BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

FREEDOM OIL COMPANY,	)	
	)	PCB No. 03-54
Petitioner,	)	PCB No. 03-56
	)	PCB No. 03-105
v.	)	PCB No. 03-179
	)	PCB No. 04-02
ILLINOIS ENVIRONMENTAL	)	(LUST Fund/UST Appeal)
PROTECTION AGENCY,	)	(Consolidated)
	)	
Respondent.	)	

NOTICE

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
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Chicago, IL 60601

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Carol Webb, Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue, East
P.O .Box 19274
Springfield, IL 62794-9274

PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board a RESPONSE TO MOTION FOR SUMMARY JUDGMENT AND CROSS MOTION FOR SUMMARY JUDGMENT, MOTION TO STRIKE, and MOTION FOR LEAVE TO FILE INSTANTER, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

John J. Kim
Assistant Counsel
Special Assistant Attorney General
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)
Dated: May 11, 2005

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

FREEDOM OIL COMPANY,	)	
	)	PCB No. 03-54
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ILLINOIS ENVIRONMENTAL	)	(LUST Fund/UST Appeal)
PROTECTION AGENCY,	)	(Consolidated)
	)	
Respondent.	)	

MOTION FOR LEAVE TO FILE INSTANTER
RESPONSE TO MOTION FOR SUMMARY JUDGMENT
AND MOTION TO STRIKE

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, John J. Kim, Assistant Counsel and Special Assistant Attorney General, and, pursuant to 35 Ill. Adm. Code 101.500, hereby requests that the Illinois Pollution Control Board ("Board") grant the Illinois EPA leave to file instanter its Response to Motion for Summary Judgment and Motion to Strike. In support of this motion, the Illinois EPA states as follows:

On or about April 4, 2005, the Petitioner, Freedom Oil Company, filed its Motion for Summary Judgment with the Board. However, the Illinois EPA received its copy of the motion on March 31, 2005. Therefore, the Illinois EPA's response was due on or before April 14, 2005. On April 14, 2005, the Illinois EPA mailed a motion for extension of time to the Board and to the Petitioner. The motion sought an extension of time until April 19, 2005, by which to file the response to the Petitioner's motion.

On April 18, 2005, the Hearing Officer approved the Illinois EPA's request for an extension of time. Unfortunately, on April 19, 2005, the Illinois EPA's computer network

experienced apparent hardware problems, and thus the ability to perform any word processing or printing of documents was lost. This problem was reported to the Hearing Officer by the undersigned counsel for the Illinois EPA.

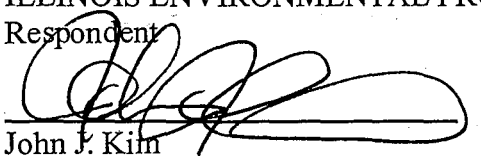
On April 22, 2005, the Hearing Officer entered an order, noting the Illinois EPA's computer problems and directing the Illinois EPA to file a motion for leave to file instanter when the response to the Petitioner's motion for summary judgment was filed. Since the time of the entry of the Hearing Officer's order to the present date, counsel for the Illinois EPA has unfortunately not been able to complete the response to the Petitioner's motion for summary judgment and related motion to strike until now. While certainly regrettable and not at all desired, this delay was the result of the undersigned counsel's continued obligations to other pending appeals as well as non-appeal matters.

This delay was not in any way due to any bad faith on the part of the Illinois EPA, and all possible efforts will be made to prevent any further recurrence of this type of delay henceforth. However, the Illinois EPA respectfully requests that the Board grant this motion so that both parties will be heard and the Board can rule upon the motions with a full understanding of the facts and legal arguments.

WHEREFORE, for the reasons stated above, the Illinois EPA hereby respectfully requests that the Board grant the Illinois EPA leave to file instanter its Response to the Petitioner's Motion for Summary Judgment and Motion to Strike.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



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	)	PCB No. 04-02
ILLINOIS ENVIRONMENTAL	)	(LUST Fund/UST Appeal)
PROTECTION AGENCY,	)	(Consolidated)
	)	
Respondent.	)	

MOTION TO STRIKE PORTIONS OF THE
PETITIONER'S MOTION FOR SUMMARY JUDGMENT

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, John J. Kim, Assistant Counsel and Special Assistant Attorney General, and, pursuant to 35 Ill. Adm. Code 101.500 and 101.502, hereby requests that the assigned Hearing Officer or the Illinois Pollution Control Board ("Board") strike portions of the Petitioner's motion for summary judgment. In support of this motion, the Illinois EPA states as follows:

The Petitioner Makes Reference To Information Outside Of The Administrative Record

The Petitioner, Freedom Oil Company, filed a motion for summary judgment ("motion") on or about April 4, 2005. Included in the motion are a number of references to documents and content contained within exhibits to the motion. Specifically, the motion refers to two affidavits, and representations therein, as found in Exhibit 17.

