

**BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS**

WEEKE OIL COMPANY,)	
Petitioner,)	
)	
v.)	PCB No. 2010-001
)	(LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
Respondent.)	

NOTICE OF FILING AND PROOF OF SERVICE

TO: John T. Therriault, Acting Clerk	Carol Webb
Illinois Pollution Control Board	Hearing Officer
100 West Randolph Street	Illinois Pollution Control Board
State of Illinois Building, Suite 11-500	1021 North Grand Avenue East
Chicago, IL 60601	P.O. Box 19274
	Springfield, IL 62794-9274
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Illinois Environmental Protection Agency	
1021 North Grand Avenue East	
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PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board, pursuant to Board Procedural Rule 101.302 (d), REPLY BRIEF, a copy of which is herewith served upon the hearing officer and upon the attorneys of record in this cause.

The undersigned hereby certifies that a true and correct copy of this Notice of Filing, together with a copy of the document described above, were today served upon the hearing officer and counsel of record of all parties to this cause by enclosing same in envelopes addressed to such attorneys and to said hearing officer with postage fully prepaid, and by depositing said envelopes in a U.S. Post Office Mailbox in Springfield, Illinois on the 26th day of March, 2010.

BY: /s/ Patrick D. Shaw

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REPLY BRIEF

NOW COMES Petitioner, WEEKE OIL COMPANY, by its undersigned counsel, and for its reply brief in this matter, states as follows:

I. THE IMPORTANCE OF THE OSFM CONFIRMATION OF RELEASE

The Illinois EPA does not dispute, nor distinguish, its position before the Board in another pending case in which it has argued that the OSFM's determination that there has been a release is sufficient by itself to confirm a release. Dickerson Petroleum v. EPA, PCB 9-87; PCB 10-5, at p. 10 (Feb. 4, 2010). Instead, the Agency argues that the OSFM logs should have been submitted prior to May 26, 2009, when it made its non-LUST determination. (Resp. Brief, at p. 6) Before addressing the procedural problems with this posture, Petitioner wishes to defend the position that the OSFM's reporting of a significant release should be given merit and deference.

The OSFM administers the LUST Program with the Agency. (415 ILCS 5/57.4) During the removal of underground storage tanks, the OSFM inspector "shall, upon preliminary excavation of the tank site, render an opinion as to whether a release of petroleum has occurred." (415 ILCS 5/57.5(c)) This opinion can nullify the need for the owner/operator to determine

whether a release occurred, (id.),¹ however, in this case the owner/operator's consultant independently certified that a release occurred. (Rec. at p. 116) While there is overlap between OSFM and IEPA programs, regulation of the tanks, particularly during removal is traditionally under OSFM oversight. Early action activities historically include the initial responses required of "an owner/operator upon confirmation of a release by the OSFM." See Kathe's Auto Service Center v. IEPA, PCB 96-102 (Aug. 1, 1996).

The owner/operator's consultant testified that he had to submit a Freedom of Information Act request to obtain the OSFM logs after he learned that the IEPA had determined there was not a release. (Hrg. Trans. at p. 18) Of course, by that time it was too late under the Illinois EPA's self-created deadline and procedures.

II. THE ILLINOIS EPA HAS FAILED TO CITE ANY LEGAL AUTHORITY SUPPORTING ITS PROCEDURES.

What authority does the Illinois EPA have to retroactively reconsider its decision at any later date it chooses? Apparently, its own letter. However, as Petitioner addressed in its brief, the letter is inconsistent with the Board's procedural rules that do not authorize conditional approval of reports. Furthermore, the Illinois EPA overlooks that the letter not only approved (conditionally perhaps) the 45 day report, it also approved the Stage 1 Site Investigation Plan and Budget without conditions. There is no authority for the non-LUST determination under any law or regulation, and particularly no authority to use such a process to retroactively repeal the

¹ The Act states that no independent determination of whether a release is required if "the owner or operator has reported the release to the Illinois Emergency Management Agency within 24 hours of removal of the tank." (415 ILCS 5/57.5(c)) Here, such notice was given before the tank was removed and the OSFM inspector indicated that re-reporting would not be required. (Hrg. Trans. at p. 17)

approval of a plan and budget. (415 ILCS 5/57.7(c)(4)(A))

The Agency is wrong to claim that the 45-day reports are not reviewed. (Resp. Brief, at p. 8) They might not be reviewed 100% as Benanti testified (Hrg. Trans. at p. 67), but they are reviewed to the extent of the importance of such a review to the Agency. And the Agency uses that review to approve the Stage 1 Site Investigation Plan and Budget.

