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SEP 22 2008

STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

HANNEL OIL COMPANY, an Illinois Corporation,)
)
 Petitioner,)
)
 v.)
)
 ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,)
)
 Respondent.)

PCB No. **09-19**
(LUST Permit Appeal)

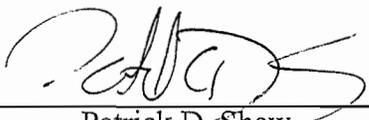
NOTICE OF FILING

To: Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

Melanie A. Jarvis, Assistant Counsel
Special Assistant Attorney General
Division of Legal Counsel
Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276

PLEASE TAKE NOTICE that we have this day filed with the office of the Clerk of the Pollution Control Board the Petition for Review a copy of which is enclosed herewith and hereby served upon you on the 16th day of September, 2008.

HANNEL OIL COMPANY, an Illinois Corporation, Petitioner

By: 
Patrick D. Shaw
One of its Attorneys

Patrick D. Shaw
MOHAN, ALEWELT, PRILLAMAN & ADAMI
1 N. Old Capitol Plaza, Ste. 325
Springfield, IL 62701
Telephone: 217/528-2517
Facsimile: 217/528-2553
Counsel for Petitioner Hannel Oil Company

THIS FILING IS SUBMITTED ON RECYCLED PAPER

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

HANNEL OIL COMPANY, an Illinois corporation,
Petitioner,
v.
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

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PETITION FOR REVIEW OF AGENCY LUST DECISION

NOW COMES Petitioner, Hannel Oil Company, pursuant to Section 40 of the Illinois Environmental Protection Act, 415 ILCS 5/40, and Part 105 of the Illinois Pollution Control Board Rules, 35 Ill. Admin. Code Sections 105.400 through 105.412, and hereby appeals that portion of the LUST decision issued August 18, 2008, by Respondent Illinois Environmental Protection Agency ("Agency"), in which the Agency rejected Petitioner's budget, and in support thereof states as follows:

A. BACKGROUND

1. Hannel Oil Company is an Illinois Corporation, and is the owner of the underground storage tanks at the former BP gas station site, now closed, described as follows: LPC #1370200031 - Morgan County, Hannel Oil Company - Main Street Station, 1002 South Main Street, Jacksonville.

2. On June 20, 2007, three (3) gasoline USTs and one (1) diesel UST were removed from the site. Early action activities, begun before the UST removals, were then completed, all of which activities were described in Petitioner's 45-Day Report provided to the Agency, and in the addendum thereto.

3. A Stage II/III Site Investigation Plan and Budget was submitted to the Agency on September 25, 2007, and approved on November 14, 2007. Following completion of site investigation activities, a Site Investigation Completion Report was submitted to the Agency on

January 4, 2008.

4. A Corrective Action Plan (CAP) was submitted to the Agency on April 24, 2008, and was approved by the Agency on August 18, 2008, the Agency finding that “the activities proposed in the plan are appropriate to demonstrate compliance with Title XVI of the Act.”

5. At the same time that Petitioner submitted its CAP to the Agency, the Petitioner also submitted its CAP Budget and Certification form, such Certification form being an Agency form that provides for a signature by the Petitioner, under oath, and certification by his professional engineer, also under oath, under penalty of law, that, to the best of his knowledge and belief, the Budget has been prepared in accordance with both the Act and generally accepted standards and practices in the professional engineering profession, and that the information presented in the Budget is accurate and complete.

6. As part of the CAP Budget, