THE ILLINOIS POLLUTION CONTROL BOARD

FREEDOM OIL COMPANY,	)	
	)	
Petitioner,	)	PCB 03-54
	)	PCB 03-105
vs.	)	PCB 03-179
	)	PCB 04-02
ILLINOIS ENVIRONMENTAL	)	(LUST Fund)
PROTECTION AGENCY,	)	PCB 03-56
	)	(UST Appeal)
Respondent.	)	(Consolidated)

NOTICE

Dorothy M. Gunn, Clerk
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PLEASE TAKE NOTICE that I have today filed (electronically) with the Office of the Clerk of the Pollution Control Board Petitioner's RESPONSE OF FREEDOM OIL COMPANY TO THE CROSS-MOTION FOR SUMMARY JUDGMENT OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, a copy of which is enclosed with this Notice and served upon you.

Respectfully submitted,

FREEDOM OIL COMPANY

By: s/ Diana M. Jagiella
Diana M. Jagiella

Diana M. Jagiella
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RESPONSE OF FREEDOM OIL COMPANY TO THE CROSS-MOTION FOR SUMMARY JUDGMENT OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

NOW COMES the Petitioner, FREEDOM OIL COMPANY ("Freedom"), by and through its attorneys, Howard & Howard Attorneys, P.C., and for its Response to the Cross-Motion of the Illinois Environmental Protection Agency ("IEPA") for Summary Judgment ("Cross-Motion"), states as follows:

I. INTRODUCTION.

IEPA's Cross-Motion reflects two glaring errors. First, IEPA misapprehends the requirements of the apportionment statute. IEPA's Cross-Motion is based upon the mere presence of ineligible tanks deemed to have had releases. IEPA then asserts Freedom failed to prove these tanks did not cause contamination. The statute, however, places no such burden on Freedom. Freedom is not required to prove the absence of contamination from ineligible tanks. The statute requires only that Freedom prove the costs for which it seeks reimbursement were incurred due to releases from eligible tanks. Because these costs were specifically ordered for releases from eligible tanks, Freedom met its burden.

Second, and more damning, is the fact that both the Cross-Motion and the administrative record finally filed in this case demonstrate that at no time has the IEPA done any analysis to determine if Freedom's claims were associated with eligible or ineligible tank releases. A review of the administrative record demonstrates there is not one note, email, letter, internal memorandum or record of discussion by the IEPA regarding the justifications offered by Freedom in support of its reimbursement claims. No supporting document or affidavit is attached to IEPA's Cross-Motion for summary judgment to support any IEPA analysis of the material submitted by Freedom or which rebuts the conclusions that these costs were ordered to remediate releases from eligible tanks.[1]

Instead, the administrative record and Cross-Motion demonstrate that IEPA merely apportioned costs on a percentage basis because the Office of the State Fire Marshal ("OSFM") declared a release from the ineligible tanks during tank removal. No review or analysis was done to see if ineligible tank releases necessitated clean up costs. No consideration was given to the fact that these tanks had been filled with sand for over thirty years. No consideration was given to the fact that clean up costs for ineligible tanks would only be ordered by the OSFM based on risk of imminent harm, a finding never made and an order never issued. No consideration was given to the fact that these tanks were found as a mere fortuity during clean up ordered for specifically identified

[1] Counsel for the IEPA is under the mistaken impression that affidavits are not permitted. Freedom has addressed this issue in its Response to IEPA's Motion to Strike Affidavits. As noted therein, affidavits are a substitute for testimony otherwise permissible at the hearing and is specifically contemplated by the rule. What is not permissible is a summary judgment motion containing unsupported allegations, nor may IEPA respond to Freedom's motion for summary judgment with an unsupported denial. IEPA's failure to rebut Freedom's evidence demonstrates there is no question of fact and that Freedom is entitled to summary judgment.

releases from the eligible tanks. No consideration was given to the fact that had such tanks not been found, the same clean up costs would have been incurred because of a court order to remediate releases from eligible tanks and have been fully reimburseable. Finally, the IEPA's Cross Motion includes no IEPA statement under oath that these ineligible tanks were in any way tied to the costs of the corrective action. In short, IEPA failed to do its job when reviewing this application. It did no analysis and its refusal to award compensation is not merely arbitrary and capricious, but borders on being a bad faith denial. Even now, IEPA is unable to offer sworn testimony that these tanks were related to the corrective action. As shown herein, in view of the evidence supplied by Freedom, IEPA has a burden or producing such evidence.

