ILLINOIS POLLUTION CONTROL BOARD
May 5, 1994

PEOPLE OF THE STATE OF ILLINOIS,	)	
Complainant,	)	
v.	)	PCB 93-59 (Enforcement)
FREEDOM OIL COMPANY,	)	
Respondent.	)	

JENNIFER M. CRAIN, ASSISTANT ATTORNEY GENERAL, APPEARED ON BEHALF OF COMPLAINANT;

JON K. ELLIS APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by M. McFawn):

This matter comes before the Board upon a two-count complaint filed March 19, 1993 by the Attorney General of the State of Illinois, on behalf of the People of the State of Illinois, against Freedom Oil Company (Freedom). It alleges that Freedom failed to comply with the investigation and reporting requirements applicable to releases from underground storage tanks (USTs) set forth at 35 Ill. Adm. Code 731.162 and 731.163.

A hearing was held in this matter at 1:20 p.m. on June 1, 1993, in Springfield, Illinois. No members of the public were present.

The violations alleged in this action occurred in connection with two separate releases: (1) a November 21, 1989 release at Respondent's facility in Savoy, Champaign County (the Savoy site), and (2) an April 4, 1991 release at a facility in Oblong, Crawford County (the Oblong site). The complaint alleges that Freedom failed to comply with the investigation and reporting requirements under 35 Ill. Adm. Code Sections 731.162 and 731.163.

APPLICABLE REGULATIONS

Pursuant to Section 731.162(b), when a release from a UST is confirmed, the owner or operator must submit a report to the Illinois Environmental Protection Agency (Agency) within 20 days summarizing the initial abatement steps taken in response to the release, and detailing any information or data collected. Section 731.162(a) details the required abatement measures, which, in pertinent part, include a requirement that the owner or operator conduct sampling to measure for the presence of a release. In particular, 731.162(a) provides:

a) Owners and Operators shall perform the following abatement measures:

1) Remove as much of the regulated substance from the UST system as is necessary to prevent further release to the environment;

2) Visually inspect any above ground releases or exposed below ground releases and prevent further migration of the released substance into surrounding soils and groundwater;

3) Continue to monitor and mitigate any additional fire and safety hazards posed by vapors or free product that have migrated from the UST excavation zone and entered into substance structures (such as sewers or basements);

4) Remedy hazards posed by contaminated soils that are excavated or exposed as a result of release confirmation, site investigation, abatement or corrective action activities. If these remedies include treatment or disposal of soils, the owner and operator shall comply with 35 Ill. Adm. Code 722, 724, 725, 807 and 809.

5) Measure for the presence of a release where contamination is most likely to be present at the UST site, unless the presence and the source of the release have been confirmed in accordance with the site check required by Section 731.152(b) or the closure site assessment of Section 731.172(a). In selecting sample types, sample locations and measurement methods, the owner and operator shall consider the nature of the stored substance, the type of backfill, depth to groundwater and other factors as appropriate for identifying the presence and source of the release; and

6) Investigate to determine the possible presence of free product, and begin free product removal as soon as practicable and in accordance with Section 731.164.

(Emphasis added.)

Section 731.163(b) requires the owner or operator of a UST to submit a report within 45 days of the confirmation of a release, summarizing the information collected in accordance with the initial site characterization detailed at Section 731.163(a). Section 731.163(a) provides:

a) Owners and operators shall assemble information about the site and the nature of the release, including information gained while confirming the release, including information gained while confirming the release or completing the initial abatement measures in Section 731.160 and Section 731.161. This information must include, but is not necessarily limited to the following:

1) Data on the nature and estimated quantity of the release;

2) Data from available sources or site investigations concerning the following factors: surrounding populations, water quality, use and approximate locations of wells potentially affected by the release, subsurface soil conditions, locations of subsurface sewers, climatological conditions and land use;

3) Results of the site check required under Section 731.162(a)(5); and

4) Results of the free product investigations required under Section 731.162(a)(6), to be used by owners and operators to determine whether free product must be recovered under Section 731.164.

(Emphasis added.)

