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)

REPLY TO RESPONSE TO MOTION FOR DEFAULT JUDGMENT OR IN THE ALTERNATIVE TO PROHIBIT INTRODUCTION OF EVIDENCE

NOW COMES the Petitioner, Freedom Oil Company ("Freedom"), by its attorneys, Howard & Howard Attorneys, P.C., and for its reply to the response of the Illinois Environmental Protection Agency ("IEPA") to Freedom's Motion for Default Judgment or in the Alternative to Prohibit Introduction of Evidence (the "Motion"), states as follows:

I. Freedom Correctly Presented the Facts.

IEPA's first response to Freedom's Motion is an accusation that Freedom misrepresents the facts. To the contrary, the facts asserted by Freedom are true. These facts are as follows: (1) IEPA's counsel made representations during Board status hearings on March 18, July 13, and August 31, 2004 that IEPA would propose a settlement; (2) IEPA's counsel did not honor these representations; (3) IEPA did not comply with the Board rules requiring discovery responses by December 14, 2004; (4) IEPA did not honor three successive deadlines set by the Hearing Officer of January 27,

March 2, and April 1, 2005 for the discovery responses; and (5) IEPA did not file the Administrative Record by the deadlines set by the Hearing Officer.

In its Motion, out of professional courtesy and collegiality, Freedom attempted to avoid harsh rhetoric describing IEPA's handling of this case. Such collegiality is difficult to maintain when IEPA claims it did make the settlement offer promised during status hearings and alleges we misrepresent the facts. As discussed below, Freedom takes exception to IEPA's characterization of the February 2005 proposed offer as the settlement offer promised during the status hearings. This "offer" was in response to Freedom's February 21, 2005 Motion for Partial Summary Judgment regarding a mathematical correction the IEPA committed to make nearly two years ago. The "offer" had nothing to do with the central case issue – IEPA's allocation of clean-up costs to Ineligible Tanks.

The facts stated by Freedom are true. The only dispute is the inference to be drawn from them, *i.e.*, whether they represent an attempt to delay or a pattern of agency inability to perform obligations when due. Either inference justifies the relief requested.

A. IEPA Never Made the Promised Settlement Offer.

Freedom's counsel was dumbfounded to read the following paragraph in IEPA's response:

> Also, the Petitioner is incorrect in stating that there have been no settlement offers made by the Illinois EPA. On February 24, 2005, the Illinois EPA made a settlement offer to the Petitioner, proposing (following discussions between counsel for the parties) to resolve some of the costs under appeal. While the Illinois EPA will not here divulge the specific nature of the settlement (having not first received consent from Freedom Oil to do so), it is fair to note that the settlement involved a five-figure amount that was ultimately slightly higher than what was originally negotiated

> between the parties. The Petitioner has since accepted and acted on this proposal, and therefore it is wrong to represent that no settlement offer or progress has been made.

This paragraph illustrates how omitting facts creates an inaccurate impression of events. The so-called "five figure" settlement amount referenced above was not a proposal to settle the central issue in the case, nor was it the proposal IEPA committed to make during the various status hearings. Rather, it was recognition IEPA made a mathematical mistake by using the wrong number and registration status of tanks in the Application 1 and 2 apportionment reimbursement determinations. This resulted in an erroneous apportionment formula. In brief, based on its use of erroneous tank status and registration information, IEPA apportioned 55.814% of costs to Eligible Tanks on Application 1, 79.07% on Application 2 and 80.95% of costs on Application 3. Only the Application 3 determination was based on the correct number of tanks and registration status and used a formula based on accurate tank information.

This mistake was brought to the attention of IEPA in letters dated March 5, 2003, and June 30, 2003. (Exhibit 1). Shortly thereafter, at an August 2003 meeting Freedom's counsel presented its arguments to IEPA demonstrating the error of the agency's apportionment of any clean up costs to Ineligible Tanks. During that same meeting, Freedom and IEPA also discussed the mathematical error and IEPA agreed to review and adjust the mathematical mistakes. The need for the agency to correct this mathematical error was noted again in the follow up information requested by the agency submitted by Freedom on December 18, 2003. (Exhibit 2).

