BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

ILLICO INDEPENDENT OIL CO., Petitioner,	)	
v.	)	PCB 17-84
	)	(LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

NOTICE OF FILING AND PROOF OF SERVICE

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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 Post-Hearing Reply Brief, copies of which are herewith served upon the above persons.

The undersigned hereby certifies that I have served this document by e-mail upon the above persons at the specified e-mail address before 5:00 p.m. on the 31st of October, 2018. The number of pages in the e-mail transmission is 9 pages.

Respectfully submitted,
ILLICO INDEPENDENT OIL CO.,
Petitioner,

BY: LAW OFFICE OF PATRICK D. SHAW

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PETITIONER'S POST-HEARING REPLY BRIEF

NOW COMES Petitioner, ILLICO INDEPENDENT OIL CO. (hereinafter "Illico"), and for its Post-Hearing Reply Brief states as follows:

I. PROCEDURAL MATTERS.

A. EXPERT TESTIMONY

Through his testimony, Wienhoff was demonstrated to be an expert in remediation of leaking underground storage tanks. (Hrg. Trans. at pp. 6-8) There is no particular test – expertise is established by virtue of knowledge, skill, experience, training, or education. See People v. Miller, 173 Ill.2d 167, 186 (1996). In the context of the Leaking Underground Storage Program (LUST Program), a professional engineering license is significant because corrective action plans must be prepared by, and conducted under the supervision of, a licensed professional engineer. (415 ILCS 5/57(5); 415 ILCS 5/57.7(f)) A licensed professional engineer's seal is a representation that the technical submission was developed with the use of accepted engineering standards. (225 ILCS 325/14 (Professional Engineering Practice Act)) Accordingly, it is not sufficient for a corrective action plan to comply with the specific requirements of the Illinois Environmental Protection Act, and regulations promulgated thereunder, but the work must also

meet the "generally accepted standards and practices" of the profession. (35 Ill. Adm. Code § 734.135(d) (certification requirement)) In particular, the Illinois Environmental Protection Act does not specify means and methods of remediation, though it does require those to be based upon generally accepted engineering standards as evidenced by the seal of the licensed professional engineer.

Experts are permitted to testify in the form of an opinion, even as to any ultimate issue to be decided. (Ill. R. Evid. 704) The issues identified by the Board as precluding summary judgment entail opinions: whether the tanks needed to be removed to access contaminated soil and whether the contaminated soil exceeded the applicable site remediation objectives. (Order of June 21, 2018, at p. 4) The first component calls upon specialized knowledge derived from practical experience in remediation of leaking underground storage tanks. The second component necessitates specialized knowledge in modeling underground conditions. This is comparable to a physician's opinion of what practices are to be employed based upon diagnostic tools used to model internal conditions. Here, Wienhoff testifed in that in his professional opinion, removing the underground storage tanks was necessary to remove soil that exceeded the remediation objectives. (Hrg. Trans. at p. 20)

There is no right to conduct voir dire of the expert's qualifications before such opinions are offered, though it may be requested by the opposing party and the failure to do so constitutes waiver of any complaint. Payne v. Murphy Hardware Co., 62 Ill.App.3d 803, 805 (2nd Dist. 1978) All that is required is that the opposing party be given an opportunity during cross-examination to question qualifications. Flynn v. Edmonds, 236 Ill.App.3d 770, 791 (4th Dist. 1992).

B. IMPEACHMENT

The Agency falsely states that "[t]he consultant testified that he did not take confirmation samples when the tanks were pulled. (Transcript 30)" (Resp. Brief, at p. 32) Here is the consultant's testimony on page 30 of the transcript:

> **Q. When you pulled the tanks, you didn't test the side walls, the inventory?**
>
> **A. We tested the side walls, which were extent of this excavation which we thought were below Tier 1, but we didn't test the material that was hauled to the landfill.**

(Transcript 30)

The only person claiming that confirmation samples were not taken is the attorney. Impeachment refers to evidence submitted to challenge the veracity of the witness, not the attorney. Furthermore, extrinsic evidence may not be used to attempt impeachment concerning a collateral matter. Holton v. Memorial Hospital, 176 Ill.2d 95, 125 (1997) Assuming impeachment was appropriate, the proper procedure would have been to confront the witness with the extrinsic statement during cross-examination. Instead, the document was first referenced during the Agency's case, and by the time of rebuttal, the Agency attorney had forgotten the testimony:

> **Q. And when I asked you before, prior, whether or not you had taken confirmation samples after you removed the tanks, you testified no, isn't that correct?**
>
> **A. I testified, no, that I had not taken samples of the shorter one to the landfill.**
>
> **Q. No. I also asked if you took it from the walls after you removed the tanks.**
>
> **A. That's not my recollection.**

Q. Well, that's my recollection, and we can always look back at the testimony.

A. If I did, I was mistaken, because we did collect confirmation samples. Obviously, we did not collect material that's hauled to the landfill.

Q. Right. And I asked you the first question, and then you said about what you hauled to the landfill, and then you said, I didn't test that, but my first question is whether or not you had taken confirmation samples in the pit where the tank had been removed.

A. Okay. I apologize if I was wrong about that, but obviously we did take confirmation samples when we removed the tanks.