FACTS

The Savoy Site

On November 21, 1989, Inspector Douglas Kirk of the Office of the State Fire Marshal (OSFM) investigated the Savoy site in response to a complaint of petroleum vapors received by the Savoy Fire Department. (Tr. at 86.) Upon investigation, Inspector Kirk found fresh product under the south unleaded pump. (Tr. at 89.) At Inspector Kirk's direction, Freedom reported a release of petroleum at the Savoy site to the Illinois Emergency Services and Disaster Agency (IESDA) on November 22, 1989. (Complainant's Exh. 1.) On December 1, 1989, the Agency sent a Notice of Release Letter (NORL) to Freedom which detailed the required response activities. (Complainant's Exh. 2.) On December 13, 1989, Freedom responded to the NORL in a letter by A. Michael Owens, Vice President of Freedom, which stated that tank test results would be forwarded to the Agency shortly and that soil samples would be taken. (Complainant's Exh. 3.) No tank test results or sampling data was ever submitted to the Agency.

On February 14, 1990, Freedom had all the USTs at the Savoy

site tested for tightness by Qualified Testing Company, and all the tanks tested "tight." (Respondent's Exh. 3.) The test report indicates that the results were forwarded to the OSFM, although no date is given and there is no confirmation of its receipt. (Respondent's Exh. 3.)

On November 21, 1991, the Agency sent Freedom a Compliance Inquiry Letter (CIL), informing Freedom that the required 20 and 45 day reports had not been submitted and that no site assessment had been performed. (Complainant's Exh. 4.) This was followed by a Pre-Enforcement Conference Letter, sent on April 7, 1992. (Complainant's Exh. 5.) Freedom did not respond to either letter.

On December 21, 1992, Freedom submitted the 20 and 45 day reports. (Complainant's Exh. 6.) The 20 day report did not include sampling data, summarize abatement measures taken, or summarize any information or data obtained as a result of those measures. (Complainant's Exh. 6.) The 45 day report denied that a release had taken place and did not include a determination of the nature and quantity of the release. (Complainant's Exh. 6.)

The Oblong Site

On April 4, 1991, Freedom reported a release at the Oblong site to the IESDA. (Complainant's Exh. 7.) Ronald Dye of RAPPS Engineering testified that soil borings were conducted on April 5, 1991 (Tr. at 137), although the record does not contain the results of that sampling. On April 8, 1991, the Agency sent Freedom notification that it must submit a report within 20 days, accompained by a packet discribing what requirements must be followed. (Complainant's Exh. 11.) On May 8, 1991, Freedom had the USTs at the Oblong site tested for tightness by Qualified Testing Company, and all the tanks tested "tight." (Respondent's Exh. 4.) As with the Savoy site, the test report indicates that the results were forwarded to OSFM, although no date is indicated and there is no confirmation of its receipt. (Respondent's Exh. 4.)

On December 16, 1991, the Agency sent Freedom a CIL for failure to submit the 20 and 45 day reports. (Complainant's Exh. 8.) On December 31, 1991, RAPP's Engineering sent the Agency a letter on behalf of Freedom, which states that it is intended to meet the requirements of the 20 and 45 day reports, despite the fact that it did not include a site assessment or sampling data. (Complainant's Exh. 9.) On June 10, 1992 the Agency responded to Freedom's submittal by letter, requesting further definition of the extent of soil and groundwater contamination in accordance with 35 Ill. Adm. Code 731.165. (Complainant's Exh. 10.) Freedom never responded to this request.

DISCUSSION

Freedom does not deny there were confirmed releases at both sites, or that it failed to submit the information and reports required pursuant to Sections 731.162 and 731.163. Freedom does, however, offer several defenses for its failure to comply.

The Savoy Site

In reference to the Savoy site, Freedom contends that the Agency should be estopped from enforcing the statute against Freedom because the Agency failed to properly inform Freedom of the reporting requirements. Freedom points out, and the Agency admits, that the NORL sent December 1, 1989 (Complainant's Exh. 2) indicated that Freedom was required to submit a 15 day report, rather than the 20 and 45 day reports actually required by the applicable Board regulations, which had been effective only since June 12, 1989 (Respondent's Post Hearing Brief at 2 - 3).