Thus, this error was purportedly addressed before IEPA's counsel made commitments to the Hearing Officer on March 18, July 13, and August 31, 2004,

concerning settlement. Freedom did not agree to delay this proceeding to receive a settlement offer concerning an undisputed math error by IEPA.

The pleadings shed further light on this issue. Despite the undisputed mathematical mistake, IEPA failed to act to correct the error. Petitioner made telephonic requests that the error be corrected to no avail. Finally, in utter frustration, Freedom filed a Motion for Partial Summary Judgment on this mathematical error issue in February 2005. Only after this filing did the agency offer the funds it owed to reach the 80.95% apportionment on Application 1 to be consistent with the apportionment formula used on Application 3.[1]

To characterize this offer as the response to its commitments to the Hearing Officer and Petitioner to propose a settlement is at best disingenuous. The February 24, 2005, proposal was not a settlement offer but a correction of an undisputed mathematical formula error. Moreover, the correction was not "offered by IEPA", but action forced at litigation gunpoint. Freedom was entitled to partial summary judgment and might have recovered an attorneys' fee award as well had IEPA not corrected its mistake.

B. IEPA's Excuses Do Not Prove a Misrepresentation of the Facts.

While Freedom identified the settlement offer delays in its Motion, the most significant delays arose in connection with discovery responses and filing the administrative record. Under its caption that Freedom misrepresented facts, IEPA offers numerous explanations for its failures. Notably, these explanations do not support a conclusion that any facts alleged by Freedom are untrue. Rather, they prove the facts, namely that IEPA did not honor its commitments or meet required deadlines.

[1] The LUST Fund is a state sponsored insurance program. Similar denial of an undisputed claim by an insurance company would likely result in a bad faith finding.

IEPA appears to believe that because (1) its technical staff has other job responsibilities, (2) its counsel has other cases and (3) its counsel has family demands, it may ignore orders issued by Board Hearing Officers and proceed (or not) at the agency's convenience. This view stands the role of adjudicative bodies, state agencies and the regulated community on its head. This Board deserves the same respect as any Court. The Board has no legislative obligation to act at the convenience of the IEPA. Rather, Illinois law mandates the IEPA schedule its other matters around the rules and orders of the Board and its Hearing Officers. Given the vast resources of the State, and its overwhelming regulatory power, the State, perhaps even more so than private parties, should be held to the highest standards of compliance with the law it is charged with upholding. The State of Illinois is an approximately $50 billion corporation with over 75,000 employees. The IEPA has an approximately $1.3 billion budget and over 1,140 employees.[2] Freedom, in contrast, is a small oil company with 300 employees and 43 retail locations. Freedom, like many other oil companies, is dependent on proper operation and reimbursement from the LUST Fund to continue in business.

A heavy case load is not a justifiable explanation for repeated failure to meet litigation deadlines. Private lawyers may not undertake more matters than they can handle competently. The State, with its vast resources, certainly has no greater right to plead a case "overload" as justification for repeated delays.

This is particularly true as (1) many of the missed deadlines were agreed to by the IEPA and (2) the IEPA made no effort, when it could not meet deadlines, to seek a continuance before such deadlines passed. As a result, Freedom had to expend funds

[2] These numbers are from the State of Illinois website.

bringing motions to have the deadlines honored and the resources of the Board were needed to compel IEPA action. The current Motion before the Board is not the first motion for discovery sanctions Freedom has filed. After IEPA did not comply with the January 27, 2005 discovery and record deadline established by the Hearing Officer, Freedom filed a Motion for Discovery Relief on February 21, 2005. Freedom withdrew this Motion when the agency agreed during the next status hearing to file its responses by March 2, 2005. When that date came and went with no responses by IEPA, on March 22, 2005, Freedom filed a second Motion for discovery sanctions seeking judgment.

Freedom's second Motion also apparently made little impression on the IEPA. Over Freedom's objection, IEPA sought another continuance on March 29, 2005, and suggested a new April 1, 2005, deadline for discovery.[3] In response to the agency's Motion for Continuance, the Hearing Officer set a new date for responding to discovery and filing the administrative record. The date set by the Hearing Officer was April 1, 2005, the date IEPA's counsel specifically requested in his continuance motion.