II. EVIDENCE IN SUMMARY JUDGMENT PROCEEDINGS.

Freedom does not quarrel with the IEPA's recital of the standard for granting summary judgment. IEPA, however, neglects to inform the Board regarding the evidentiary requirements in summary judgment. When a motion has been made supported by exhibits and sworn testimony in affidavits, a respondent is required to show a material issue of fact by counter-affidavit.

Freedom recognizes the need to counter a motion for summary judgment. As necessary to meet the requirements of a response to IEPA's Cross-Motion, Freedom hereby incorporates herein its statement of facts, exhibits, and affidavits set forth in Freedom's Motion for Summary Judgment in defense of IEPA's Cross-Motion.

In contrast, IEPA's response to Freedom's Motion, fails to meet the requirements for a response to a well-supported motion. Freedom's Motion contained the affidavits of two experts that the corrective actions in this case as described in the record were not

attributable to the ineligible tanks. IEPA offered no counter affidavit. As a result, and as a matter of law, this Board must accept the affidavits presented by Freedom as true, and rule in favor of Freedom on its Summary Judgment Motion.

The Illinois Supreme Court stated this rule in *Carruthers v. B.C. Christopher & Company*, 57 Ill. 2d 376, 313 N.E.2d 457, 459 (1974) ("If the party moving for summary judgment supplies facts which, if not contradicted, would entitle such a party to judgment as a matter of law, the opposing party cannot rely upon his complaint or answer alone to raise genuine issues of material fact."). The Court recognized that a party is not compelled to file counter affidavits, except for the compulsion that "if the defendants' affidavits are uncontested, the material facts stated therein must be accepted as true." 313 N.E.2d at 460.

Freedom's submittal of an affidavit containing the conclusions of expert witnesses based on the record is an acceptable procedure in summary judgment proceedings. *See e.g. Evanston Hospital v. Crane*, 254 Ill. App. 3d 435, 627 N.E.2d 29 (1993). The affidavits here set forth facts concerning the status of the ineligible tanks when found, personal experience with implementations of the corrective action and with the analytical results thereof. IEPA made no objections to them based upon foundation. The only objection was that the representations were post record. We addressed this objection in a separate response to IEPA's Motion to Strike.

Given that Freedom's Motion was supported by affidavits of expert witnesses, IEPA's failure to counter them means they must be accepted as true. When a party fails to rebut an expert's conclusion in summary judgment, such conclusion stands. Thus, in *Evanston Hospital v. Crane*, 254 Ill. App. 3d 435, 627 N.E.2d 29, 34 (1993), the Illinois

Appellate Court affirmed the granting of summary judgment in favor of the hospital where the patient failed to adequately rebut the conclusion regarding a standard of care provided by the hospital's expert. The Court found that even the affidavit of the party was insufficient to withstand the motion of the hospital because the party was not a qualified expert. Here, IEPA also failed to rebut. Not only did it not offer an affidavit of a qualified expert, IEPA offered no affidavit at all.

When reviewing IEPA's Response to Freedom's Motion and IEPA's Cross-Motion, this Board should note that IEPA failed to produce an expert to contradict or rebut under oath, the opinion of a professional engineer and a project scientist with MacTec. The conclusions of these experts stand unrebutted and Freedom should be granted summary judgment on this point alone.

III. ARGUMENT.

A. OSFM decisions do not determine the right to compensation.

In its Cross-Motion, IEPA argues that "OSFM's Action Were Correct." This entire line of argument by IEPA should be considered pointless. On the one hand, IEPA correctly notes "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." IEPA's Cross-Motion, page 6. Yet, on the other hand, IEPA states its decision to apportion is supported by the OSFM release determination:

> 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 EDA's submitted to OSFM by Freedom Oil must be taken as true, as the information was certified as such by Freedom

> Oil (or a designated agent thereof). AR II, p. 10; AR II, p. 20. Therefore, as was certified by Freedom Oil, Tanks #7 through #11 did experience releases.
>
> IEPA's Cross-Motion, pages 9-10.

