BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

WEEKE OIL COMPANY,	)	
Petitioner,	)	
	)	
v.	)	PCB No. 2010-001
	)	(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), 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 22nd day of February, 2010.

BY: /s/ Patrick D. Shaw

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v.	)	PCB No. 2010-001
	)	(LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

PETITIONER'S BRIEF

NOW COMES Petitioner, WEEKE OIL COMPANY, by its undersigned counsel, and for its brief in this matter, states as follows:

INTRODUCTION

Despite prior approvals of the 45-day report and early action plan and budget given to this leaking underground storage tank incident by the Illinois Environmental Protection Agency (hereinafter "the IEPA" or "the Agency"), the Agency has sought to retroactively reverse itself and remove this incident from the Leaking Underground Storage Tank ("LUST") program. The Agency lacks the statutory authority to reverse itself, and even if such implied authority exists, the Agency failed to provide a pre-reversal contested case hearing as required by the Administrative Procedure Act and the due process clauses of the U.S. and Illinois constitutions. Even then, the Agency was without legal authority to make its reversal retroactive in order to deny reimbursement of early action costs for early action reporting requirements.

Alternatively, if the Board determines that the Agency had authority to issue non-LUST determinations to retroactively reverse its prior approvals, the totality of the evidence that should be considered by the Board demonstrates that a release did occur at the facility and that site investigation of the extent and nature of that release should continue.

STATEMENT OF FACTS

The Weeke Oil facility is located in the city of Nashville, Washington County, Illinois (Rec. at p. 116) From 1998 to 2008, the site was an active service station with three underground storage tanks. (Hrg. Trans. at p. 30) The consultant for Weeke Oil is Applied Environmental, and that company's principal, Bryan Williams, testified at the hearing herein. (Hrg. Trans. at pp. 10-12)

Bryan Williams is a professional geologist, who has worked for most of the past eighteen years in the environmental field, particularly the remediation of leaking underground storage tanks. (Hrg. Trans. at pp. 10-11) Since starting his own business, Applied Environmental has removed over 300 tanks and received 100 No Further Remediation letters. (Hrg. Trans. at p. 11)

During a subsurface investigation of the tank pit performed by Applied Environmental on October 29, 2008, Williams observed "odorous and discolored soil . . . in a boring advanced adjacent to the tank pit." (Rec. at p. 91) The soil was a discolored greenish-gray silty clay. (Rec. at p. 92) Based upon observed "evidence of a release," (Rec. at p. 91), Williams notified the Illinois Emergency Management Agency that a leak or spill of an unknown quantity had occurred from the three tanks: one 4,000 gallon gasoline tank, one 6,000 gallon gasoline tank and one 4,000 gallon diesel tank. (Rec. at p. 81 (IEMA Hazmat Report)).

After the report, the tanks were emptied of product, which was then recycled. Specifically, 350 gallons of gasoline and 150 gallons of diesel fuel were removed from the tanks to prevent any further release into the environment. (Rec. at p. 91) These tanks had been in service until September of 2008. (Rec. at 94).

Applied Environmental then arranged for the removal of the underground storage tanks.

(Hrg. Trans. at p. 14) While co-ordinating these activities, Applied Environmental filed the 45 day report . (Rec. At pp. 83-108 (45 Day Report)) The report summarized the evidence of a release to date and indicated more investigation would occur as to the amount and extent of the release:

> **Following removal of the tanks, soil samples will be collected from the excavation walls, floor, piping and below the dispensers. Applicable indicator contaminants will include BTEX, MTBE, and PNA Compounds. In the event these closure samples exceed the applicable remediation objectives, a Site Investigation will be performed.**

(Rec. at pp. 93-94)

Williams certified that the most stringent Tier 1 remediation objectives have not been met, (Rec. at p. 87) This certification, signed by the owner or operator and licensed professional geologist or engineer, is "intended to meet the requirements for a plan and budget for the Stage 1 site investigation." (Rec. at p. 89)