As to the Agency's claim that no reliance interest can be based on approvals given while the tanks were being pulled, it overlooks that substantial work, documented in the bills submitted with the application for early action reimbursement were incurred following the tank pulls through January 27, 2009, including work associated with analysis of the soil samples, producing the 45-day report addendum and the early action reimbursement application itself. (Rec. at p. 17) Beyond monetary costs, the consultant relied upon the Agency's approvals in postponing some investigation work authorized under early action ((35 Ill. Admin. Code 734.210(h)(1)(B))² and in not obtaining the OSFM log prior to the Agency's May 26, 2009, self-created deadline.

The date that the Agency says is the cut-off to submit information is the non-LUST determination date, a concept and procedure that has no basis in law or regulations. Yet, its use appears to be the only way the Agency can find to deny early action costs that are otherwise deemed reasonable and reimbursable by the LUST Claims unit (subject to the agreed \$10,000 deductible). (Rec., at p. 11). Clearly, the procedure is the problem and Petitioner hopes the Board sees that this process cannot be used to deny otherwise reasonable costs of early action activities, or remove a site from the LUST program without any conceivable way of challenging

² The Agency claims that it is "unlikely" that confirmatory sampling along the piping runs and under the dispensers will reveal anything. (Resp. Brief, at p. 7) This would appear to be entirely inconsistent with the Board's procedural rules and the purpose of the Act.

the decision with evidence once made.

III. FREE PRODUCT OR CONTAMINATED GROUNDWATER WAS ENCOUNTERED.

The Illinois EPA claims that “[t]he Addendum again reported that no free product or groundwater was encountered.” (Resp. Brief, at p. 3) The Addendum specifically reported that “[n]o evidence of free product was observed in the tank pit following the removal of the tanks and tank backfill.” (Rec. at p. 124 (emphasis added))

The 45-day reports are intended to describe the results following early action. In contrast, the OSFM observes the “preliminary excavation of the tank site.” (415 ILCS 5/57.5(c)) The OSFM UST removal log reported that contaminated water was present. (Ex. 11) The Act also clearly states that the removal of “visibly contaminated fill material and any groundwater in the excavation which exhibits a sheen” is reimbursable as early action costs. (415 ILCS 5/57.6(b)) The consultant performed the activities authorized by the Act by mixing the water, fuel, and backfill in the excavation pit and then manifested the mixture to a landfill for disposal. (Hrg. Trans. at pp. 15-16) After this was done, he observed that the dry excavation pit did not recharge with either product or groundwater. (Hrg. Trans. at pp. 45-46)

The 45 day reports require the owner/operator to certify whether those early action activities have cleaned-up the problems. Cf. 35 Ill. Admin. Code § 734.210(h) (the owner must determine compliance for areas exposed by “early action excavation (e.g., excavation boundaries, piping runs”).” Those remediation objectives include consideration of whether there remains “free product that may impact groundwater,” or “evidence that contaminated soils may be or may have been in contact with groundwater” measured in part by examining recharge of the tank

cavity 24 hours after its been dried. (35 Ill. Admin. Code § 734.210(h)(4)) Weeke's consultant testified that the Agency instructs consultants that a free product report need not be provided if product on the tank, once removed, does not come back and this is the reason he did not check the box regarding free product in the 45-day report. (Hrg. Trans. at pp. 45-46) The Agency's own guidance indicates that the free product analysis takes place after early action activities are performed. (See Exhibit A)

In short, free product and contaminated groundwater were encountered in the tank pit; they were removed pursuant to the Act, and the 45-day addendum report indicated that free product and groundwater were no longer an issue once early action had been performed.