According to the IEPA, an OSFM release determination can be bootstrapped into a clean up obligation. The law clearly does not allow such bootstrapping. We must accept that releases from ineligible tanks occurred. Yet, as the IEPA notes, the OSFM takes no position on the need for corrective action regarding such releases. An OSFM release determination does not mean the corrective actions which are the subject of Freedom's applications had anything to do with these ineligible tanks or any releases therefrom. Whether compensation is awarded depends upon whether costs of a corrective action are attributable to eligible tanks. This requires the IEPA to review the corrective action and determine if the corrective action arose from a release from an eligible tank. It requires more than a mere finding of the possibility of a release from ineligible tanks. Nonetheless, IEPA rubber-stamped an OSFM release determination as its final conclusion regarding the necessity for clean up.

If the OSFM has no authority to determine corrective actions, then IEPA cannot simply rely upon a release determination to justify apportionment. The statute concerning apportionment of costs permits apportionment only if "*corrective action* costs" (emphasis added) sought are the result of addressing problems with ineligible tanks. By IEPA's own admission, the OSFM does not make determinations regarding the need for corrective action. IEPA, therefore, cannot simply assume that any corrective action is attributable to these tanks merely because of an initial release determination by the OSFM. Therefore, reliance solely upon an OSFM report to make decisions regarding

compensation from the LUST Fund is misplaced. It reflects an agency that either (1) misunderstands the statute; (2) is too busy to do its job properly; or (3) is intentionally delaying payment in hopes of a settlement for far less than what petitioners are due in matters of this type. We hope that the later reason is not what occurred here and that the IEPA has learned that it must act lawfully. *Grigoleit Company v. Illinois Pollution Control Board,* 245 Ill. App. 3d 337, 613 N.E.2d 371, 351 (1993) (J. Steigman, concurring opinion commenting on the agency's past improper lawlessness.)

Assuming the first reason is the culprit, it is clear that the IEPA's understanding of the statute is wrong. Mere existence of an OSFM release determination from an ineligible tank is irrelevant. Section 57.7(m) apportions costs for a plan if "the owner or operator failed to justify all costs attributable to each underground storage tank at the site." The emphasis is on "corrective action" in a plan and "costs". Nothing in an OSFM release determination considers the issue of whether the costs of the corrective actions were for ineligible tanks. Release reports merely list the number of tanks, whether they are registered and whether there may have been releases. The mere listing of an ineligible tank with a release is meaningless. For example, any hole in the ineligible tank results in the listing of a release. Whether corrective action is required is typically determined at a later date based upon further investigation. A hole in an ineligible tank could have occurred at any time after the tank was retired and filled with sand. Unless there is corrective action associated with a release, the mere listing of a release by the OSFM has no bearing on a decision under Section 57.7(m).

Instead, the IEPA must review the evidence submitted by an applicant and ask the following relevant questions: Why was the corrective action necessary? Why was it

ordered? Would any corrective action have been ordered with respect to the ineligible tanks even if the OSFM stated there had been a release? Would the corrective action still have been ordered with respect to the eligible tanks if none of the ineligible tanks were present?

As demonstrated in Freedom's Motion for Summary Judgment, each of these questions was answered by material submitted by Freedom. All the answers demonstrate that *100%* of the costs here were incurred as corrective action ordered with regard to eligible tanks. Freedom can justify each cost as associated with an eligible tank because each cost was specifically ordered to be undertaken due to a release from eligible tanks. The costs were not ordered for any other purpose. Despite this overwhelming evidence, IEPA did not address any of these issues. No memo, email, correspondence or other record demonstrates that IEPA ever considered whether the *costs* of the plan were attributable to ineligible tanks. Instead, IEPA only considered the OSFM release determination.

B. Freedom is only required to show 100% of the costs was attributable to eligible tanks; it is not required to demonstrate the absence of contamination from ineligible tanks.

According to IEPA, Freedom must prove that no contamination at the site was due to ineligible tanks. Nothing in the statute requires Freedom to prove this. Rather, the statute requires only that Freedom justify attributing costs of a particular clean up to eligible tanks. If, as here, the plan required these actions to remediate specific releases from eligible tanks, Freedom fully justified that the costs were attributable to eligible tanks.

