BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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

NOTICE

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PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board a RESPONSE TO MOTION FOR DEFAULT JUDGMENT, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

John J. Kim
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Dated: April 6, 2005

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

FREEDOM OIL COMPANY,	)	
	)	PCB No. 03-54
Petitioner,	)	PCB No. 03-56
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Respondent.	)	

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

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, John J. Kim, Assistant Counsel and Special Assistant Attorney General, and, pursuant to the Illinois Pollution Control Board ("Board") Rules at 35 Ill. Adm. Code 101.500, hereby responds to the Motion for Default Judgment or In The Alternative to Prohibit Introduction of Evidence ("motion for default judgment" or "motion") filed by the Petitioner, Freedom Oil Company ("Freedom Oil"). The Illinois EPA requests that the Board enter an order denying the Petitioner's motion in its entirety, including the alternative relief sought. In response to the motion, the Illinois EPA hereby responds as follows.

I. PETITIONER HAS MISREPRESENTED THE FACTS

In its motion, the Petitioner cites to certain facts it alleges to be supportive of a default judgment or, in the alternative, to prohibiting the introduction of evidence by the Illinois EPA at hearing. Among those facts are the alleged lack of attention to these consolidated appeals, the failure of a settlement offer to be made to the Petitioner, the failure of the Illinois EPA to comply with

Hearing Officer orders regarding certain filing deadlines, and the failure to follow through on "personal commitments" made by the undersigned counsel to the Hearing Officer.

However, those representations are not what they are made out to be. First, the undersigned counsel for the Illinois EPA notes by way of background that of the approximately 85 appeals now pending before the Board involving the Illinois EPA's administration of the Leaking Underground Storage Tank ("LUST") program, the undersigned counsel is the attorney assigned to 83 of those matters.[1] This case load does not include other pending matters before the Board or internal assignments, nor does it include involvement on an as-needed basis in discussions related to pending 90-day extensions of LUST program decisions (all of which are assigned to the undersigned counsel). This information is not presented to justify delays in these or any pending matters, but rather is noted to provide the basis for the undersigned counsel's explanation that his "normal" work load simply does not afford the time otherwise desired to spend on each of his assigned cases.

As to the notion that there has been a lack of attention to these cases, that simply is not true. As the Petitioner must acknowledge, there have been repeated telephone discussions and electronic mail correspondences discussing these appeals. In this situation, as in any matter involving an appeal before the Board of a LUST program matter, the undersigned counsel is subject to the time and attention that the Illinois EPA's technical staff can spare, as that staff effectively represents the "client" in these types of appeals. The pendency of the these appeals, and specifically over the past calendar year, has coincided with the LUST program's involvement with the latest LUST regulatory proposal; this proposal has taken a great deal of time away from the LUST program staff's normal work duties, and all decisions requiring their involvement have been delayed.

[1] These figures were calculated following a review of search results from the Board's COOL database; the actual figures

However, that factor aside, the Illinois EPA has attempted to convey its position to the Petitioner when possible, and at no times has the Illinois EPA refused to discuss or consider reviewing information submitted by the Petitioner. Although the answers have not necessarily been to the Petitioner's liking, it is wrong to conclude that the Illinois EPA has refused to engage in a good faith discussion with the Petitioner.

These ongoing discussions have been conveyed to the Hearing Officer in this matter, with the representation that undersigned counsel is not able to make final decisions or settlement offers without approval of the LUST program staff.

Admittedly, the Illinois EPA has not met all deadlines imposed by the Board or the Hearing Officer in these appeals. As has been stated by undersigned counsel, that delay has not been without regret and a good faith effort to abide by future deadlines. Unfortunately, the circumstances of late (unusual in the sense that counsel has had certain family obligations of a non-recurring nature, i.e., the birth of counsel's second and last child) have indeed prevented filings in a timely fashion. Though these delays have been acknowledged, the Illinois EPA at no time has stated any disdain or refusal to comply with the Board's or Hearing Officer's orders. If anything, counsel was possibly too optimistic in estimating times for responses, etc., borne purely out of a desire to keep these matters moving in a forward manner.

That said, there has been positive movement by the parties in these appeals. The parties have agreed that the issue remaining on appeal in most of the consolidated appeals relates to the question of whether the Illinois EPA's apportionment of costs was appropriate, given the Petitioner's argument that the ineligible tanks included in the apportionment calculations should not be

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may be slightly higher or lower.

considered at all. In each of the appeals referenced above involving a reimbursement decision, there were multiple deductions; the parties have agreed the focus should be on the question of apportionment of costs.

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.

Lastly, the Illinois EPA notes that the Hearing Officer recently granted a motion for continuance designed to facilitate the filing of the administrative records in these appeals as well as discovery responses. The Illinois EPA specifically noted that one of the reasons for making the request for a continuance was to allow the Petitioner sufficient time to review all necessary documents. This rationale was intended to prevent any undue prejudice upon the Petitioner, and was made in good faith.