However, the representations of the affiants, Michael J. Hoffman and Richard Pletz, were made on March 30, 2005. Exhibit 17, pp. 1089, 1091. These representations clearly post-date all of the final decisions currently under appeal, therefore reference to the information within that exhibit is not appropriate. The Board's review of permit appeals, including appeals of decisions

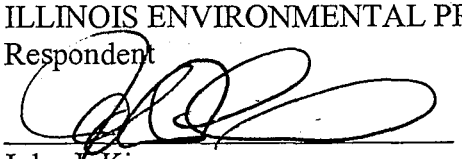
related to the Leaking Underground Storage Tank Program, is generally limited to information before the Illinois EPA during the Illinois EPA's statutory review period, and is not based on information developed by the permit applicant or the Agency after the Agency's decision. Alton Packaging Corp. v. Pollution Control Board, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987); Saline County Landfill, Inc. v. Illinois EPA, PCB 02-108 (May 16, 2002).

Pursuant to well-established Board precedent, the Board should consider any of the information contained within Exhibit 17, and the Petitioner's motion should be stricken accordingly.

WHEREFORE, for the reasons stated above, the Illinois EPA hereby respectfully requests that the Board strike Exhibit 17 in the Petitioner's motion, and further strike any and all references to that Exhibit the information therein as such references may exist within the Petitioner's motion.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



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PROTECTION AGENCY,	)	(Consolidated)
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RESPONSE TO MOTION FOR SUMMARY JUDGMENT
AND CROSS MOTION FOR SUMMARY JUDGMENT

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, John J. Kim, Assistant Counsel and Special Assistant Attorney General, and, pursuant to the Illinois Pollution Control Board ("Board") Rules at 35 Ill. Adm. Code 101.500, hereby responds to the Motion for Summary Judgment ("motion for summary judgment" or "motion") filed by the Petitioner, Freedom Oil Company ("Freedom Oil") and also moves for summary judgment in favor of the Illinois EPA. The Illinois EPA requests that the Board enter an order denying the Petitioner's motion in its entirety and issue an order granting the Illinois EPA's cross motion.

I. NOT ALL ISSUES RAISED IN THE APPEALS ARE ADDRESSED IN PETITIONER'S MOTION

Previously, in late January 2003, the Hearing Officer assigned to the above-referenced appeals consolidated the appeals for purposes of docketing convenience. Of the five appeals that have been consolidated, three appeals involve final reimbursement decisions (PCB 03-105, 03-179, 04-02) and two appeals concern technical final decisions (PCB 03-54, 03-56). The motion filed by

the Petitioner addresses only the issues raised in the three reimbursement decisions, and therefore it must be assumed that, at least for now, the Petitioner is not choosing to present a motion for summary judgment as to PCB 03-54 and 03-56. Accordingly, for now, the Illinois EPA will also set those matters aside and instead shall focus on the three reimbursement final decisions.

II. COMMON ISSUE ON APPEAL

In its motion, the Petitioner states that the issue before the Board is a simple one. Specifically, can the Illinois EPA direct or compel, by court order, corrective action with regard to releases from tanks eligible for reimbursement from the Underground Storage Tank Fund ("UST Fund"), and then deny such reimbursement because ineligible tanks are discovered during the implementation of the corrective action. Simply put, the Illinois EPA can clearly take the action described by the Petitioner.

The Petitioner's issue is really a two-part question. First, 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)? The answer is yes, as provided for in several different provisions of the Illinois Environmental Protection Act ("Act") (415 ILCS 5/1, et seq.).[1] However, it should be noted that, as was done in this case, it is not the Illinois EPA but rather an action brought in the name of the People of the State of Illinois that compels a defendant to take corrective action if warranted. The Illinois EPA can request that the Illinois Attorney General's Office initiate such an action (subject to certain procedural requirements having been met), but it is formally the State of Illinois, and not a particular agency thereof, that acts as the plaintiff in an action

[1]The Petitioner's motion includes copies of the complaints and orders related to the corrective action in this particular situation. There are other general provisions in the Act, including prohibitory water pollution and land pollution sections, that are applicable depending on the specific facts related to a release.

seeking to compel the performance of corrective action. Though this clarification is a fairly obvious one, it needs to be stated given that there seems to be a thematic implication in the Petitioner's motion that the Illinois EPA itself has acted in either an inappropriate or inconsistent manner. Such is not the case, and the Illinois EPA's role needs to be defined and understood.

The second part of the issue identified by the Petitioner 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. Again, the answer is clearly yes, as provided for in Section 57.8(m) of the Act (415 ILCS 5/57.8(m)).