Section 57.8 of the Environmental Protection Act must be read in its context. Subsection (m) provides:

> The Agency may apportion payment of *costs for plans* submitted under Section 57.7 if:
>
> (1) the owner or operator was deemed eligible to access the Fund for payment of corrective action costs for some, but not all, of the underground storage tanks at the site; and
>
> (2) the owner or operator failed to justify all *costs attributable* to each underground storage tank at the site.

(emphasis added).

Section 57.8(m) must be read in context of the entire Act of which it is a part. As contemplated by Section 57.9, a party is entitled to reimbursement of costs incurred to implement a plan to remediate a confirmed release from an eligible tank. If all costs were incurred to remediate such a release, they are reimbursable. To avoid apportionment under Section 57.8(m), the petitioner need only justify that a cost arose in connection with remediation of a release attributable to an eligible tank. This Board recognized this in *Martin Oil Marketing v. IEPA*, Case PCB 92-53 (August 13, 1992) which Freedom discussed in Freedom's Motion. IEPA completely ignored this case. Therefore, Freedom need not prove the absence of all contamination from any other source at the site if the purpose of the clean up was related to a release from an eligible tank.

IEPA cannot contradict that Freedom was ordered to undertake the remediation for two releases both identified with eligible tanks. The plan mandated by IEPA was specifically to address these releases, not releases from ineligible tanks. The action was required regardless of whether ineligible tanks were discovered. More importantly, although authorized under Section 57.8, the IEPA did not demand a revised corrective

action plan after discovery of the tanks. It never said that the plan must now address possible releases from these tanks. Thus, the plan ordered to remediate the two releases remained in place and cannot now be deemed a plan to remediate releases of the ineligible tanks. The IEPA is using the mere fortuity of discovering such tanks to deny payment of costs that would have been incurred absent such discovery and, but for such discovery, would be unquestionably reimbursable.

IEPA, therefore, misleads this Board by discussing "releases" from ineligible tanks and possible contamination. The plan here was not ordered for these releases and Freedom has no obligation to prove the absence of other contamination at the site. No such requirement exists in the statute or any precedent of any case interpreting the statute. Under *Martin Oil,* Freedom only has to prove that the costs subject to its applications were incurred to remediate a release from an eligible tank. Because such actions were specifically ordered due to releases from such tanks and Freedom was obligated to undertake such costs regardless of the presence of other tanks, Freedom has justified attributing the costs to eligible tanks.

C. Freedom has met its burden of proof.

1. Freedom is not required to provide plenary proof that costs are not attributable to ineligible tanks before the IEPA must rebut.

IEPA misunderstands the concept of a burden of proof. It is under the mistaken impression that it never has to present "information that demonstrates ineligible tanks were contributing to the contamination at the site." This statement is wrong in two respects. First of all, only if the ineligible tanks contributed to the releases for which clean up occurred can any apportionment be considered. This case concerns whether

clean up costs ordered for the specific releases involved the ineligible tanks. This is especially true given the standard for corrective action of ineligible tanks is not simply contamination, but imminent harm, a finding never made in connection with these tanks.

Second, the statement is wrong in that IEPA does have a burden of production in this matter. It may not sit silently and simply argue that Freedom's evidence is not perfect. Moreover, before it can argue that ineligible tanks contributed to the costs, there must be evidence of a release from these tanks necessitating clean up costs. Normally, IEPA has the burden of proving the necessity of corrective action. It is ridiculous to demand that Freedom prove no corrective action was necessary regarding the ineligible tanks. IEPA should be required to offer some evidence that these tanks required the corrective action which Freedom performed.

The statute here does place a burden on Freedom. Unfortunately, it is a burden to prove a negative, i.e., Freedom must prove that the costs of the corrective action are not attributable to the ineligible tanks. Proving a "not" typically is difficult. As a result, courts have stated that such proof need not be "plenary," that is the proof need not be "full, entire, complete, absolute, perfect, or unqualified." *Black's Law Dictionary*, 5th Ed., Definition of "plenary."