Therefore, while the Illinois EPA concedes that certain deadlines have not been met in a timely manner, the undersigned counsel represents that efforts to resolve or ultimately litigate these appeals have been ongoing and done in good faith, and that any delay, while regrettable, certainly does not rise (or sink, depending on one's viewpoint) to the level such that default judgment or other evidentiary sanctions are warranted.

II. THERE IS NO LEGAL AUTHORITY IN FAVOR OF PETITIONER'S REQUEST

To further justify its request for a default judgment or a restriction upon the Illinois EPA in presenting evidence at hearing, the Petitioner cites to several cases it argues are supportive of its position. A review of those cases indicates just the opposite, and as such the Board should not rely upon the legal authority cited by the Petitioner.

In the case of Illinois EPA v. Celotex Corporation, 168 Ill. App. 3d 592, 522 N.E.2d 888 (3rd Dist. 1988), the court ruled that the Board was correct in dismissing a count included in a complaint brought by the Illinois EPA against Celotex Corporation. The court first noted that dismissal of a party's claim is a drastic sanction that should be employed sparingly. However, when a scheme of deliberate defiance of the rules of discovery and the court's authority or an attempt to stall significant discovery has been shown, such sanction is appropriate and should be unhesitatingly applied. Celotex, 168 Ill. App. 3d at 597, 522 N.E.2d at 891-892. The court went on to find that the Board properly found that the Illinois EPA had engaged in a pattern of dilatory response to hearing officer orders, unjustifiable cancellation of depositions, and engaged in an intentional pattern of refusal to meet deadlines; further, the explanations tendered for the activities were not reasonable. Id., 168 Ill. App. 3d at 597-598, 522 N.E.2d at 892.

The Illinois EPA's handling of the present matters, while not pristine, hardly is analogous to the conduct before the Celotex court. There, the Illinois EPA cancelled a deposition; here, no such cancellation has taken place. There, the Illinois EPA refused to make documents available after first promising access; here, no such refusal has taken place.[2] Other aggravating facts cited to in the

[2] The only arguably similar occurrence here is the delay in filing the administrative records. The Illinois EPA on this date is sending to the Petitioner the consolidated administrative record for two of the pending appeals, and the remaining administrative records will be sent shortly hereafter. This delay is not tantamount to a refusal of documents.

Celotex case are similarly not present here, and therefore the Celotex case should not be considered either controlling or persuasive. The facts before the Hearing Officer and the Board to date do not warrant actions as taken in Celotex.

Indeed, the relief granted by the Board in Celotex was not the same relief that is sought by the Petitioner here. There, the Board granted a request by a respondent in an enforcement action to dismiss one count of the petitioner's complaint. Here, the Petitioner in an appeal is seeking a default judgment in its entirety. The Board did not consider or characterize its actions in Celotex as granting default judgment, and thus the case is inapplicable here.

A similar argument can be made regarding the other case cited to by the Petitioner. In Modine Manufacturing v. Pollution Control Board, 192 Ill. App. 3d 511, 548 N.E.2d 1145 (2nd Dist. 1989), the appellate court reviewed a decision by the Board to dismiss an appeal due to the petitioner's failure to timely file a brief. There, the brief in question was filed 26 ½ weeks after the date of the original due date, and there was no intervening request for an extension of time filed by the petitioner. Here, there has been no such gap in time, and the Illinois EPA has attempted to either meet deadlines imposed by the Hearing Officer or, at the very least, file a request for additional time to comply with the deadline, thus informing the Hearing Officer of the intent to ultimately follow through on the activity in question. Again, the Modine case did not involve the Board granting default judgment, rather it concerned the dismissal of an appeal by a party that failed for an egregious time period to comply with a deadline (with no intervening request for additional time).

Case law on the subject of default judgments is clear. Entering a default judgment is a drastic measure, not be encouraged and only to be employed as a last resort. Rockford Housing Authority v. Donahue, 337 Ill. App. 3d 571, 786 N.E.2d 227 (2nd Dist. 2002). The sanction causing a default

judgment is proper only where the sanctioned party's conduct showed "deliberate, contumacious, or unwarranted disregard for the court's authority." In re: B.C., D.C., et al. v. Bernadine C., 317 Ill. App. 3d 607, 740 N.E.2d 41 (1st Dist. 2001).

There is simply no information before the Board or the Hearing Officer that warrants a finding that the conduct of the Illinois EPA, or the undersigned counsel, has been anything remotely approaching a deliberate, contumacious, or unwarranted disregard for the Board's authority. To the contrary, the undersigned counsel has always held the Board and its Hearing Officers in the highest regard, and certainly has never taken any action that was in any way intended to be seen or interpreted as a sign of even the slightest disrespect.