On December 4, 2008, the OSFM determined that the three tanks were eligible for reimbursement from the LUST fund for costs in response to the recent incident, subject to a $10,000 deductible. (Rec. at p. 44) On December 8, 2008, the three USTs were removed. (Rec. at p. 120) After the material over the tanks was removed, Williams testified that "[t]here was a considerable amount of water in the tank pit, around the tanks, that had a heavy sheen, and it had a layer of fuel on it." (Hrg. Trans. at p. 15) Williams explained the importance of these observations:

> **I've done so many of these, it is obvious when you encounter product on a tank pit, you clean it up. You don't take a sample; you don't wait. So we mixed the water and the fuel with the backfill and clay from the sidewalls and dried up the tank pit and manifested the petroleum-impacted backfill to a special waste landfill for disposal.**

(Hrg. Trans. at pp. 15-16)

A total of 309.30 cubic yards (463.95 tons) of impacted backfill was manifested to the Perry Ridge Landfill as special waste. (Rec. at p. 120) Applied Environmental took pictures of the tank pit. (Hrg. Trans. at p. 20)[1] They also took confirmation samples from the walls of the excavated pit. (Rec. at p. 126)

Present at the tank pull was Don Grammar, a professional engineer, who provides consulting services for Applied Environmental. (Hrg. Trans. at p. 16) Also present was a field representative from the Office of the State Fire Marshall, who told Williams that he would be reporting "significant impaction" on his removal log, but that an additional notification to IEMA would not be required. (Hrg. Trans. at p. 17) A few days later, OSFM recorded the following log on the three tanks pulled at the site:

SECTION D.	**CONTAMINATION INFORMATION**		
1. Appears to have leaked	Yes	Yes	Yes
2. Contamination status	S[ignificant]	S[ignificant]	S[ignificant]
3. Area of contamination	TF; TW; PT	TF; TW; PT	TF; TW; PT
4. Groundwater	Yes	Yes	Yes

[1] Some of these pictures were later attached to the 45-day addendum filed with the Agency. (Rec. at pp. 246-51). Additional pictures were later sent to the Agency after its non-LUST determination. (Ex. 12) The Agency objected to the admission of the additional pictures as they were submitted to the Agency after it had already made its decision. (Hrg. Trans. at p. 37)

contaminated			
5. Water wells in area	Unknown	Unknown	Unknown

(Hrg. Trans. Ex. 11) (TF = Tank Floor; TW = Tanks Walls; PT = Pipe Trench)

The Agency objected to the admission of these logs as they were not provided prior to the Agency's decision. (Hrg. Trans. at p. 19) Bryan Williams testified that he obtained the logs from the Office of the State Fire Marshall by a Freedom of Information Act request after he learned that the Agency contested the notion that there had been a release. (Hrg. Trans. at p. 18)

On the same day the Office of the State Fire Marshall entered its log, the Illinois Environmental Protection Agency approved further site investigation work:

> **Pursuant to your certification, the Stage 1 Site Investigation Plan is approved and must be conducted in accordance with 35 Ill. Adm. Code 734.315. The budget, if applicable, is approved, and costs must not exceed the amounts set forth in 35 Ill. Adm. Code 734.Subpart H, Appendix D, and Appendix E. Please be advised that, if you do not meet the eligibility requirements as determined by the Office of the State Fire Marshal, you may not be entitled to payment from the Underground Storage Tank Fund for costs incurred. You must proceed with the Stage 1 site investigation in accordance with 35 Ill. Adm. Code 734.315.**
>
> **The Illinois EPA has determined that, pursuant to Section 57.7(a) and 57.12(c) and (d) of the Act and 35 Ill. Adm. Code 734.305, a site investigation plan and budget for the subsequent stage of investigation (including the results of the Stage 1 site investigation and a summary of actual costs) or a site investigation completion report (if the extent of contamination is defined) must be submitted within 90 days of the date of this letter. . . .**

(Ex. 10 (Agency letter of Dec. 8, 2008))

As mentioned earlier, the OSFM had already determined that Weeke was entitled to payment from the Fund (Rec. at p. 44), but as will be discussed shortly, the Agency would

retroactively withdraw this document several months later.