This point was set forth in *Shumak v. Shumak,* 30 Ill. App. 3d 188, 332 N.E.2d 177 (1975). In *Shumak,* divorce law required one charging mental cruelty to allege and prove that the actions of defendant were without provocation. Thus, as here, a plaintiff had to negate the existence of certain facts, namely provocation. The court recognized that law can place a burden on a party to prove a negative. However, while the party retains this burden, the party is not required to present absolute, perfect proof but only

reasonable grounds for the allegation that the facts do not exist. Once such evidence is offered, it is incumbent that the opposing party counter the evidence.

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

332 N.E.2d at 180.

This Board apparently concurs with these rules. Thus, in *Martin Oil,* the petitioner lost because of a failure to provide any evidence. Had it provided some, the implication of this Board's statement is that IEPA must produce some evidence.

Here, Freedom has provided the following evidence that none of the costs of corrective action is attributable to the ineligible tanks:

1. The corrective action was ordered for releases specifically related to eligible tanks. These releases were a tank liner failure on Tank 1 and a leaky valve on Tank 1. At the time of the order, the ineligible tanks had not been discovered. Thus, none of the specified requirements in the plan can be attributed to such tanks. Therefore, the same work would have been done even if the ineligible tanks had not been discovered (except for the minimal cost of removing the tanks itself).

2. The ineligible tanks were filled with sand. They clearly did not contribute to the 1,100 gallons of gasoline released nor to the vapors in the Paris High School. It is simply not possible that the ineligible tanks produced the sewer vapors, gasoline in the sewer, free product found in wells or product oozing from the soil. Expert testimony supplied in the affidavits submitted by Freedom also concluded such tanks could not have been responsible for such releases.

3. The ineligible tanks are subject to a statute which requires corrective action for such tanks only if a release from such tanks gives rise to an imminent danger. No such finding has ever been made by any agency. Thus, no corrective costs can be associated with the tanks.

4. Sampling from soil borings in the vicinity of the ineligible tanks demonstrated no contamination requiring clean up from the tanks.

The above evidence set forth in Freedom's Motion in detail was more than sufficient to place a burden of production on IEPA. IEPA has completely failed in its responsibility to produce counter evidence. Instead, IEPA's case is nothing more than rank speculation that the ineligible tanks could have produced contamination. Such rank speculation is not sufficient to deny Freedom summary judgment, and it most certainly fails to justify summary judgment in favor of IEPA.

2. Freedom has met its burden which IEPA has failed to counter.

As noted, the corrective actions covered in the applications arose from two releases. One was the presence of vapors at the Paris High School. The investigation revealed that the leak from a sheared valve on Pump No. 1 may have been responsible. The second release occurred from a tank liner failure on Tank No. 1 which involved the release of 1,100 gallons. Both corrective actions were ordered to treat these releases.

Now, the IEPA cannot possibly argue that any of the ineligible tanks were responsible for the 1,100 gallons of gasoline released from the tank liner failure in Tank No. 1. The ineligible tanks did not contribute to this release; they were filled with sand. Moreover, the leakage was specifically traced to Tank 1. Corrective action was ordered for this release and the costs would have been incurred *whether or not* other tanks were found. These costs can only be attributed to Tank 1 as the subject release could not have been the result of ineligible tanks.

That leaves the corrective action undertaken to address the vapors in the Paris High School. Is the IEPA seriously contending that these vapors could have been caused by tanks filled with sand over thirty years ago? Freedom has provided this Board with

sufficient evidence that such is not possible, including the expert opinions of an engineer and project scientist. What more evidence can a party produce on the point than expert opinion? By providing it, the onerous is now on IEPA to rebut it.

Moreover, IEPA virtually concedes that the ineligible tanks cannot be responsible for the vapors in the Paris High School. Throughout its Cross-Motion, IEPA criticizes Freedom because its samples were to the north and up gradient, that is where Paris High School was. According to IEPA, no contamination could be expected from the ineligible tanks in this direction. Thus, by its own argument, IEPA negates the possibility that the release associated with the fumes at the Paris High School for which corrective action was taken had anything to do with the ineligible tanks.

In response to this more than sufficient evidence, IEPA merely cites that an expert of Freedom concluded that "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." IEPA then argues that the sampling did not rule out the possibility of site contamination by the ineligible tanks.[2] IEPA argues that Freedom failed to prove that eligible tanks were the sole source of contamination at the site.