IV. THE EVIDENCE SUBMITTED IN SUPPORT OF A RELEASE IS SCIENTIFIC.

The IEPA argues that the evidence submitted in support of a release is not "scientific or objective." (Resp. Brief, at p. 7) This is not an accurate understanding of science. Visual and olfactory observations constitute relevant data, to disregard them as the Illinois EPA wishes is itself not scientific. It is also contrary to any number of Board regulations that require the owner/operator to "visually inspect" releases. (E.g., 35 Ill. Admin. Code 734.210((b)(2))

What the Agency means, of course, is that some of the evidence lacks numbers. The Agency wants an analytical result to confirm a release. However, there are no analytical requirements to confirm an historical release. The TACO rules are remediation objectives, not investigatory objectives, and as discussed in the previous section, the confirmatory sampling follows clean-up activities. Benanti admitted at hearing that the purpose of the confirmation samples is to determine "whether or not there is contamination remaining after removal of the tanks . . . [and] a certain amount of impacted soil." (Hrg. Trans. at p. 83) The LUST Program

assumes that a number of sites can be closed-out following early action activities, and confirmatory sampling. It is not analytical, nor scientific, to assume that a site that can be closed-out following early action, never had a release and was never supposed to be in the LUST Program to begin with.

V. THE ROUNDING RULE IS NOT A RULE.

No legal authority was given mandating that confirmation samples be rounded down. Assuming *in arguendo* that a release can only be confirmed by an exceedance of the most stringent Tier 1 objectives, there is no basis for concluding that the failure to round down constitutes a violation of any law. Swif-T-Food Mart v. IEPA, PCB 03-185 (May 0, 2004) (“The standard of review under Section 40 of the Act is whether the application, as submitted to the Agency, would not violate the Act and Board regulations.”). This is particularly true where the Board’s regulations require the owner/operator to affirmatively demonstrate compliance before discontinuing further investigation. (35 Ill. Admin. Code § 734.210(h)(3)) Without a rule of law requiring rounding in the manner described by the Illinois EPA, the Agency’s reasoning cannot be sustained even if all of its other arguments are.

CONCLUSION

The unpromulgated procedures used by the Illinois EPA to retroactively remove this site from the LUST Program cannot be used to deny reimbursement of early action costs approved by the LUST Claims unit on accounting principles, nor invalidate its previous approval to continue site investigation activities. Petitioner asks that the Agency’s decision be reversed.

Respectfully submitted,

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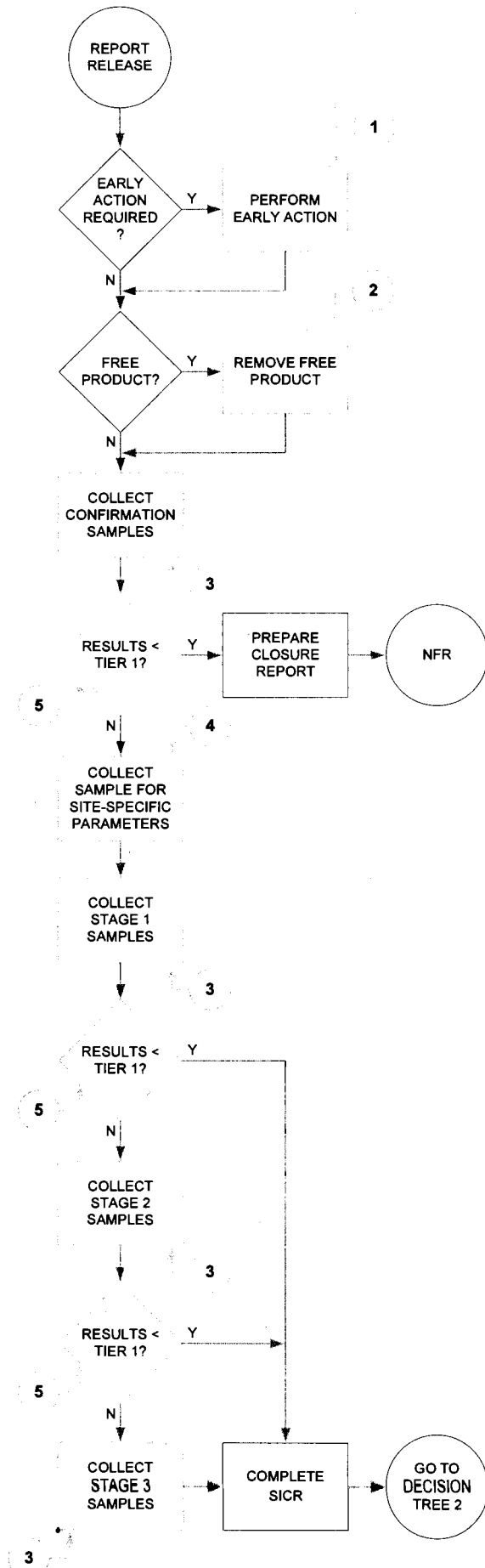
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GREENER CLEANUP STRATEGIES