Despite the fact the Hearing Officer agreed to IEPA's chosen date, IEPA again failed to comply. On April 6, 2005, IEPA partially responded to discovery with incompletely answered interrogatories and filed what appears to be a partial record. Once again, IEPA let the April 1 deadline pass without a request for a continuance. This approach to order deadlines reflects an attitude that Hearing Officer orders are not binding but mere suggestions.

[3] IEPA's counsel portrays this as action in Freedom's best interest by giving it time to review what it may produce at some date. In reality, the continuance was exactly what Freedom opposes, continued delay to its prejudice.

Family obligations similarly do not constitute justification for repeated delays. Counsel pleads family demands, including a recent birth. While this explanation might explain March paternity leave difficulties, it does not explain counsel's failure to comply with the first two discovery deadlines (December 14, 2004 by rule and January 27, 2005 by order), both of which occurred before counsel's paternity leave. It does not justify missing the third deadline, March 2, 2005, to which counsel agreed. Surely, when agreeing to this date, he was aware of his wife's pregnancy timetable. Finally, it does not explain again missing the most recent date of April 1, 2005, the date suggested by IEPA counsel in the Motion for Continuance.

Freedom's counsel is the mother of three and understands first hand the strain and demands of balancing law practice with family. Counsel assisting her is battling cancer. Emergencies certainly arise and Freedom's counsel recognizes that all attorneys from time to time need extensions and extending professional courtesy to one another is important. Children, however, should not excuse missing four separate discovery deadlines over an almost five month period. Coverage of files should be arranged when one's case load or other unforeseen events prevent counsel from performing obligations or an order requesting an extension beforehand should be made.

Pleading a client's failure to act is also an inadequate explanation for repeated delays. A state agency is not excused from meeting the demands of this Board's rules or a Hearing Officer's orders because it has other business. This would not be an available excuse to Freedom or any other regulated business. Virtually all litigants have other business to perform. Few make their business solely litigation. However disruptive the requirements of litigation, one of the duties of any party in a suit is to make the suit a

priority. Counsel's responsibility is to advise the client that litigation deadlines are not mere suggestions. If the client ignores this advice, the client then bears the consequences.

II. The IEPA Failed to Meet Yet Another Deadline and Further Incompletely Answered Interrogatories.

Since filing of Freedom's Motion, IEPA filed a request for a continuance and requested April 1, 2005 as the date for delivering its discovery responses and filing the administrative record. The Hearing Officer incorporated this date in the March 30, 2005, Order.

The agency did not file its responses or the record by this third date set by the Hearing Officer. On April 6, 2005, IEPA filed a partial response to interrogatories and what appears to be a partial administrative record. (Exhibit 3)

IEPA's April 6, 2005, discovery responses are incomplete. For example, the interrogatories request the identification of witnesses (Interrogatory 2) and the anticipated subject matter of testimony. While IEPA named potential witnesses, counsel failed to disclose whether such witnesses were lay witnesses, expert witnesses or controlled expert witnesses. Supreme Court Rule 213(f) (requiring when asked to identify witnesses to designate whether they will be lay, expert or controlled expert).[4] As to answering the question concerning the subject matter of testimony, counsel's response is vague and unresponsive:

> Interrogatory No. 3: Please list the anticipated subject matter of testimony to be given by the persons identified in the above stated Interrogatory No. 2.

[4] Section 101.616 of this Board rules make the Supreme court Rules applicable for guidance in discovery.

> Answer:
>
> Messrs. Heaton and Oakley may testify regarding the bases for the Illinois EPA's decisions under appeal.

That is not an answer. It provides no detail regarding the subject matter as requested by the interrogatory.

Further incomplete responses can be found in answers to interrogatory nos. 6, 8 and 11. Number 6 refers to a decision of the OSFM. While Freedom believes it may know the document being referred to, IEPA neither describes such decision nor attaches it. More importantly, IEPA provides no explanation as to how such decision related to its apportionment decision.

In Interrogatory Answer Number 8, IEPA claims that it has not been provided any information that tanks 7, 8, 9 and 10 did not contribute to the contamination at the site. This contradicts representations made by IEPA's counsel to the Hearing Officer and even in its own response to the Motion that it had received information for review on this point and that its technical staff was reviewing. If IEPA disputes that such information demonstrates the point, the answer to this interrogatory should state why this material failed to demonstrate a lack of contamination. Moreover, the answer wholly ignores whether the costs here even related to the contamination.