(Transcript, at pp. 69-70)

We believe the transcript entirely supports the consultant's testimony, he was not wrong and a credibility determination is not necessary. However, if the Board deems one necessary, undersigned counsel believes the proper procedure is for the Hearing Officer who presided over the taking of live testimony issue her findings.

C. APPENDIX A IS NOT EVIDENCE

Appendix A to the brief, previously submitted as an appendix to the motion for summary judgment, is not evidence, but a summation of items in the agency record.

II. REPLY TO AGENCY ARGUMENTS

A. SPILLS AND OVERFILLS ARE RELEASES FROM TANKS.

Spills and overfills are releases from tanks that occur when product is transferred to underground storage tanks and are distinct from releases from the pump nozzle. Harlem Township v. IEPA, PCB 92-83, slip op. 6 (Oct. 16, 1992) (citing 53 Fed. Reg. 185, 37090 (1988)

for the proposition that "spills" and "overfills" are located above the tanks or at the fill port and are distinct from those that happen when product is dispensed) The fill ports are located "on top of the USTs." (Hrg. Trans. at p. 11) While the Agency is asking the Board to speculate as to a release from the pump dispensers, the Agency's own witness testified that there is no information that there were any releases from a pump dispenser at the site. (Hrg. Trans. at p. 56) He testified that contamination near the pumps was due to "a preferential migration pathway that led to it," and "I don't believe that's where -- where petroleum was spilled into the ground." (Hrg. Trans. at p. 32)

B. THERE ARE NO RELEVANT 45-DAY REPORT REQUIREMENTS

Releases from spills and overfills of the tanks were reported in 1992 and until 2016 when Petitioner removed the tanks and contaminated soil, no remediation was ever conducted. OSFM directed the consultant to report Incident # 2016-0095, which was deemed a re-reporting of the previous incident. (R.561) Since there was no new release, no reporting requirements exist with respect to non-releases.

If the Agency disputes that an incident is a re-reporting, it must do so by rejecting the applicable plan before it, as it did in Prime Location Properties v. IEPA, PCB 09-67, slip op. 23 (Aug. 20, 2009). Since the Agency here did not deny the subject plan due to the lack of a 45-Day Report, the issue is not grounds for affirmation. Id. at 34.

C. TESTING THE SOIL IN THE TANK PIT IS NOT A COMMON OR REQUIRED PRACTICE.

What the Agency describes without attribution as a common practice when removing

tanks, i.e., testing the soil removed from the tank pit, (Resp. Brief, at p. 22), is not a common or required practice. Prime Location Properties v. IEPA, PCB 09-67, slip op. 22 (Aug. 20, 2009) (none performed). Confirmation samples are taken of the material remaining after excavation in order to assess whether corrective action worked. (35 Ill. Adm. § 734.335(a)(4)) Its purpose is not to determine whether corrective action should have been taken in the first place. The justification for removing contaminated soil in the tank pit was based upon the modeling performed through Site Investigation, and in particular exceedances of applicable site remediation objectives downgradient from the tank pit.

As Wienhoff testified, locations chosen for initial soil borings are as close to the tank pit as possible, while maintaining the safety of that area. (Hrg. Trans., at p. 18) One doesn't advance borings into the tank pit itself. (Id.) While it should be kept in mind that this release predates Title XVI and therefore various activities occurred under different statutory and regulatory regimes, the current Board regulations require at least one soil boring "as close as practicable to each UST field" without specifying a particular distance. (35 Ill. Adm. Code 734.315(a)(1)(A)) While Wienhoff testified that typically this means five to ten feet, it depends on site specific conditions. (Hrg. Trans., at p. 18) Here, the immediate downgradient soil boring was fifteen to seventeen feet from the tank pit, but it reported results exceeding Tier 2 site remediation objectives. Since current Stage 1 Site Investigation standards merely seeks to determine whether contamination has migrated from the tank pit, as measured by the most stringent remediation objectives (as opposed to remediation objectives), the sample was sufficient to demonstrate that contamination exceeding site remediation objectives had migrated from the tank pit towards and perhaps under the highway.

D. THE AGENCY REVIEWER'S EXPLANATION.

The Agency reviewer explained that he did not believe site remediation objectives had been exceeded in the tank pit based upon soil samples that were not downgradient from the tank pit. (Hrg. Trans. at pp. 56-57) The presence of contamination was first reported in the adjoining highway by IDOT, soil borings between the highway in the "blue zone" and the tank pit were hot, and overfills were reported from the tank pit and confirmed visually by OSFM during the tank pull. Contamination at SB-17 did not spring from the ground by magic, but from the source, traveling downgradient and along migration pathways, slowly dissipating into the surrounding environment. Choosing upgradient soil borings and ignoring downgradient is simply picking and choosing data to reach a conclusion.

WHEREFORE, Petitioner, ILLICO INDEPENDENT OIL CO., prays the Board reverse the Agency's decision to modify the plan and budget, offer Petitioner an opportunity to prove its legal costs in this matter, award Petitioner its legal costs and for such other and further relief as it deems meet and just.

ILLICO INDEPENDENT OIL CO.,
Petitioner

By its attorneys,
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