1. EARLY ACTION

Early Action provides many opportunities to implement green approaches, such as:

- Imposing idling restrictions on construction equipment
- Using low-sulfur diesel fuel
- Using alternate fuels, such as E85 or biodiesel
- Using construction equipment with enhanced emissions controls
- Sequencing work to minimize double-handling of materials
- Covering stockpiles with tarps
- Collecting rain-water for on-site use, such as dust control
- Using recycled materials for fill

2. FREE PRODUCT REMOVAL

Some free product recovery systems can be powered by renewable energy sources, such as solar panels. Depending on the quantity and quality of the free product being recovered, in some cases it may be recyclable or suitable for use as an alternative energy source.

3. SAMPLE LOCATIONS

Sample locations should be carefully selected to efficiently identify the extents of contamination. In some cases, phasing sampling events could help reduce costs by eliminating unnecessary samples.

4. SITE-SPECIFIC PARAMETERS

Site-specific parameters are needed to determine site-specific remediation objectives under a Tier 2 analysis. A Tier 2 analysis could help reduce the amount of contaminated soil requiring removal and disposal, thereby saving time, money, and the environmental impacts associated with excavating and transporting the contaminated soil. Site-specific parameters include hydraulic conductivity, soil bulk density, soil particle density, moisture content, and organic carbon content.

5. TIER 1 COMPARISON

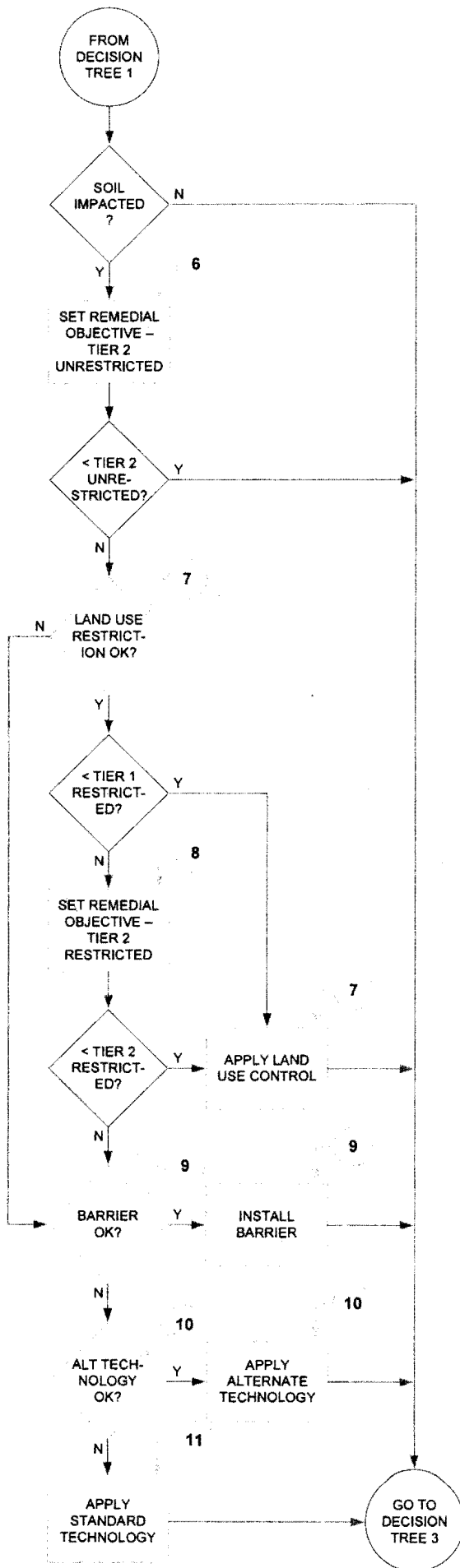
The Illinois EPA requires that the results of sampling performed to delineate the extents of contamination be compared to the most stringent Tier 1 remediation objectives. This does not limit the use of a Tier 2 or Tier 3 analysis to set remediation objectives after the contamination has been fully delineated, however. In fact, failure to use site-specific remediation objectives may result in certain corrective action costs being ineligible for reimbursement from the Fund.