After the lab results came back from the samples taken from the excavation, Applied Environmental filed a 45-day addendum report. (Hrg. Trans. at p. 121; Rec. at pp. 111-251) The report provided additional information obtained from the excavation of the tanks, including photographs and analytical results. The report concluded that: "Soil samples collected from the tank pit following early action activities are above TACO Tier I Commercial/Industrial Objectives." (Rec. at p. 126) Specifically, after the free product and impacted soil were removed from the excavation, two samples exceeded the most stringent Tier I objectives for benzene. (Rec. at p. 135) The migration to groundwater objective for benzene is 0.03 mg/kg, and sample number 8 was 0.034 mg/kg for benzene and sample 3 was <0.25 mg/kg for benzene. (Rec. at p. 135)

As with the earlier 45-day report, Applied Environmental certified that the report does not "demonstrate that the most stringent Tier 1 remediation objectives have been met." (Rec. at p. 116) Also, while Applied Environmental had previously indicated in the 45 day report that soil samples would be taken from the piping and under the dispensers at the time of the tank pulls (Rec. at pp. 93-94), Applied Environmental stated that it would now perform confirmation sampling along the piping run and below the dispensers as part of the (then) approved Site Investigation. (Rec. at p. 121)

On February 2, 2009, Applied Environmental submitted its Early Action Bililng Application for work performed for the work done in conjunction with the 20-day report, 45-day report and 45-day addendum. (Rec. at pp. 17, 20) This work involved "[tank removal, cleanup of the tank pit, backfill, trucking, excavation, landfill costs, disposal, sampling and project

oversight." (Hrg. Trans. at p. 24) The amount requested was $50,973.41. (Rec. at p. 23)

Around May 19, 2009, the request for reimbursement of the work conducted for the early action notices led the Agency to reconsider whether this was a LUST incident. (Rec. at p. 13) On May 26, 2009, the Agency issued a "Non-LUST" determination letter for the site:

> **Based on the information currently in the Illinois EPA's possession, this incident is not subject to 35 Ill. Adm. Code 734, 732, or 731; therefore, the Illinois EPA Leaking Underground Storage Tank Program has no reporting requirements regarding this incident.**

(Rec. at p. 78)

Since there are no reporting requirements, these reports were nullities:

- 20 day report, received November 12, 2008, 195 days before Non-LUST determination
- 45 day report, received November 17, 2008, 190 days before Non-LUST determination
- 45 day addendum report, received January 14, 2009, 132 days before Non-LUST determination

Furthermore, the Agency's approval of the stage 1 site investigation, made December 8, 2008, was "reversed" according to Agency testimony given at the hearing, (Hrg. Trans. at p. 74), which was 169 days before the Non-LUST determination. The non-LUST determination was made "as a result of the early action claim." (Hrg. Trans. at p. 82)

The non-LUST determination made May 26, 2009, also marks the end of the agreed record in this proceeding. At the hearing herein, the Agency objected to evidence that Petitioner sought to introduce following the date the Agency made its decision on that date. (Hrg. Trans. at

pp. 19, 37) Petitioner contends that this information is necessary to address the fundamental unfairness and illegality of the Agency's non-LUST determination procedures and practices.