Six elements must be shown in order for the doctrine of equitable estoppel to apply: (1) Words or conduct by the party against whom the estoppel is alleged constituting either a misrepresentation or concealment of material facts; (2) knowledge on the part of the party against whom the estoppel is alleged that representations made were untrue; (3) the party claiming the benefit of an estoppel must not have known the representations to be false either at the time they were made or at the time they were acted upon; (4) the party estopped must either intend or expect that his conduct or representations will be acted upon by the party asserting the estoppel; (5) the party seeking the estoppel must have relied or acted upon the representations; and (6)the party claiming the benefit of the estoppel must be in a position of prejudice if the party against whom the estoppel is alleged is permitted to deny the truth of the representations made. City of Mendota v. Pollution Control Board, (October 1, 1987) 112 Ill. Dec. 752, 756.)

The Board has rarely applied the doctrine of estoppel. (City of Herrin v. Illinois Environmental Protection Agency, (March 17, 1994) PCB 93-195 at 8.) In those cases where we have applied it, The Agency was found to have affirmatively mislead a party and then sought enforcement against that party for acting on the Agency's recommendation. See In the Matter of: Pielet Brothers' Trading, Inc., (July 13, 1989) AC 88-51, 101 PCB 131, and IEPA v. Jack Wright, (August 30, 1990) AC 89-227).

In this case, it is not clear that Freedom was affirmatively mislead by the Agency, since, as the Agency points out, the NORL did reference the proper Code of Federal Regulations (CFR) Sections, contained in 40 CFR Part 280, which require the 20 and 45 day reports. (Complainant's Post-hearing Brief at 2.) Even if the reference to the 15-day reporting requirement caused

Freedom some initial confusion, the Agency corrected any possible misunderstanding and clearly defined the reporting requirements in its CIL, sent November 21, 1991, one year and 4 months prior to bringing this enforcement action. This was followed by the Pre-enforcement Conference Letter on April 7, 1992, which reaffirmed that 20 and 45 day reports were required. Besides these notices, as early as April 8, 1991, the Agency notified Freedom of the proper response requirements in connection with the release at the Oblong site. (Complainant's Exh. 11.)

Furthermore, Freedom has not demonstrated that it relied on the Agency's misstatement, since it failed to comply with the requirements set forth in the NORL. The NORL gave Freedom notice that soil sampling was required (Complainant's Exh. 2), and Freedom's response to that letter indicated that soil sampling would be performed (Complainant's Exh. 3). However, despite these representations, Freedom never submitted any sampling data to the Agency.

Since the Agency corrected its misstatement prior to bringing this enforcement action, and since Freedom has not shown that it relied on the Agency's misstatement, we find that the doctrine of estoppel does not apply. In fact, every Agency communication notified Freedom it was required to do soil sampling.

The Oblong Site

In reference to the Oblong site, Freedom offers in defense that on April 12, 1991 it was orally granted a 30 day extension of time in which to file the 20 and 45 day reports. (R. at 142.) The Agency contends that a Board order, i.e. a variance, would be required for Freedom to be given such an extension. (R. at 16.) Even if Freedom believed it was given a 30 day extension, it has not offered any justification for its continuing failure to comply with the sampling and reporting requirements. The release at the Oblong site was reported on April 4, 1991, almost 2 years before this action was filed. At most, Freedom may have believed that it was given until the summer of 1991 to comply. Additionally, Freedom has never submitted soil sampling data to the Agency despite its contention that sampling was performed at the Oblong site. Yet, the brief discussion on the record of that data indicates evidence of petroleum contamination. (R. at 138.)

Freedom also seeks to rely on the fact that tank tightness tests were performed at both sites, and the results were forwarded to OSFM. Even if true, that action clearly does not fulfill Freedom's obligations under the applicable Board regulations. Freedom cannot assume OSFM forwards such information to the Agency. The OSFM's interest is in responding to emergency fire hazards, while the Agency's interest is in remedying environmental contamination. The reporting

requirements under Sections 731.162 and 731.163 constitute separate obligations which Freedom was under a duty to fulfill.

Since the Agency did not receive the results of the tank tightness tests or any sampling information, it has no way of knowing the extent of environmental contamination which resulted from the release at either site. Freedom has consistently refused to provide the Agency with this information, despite the Agency's repeated attempts to obtain it.