So the answer to the question posed by the Petitioner must be answered affirmatively, which is consistent with the sequence of events here. The Petitioner attempts to tie the performance of ordered corrective action with the possibility of resulting costs being reimbursed in full from the UST Fund. There is no such condition in the Act, and the court here recognized no such connection, in terms of a party not being required to perform corrective action if contamination is found at a site that includes tanks that are ineligible for reimbursement.

The true issue here 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. The Petitioner states that the Illinois EPA imposed the apportionment despite an absence of evidence demonstrating the ineligible tanks created any conditions requiring remediation. That statement 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. Put another way, Freedom Oil failed to demonstrate that the costs that were the subject of the reimbursement requests in the three consolidated appeals were all

attributable only to eligible, and not in any way to any of the ineligible, tanks at the site. Given that failure, 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.

III. STANDARD FOR ISSUANCE OF SUMMARY JUDGMENT

A motion for summary judgment should be granted where the pleadings, depositions, admissions on file, and affidavits disclose no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill.2d 460, 483, 693 N.E.2d 358, 370 (1998); Ozinga Transportation Services v. Illinois Environmental Protection Agency, PCB 00-188 (December 20, 2001), p. 2.

In the present situation, the relevant facts are applicable to each of the three consolidated reimbursement appeals, with one caveat. From the time of the initial reporting of a release at the Freedom Oil site, to the date of the final decision under appeal, there were new facts that came to light and also there were a sequence of different eligibility and deductibility decisions issued by the Office of the State Fire Marshal ("OSFM").

In order for the Board to grant summary judgment in favor of either party in this action, it must first decide that there are no material facts at issue. The parties generally agree upon the facts here, but the conclusions to be drawn from those facts are not agreed upon, as 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. If the Board determines this situation is tantamount to a material issue of fact, then the Board should deny Freedom Oil's motion for summary judgment. If the Board instead determines

that the parties do agree on the basic facts, and that the legal interpretation to be drawn therefrom is the basis for the dispute, then the Board should grant summary judgment in favor of the Illinois EPA.[2]

IV. ARGUMENT

Freedom Oil has presented three arguments in support of its claim that it should not be subjected to the apportionment provisions of Section 57.8(m) of the Act and corresponding regulation Section 732.608 (35 Ill. Adm. Code 732.608).

First, the Petitioner argues that OSFM's field observations, and requirement that the petitioner report suspected releases, are not determinative of whether corrective action was required, since the field observations and analytical results from the site show no basis for such order. Petitioner's motion, p. 15.

Second, the Petitioner argues that the Illinois EPA has taken different positions in circuit court and in its final decisions now under appeal. Petitioner's motion, pp. 15-16.

Finally, the Petitioner argues that the field conditions and analytical evidence confirm that the eligible tanks, not the ineligible tanks were the source of the contamination at the site. Petitioner's motion, p. 16.

As the Illinois EPA will counter, each of those arguments fails and instead a conclusion in favor of the Illinois EPA should be reached.

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[2] Although the Board could reach the conclusion that a hearing is needed based upon a finding that factual issues remain, the Illinois EPA will henceforth argue that summary judgment is appropriate and should be granted in favor of the Illinois EPA.

A. OSFM's Actions Were Correct

The involvement of OSFM (both from field inspections and in issuance of final eligibility and deductible decisions) in this situation was correct in all aspects, but does not reflect any reason why the Illinois EPA's decisions under appeal were in error.

In March 1993, a 1,000 gallon underground storage tank ("UST") was removed AR I, p. 29.[3] As the Petitioner noted, the release and removal activities associated with that tank (Tank #5) was resolved and the incident number associated with the release was closed. Petitioner's motion, p. 4.

In September and October of 1996, the UST system at the site was undergoing environmental upgrade under the supervision of a representative of the OSFM. AR I, p. 29. Later, in April of 2002, a release was reported (Incident #2002-0433) based upon a presence of odors in an adjoining high school. AR I, p. 76. Several months later, in August of 2002, another suspected release was reported (Incident #2002-1122) based upon further odors detected near the site. Petitioner's motion, Exhibit 4, p. 57. As the Petitioner itself noted, the role of OSFM in removal oversight is not to determine whether corrective action (or what type of corrective action) is needed based upon site conditions at the time of tank removal. Rather, the role of the on-site inspector/representative of OSFM is to determine whether conditions (either the site conditions or the tank/system conditions) indicate the possibility of a release from the subject UST(s). If there is reason to believe a suspected release has occurred, the inspector/representative will direct the owner/operator of the UST to report the suspected release to IEMA.

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[3] The administrative records in these appeals were unfortunately filed following the filing of the Petitioner's motion. Henceforth, reference to the records will be made as follows. For the administrative record for PCB 03-54 and 03-56, reference will be to "AR I, p. ___." The record for PCB 03-105 will be referred to as "AR II, p. ___," the record for PCB 03-179 will be "AR III, p. ___," and the record for PCB 04-02 will be "AR IV, p. ___."