Upon receiving the NON-Lust determination letter, Bryan Williams was surprised and called the Agency project manager, Trent Benanti. (Hrg. Trans. at p. 26) Then Bryan Williams sent Hernando Albarracin, Manger of the LUST section, a letter with additional photographs that had not been sent with the 45-day addendum and stated that there had not been such product discovered during earlier incidents at the site. (Ex. 11) As indicated earlier, Williams also sent a Freedom of Information Act request to the OSFM. (Hrg. Trans. at p. 18)

The week after the NON-Lust determination letter, the Agency denied the application for payment for early action, quoting the main paragraph in the NON-Lust determination letter verbatim. (Rec. at p. 3) Williams never received any response from the Agency as a result of his letter sent after the non-LUST determination. (Hrg. Trans. at pp. 39-40)

ARGUMENT

I. THE AGENCY'S NON-LUST DETERMINATION PRACTICES ARE ILLEGAL FOR RETROACTIVELY REVERSING PRIOR APPROVALS

The Agency's decision herein was premised on retroactively voiding the notices given during early action and reversing its approval of site investigation. Whatever the merits of the Agency's concerns about the site, it's practice violates the Illinois Environmental Protection Act, the Administrative Procedures Act and Constitutional due process.

Section 734.210 of the Board's procedural rules identify "early action" to be taken in response to a release. (35 Ill. Admin. Code § 734.210) These response obligations correspond with reporting requirements:

a) Report of release to IEMA (734.210(a))

b) 20-Day Report to IEPA (734.210(b) & (c))

c) 45-Day Report to IEPA (734.210(d) & (e))

Since early action is conducted without a plan and budget, the application form for seeking payment for early action requires identification of the early action reports. (Rec. at p. 20) Therefore, to find that there are "no reporting requirements regarding this incident," as the Agency did in its non-LUST determination letter, is to find that there was no early action performed and is comparable to finding that there was no budget approved.

Each 45-day report requires the licensed geologist or engineer to certify whether "the report demonstrate[s] that the most stringent Tier 1 remediation objectives have been met." (Rec. at p. 116) This requirement stems from Section 734.210(h)(3) of the Board's regulations which requires that a report "demonstrating compliance" be submitted within 30 days of completing early action activities. (35 Ill. Admin. Code § 734.210(h)(3)) Otherwise, the owner or operator must proceed to site investigation. (35 Ill. Admin. Code § 734.210(h)(4)) Within these parameters it is clear that three situations may exist at the close of early action; (1) the site is in compliance; (2) the site is not in compliance; or (3) there is insufficient information. The regulatory requirement that compliance be demonstrated within the time-frame means that where there is insufficient information to certify compliance, it is the same as not being in compliance.

The Agency's forms utilize the certification of non-compliance as a proposed plan and budget for stage 1 site investigation. That is, the 45 day report which certifies that compliance with the most stringent Tier 1 remediation objectives has not been met is intended to "meet the requirements for a plan and budget for the Stage 1 site investigation required to be submitted

pursuant to 35 Ill. Adm. Code 734.315 and 734.310." (Rec. at p. 118) Here, the Agency approved the first 45 day report and approved the Stage 1 site investigation plan and budget. (Ex. 10) The Stage 1 site investigation would necessarily include sampling around each UST piping run. (35 Ill. Admin. Code § 734.315(a)(1)(B))

As a result of the application for reimbursement of early action costs, (Hrg. Trans. at p. 82), the Agency determined that this was not a LUST incident and issued a No-LUST determination letter finding that there were no reporting requirements associated with this incident. Since the costs of complying with early action reporting requirements are reimbursable under the LUST Fund, (35 Ill. Admin. Code § 734.625(a)(1)), the decision that there were no reporting requirement meant there are no reimbursable costs. What about the Agency's approval of the 45 day report and stage 1 early action plan and budget? It's been reversed. (Hrg. Trans. at p. 74) This has the additional impact of retroactively stopping confirmation soil sampling.

Having approved Weeke's 45-day report and its plan and budget to proceed with stage 1 site investigation, the Agency is not at liberty to reverse itself. It's non-LUST determination is not authorized by the Act or the Board's regulations promulgated thereunder, and it violates the procedural safeguards in the Administrative Procedures Act and the Constitution.