DECISION

Based on the record, the Board finds that Freedom failed to comply with the investigation and reporting requirements set forth at Sections 731.162 and 731.163 for the releases at both sites. These requirements are applicable to releases unless it is demonstrated that there is no "confirmed" release. Such demonstration is governed by the requirements set forth at Section 731.152. In addition to the systems test defined in 731.152(a), this demonstration requires a site check, including sampling, as defined in 731.152(b). The record contains no evidence of such a demonstration, and Freedom does not dispute that there was a confirmed release at either site. Furthermore, Freedom has not demonstrated through its defenses that compliance with the Board's regulations would impose an arbitrary or unreasonable hardship under Section 31(c) of the Act.

REMEDY

Having found Freedom to be in violation of paragraphs (a) and (b) of Sections 731.162 and 731.163 at both sites, the Board must issue an appropriate order under the circumstances. This determination is governed by Section 33(b) and Section 42 of the Environmental Protection Act 415 ILCS 5/1 et seq. (Act). Under Section 33(b) the Board has authority to issue final orders, including orders directing a party to cease and desist from violations, and orders imposing civil penalties in accordance with Section 42. Under Section 33(c), when issuing its orders and determinations, the Board is to consider:

> all the facts and circumstances bearing upon the reasonableness of the emissions, discharges, or deposits involved, including but not limited to the following:
>
> 1. the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
>
> * * *

4. the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and

5. any subsequent compliance.

45 ILCS 5/33(c) (Emphasis added.)

Only the last of the three criteria recited above seems directly applicable to the facts of this case. However, the first two criteria, concerning protection of health and the environment and the practicability of compliance, also aid the Board in framing an order and determining a penalty.

There has been no subsequent compliance by Freedom. Despite repeated attempts by the Agency to get Freedom to comply with the rudimentary investigation required by Sections 731.162 and 731.163, Freedom refused to do so. The record before us contains none of the data required pursuant to paragraphs (a) of Sections 731.162 and 731.163. As for the reporting requirements contained in paragraphs (b) of Sections 731.162 and 731.163, Freedom appears to pay lip service by merely filing some pieces of paper. The 20 day and 45 day reports submitted by Freedom for both sites contain no information about site assessment or soil sampling. In fact the report filed for the Savoy site simply denies that a releases occurred, but offers no supporting data. Furthermore, these reports were submitted for both sites only after the Agency sent repeated letters to Freedom informing it of its failure to comply.

Freedom refers to these violations as the mere "failure to timely file some pieces of paper." (Respondent's Post-Hearing Brief at 20.) Freedom seriously misconstrues the nature of its violations. Without the data required by these Board regulations, the Agency cannot determine the degree of injury to the environment. By failing to submit this information, Freedom has demonstrated a continuing lack of good faith concerning the protection of the public health and general welfare and the environment. Based on the record before us, which is devoid of any sampling or site assessment data, we find that Freedom did not undertake the investigation necessary to determine the extent and nature of the releases and their impact on the surrounding environment. Such an investigation has become a routine matter for owners and operators of USTs at gasoline stations. Certainly, the fact that undertaking this routine investigation has become a standard practice for all owners and operators of USTs demonstrates its technical practicability and economic reasonableness. The Board finds Freedom's failure to comply with the investigation and sampling requirements incomprehensible in light of all the facts and circumstances. Freedom offers no plausible explanation for its recalcitrance.

As for the reporting requirements, Freedom submitted reports insufficient on their face. Furthermore, the report filed for the Savoy site came more than one year after the Agency sent Freedom a CIL and more than six months after the Agency sent a Pre-Enforcement Conference Letter. As for the Oblong site, Freedom submitted the report over six months after Freedom alleges it received a verbal extension of time to file the reports, and then only after the Agency had sent Freedom a CIL.

PENALTY

These same facts are the matters of record which the Board considers in assessing a penalty. Under Section 42(h), the Board is authorized to consider any matters of record in mitigation or aggravation of a penalty, including, but not limited to the following factors:

1. the duration and gravity of the violation;

2. the absence of due diligence on the part of Freedom to comply with the requirements of the cited Board regulations; and

3. the amount of monetary penalty which will serve to deter further violations by Freedom and to otherwise aid in enhancing voluntary compliance with this Act by Freedom and other persons similarly subject to the Act.