However the Petitioner may attempt to portray the actions of the Illinois EPA or undersigned counsel in the handling of these matters, it is wrong and wholly inappropriate to make any claim that any conduct even hinting of the nature required to invoke a sanction of default judgment has been present. As such, the Board should not consider entering a default judgment in these appeals.

III. THE BOARD SHOULD NOT GRANT ANY ALTERNATIVE RELIEF

Aside from the lack of basis for the Board to issue a default judgment in favor of the Petitioner, the Board should further deny the Petitioner's request that the Illinois EPA be prevented from presenting any evidence at a hearing on these matters.

Pursuant to Section 105.112(a) of the Board's procedural rules (35 Ill. Adm. Code 105.112(a)), the burden of proof shall be on the petitioner. In reimbursement appeals, the burden is on the applicant for reimbursement to demonstrate that incurred costs are related to corrective action, properly accounted for, and reasonable. Rezmar Corporation v. Illinois EPA, PCB 02-91 (April 17, 2003), p. 9. The primary focus must remain on the adequacy of the permit application and the

information submitted by the applicant to the Illinois EPA. John Sexton Contractors Company v. Illinois EPA, PCB 88-139 (February 23, 1989), p. 5. Further, the ultimate burden of proof remains on the party initiating an appeal of an Illinois EPA final decision. John Sexton Contractors Company v. Illinois Pollution Control Board, 201 Ill. App. 3d 415, 425-426, 558 N.E.2d 1222, 1229 (1st Dist. 1990).

In the pending appeals, the burden of proof is thus on Freedom Oil. However, the Board has noted that there can be something akin to a shifting of burden should the petitioner meet its burden. Without presenting extensive legal arguments on the appropriateness or likelihood of such a decision here, it is possible that the Illinois EPA might be put into the position of having to effectively demonstrate that its decisions were correct. If the Board grants the extreme alternative sanction requested by the Petitioner, then it would essentially be preventing the Illinois EPA from presenting any explanation or rationale as to the decisions in question. The inability to answer an open-ended question posed by the Petitioner through testimony at hearing would be extremely prejudicial to the Illinois EPA, far more so than any alleged prejudice that may have befallen the Petitioner through the handling of this matter thus far.

The Illinois EPA has committed in these appeals, as it does in most every matter under appeal, to fully explore any and all possible avenues for amicable resolution. It believes it has done so in good faith, though not with the expediency hoped for by the Petitioner. But, as the Board is aware, the Illinois EPA cannot grant extensions of decision deadlines, nor can it grant open waivers of deadlines. Only the petitioner bringing an action can do so, and if such extensions or open waivers have been granted, then it should be presumed the petitioner did so in a well-thought manner. Here, the Illinois EPA freely acknowledges that the Petitioner has been very receptive to

any and all settlement discussions, and there are no complaints or objections from the Illinois EPA to the handling of the appeals on the part of the Petitioner.

That said, the situation now before the Board in terms of the time taken to reach a resolution is not entirely of the Illinois EPA's doing, and thus the Petitioner must also shoulder the "blame" for the time taken to resolve these cases. So there is no mistake, the Illinois EPA is not in any way insinuating that there has been any fault by the Petitioner in its actions to date; to the contrary, the time that has elapsed since the filing of these consolidated appeals has been spent by both parties to work to a resolution or narrowing of the issues. It is somewhat disingenuous of the Petitioner to now cry foul that so much time has passed, and certainly such cries should not be rewarded with the extreme and prejudicial relief sought by the Petitioner.

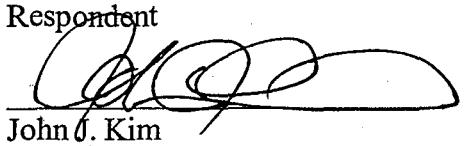
IV. THE ILLINOIS EPA'S DECISIONS WERE CORRECT

The Petitioner has speculated that the Illinois EPA's delays suggest a lack of a defensible position in some way. Just the opposite is true, as the Illinois EPA firmly believes that its decisions under appeal were justified and correct and will be upheld by the Board. This response to the Petitioner's request for a default judgment or evidentiary sanctions is not the proper forum for presenting such arguments, but let there be no doubt that the Illinois EPA's intention is to make all due arguments at the proper time.

V. CONCLUSION

For the reasons stated more fully above, the Illinois EPA hereby respectfully requests that the Board deny the Petitioner's motion for default judgment and its request for alternative relief.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



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Dated: April 6, 2005

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on April 6, 2005, I served true and correct copies of a RESPONSE TO MOTION FOR DEFAULT JUDGMENT, by placing true and correct copies in properly sealed and addressed envelopes and by depositing said sealed envelopes in a U.S. mail drop box located within Springfield, Illinois, with sufficient First Class postage affixed thereto, upon the following named persons:

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