A. The Non-LUST determination violates the Illinois Environmental Protection Act.

There is no authority under the Act or the Board's regulations giving the Agency the right to make non-LUST determinations. The Act only authorizes the Agency to review plans and budgets submitted by the applicant. (415 ILCS 5/57.7(c)(4)) The Agency herein reviewed the 45 day report, approving the plan and budget for stage 1 site investigation. Having done this, and having thought better of its decision, the Agency utilized its non-LUST determination process to

retroactively reverse its prior approval. The Agency has previously been adjudged as have no statutory authority to reconsider or modify its decisions. Reichhold Chemicals v. PCB, 204 Ill. App. 3d 674, 678 (3rd Dist. 1990).

Nor do the Board's regulations authorize tentative approvals of reports, plans and budgets. The Board's procedural rules are clear: "[t]he Agency has the authority to approve, reject, or require modification of any plan, budget, or report it reviews." (35 Ill. Admin. Code § 734.505(b)) The Agency is not authorized to tentatively approve and later reject plan, budgets or reports it chooses to review. Doing so would be inconsistent with the sequential nature of the LUST program, where quick and immediate steps to remediate and investigate a site are followed by increasingly intense stages of investigation and remediation. The premise of the information gathered for the 45-day report is to determine whether information can be gathered within the 45-day time-frame to "demonstrat[e]" that the most stringent Tier 1 remediation objects have been met. (35 Ill. Admin. Code § 734.210(h)(3)) If that demonstration is not possible within 30 days of completing early action, further site investigation is the function of the next stage. (415 ILCS 5/57.7(a))

Furthermore, the Agency is not authorized to make stand-alone legal determinations of a site's regulatory status without express statutory authority. States Land Improvement Corp. v. EPA, 231 Ill. App. 3d 842, 848 (4th Dist. 1992). A determination that the site is not a LUST-incident is merely the mirror image of the program invalidated in States Land Improvement. To take a site out of the jurisdiction of the LUST program and retroactively nullify all early action reporting requirements and approvals, has substantial consequences on the site owner/operator. In reliance upon the Agency's approval, Weeke continued early action work, with the expectation

of reimbursement from the LUST Fund, as well as postponed some soil samples around the piping to be conducted during the approved site investigation stage. Unlike States Land Improvement, however, there are no ostensible environmental benefits from creating uncertainty in the reimbursement program and encouraging potential contamination along the pipings and under the dispensers to remain uninvestigated.

In summary, there is no statutory or regulatory authority for the Agency's non-LUST determinations, there is no authority for the Agency to reverse its prior decisions, and there is no authority for the Agency to retroactively invalidate early action reports.

B. The Non-LUST determination violates the Administrative Procedures Act and Procedural Due Process.

Assuming that authority exists in the Act for the Agency to reverse itself, the revocation of a prior agency approval raises issues unique from the process of applying for an approval of a permit or plan. The basic expression of these principles is in the Administrative Procedures Act:

> **[N]o agency shall revoke, suspend, annul, withdraw, amend materially, or refuse to renew any valid license without first giving written notice to the licensee of the facts or conduct upon which the agency will rely to support its proposed action and an opportunity for a hearing in accordance with the provisions of this Act concerning contested cases. At the hearing, the licensee shall have the right to show compliance with all lawful requirements for the retention, continuation, or renewal of the license. If, however, the agency finds that the public interest, safety, or welfare imperatively requires emergency action, and if the agency incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. Those proceedings shall be promptly instituted and determined.**

(5 ILCS 100/10-65(d) (emphasis added))

A license under the Administrative Procedures Act means "any agency permit, certificate, approval, registration, charter, or similar form of permission required by law." (5 ILCS 100/1-