Examining the duration of the violations, again we consider that the release at the Savoy site was recorded on November 22, 1989, almost 3 and 1/2 years before the complaint was filed in this action on March 19, 1993. The release at the Oblong site was reported on April 4, 1991, almost 2 years before this action was filed. In the interim, the Agency sent Freedom three letters concerning the Savoy site and two letters concerning the Oblong site. In each letter, the Agency notified Freedom of the information it must collect at each site, and that the same must be submitted to the Agency. Even with these letters, Freedom did next to nothing to comply, and, as of this date, Freedom still has not complied with the applicable investigation and reporting requirements. Freedom's recalcitrance demonstrates a lack of due diligence to comply with the Board's regulations.

Addressing the gravity of the violation, again we must correct Freedom. These violations are not mere paper violations. Without the required reports and sampling data, the Agency has no way of knowing the extent of contamination that may exist at either site. For at least 3 and 1/2 years and two years at the Savoy and Oblong sites, respectively, the presence of ground water, as well as soil, contamination remained undetermined. The reporting requirements are there to prompt the investigation necessary to determine the extent of contamination and

remediation. Left uninvestigated, the pollution can migrate and cause more damage than it did initially. Not only did Freedom fail to submit the reports despite the Agency's repeated requests for them, it also failed to undertake the investigations required at each site to insure that the environment is protected.

Until the extent of contamination is known at each site, the economic benefit accrued by Freedom due to its recalcitrance cannot be accurately determined. While the cost of the investigations could be estimated, the costs saved by deferring any necessary remediation cannot be. Without the investigation, we only know that the remedial costs could range between zero and multiple millions of dollars. Freedom argues that it incurred "a large loss of economic benefits" because of soil samplings, site investigation, related attorneys' fees, engineering fees, tank tightness tests, equipment repairs and service station down time. (Respondent's Post-Hearing Brief at 19.) First, all of those costs are unsubstantiated on the record. Second, the last three items involve repairing the source of the release, not complying with the Board's regulations. Finally, money spent on the remaining items is not itemized, and based on the record before us, the money spent on engineering was for reports which are inadequate and that spent on attorneys' fees was for its defense to this action. Also, the results of soil sampling were never submitted, so the cost for the same cannot be credited to Freedom.

Freedom's failure to comply, the fact that the extent of contamination remains unknown because of that failure, and Freedom's recalcitrance over the three year period lead the Board to conclude it must assess a penalty sufficient to deter continuing violations at these sites and future violations at other UST sites owned by Freedom. The Act authorizes the Board to assess a civil penalty of up to $50,000 per violation, and an additional civil penalty of not to exceed $10,000 for each day during which a violation continues.

The Agency seeks a penalty of $30,000 and an award of costs and fees pursuant to Section 42 of the Act. In support of a penalty in that amount, the Agency cites Freedom's blatant disregard for the applicable regulations. For the most part, Freedom ignored the Agency's letters warning Freedom that it was in possible violation of those regulations. Freedom went so far as to promise soil sampling in its response to the NORL for Savoy, but then went on to ignore the subsequent CIL and Pre-Enforcement Conference Meeting letter sent by the Agency. Concerning the Oblong site, Freedom did submit reports but only after it received a CIL and, thereafter, it ignored the Agency's request for more information concerning the extent of contamination evidenced by those reports. Finally, Freedom has taken no action to correct the contamination at the Oblong site, and simply submitted information insufficient for the Agency to

determine if remediation is necessary due to the release at the Savoy site.

The Board finds that Freedom acted with knowledge of and blatant disregard for the applicable Board regulations. The Board further finds no facts or circumstances which would mitigate the penalty requested. Therefore, the Board orders Freedom to submit the required reports and sampling data, to otherwise cease and desist from violations of Sections 731.162 and 731.163 and related regulations, and to pay a penalty of $15,000 into the Environmental Protection Trust Fund. In setting this penalty amount, we have considered the costs Freedom saved through its refusal to properly investigate either site, the costs saved through its refusal to submit adequate 20 and 45 day reports at either site, and its recalcitrance in the face of repeated attempts by the Agency to obtain this information. We have also considered the increased threat to the public health and welfare posed by the delay in quantifying the releases, and the costs associated with remediating such contamination. Finally, we have considered what would deter Freedom from engaging in such behavior in the future.

