "impossible" to identify which tanks had experienced a release without removing the tanks. (R.23) Those tanks were removed in 2006 in the presence of a representative from OSFM, and unsurprisingly, holes were found in the tanks and the incident was reported as a re-release of the 2001 incident. (R.34; R.36)

There is simply no evidence to support the Agency's finding that the 2006 incident number was anything but further confirmation that all of the tanks had experienced a release by 2001. Re-reportings of releases are not uncommon. In Swif-T-Food Mart v. IEPA, PCB 03-185 (May 0, 2004), the Board found that the Agency had erred in disputing the petitioner's contention that a 1996 release was merely a re-reporting of an incident reported in a previous year. In Mick's Garage v. IEPA, PCB 03-126 (Dec. 18, 2003), the Agency successfully argued that a re-reporting of a previous release had occurred at the time the tanks were removed in response to an earlier reporting. Such multiple reportings promote the Act's purpose of making sure the site is fully cleaned-up and no evidence is ignored; it is certainly not intended to promote multiple, bureaucratic parceling of the cleanup process into multitudes of parallel clean-up tracts.

C. THE LEGAL BASIS OF THE AGENCY'S INTERPRETATION OF THE ACT AND REGULATIONS HAS BEEN REJECTED BY THE BOARD.

Even if Petitioner were to assume for the sake of argument that there were multiple incidents at the site, this is not relevant under the Act or the Board's regulations. Frustratingly, this is an issue the Board has already decided over the Agency's continual disagreement.

In Mac Investments v. OSFM, PCB No. 01-129 (Dec. 19, 2002), a building had to be demolished to remove five underground storage tanks on the site. After their removal and further corrective action, a sixth tank was discovered and removed. OSFM argued, as here, that the sixth tank gave rise to a separate incident, subject to an additional deductible. The Board disagreed, finding that the number of occurrences at a site is irrelevant under the Act, which is concerned about cleaning up "the site." "In terms of corrective action, the Board does not see how the sixth tank is any different than the first five tanks."

The Agency tried to challenge this ruling in Swif-T-Food Mart, PCB No. 03-185 (May 20, 2004), but the Board held that the Agency's arguments had not persuaded the Board to alter its previous decision that deductibles are assessed per site, not per occurrence.

Therefore, even if we assume *arguendo*, that there were multiple occurrences at the site, this is legally irrelevant. As stated earlier, the Agency can deny a plan only if it articulates how the Act or its regulations would be violated. None of the provisions cited in the Agency's denial letter contain anything more than general provisions concerning the LUST program, and none contradict the Board's prior decisions.

D. THE AGENCY'S DECISION IS BAD POLICY.

The LUST program should be interpreted in a manner which furthers the purposes of the Act, which are foremost the "protection of Illinois' land and water resources." (415 ILCS 5/57) The Agency's decision is bad for the environment because it will infuse more delays as the owner/operator is required begin the process anew. The Agency's decision is bad for the LUST Fund, as it will give rise to redundant costs, which may not even be offset by charging an additional deductible it seeks to assess the owner. Better for the environment would be to continue investigation of the extent of contamination as part of a second phase of investigative corrective action.

E. IN THE ALTERNATIVE, JUDGMENT SHOULD BE ENTERED DUE TO THE AGENCY'S FAILURE TO FILE THE RECORD ON TIME.

On May 7, 2009, the Board accepted the Amended Petition for Hearing in this matter, and directed the Respondent to file the entire record of its determination by May 20, 2009. The Agency failed to file the administrative record by May 20, 2009, nor did it request an extension of time before that date. (35 Ill. Admin. Code §105.116) The Board's procedural rules state the Respondent's failure to timely file the administrative record is subject to sanctions. (35 Ill. Admin. Code §105.118) The Board has previously indicated that at two types of sanctions are specifically applicable to the issue of late filed Agency records: the Agency be barred from filing any other pleading or document in this matter or immediately award the Petitioner the result it seeks. E & L Trucking Co. v. IEPA, PCB No. 02-83 (April 18, 2002).

F. PETITIONER RESERVES ITS RIGHT TO SEEK ATTORNEY'S FEES.

Pursuant to Section 57.8(l) of the Act, the Board is authorized to award legal fees if the owner or operator prevails before the Board. (415 ILCS 5/57.8(l)) Past practice has been to reserve this issue for post-judgment filings, and accordingly Petitioner expressly reserves the issue as well.

WHEREFORE, Petitioner prays for an order reversing the Agency's decision, denying the subject corrective action plan and budget, and for such other and further relief as the Board deems meet and just.

Respectfully submitted,

PRIME LOCATION PROPERTIES, LLC,
Petitioner,

BY: MOHAN, ALEWELT, PRILLAMAN & ADAMI, its attorneys

BY: /s/ Patrick D. Shaw
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RECORD EXHIBITS

1. LUST Technical Review Notes (11/21/05)
2. Incident Report (8/1/01)
3. Early Action Extension Request Approval (9/6/01)
4. 45 Day Report (9/13/01)
5. 45 Day Report Addendum (12/3/01)
6. Site Classification Work Plan and Budget (2/18/02)
7. LUST Technical Review Notes (3/11/02)
8. Agency Modification and Denial of Site Classification Plan (3/21/02)
9. Amended Site Classification Work Plan and Budget (4/19/02)
10. LUST Technical Review Notes (5/15/02)
11. Agency Modification of Amended Site Classification Work Plan and Budget (5/21/02)
12. Site Classification Completion Report (6/21/02)
13. LUST Technical Review Notes (7/9/02)
14. LUST Technical Review Notes (7/23/02)
15. Agency Conditional Approval of Site Classification (8/5/02)
16. Corrective Action Plan and Budget (8/13/02)
17. LUST Technical Review Notes (10/15/02)
18. Agency Modification and Rejection of Corrective Action Plan and Budget (10/22/02)
19. Phase I Corrective Action Plan and Budget (7/30/03)
20. LUST Technical Review Notes (9/24/03)
21. Fax from Consultant to IEPA (9/25/03)
22. Agency Denial of Corrective Action Plan (10/13/03)
23. Corrective Action Plan and Budget (8/22/05)
24. Agency Modification of Corrective Action Plan (11/23/05)
25. Corrective Action Plan and Budget (12/20/05)
26. LUST Technical Review Notes (2/14/06)
27. Agency Approval of Plan and Rejection of Budget (2/24/06)
28. Notice of New Ownership (4/3/06)
29. Agency Acceptance of New Ownership (4/10/06)
30. Corrective Action Plan Budget (7/18/06)
31. LUST Technical Review Notes (9/12/06)
32. Agency Modification of Budget (9/15/06)
33. IEMA Hazmat Report (12/13/06)
34. Agency Acknowledgment of Receipt of Notice of Release (12/18/06)
35. Notice of Failure to File 20 Day/45 Day Reports (2/27/07)
36. Corrective Action Plan and Budget (11/10/08)
37. LUST Technical Review Notes (1/23/09)
38. Agency Denial of Plan and Budget (1/27/09)
39. Owner’s Request for Extension of Appeal Period (2/17/09)