To the contrary, the evidence provided by Freedom was more than sufficient for a party to reasonably conclude that the eligible tanks were the sole source given the absence of *any* counter testimony by IEPA. Freedom specified the sources of the releases, which were eligible tanks. Freedom proved the tanks had been filled with sand for thirty years and, therefore, were unlikely to be the culprit for current problems. They certainly would not cause a release involving imminent danger, the only instance in

[2] It should be stressed that IEPA prevented such sampling. It should not be able to then punish Freedom for the absence of such sampling.

which the costs of a corrective action could be charged to the ineligible tanks. In view of all these facts, IEPA must show some evidence, even that of an expert willing to opine, that the tanks were behind the releases necessitating action. That IEPA has not provided expert affidavits that tanks filled with sand produced the releases that resulted in these corrective actions is not surprising. It is unlikely an expert would risk his or her professional reputation on such an outlandish claim.

More importantly, once again, Freedom did not have to prove the absence of any contamination at the site from ineligible tanks. It only had to justify the costs as being costs incurred to remediate releases from eligible tanks. Freedom was ordered to incur these costs to remediate releases from eligible tanks. The mere fortuity of discovering ineligible tanks should not change this result absent evidence that they caused these corrective actions to be undertaken. No such evidence has been offered.

D. IEPA is subject to judicial estoppel.

IEPA argues that judicial estoppel is not appropriate here for three reasons. First, the matter is one of opinion. Second, it has not made the argument in two proceedings. Third, IEPA argues that it has not benefited. IEPA again misapplies the law.

The matter here was not opinion testimony. It was a representation of fact and a specific position taken by IEPA in the Court. True, it is possible that the attorney making such representation of fact was in error, but that does not make this opinion testimony such as was involved in *Ceres Terminals v. Chicago City Bank*, 259 Ill. App. 3d 836, 635 N.E.2d 485 (1994) (involving the concept of valuation requiring expert testimony). While property can have different values to different experts, a fact is either true or not. The attorney stated as fact that the release came from a tank. This is a fact that is either

true or not. This was a fact represented to the Court. One cannot obtain a favorable ruling on one set of facts and then obtain another by denying such facts. One cannot argue, for example, that a stop light was functioning perfectly and based upon such obtain a money award and then argue later, in a separate proceeding, it was not functioning because of new information to win a different favorable ruling.

If parties were permitted to recharacterize fact as an opinion merely by alleging the fact was mistaken, the created exception would swallow the rule regarding judicial estoppel. The purpose of the rule is to prevent a party from urging *different positions* in two separate proceedings. This is precisely what IEPA is attempting to do.

Moreover, IEPA has failed to demonstrate that discovery of the additional tanks rendered such fact mistaken. The tanks discovered were filled with sand, not gasoline. In fact, they were filled with sand over thirty years ago. No one can seriously contend that these tanks were responsible for the then current release of gasoline in 2002 or the vapors in the high school which was the subject of the Court hearing and the reason the corrective action was ordered. IEPA has offered no reason to this Board and no evidence to demonstrate that the discovery of this tank renders its earlier position that the releases were attributable to Tank 1 as a mistake.

In all of this, IEPA misses the point. It is judicially estopped from denying that it sought a plan involving corrective costs for the releases involving the leaking valve and the tank liner failure. The plan it sought to enforce in Court was for *no other* reason. It cannot now argue before this Board that the plan also was for the ineligible tanks. This is taking *inconsistent positions,* which is what is prohibited by the rule.

IEPA's second argument is also unavailing. Perhaps, its own decision may not have amounted to an administrative proceeding, but matters before this Board clearly constitute an administrative proceeding. The IEPA cannot argue in a judicial proceeding that the Plan was necessary to address the releases on eligible tanks and now argue before the Board that it was not. The rule applies when one takes a position in one judicial or administrative proceeding, but then takes an opposing position in another judicial proceeding or administrative proceeding. IEPA adopted one position in the Edgar Circuit Court. Before this Board, it seeks to take another. It is in urging a different position to this Board in this proceeding that IEPA is involved in urging an inconsistent position in a second proceeding. We are estopping a position in this administrative proceeding.