As for an award for costs and fees, the Board finds that Freedom has committed wilful, knowing and repeated violations of the Board regulations as discussed above. Therefore, the Board awards the State its attorneys' fees and costs pursuant to Section 42(f) of the Act. Towards that end, the Board finds that the information contained in the affidavit submitted by the assistant attorney general in this case supports an hourly rate of $100 per hour. The Board disagrees with Freedom's argument that the State is not entitled to that hourly rate because it does not have the same overhead costs as a private attorney. The State has overhead costs similar to, as well as distinct from those incurred by private enterprises. The only difference offered by Freedom is that private enterprises must pay federal and state taxes. An hourly rate of $100 per hour is sufficiently low to take that difference into account.

This opinion constitutes the Board's findings of fact and conclusions of law in this matter.

ORDER

1) Freedom Oil Company is hereby found to have violated 35 Ill. Adm. Code 731.162 and 731.163 by failing to comply with the investigation and reporting requirements for a November 21, 1989 release at its facility in Savoy, Champaign County and an April 4, 1991 release at its facility in Oblong, Crawford County.

2) Freedom Oil Company shall submit properly completed 20 and 45 day reports and sampling data for the releases at the

Savoy and Oblong sites, as required by 35 Ill. Adm. Code Sections 731.162 and 731.163, and shall cease and desist from further violations of these Sections and related regulations.

3) Freedom Oil Company shall pay the sum of fifteen thousand dollars ($15,000) within 35 days of the date of this order. Such payment shall be made by certified check or money order payable to the Treasurer of the State of Illinois, designated for deposit to the Environmental Protection Trust Fund, and shall be sent by First Class mail to:

Illinois Environmental Protection Agency
Fiscal Services Division
2200 Churchill Road
Springfield, IL 62794-9276

The certified check or money order shall clearly indicate on its face the case name and number, Freedom Oil Company's federal employer identification number or social security number, and that payment is directed to the Environmental Protection Trust Fund.

Any such penalty not paid within the time prescribed shall incur interest at the rate set forth in subsection (a) of Section 1003 of the Illinois Income Tax Act, (35 ILCS 5/1003), as now or hereafter amended, from the date payment is due until the date payment is received. Interest shall not accrue during the pendency of an appeal during which payment of the penalty has been stayed.

5) Freedom Oil Company shall pay the State's attorneys' fees of one thousand five hundred dollars ($1,500), and the State's costs of three hundred eight dollars and ninety cents ($308.90), as detailed in the Affidavit of Jennifer M. Crain, filed June 24, 1993, for a total of one thousand eight hundred eight dollars and ninety cents ($1,808.90). Such payment shall be made within 35 days of the date of this order by certified check or money order payable to the Treasurer of the State of Illinois, designated for deposit to the Hazardous Waste Fund, and shall be sent by First Class mail to:

Illinois Environmental Protection Agency
Fiscal Service Division
2200 Churchill Road
Springfield, Illinois 62706

The certified check or money order shall clearly indicate on its face the case name and number, Freedom Oil Company's federal employer identification number or social security number, and that payment is directed to the General Revenue

Fund.

Any such penalty not paid within the time prescribed shall incur interest at the rate set forth in subsection (a) of Section 1003 of the Illinois Income Tax Act, (35 ILCS 5/1003), as now or hereafter amended, from the date payment is due until the date payment is received. Interest shall not accrue during the pendency of an appeal during which payment of the penalty has been stayed.

IT IS SO ORDERED.

J. Theodore Meyer concurred.

Section 41 of the Environmental Protection Act (415 ILCS 5/41 (1992)) provides for appeal of final Board orders within 35 days of the date of service of this order. The Rules of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill. Adm. Code 101.246, Motions for Reconsideration.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, do hereby certify that the above opinion and order was adopted on the 5th day of May, 1994, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board