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January 2009



DECISION TREE 2: SOIL REMEDIATION



GREENER CLEANUP STRATEGIES

6. TIER 2 ANALYSIS - UNRESTRICTED

A Tier 2 Analysis determines site-specific remediation objectives based on site-specific parameters, described in more detail in Decision Tree 1. In some cases a Tier 2 Analysis under an unrestricted, residential scenario could produce remediation objectives that minimize the amount of contaminated soil requiring cleanup.

7. LAND USE RESTRICTIONS

If the future use of a site is industrial or commercial, a land use restriction allows Tier 1 remediation objectives for industrial/commercial properties to be referenced. These remediation objectives may be less stringent than the Tier 1 residential objectives, thereby reducing the amount of contaminated soil requiring cleanup.

8. TIER 2 ANALYSIS - RESTRICTED

A restricted Tier 2 Analysis determines site-specific remediation objectives for industrial/commercial and construction worker scenarios. These remediation objectives may be less stringent than the Tier 2 residential objectives, thereby reducing the amount of contaminated soil requiring cleanup.

9. ENGINEERED BARRIERS

In certain cases an engineered barrier can be placed over contaminated soil to prevent users of the site from being exposed to the contamination. Engineered barriers can include asphalt, concrete, buildings, and three feet of clean fill. Placing an engineered barrier will likely reduce the amount of contaminated soil requiring cleanup. Engineered barriers can help save time and money, especially if they are coordinated with the redevelopment of the site, such as placing a planned parking lot over contaminated soil.

10. ALTERNATE CLEANUP TECHNOLOGIES

While excavation and off-site disposal is often the quickest cleanup strategy, it is also often the most expensive. If a cleanup doesn't have to be completed right away, an alternate cleanup technology could save money while reducing the environmental impacts of excavating and transporting contaminated soil. Alternate cleanup technologies include in-place oxidation, in-place reduction, bioremediation, and dual-phase vapor extraction.