Thus, the OSFM inspectors in this situation performed their roles exactly as required. They witnessed all requisite on-site removal activities, and properly instructed the owner/operator of the USTs to report the suspected releases to IEMA. What was more telling, though, were the actions of the Petitioner in filing applications for eligibility/deductible determinations from OSFM.

On July 11, 2002, OSFM received an Eligibility and Deductibility Application ("EDA" or "application") from Freedom Oil. In the July 2002 EDA, Freedom Oil represented that there were six tanks at the site, four of which had had a release. Freedom Oil also stated that the Incident number for which reimbursement would be sought was #2002-0433. AR II, pp. 8-9. Of the six tanks at the site, Freedom Oil presented the following information to OSFM:

Tank #	Product Code	Size (Gallons)	Date Installed	Date out of Service	Date Removed	Date Registered	IEMA #	Date IEMA Notif.	UST Had a Release?	UST Aban-doned?
1	D	4,000	1/1/80	N/A	N/A	4/18/86	N/A	N/A	N	N
2	G	4,000	1/1/80	N/A	N/A	4/18/86	2002-0433	4/13/03	Y	N
3	G	4,000	1/1/80	N/A	N/A	4/18/86	2002-0433, 96-1825	4/13/02, 10/3/96	Y	N
4	G	4,000	1/1/80	N/A	N/A	4/18/86	2002-0433	4/3/02	Y	N
5	G	1,000	1/1/80	12/88	3/4/93	4/18/86	93-0540	3/4/93	Y	N
6	K	1,000	1/1/80	N/A	N/A	4/18/86	N/A	NA	N	N

AR II, p. 11. Therefore, Freedom Oil informed OSFM that there were at one time six tanks at the site, one of which (Tank #5) having been previously removed. Freedom Oil also stated that all the tanks but Tanks #1 and 6 had experienced a release.

Based on this information, OSFM issued a determination on August 1, 2002, which found that Tanks #2, 3 and 4 were eligible for reimbursement from the UST Fund, and that Tanks #1, 5 and 6 were listed for the site but not found eligible at that time. AR II, pp. 5-6. This decision from

OSFM was the first of several to be issued for the site, each based upon additional or new information received from Freedom Oil.

Later in August 2002, another suspected release was discovered at the Freedom Oil site, and a second report was made to IEMA, with a second incident number (#2002-1122) being assigned to the site. This release was the subject of at least one court hearing in Edgar County Circuit Court, a transcript of which is found in Exhibit 9 of the Petitioner's motion. As a result of the legal proceedings, at least two different injunction orders were issued by the court, one on August 15, 2002 (AR I, pp. 198-203), and one on August 23, 2002 (Petitioner's motion, Exhibit 11, pp. 579-584).[4] Based upon the arguments of the parties and the court's consideration of the facts presented, the relief found in the orders was carried out.

In late October 2002, Freedom Oil submitted another EDA to OSFM. AR II, pp. 18-21. In that EDA, Freedom Oil then represented that there were 11 tanks at the site, nine of which had experienced a release. AR II, pp. 19, 21. As noted by the Petitioner in its motion, none of the parties were aware of the additional tanks (#7 through #11) until the remediation initiated following the issuance of the court's orders. The information in the October 2002 EDA was the same as the information in the table above, with some exceptions. Tanks #1 through #4 were now listed as being taken out of service on September 5, 2002, with removal dates of September 6, 2002. Also, Tanks #7 through #11 were now listed as being associated with the site, with the installation and taken-out-of-service dates being pre-1974, and removal dates of October 3, 2002 (with the exception of #11,

4 There are certain documents contained within the Petitioner's motion's exhibits which are not found in the administrative records filed by the Illinois EPA. This omission is due to the fact that the records contain the documents relied upon by the Illinois EPA staff in issuing the final decisions under appeal, and those omitted documents were not included in the list of documents relief upon. However, to the extent that such documents did pre-date the final decisions under appeal, and in this instance reflected the participation of the State of

which was removed on October 8, 2002). Also, Tanks #7 through #11 were all reported as having had a release. AR II, p. 21.

The Illinois EPA's final decision dated December 18, 2002, was issued in accordance with the information available at that time. AR II, pp. 1-4. See, Attachment 1.[5] After the Illinois EPA's December 2002 final decision was issued, OSFM issued another final decision regarding eligibility and deductible. On February 26, 2003, OSFM issued a decision that determined Tanks #1, 2, 3, 4, and 6 were eligible for reimbursement from the UST Fund. The decision also noted that Tanks #5, 7, 8, 9, 10 and 11 were listed for the site, though they were not found to be eligible. AR III, pp. 35-36. In reliance on the information found within the February 2003 OSFM final decision, the Illinois EPA issued another final reimbursement decision on March 19, 2003. AR III, pp. 1-5; Attachment 1.