35; see also Pioneer Processing v. EPA, 102 Ill. 2d 119, 141 (1984) (permit issued by the IEPA is a license)). Here, the Agency approved a stage 1 early action plan and budget, and then reversed itself. Under the Administrative Procedures Act, the Agency was required to first give Weeke Oil notice of its proposed action and an opportunity for a contested case hearing. The Agency has procedural rules for conducting contested case hearings. (35 Ill. Admin. Code Part 168)

Even if it is argued that the Administrative Procedures Act does not apply to these proceedings, the Constitution requires fundamental fairness in administrative proceedings. Lyon v. Dep't of Children & Family Servs., 335 Ill. App. 3d 376, 384 (4th Dist. 2002). "Due process considerations are more demanding in proceedings involving the revocation of a license than in other administrative proceedings." 2 Am. Jur. 2d, Administrative Law, § 261. For example, when a statute is amended to retroactively require local siting approval of a recently permitted facility, the Illinois Appellate Court has ruled that "justice, fairness and equity require that persons who comply with the law not as it might be but as it is then in effect, and in this instance obtain the required permit after expenditure of funds" should not be have their approvals retroactively invalidated. American Fly Ash Co. v. County of Tazewell, 120 Ill. App. 3d 57, 59 (3rd Dist. 1983). Similarly, here, Weeke Oil was proceeding with the investigation and clean-up of the site, filing the required reports, receiving approval from the Agency to continue site investigation, but when the bills started coming in, the Agency retroactively eviscerated those approvals and removed the incident entirely from the LUST program.

Statutory and constitutional due process requires prior notice and an opportunity to be heard before an agency reverses itself. "Cases where drivers licenses are to be revoked, welfare

benefits to be terminated, or students to be expelled from public school for misconduct have required notice and an opportunity to be heard prior to the time of revocation, termination, or expulsion . . .." Kraut v. Rachford, 51 Ill. App. 3d 206, 214 (1st Dist. 1977). Even in these cases, the approvals are only eliminated going forward. The person whose driver's license has been suspended is not then ticketed for driving without a license prior to the determination. While the exact formula varies from situation to situation, due process requires at a minimum that "notice must be given and an opportunity to be heard afforded which will be meaningful and appropriate under the circumstances." Id.

Here, the Agency project reviewer testified that he reviewed the 45 day report and 45 day report addendum in deciding this was a non-LUST event. Those reports had been submitted 190 days and 132 days earlier. Those reports had been reviewed by the Agency (Hrg. Trans. at p. 67) and those reports were relied upon by the Agency in approving the plan and budget for stage 1 site investigation. (Ex. 10) If the Agency had come into information which necessitated reversal of its prior approval, it was required to initiate a formal process, by which the Agency would have the burden of proving that its prior approvals should be reversed. Even then, reversal could not be deemed to have retroactive effect.

II. ALTERNATIVELY, INFORMATION IN THE RECORD, OR THAT SHOULD HAVE BEEN ALLOWED IN THE RECORD, DEMONSTRATES THAT A RELEASE OCCURRED.

One of the items that was not admitted into the record was the log of the Office of the State Fire Marshall. The importance of the OSFM logs is evidenced in a recent case in which the Agency's position was that the OSFM's determination that there has been a release is sufficient

by itself to confirm a release. Dickerson Petroleum v. EPA, PCB 9-87; PCB 10-5, at p. 10 (Feb. 4, 2010). When Petitioners sought to introduce the OSFM log into evidence before the Board, the Agency objected to any evidence that was not in the Agency's possession at the time it issued it's non-LUST determination, May 26, 2009. (Hrg. Trans. at pp. 19) Similarly, when Petitioners sought to mail an explanation and additional pictures to the Agency after the May 26, 2009, no-LUST determination, the information was ignored by the Agency, (Hrg. Trans. at pp. 39-40), and was likewise rejected at the hearing. (Hrg. Trans. at p. 37)

Undersigned counsel understands the basis of the Hearing Officer's rulings herein, but if the Agency is going to be allowed to *sua sponte* declare a site to be outside the LUST program, after having issued approvals to proceed in that program, Petitioner must be given an opportunity at some point in time to respond. Accordingly, in the following sections, Petitioner will reference not only information in the Agency's record, but also that evidence, to the extent allowed under offer of proof.