Finally, IEPA does not have to receive money for judicial estoppel to apply. The requirement of a favorable judgment does not mean one receives money; it means one wins. IEPA used the releases specifically attributable to eligible tanks to win an injunction requiring corrective action. Requiring a remediation for ineligible tanks would have required a different showing in that Court. IEPA put forth no other reason for the injunction. It did not allege any general contamination at the site attributable to any other known tank or that might have been unattributable. Now, IEPA wants to urge before this Board that, in fact, the corrective action was not just for these tanks, but for contamination in general. It is attempting to win a *favorable ruling* relying on an inconsistent position.

This is inequitable and the rule of judicial estoppel exists to preclude such inequity. Freedom did not appeal the judgment in the judicial proceeding because the action was specifically sought to remediate eligible tanks and, thus, reimbursable. The

action required far exceeded what was necessary as is evidenced now by IEPA's own admission that there was no possibility of contamination to the north. However, rather than spend further funds to appeal, Freedom proceeded to take such action based upon the reasons given for such action in Court and letters from IEPA that these actions, being ordered to address these releases, were indeed reimbursable. In the process of fulfilling an order to remediate releases of eligible tanks, Freedom found ineligible tanks. This discovery did not change the fact that the corrective actions were specifically ordered to remediate releases from eligible tanks. Moreover, how can IEPA both attribute the remediation to the north to eligible tanks while arguing to this Court that Freedom's samples from such area are bad because the ineligible tanks could not have caused contamination to the north. This inconsistency within this proceeding alone demonstrates IEPA's bad faith.

Now, however, IEPA seeks to rewrite history before this Board. The mere fortuity of discovering such tanks, IEPA believes, allows IEPA to argue that the corrective action now included remediation of these tanks. By so arguing, it can win a favorable judgment denying compensation.

The position is all the more galling because Freedom had objected to much of the action as unnecessary because it required remediation to the north and up gradient. Yet, reassurances by IEPA that costs were reimbursable and, thus, Freedom should not care led to such action being taken. Now, IEPA wishes to deny full reimbursement of such costs because of ineligible tanks. Moreover, it wishes to deny it while at the same time arguing that our samples were no good because the ineligible tanks could not have produced contamination to north, despite Freedom's now supported belief that no

contamination would be up gradient. It was ordered because of a release from an eligible tank. Now, IEPA concedes that ineligible tanks could not be responsible for any contamination to the north, yet never has it offered to pay for this expense.

IEPA cannot obtain an order by arguing specific corrective action was needed to address certain releases and then obtain an order that such releases really did not cause 100% of the corrective actions. It is estopped from taking *different positions* in two matters. This is not a matter of opinion, but a matter of fact. IEPA urged as fact that eligible tanks created two specified releases. Now, IEPA urges a different set of facts. This it cannot do.

IV. CONCLUSION.

This should have been an easy case. IEPA insisted upon a plan to remediate releases from eligible tanks. Every required action was required because of these releases. Had no ineligible tanks ever been found, there would be no doubt that each action and resulting cost would have occurred. The mere fortuity of finding ineligible tanks containing sand cannot and should not lead to rewriting history. IEPA ordered these corrective actions to remediate releases from eligible tanks. That fact cannot change just because ineligible tanks were found.

IEPA's entire case rests upon a complete misapplication of the statute. IEPA continues to insist that Freedom must present perfect proof that ineligible tanks did not contribute to contamination at the site. The statute contains no such burden. Freedom must only prove that the costs of the corrective actions it took were not attributable to such tanks. As those actions were specifically required to remediate releases from eligible tanks, Freedom met this burden. IEPA now has some burden of showing that

these corrective actions were the result of conditions of the ineligible tanks. A mere speculation of contamination generally at the site that may have come from ineligible tanks is not sufficient.

IEPA's complete failure to provide any counter evidence justifies a finding for Freedom. IEPA's Cross-Motion should be denied and judgment should be entered in favor of Freedom.

Respectfully submitted,

HOWARD & HOWARD ATTORNEYS, P.C.

By: **s/ Diana M. Jagiella**

Dated: May 31, 2005

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on May 31, 2005, I served the attached Response of Freedom Oil Company to the Cross-Motion for Summary Judgment of the Illinois Environmental Protection Agency by electronic filing or by depositing same via first-class U.S. mail delivery to:

Dorothy M. Gunn, Clerk (via electronic filing)
Illinois Pollution Control Board
State of Illinois Center
100 West Randolph, Suite 11-500
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