Finally, on March 25, 2003, OSFM issued another revised eligibility and deductible decision for the Freedom Oil site. That decision was essentially the same in content as the February 2003 decision, other than noting that Tank #11 contained heating oil instead of used oil. On May 28, 2003, the Illinois EPA issued the last reimbursement decision under appeal, again relying on the most recently-issued OSFM decision. AR IV, pp. 1-5; Attachment 1.

In each instance, OSFM has acted in accordance with its statutory mandate, issuing final decisions regarding eligibility and deductibles based on the applications submitted to it. 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 EDAs submitted to OSFM by Freedom Oil must be taken as true, as the information was certified as such

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Illinois in enforcement proceedings regarding the Freedom Oil site, reference to such documents is appropriate.

[5] Attached to this pleading is Attachment 1, which summarizes the information relied upon (including admitted errors in calculation) by the Illinois EPA in each of the reimbursement decisions under appeal.

by Freedom Oil (or a designated agent thereof). AR II, p. 10; AR II, p. 20. Therefore, as was certified by Freedom Oil, Tanks #7 through #11 did experience releases.

B. Judicial Estoppel Is Not Appropriate

In its motion, the Petitioner also argued that the State represented in circuit court that corrective action was needed due to discharges from eligible tanks at the Freedom Oil site, and thus the State is now judicially estopped from taking a different position in this forum. To support this claim, the Petitioner has cited to portions of transcripts from hearings held on August 15, 2002, and August 23, 2002. Petitioner's motion, pp. 8-10.

However, as even the Petitioner acknowledges, neither the State (including representatives of the Illinois EPA and OSFM) nor Freedom Oil was aware of the existence of the ineligible tanks until September 2002 when the excavation at the site revealed their presence. Petitioner's motion, p. 17; Petitioner's motion, Exhibit 5, p. 456 ("The five ineligible or unregulated tanks (tanks 7-11) were discovered on October 2, 2002 * * *").

With that understanding of the time line (i.e., August 2002: statements made in court; October 2002: ineligible tanks first discovered), the Petitioner's argument in support of judicial estoppel must fail for one—if not all—of the following reasons.

First, and foremost, no party, including the State, was aware of any ineligible tanks at the site at the time of the statements cited to in circuit court. Those ineligible tanks were only discovered after the issuance of the resulting orders from the court. The Petitioner's argument, if taken as correct, would mean that a party would not be able to conform arguments with the discovery of new facts. 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. In short, the Petitioner cannot show that the

State has made inconsistent statements, since the facts upon which any such statements would be based were different from August 2002 (when 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.

Further, it is likely there is no real inconsistency (of the kind referred to in the elements of judicial estoppel) in this situation. Courts have determined that representations on matters of opinion are insufficient to support the invocation of the doctrine of judicial estoppel. Ceres Terminals, Inc. v. Chicago City Bank & Trust Co., 259 Ill. App. 3d 836, 851, 635 N.E.2d 485, 496 (1st Dist. 1994). When the representative of the State made statements in court in August 2002, it was an opinion based upon the facts as then known. When the Illinois EPA issued final reimbursement decisions in December 2002, February 2003 and May 2003, they were opinions based on the facts as then known. The change in opinions, if any, is due to the change in facts.

Also, to prevail in a claim of judicial estoppel, the estopped party must have asserted inconsistent positions in separate proceedings in order to receive favorable judgments in each proceeding. Ceres Terminals, 259 Ill. App. 3d at 850, 635 N.E.2d at 494. Here, while the statements made by the State in August 2002 were clearly made in circuit court proceedings, the decisions issued by the Illinois EPA in December 2002, March 2003 and May 2003 were final administrative decisions. The decisions were not offered by the Illinois EPA in any court or administrative proceeding in order to obtain a favorable ruling, but rather reflected the Illinois EPA's determination based upon information and claims submitted. For there to be some attempt by the Illinois EPA to obtain a favorable ruling, the Petitioner would have to show that the Illinois EPA somehow benefited from the decisions under appeal. However, such is not the case, as the deduction of costs by the

Illinois EPA pursuant to apportionment does not in turn allow the Illinois EPA any access to that money. There is no favor to be gained on the part of the Illinois EPA through the final decisions here.

While the Illinois EPA is obviously defending the correctness of its decisions before the Board, the arguments here are not made to further any benefit that would otherwise fall to the Illinois EPA, but rather are in defense of final decisions that conceivably may not have ever been the subject of any judicial or quasi-judicial review. To argue that the position taken by the State in seeking injunctive relief equates to a final decision issued in response to a claim for reimbursement from the UST Fund is a classic "apples and oranges" comparison.

For these reasons, the Petitioner has failed to demonstrate that the doctrine of judicial estoppel is appropriate in this setting. Even if the argument is made that the doctrine could be considered, the Petitioner has failed to prove all the necessary elements to warrant the imposition of judicial estoppel.