The answer to Interrogatory No. 11 is similarly incomplete. The question asked whether the state contended that any of the corrective action costs were associated with or necessitated by the presence of Ineligible tanks and if so to state the factual basis for the contention. This interrogatory goes to the factual heart of this case. Were these corrective action costs required because of ineligible tanks or eligible tanks? The

question was intended to identify what evidence the State has in its possession to show that the costs were required as a result of ineligible tanks. Instead of answering, the IEPA stated, "The corrective action performed at the site was conducted pursuant to applicable statutory and regulatory guidelines. The initial action taken at the site was the result of legal action in the form of an Immediate Injunctive Order dated August 15, 2002."

The answers to these interrogatories are incomplete and do not satisfy the agency's discovery obligations under Illinois law. The agency's answers do not apprise Freedom of the agency's factual basis required under 415 ILCS 5/57.8(m) to apportion clean up costs to ineligible tanks. The law does not allow the agency to apportion costs merely based on the presence of Ineligible Tanks. If the matter proceeds to hearing, Freedom will need to bring a motion to compel answers to the questions it propounded. Based on the agency's responses, Freedom remains in the dark as to the factual basis for the agency to allocate clean up costs to the Ineligible Tanks. This late delivery of incomplete discovery and a partial record does not constitute compliance with the April 1, 2005 deadline.

III. Freedom Is Legally Entitled To The Relief Requested.

Counsel for the IEPA appears to suggest that only facts identical to those in *Illinois EPA v. Celotex Corporation*, 168 Ill. App. 3d 592, 522 N.E.2d 888 (1988) justifies granting a default judgment. Because IEPA has not repeatedly cancelled a deposition, IEPA argues *Celotex* does not apply.

This argument misses the point of *Celotex*. The case is not limited to instances where IEPA repeatedly cancels a deposition. Rather, the case applies to any instance in which there is a pattern of dilatory response to Hearing Officer orders. There is no

dispute that IEPA did not comply with Hearing Officer orders and the Board rules in this case. Nor did IEPA seek, even for the latest missed deadline, any continuances before the deadlines passed. Instead, IEPA determined that other commitments took precedence over the rules and the orders to the prejudice of Freedom.[5] *Celotex* establishes an agency does not have the privilege of deciding on its own it is "too busy" without seeking permission of the Hearing Officer.

IEPA's further attempt to distinguish *Celotex* on the basis of relief granted is without merit. Dismissing a count with prejudice is defaulting a plaintiff with respect to such count. If that count had been the agency's only count this Board would be granting a default in its entirety. Moreover, this Board precludes raising any issues concerning certain claims, effectively defaulting the IEPA on such actions.

Here there is one central issue – the right to apportion merely because of the presence of ineligible tanks when all corrective action was ordered as the result of eligible tanks. IEPA seems to suggest that the default relief permitted by the rule is only applicable if default can be entire on just one claim while leaving some rights. Yet, nothing in the rule suggests it is not applicable to one count complaints. Nothing prohibits entry of default in the entirety.

Freedom agrees that default judgment is a drastic remedy. Yet, circumstances of this case warrant such remedy. In deciding to apply this remedy, this Board may

[5] The claim that Petitioner must also shoulder the blame for delays is not legitimate. Freedom agreed to deadline waivers because it believed the IEPA would promptly review and propose a settlement. While we understand that counsel cannot make a settlement without his client, counsel is responsible for making representations regarding dates for performance. At a minimum, counsel was responsible for stating by these dates that there would be no settlement offer.

consider not only the disregard of Board rules and three Hearing Officer orders, but the total circumstances of the case.

This case involves a matter where the General Assembly intended that petitioners receive a prompt LUST Fund reimbursement when merited. After all, the amount of money involved is great, and the State is not required to pay interest for a delay in payment. Additionally, many oil companies are dependent on the Fund to remain in proper operation. When Freedom filed this case, it stated it would not waive its right to a prompt decision. Representations of IEPA's counsel that it would propose a settlement induced Freedom to file an open waiver.

Freedom remains frustrated. This is the second motion Freedom has brought asking for sanctions as relief for failure to comply with discovery requests and record filing to allow the hearing to proceed.