A. There Is Evidence of a Release.

The following evidence exists, which confirms that a release occurred at the site:

1. Certification of Professional Geologists that the 45-day report does not demonstrate compliance with the most stringent Tier 1 remediation objectives. (Rec. at p. 87, 89-90)
2. IEPA approval of the Stage 1 Site Investigation Plan and Budget. (Ex. 10)
3. Certification of Professional Geologists that the 45-day addendum report does not demonstrate compliance with the most stringent Tier 1 remediation objectives. (Rec. at p. 116, 118-19)

4. Two confirmation soil samples above the most stringent Tier I objectives for benzene. (Rec. at p. 135)
5. Pictures of the contamination and product in the pit given to the Agency. (Rec. at p. 247)
6. Pictures of the contamination and product in the pit given to the Agency after its determination. (Ex. 12) (Offer of Proof)
7. Observations of "discolored and odorous material . . . in a soil boring advanced adjacent to the tank pit" reported to the Agency. (Rec. at p. 123) (leading to the IEMA notification, Rec. at p. 81)
8. OSFM on-site representative's statements that there was evidence of "significant impaction." (Hrg. Trans. at p. 17)
9. OSFM Log of Underground Storage Tank Removal, including that all three tanks appear to have leaked, causing significant contamination on the tank floor, tank walls, pipe trench and groundwater. (Ex. 11) (Offer of Proof)

It is not disputed that the most stringent applicable soil sampling objective here is 0.03 mg/kg for benzene. (35 Ill. Admin. 742 Table I (Soil Remediation Objectives for Industrial/Commercial Properties)) Trent Benanti testified that the soil sample that was 0.034 mg/kg for benzene was below the most stringent Tier I objective for benzene because he rounded down. (Hrg. Trans. at p. 64) There is no rule authorizing rounding in the LUST Program. Compare with 35 Ill. Admin. Code § 225.475(a)(3) (rounding rules for emissions trading). Confirmation samples are taken to determine whether or not the owner/operator can "demonstrat[e] compliance" with the most stringent remediation objectives. Neither the sample

that clearly exceeds the most stringent standard for benzene, nor the sample result which had a detection limit (<.25) above the most stringent objective, demonstrated compliance. Further investigation activities should continue.

B. The IEPA Cannot Establish that the 2008 release is a re-reporting of the release from ten years earlier.

The Agency's position on the LUST Incident No. 982004 is ambiguous. At the hearing, Trent Benanti testified that his review of the 45 day reports was triggered by information that there had previously been another release at the site. (Hrg. Trans. at p. 63) However, his actual review and no-LUST incident determination were made solely on the 45 day reports from the 2008 release. (Id.) When the Agency's record was filed herein, there were no documents from the 1998 release included. See 35 Ill. Admin. Code § 105.410(b)(4) (Agency must file "any other information the Agency relied upon in making its determination"). The Agency admitted the No Further Remediation letter from the 1998 release at the hearing, with no objection from undersigned counsel. (Ex. 1) Benanti stated that he did not review the file from the 1998 release until after the Non-LUST determination had been made. (Hrg. Trans. at p. 81) So while the 1998 release and the resulting NFR letter is referenced in the No-LUST determination, the Agency's position appears to be no more than to raise anecdotal doubts that a new release could occur ten years later.