C. The Petitioner Has Not Shown Field Conditions And Analytical Results Prove The Eligible Tanks The Sole Source Of Contamination

The last argument proffered by the Petitioner is that the 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.

As the parties agree, the standard for application of apportionment of costs is found in Section 57.8(m) of the Act:

The Agency may apportion payment of costs for plans submitted under Section 57.7(c)4)(E)(iii) 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.

To apportion costs as was done in the final decisions under appeal, the two requirements of Section 57.8(m) must be in place. Here, the parties agree that Freedom Oil received final decisions from OSFM that determined Freedom Oil was eligible to seek reimbursement for some, but not all, of the underground storage tanks at the site. Thus, the first requirement has been met.

Freedom Oil is arguing that the Illinois EPA cannot apportionment costs because Freedom Oil has not failed to justify all costs attributable to each underground storage tank at the site. On this point the parties differ.

The Petitioner argues that work related to the costs in Reimbursement Application 1[6] was clearly related to the shear valve release from Pump No. 1. Further, the Petitioner argues that the work done in connection with Reimbursement Applications 2 and 3 was caused by tank liner failure. Petitioner's motion, p. 16. The Petitioner goes on to contend that Illinois EPA has submitted no evidence of any condition created by the ineligible tanks that required remediation under Illinois law. Petitioner's motion, p. 17.

The Petitioner claims that analytical results from sampling in connection with the 1993 and 1996 release, along with sampling from 2002, demonstrate that the ineligible tanks did not give rise

[6]Reimbursement Application 1 was the claim for reimbursement that led to the December 2002 final decision, while Reimbursement Applications 2 and 3 resulted in issuance of the February 2003 and May 2003 final decisions, respectively.

to any remediation obligation or create conditions needing corrective action. The Petitioner then provides examples of the sampling results taken from those time periods as proof of its arguments. Petitioner's motion, pp. 17-22.

These arguments and offers of information notwithstanding, the Petitioner's contentions are without merit. 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 the negative, i.e., 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.

1. Freedom Oil's consultant admitted it did not verify whether the ineligible tanks were contributing to the site condition

In a letter dated January 8, 2003, Michael Hoffman, P.E., of MACTEC Engineering and Consulting, Inc. ("MACTEC"), on behalf of Freedom Oil, responded to the Illinois EPA's December 2002 final decision. AR III, pp. 463-473. In the letter, sent to Michael Heaton of the Illinois EPA, Mr. Hoffman stated in part:

> "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." AR III, p. 466.

Mr. Hoffman both before and after making that statement argued that other information available could be shown to demonstrate that the ineligible tanks were not a contributing factor, and those arguments will be addressed. However, the statement cited above clearly shows MACTEC's

admission that it did not take any samples that would verify whether or not the ineligible tanks contributed to the site conditions.[7] Regardless of the fact that Freedom Oil was under a court order to perform the remediation in question, Mr. Hoffman's statement makes clear that no soil samples were taken to verify whether the ineligible tanks were responsible in any way for the contamination at the site. This lack of pre-excavation sampling shows that Freedom Oil did not justify all costs attributable to each UST at the site.

2. The analytical and sampling results cited by Freedom Oil do not rule out the possibility of the ineligible tanks contributing to the contamination

Despite the fact that Freedom Oil's consultant conceded it did not take any samples that would demonstrate the ineligible tanks were not contributory in nature, Freedom Oil still argues that it other information proves the ineligible tanks could not have caused any portion of the release contamination at the site. In its motion, the Petitioner cites to several different sets of sampling data as proof that the ineligible tanks were not a cause of any contamination.

Before reviewing each of those sets, the Illinois EPA directs the Board's attention to a report submitted by Harding ESE, Inc. ("Harding") (the predecessor to MACTEC) on behalf of Freedom Oil to the Illinois EPA, dated May 22, 2002. AR I, pp. 73-163. In that report, Harding states that the groundwater flow direction at the Freedom Oil site was determined by a previous consultant, PSI, in 1996 to be to the southwest. Further investigations by Harding confirmed a westerly flow direction.

[7] Throughout the Petitioner's motion, there are repeated protestations regarding the manner in which the court-ordered remediation was obtained, as well as the scope of the remediation. These comments have no relevance or merit in this appeal, however, as the Board is not in the position to second-guess injunctive orders issued by a circuit court. The Petitioner's complaints regarding the circuit court action could have been dealt with in a different forum, and the Board should not allow the Petitioner to cloud the issues here by attempting to introduce such complaints into these appeals. While the Petitioner may have objections as to the scope of the work that was performed, it was undisputably done following the entry of orders by the court. The discovery, following issuance of those orders, of the ineligible tanks is something that cannot be ignored or discounted

AR I, pp. 80, 93. With this statement regarding groundwater flow in mind, the sampling sets cited to by the Petitioner should be reviewed.