One of the reasons for granting default judgment can be to serve as general detriment for certain behavior. IEPA's belief that it may decide its own priorities and comply with orders at its own convenience is an attitude that warrants correcting.

This Board has warned IEPA that continued conduct of this nature may result in awarding a petitioner immediately the result it seeks. In *E&L Trucking Company v. Illinois Environmental Protection Agency*, PCB 02-53, E&L Trucking Company, in a LUST reimbursement case, sought sanctions for failure to file the administrative record on time. In that case, this Board noted that the IEPA has a history of late filed records, and noting such untimeliness "haunts the permit review process" in reimbursement cases. This Board noted that it may grant one of two remedies in the event of late filed records: (a) barring future pleadings or otherwise appearing before the Board or (b) immediately

awarding the petitioner the results it seeks. This Board specifically warned the IEPA that the rule requiring filing "does not allow the Agency to ignore the due date and file the record, or a request for extension of the filing requirement, well after the due date of the record." The Board declined to grant sanctions in this case, but this Board did so with a warning:

> In this case, the Board declines to order such drastic measures. The Agency should be on alert, however, that the Board will no longer tolerate late-filed Agency records in permit appeals and will, in an appropriate case, sanction the Agency in one of the manners prescribed above.

The above warning will have little impact if the practice continues without consequence.

IV. Alternative Relief Is Appropriate.

If the Board declines to enter judgment for Freedom based on its motions, the Board should order the hearing to immediately commence and deny the IEPA the right to introduce evidence that was the subject of Freedom's discovery requests. The purpose of this alternate sanction is to remove the prejudice to a party arising from unfair surprise because a party failed to respond to discovery. It also allows the party to proceed to trial protected from such surprise rather than suffer another delay and continuance.

IEPA is correct that such sanction "would essentially be preventing the Illinois EPA from presenting any explanation or rationale as to the decisions in question." Why should the Illinois EPA be entitled to present such explanations when it refuses to disclose the factual basis for its decisions in discovery? The agency's refusal prevents Freedom from preparing its case.

Moreover, IEPA's interrogatory responses continue to conceal their "explanation for its decision." It is hard to imagine anyone capable of ascertaining IEPA's explanation

or rationale for its apportionment decision from the answers to the interrogatories. IEPA either does not have a case, thus explaining the poor answers, or is attempting to "sandbag" Freedom at the hearing. Or possibly, IEPA believes a half-hearted effort in responding to discovery satisfies the Board rules.

V. Conclusion.

IEPA alone is responsible for its predicament. It had the interrogatories for five months. It has had almost four months since the initial discovery deadline of December 14, 2004, to respond. It still has not properly responded. It is no longer proper to continue the decision date, especially when IEPA demonstrates it considers Orders as mere suggestions. Nor is it proper to allow IEPA to put on evidence it failed to disclose.

IEPA's conduct is a deliberate choice to determine its own priorities. Such conduct prejudices private party litigants, shows disrespect for the Board and requires deterrence.

Respectfully submitted,

HOWARD & HOWARD ATTORNEYS, P.C.

By:_____
Diana M. Jagiella

Dated: April 8, 2005

Diana M. Jagiella
Howard & Howard Attorneys, P.C.
Attorney for Petitioner
One Technology Plaza, Suite 600
211 Fulton Street
Peoria, IL 61602
(309) 672-1483 - telephone
(309) 672-1568 - facsimile

THIS FILING IS SUBMITTED ON RECYCLED PAPER

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 8th day of April, 2005, I have served the attached Reply to Response to Motion for Default Judgment or in the Alternative to Prohibit Introduction of Evidence 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
Chicago, IL 60601-3218

John J. Kim, Assistant Counsel (via mail)
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue East, P. O. Box 19276
Springfield, IL 62794-9276

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

Diana M. Jagiella, Attorney for Petitioner

Diana M. Jagiella
Howard & Howard Attorneys, P.C.
Attorney for Petitioner
One Technology Plaza, Suite 600
211 Fulton Street
Peoria, IL 61602
(309) 672-1483 - telephone
(309) 672-1568 - facsimile

man\G:\F\Freedom Oil\pldgs\Reply to Response to Mot for Default.doc