Bryan Williams was also the consultant for Weeke Oil in 1998 and testified to that incident herein from personal knowledge. The 1998 incident resulted from tank work on the property initiated to bring the underground storage tanks into compliance with the 1998 legal mandates. (Hrg. Trans. at p. 27) When the tanks were uncovered, contamination was

encountered in the backfill and material over the tanks. (Id.) This material was excavated and removed to a landfill, and the gasoline and diesel tanks were upgraded. (Id. at pp. 27-28) A heating oil and used oil tank were removed and not replaced. (Id. at p. 30) The site was closed through the former method of site classification. (Id. at p. 28) Specifically, one soil boring was taken downgradient from the tank pit and then multiple soil borings were advanced around the perimeter of the property. (Id.) The tank pit itself was never investigated under this method. (Id.) Bryan Williams disputed the notion that the property had been cleaned up under this method, as opposed to being "closed out and managed in place." (Id. at p. 29)

Trent Benanti, relying upon a drawing attached to the NFR letter, disputed the notion that the tank pit had not been investigated in response to the 1998 incident. (Hrg. Trans. at p. 88) Bryan Williams was called to testify in rebuttal of this claim. (Hrg. Trans. at p. 93) He testified that the soil boring that appears near to the tank pit in the drawing was actually outside the tank pit according to the boring logs. (Hrg. Trans. at p. 93) Williams renewed his testimony that the tank pit was never investigated and the soil borings were taken outside of the tank pit. (Hrg. Trans. at p. 94)

While the tank pit was never investigated, it's probably more significant that after 1998 when the release was reported, the service station continued for over ten years as an active fuel station with gas and diesel sales. (Hrg. Trans. at p. 30) The Act contemplates that a site can have multiple releases, requiring the payment of more than one deductible as the result of an additional occurrence. (415 ILCS 5/57.9(b)(3)) The only reason that testing in the tank pits is an issue is to point out that we do not have analyticals from 1998 to compare with 2008.

Finally, in response to criticism that the Agency is encouraging the leaving of grossly

contaminated water and backfill on a site, in contradiction to everything that the Illinois Environmental Protection Act was created to address, Trent Benanti testified that the owner/operator was still obligated to remove the contaminated water, not under the LUST Program, but under the NFR letter. (Hrg. Trans. at pp. 77, 88) The provision of the NFR letter he cites is paragraph 6:

> **6. Any contaminated soil or groundwater removed, excavated from, or disturbed at the above-referenced site, more particularly described in the Leaking Underground Storage Tank Environmental Notice of this Letter, must be handled in accordance with all applicable laws and regulations under 35 Ill. Adm. Code Subtitle G.**

(Ex. 1)

Far from evidencing that there is some independent obligation to remediate contamination at the site, this provision merely states that the LUST program still applies to the site. A site that has previously been cleaned-up and issued a No Further Remediation letter is only safeguarded from liability for the "occurrence" it addressed. (415 ILCS 5/57.10)

C. Any Doubts Should be Decided in Favor of Completing Investigation of the Site.

The OSFM representative at the site during the tank pulls reported significant contamination not only along the tank walls and floor, but the lines leading to the dispensers. (Ex. 11) Originally, the consultant planned to take soil samples along the lines and below the dispensers. (Rec. at pp. 93-94) But after receiving the Agency's approval of stage 1 site investigation, it was decided to conduct the confirmation sampling along the piping run and below the dispensers as part of the site investigation. (Rec. at p. 121) This is an appropriate action during stage 1 site investigation. (35 Ill. Admin. Code § 734.315(a)(1)(B))

While the Agency has "reversed" its approval of the stage 1 site investigation, any doubts

about whether the site is contaminated should be weighed in favor of continuing to the site investigation phase, where samples along the migration pathways can be investigated.

CONCLUSION

The Agency's no-LUST determination decision should be reversed in all respects, meaning that the early action reporting should be reinstated, the approval of the stage 1 site investigation plan and budget should be reinstated, and the application for payment for site investigation activities approved. The incident should proceed with stage 1 site investigation and only if, after completing that stage, the most stringent Tier 1 remediation objectives have been demonstratively met, should the owner or operator "cease investigation and proceed with the submission of a site investigation completion report in accordance with Section 734.330." (35 Ill. Admin. Code § 734.310).

Respectfully submitted,
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