The first sampling cited to by the Petitioner was taken by PSI as reported in a Preliminary Contamination Assessment ("PCA") dated January 16, 1997. Petitioner's motion, p. 18; Petitioner's motion, Exhibit 3, pp. 391-419 (or 20-47, depending on which page numbers are used). In the PCA, PSI stated that four soil samples were taken from Borings B-1, B-2, B-3 and B-4. Petitioner's motion, Exhibit 3, p. 401. PSI also stated that the four soil borings were converted to four groundwater monitoring wells, MW-1 through MW-4, presumably consistent with the boring numbers. Petitioner's motion, Exhibit 3, p. 398. In a figure that accompanied the PCA, PSI showed the locations of the four soil borings/monitoring wells, though not to scale. Petitioner's motion, Exhibit 3, p. 408.

The Petitioner cites PSI's conclusion that the results from Borings 1 and 2 may not be as extensive as those near borings 3 and 4. Petitioner's motion, p. 18. Boring 1 is located to the north of the site, and Boring 2 is in the southeast corner of the site. The Petitioner then cites to the data from Borings 3 and 4, which showed much more significant levels of contamination. Petitioner's motion, p. 19. Borings 3 and 4 were located somewhere on the south edge of the site, possibly bordering the centerline of the site (again, the figure provided by PSI is not to scale). Petitioner's motion, Exhibit 3, p. 408. A more recent figure prepared by Harding shows the locations of the four borings/monitoring wells utilized by PSI, along with showing the location of the UST Bed that contained Tanks #1 through #5. AR I, p. 176. The UST Field referred to by PSI is the same as the UST Bed referred to by Harding. These figures should also be compared to a soil excavation map

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simply because Freedom Oil disagreed with having to perform the remediation in the first place.

prepared by Harding that also shows the location of the pre-74 USTs, or the ineligible tanks at issue here. AR III, p. 473.

Taking into account the locations of the borings/wells used by PSI, and the groundwater flow directions (southwesterly or westerly) reported by Harding, it is anticipated that PSI's Borings 1 and 2 would not yield data showing significant contamination, as those borings were to the north and east of Tanks #1 through #4 (the UST Field/Bed), #5 (shown in the "Excavation Former UST Location" in PSI's map (AR I, p. 43)), and the ineligible tanks (the pre-74 USTs shown in the Harding map (AR III, p. 473)). Put another way, Boring 1 is north of the UST field/Bed and pre-74 tanks, and Boring 2 is to the east of the UST Field/Bed and to the southeast of the pre-74 USTs. Given that the groundwater flow is to the west or southwest, neither Boring 1 or 2 should show any significant contamination.

Looking to PSI's Borings 3 and 4, the higher levels of contamination that were shown are expected, given the proximity of those borings to the UST Field/Bed. So, the PSI results cited to by the Petitioner are consistent with the site conditions and all UST locations, including the ineligible tanks.

The next set of sampling information referenced by the Petitioner is taken from MACTEC's 2002 sampling. The Petitioner notes in its motion that the analytical results of the samples taken closest to the ineligible tanks did not identify contamination caused by the tanks requiring remediation. The Petitioner then cites to results for: RW-1, B-02-1, MW-02-4, MP-02-3, B-02-6, B-02-7, B-02-2, B-02-3, B-02-4, B-02-5, MW-1, MW-02-3 and MW-02-4. Petitioner's motion, pp. 20-21. Looking to the Harding soil excavation map which shows the location of each of those sampling points shows that each and every one of those points is located to the north of the Pre-74

USTs (ineligible tanks). AR III, p. 473. Again, given the groundwater flow being to the west or southwest, there would be no reason to believe that any contamination resulting from releases from the ineligible tanks would influence the sample results cited in the Petitioner's motion, since each of those samples were taken in a direction opposite to the groundwater flow. Therefore, there is no way the Petitioner can claim that the results cited in its motion in any way support a claim that it has justified the costs associated with each UST at the site.

Furthermore, the Petitioner's reliance on PID readings is also without substance. The Petitioner argues that the readings taken around the ineligible tanks in October 2002 indicate low readings showing no releases requiring remediation. Petitioner's motion, p. 22. But again, looking to the locations cited to by the Petitioner, only one PID reading is in the approximate area of any of the Pre-74 (ineligible) tanks. Petitioner's motion, Exhibit 16, p. 1087. Just one reading is far too scant to draw any substantive conclusions as are being made by the Petitioner.

Also, the Petitioner argues that samples taken during removal and excavation in October 2002 confirm an absence of contamination. Petitioner's motion, p. 22. But, as Freedom Oil's consultant acknowledged, there were no samples taken prior to excavation to test whether the ineligible tanks were contributing to the contamination. AR III, p. 466. The samples that were taken were bottom and sidewall samples taken after excavation was completed. AR III, p. 466. A comparison of the dates of ineligible tank removal (October 3 and 8, 2002) versus the sampling dates (October 3, 7 and 9, 2002) confirm that no pre-excavation samples were taken. AR III, pp. 471-472; AR III, p. 485.