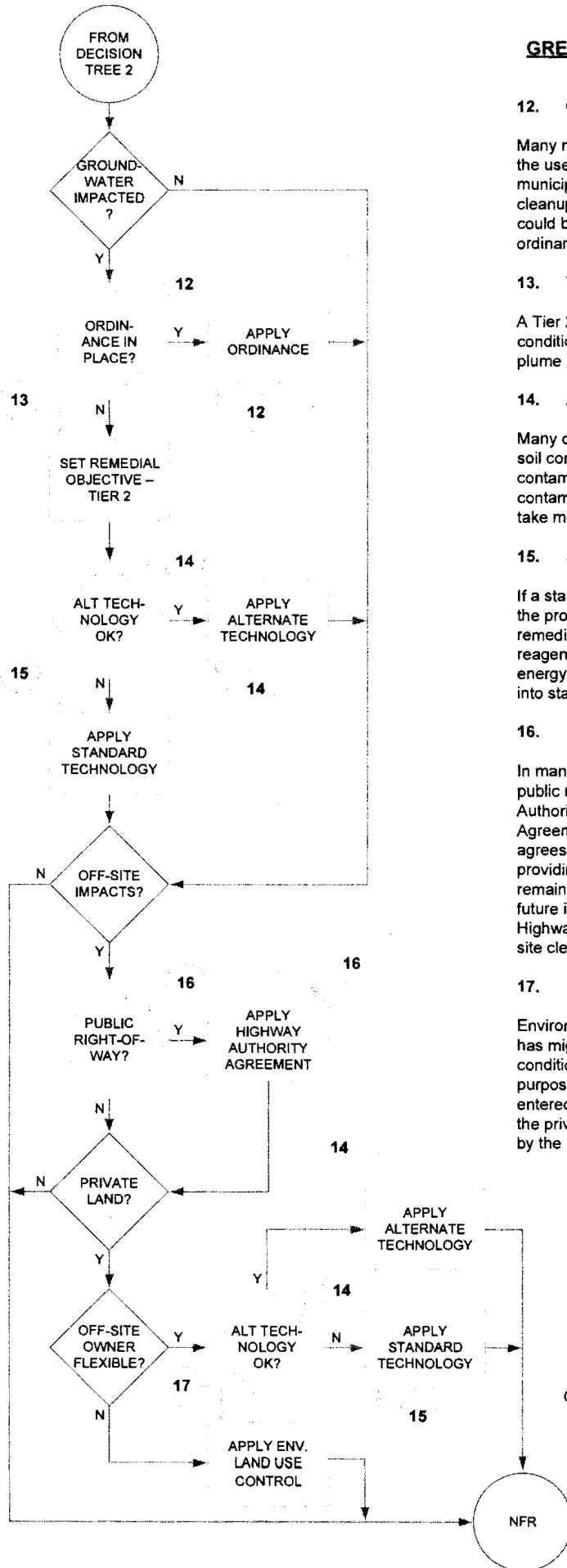
11. STANDARD CLEANUP TECHNOLOGIES

If standard cleanup technologies are planned for a site, specifically excavation and off-site disposal, then the green approaches under "Early Action" on Decision Tree 1 should be considered. In addition, cleanup work should be sequenced to integrate with redevelopment activities. This will minimize the need to fill excavations that may not need to be filled if cleanup is coordinated with the redevelopment activities.

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12. GROUNDWATER ORDINANCES

Many municipalities have ordinances in place restricting the use of groundwater for potable purposes. If a municipality has such an ordinance in place, the amount of cleanup required for a contaminated groundwater plume could be reduced. The Illinois EPA must approve an ordinance before it can be applied to a cleanup.

13. TIER 2 ANALYSIS

A Tier 2 Analysis for groundwater sets site-specific conditions that may reduce the size of the contaminant plume requiring cleanup.

14. ALTERNATE CLEANUP TECHNOLOGIES

Many of the alternate cleanup technologies applicable to soil contamination can also be considered for groundwater contamination, depending on the nature and extents of the contamination. These alternate cleanup technologies may take more time but can reduce cleanup costs.

15. STANDARD CLEANUP TECHNOLOGIES

If a standard groundwater cleanup technology is applied, the process should be carefully optimized to meet the remediation objectives using the least amount of electricity, reagents, and other supplies. In some cases renewable energy systems, such as solar panels, can be incorporated into standard cleanup systems.

16. HIGHWAY AUTHORITY AGREEMENTS

In many cases contamination extending off-site and onto a public right-of-way can be addressed using a Highway Authority Agreement. Under a Highway Authority Agreement, the public entity that owns the right-of-way agrees that the contamination can remain in place providing the person responsible for the contamination remains responsible for the cleanup at some point in the future if the public entity needs to access the right-of-way. Highway Authority Agreements can limit the amount of off-site cleanup required.

17. ENVIRONMENTAL LAND USE CONTROLS

Environmental Land Use Controls allow contamination that has migrated off-site to stay in place under certain conditions. Environmental Land Use Controls are similar in purpose to Highway Authority Agreements but they are entered into by the person responsible for the cleanup and the private property owner whose land has been impacted by the release.

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