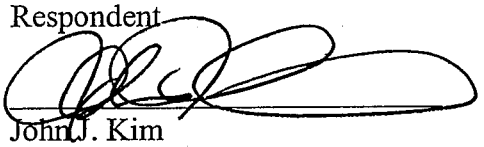
Therefore, none of the sampling data presented by the Petitioner demonstrates that the ineligible tanks were not contributory to the contamination at the site, and there is no showing of any

kind by the Petitioner that it justified the costs attributable to each UST at the site prior to the issuance of any of the reimbursement decisions under appeal.

V. CONCLUSION

Section 57.8(m) of the Act clearly places the burden upon the owner or operator to justify the costs attributable to each UST at a site to avoid the possible imposition of apportionment of costs. In this situation, Freedom Oil did not provide the Illinois EPA with any information as of the time of issuance of its reimbursement final decisions that could allow Freedom Oil to escape an apportionment of its costs. 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 an UST-by-UST basis. Given that there were ineligible tanks at the site, and that Freedom Oil failed to justify the costs as otherwise required by statute, the Illinois EPA's imposition of an apportionment of costs was correct. The Illinois EPA therefore respectfully requests that the Board affirm its decisions as to apportionment of costs.[8]

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



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Dated: May 11, 2005

[8] The other miscellaneous costs included in the reimbursement final decisions are contested from a factual standpoint, and therefore are not suitable for resolution via a motion for summary judgment.

Attachment 1

D:	Diesel	E:	Eligible
G:	Gasoline	IE:	Ineligible
K:	Kerosene	UK:	Existence unknown at time
UO:	Used Oil		

Tank #: Gallons: Content:	1 4,000 D	2 4,000 G	3 4,000 G	4 4,000 G	5 1,000 G	6 1,000 K	7 1,000 G	8 1,000 G	9 1,000 G	10 1,000 G	11 500 UO
December 12, 2002 Final Decision:	IE	E	E	E	IE*	IE	IE**	IE	IE	IE	UK

*: Tank 5 was erroneously included in the calculations.
**: Tank 7's volume was erroneously calculated at 500 gallons instead of the correct 1,000 gallons.

Ratio of total eligible tank volume to total tank volume = 12,000 / 21,500 = 0.55814

Thus 55.814% of eligible costs were approved.
100% minus 55.814% = 44.186% = percentage of eligible costs deducted from final approval of costs.

Tank #:	1	2	3	4	5	6	7	8	9	10	11
Gallons:	4,000	4,000	4,000	4,000	1,000	1,000	1,000	1,000	1,000	1,000	500
Content:	D	G	G	G	G	K	G	G	G	G	UO
March 19, 2003 Final Decision:	E	E	E	E	IE*	E	IE**	IE	IE	IE	UK

*: Tank 5 was erroneously included in the calculations.
**: Tank 7's volume was erroneously calculated at 500 gallons instead of the correct 1,000 gallons.

Ratio of total eligible tank volume to total tank volume = 17,000 / 21,500 = 0.7907

Thus 79.07% of eligible costs were approved.
100% minus 79.07% = 20.93% = percentage of eligible costs deducted from final approval of costs.

Tank #:	1	2	3	4	5	6	7	8	9	10	11
Gallons:	4,000	4,000	4,000	4,000	1,000	1,000	1,000	1,000	1,000	1,000	500
Content:	D	G	G	G	G	K	G	G	G	G	UO
May 28, 2003 Final Decision:	E	E	E	E	IE	E	IE**	IE	IE	IE	IE

**: Tank 7's volume was erroneously calculated at 500 gallons instead of the correct 1,000 gallons.

Ratio of total eligible tank volume to total tank volume = 17,000 / 21,000 = 0.8095

Thus 80.95% of eligible costs were approved.
100% minus 80.95% = 19.05% = percentage of eligible costs deducted from final approval of costs.

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on May 11, 2005, I served true and correct copies of a RESPONSE TO MOTION FOR SUMMARY JUDGMENT AND CROSS MOTION FOR SUMMARY JUDGMENT, MOTION TO STRIKE, and MOTION FOR LEAVE TO FILE INSTANTER, by placing true and correct copies in properly sealed and addressed envelopes and by sending via First Class U.S. Mail delivery to the following named persons:

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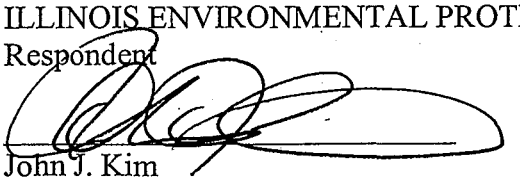
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



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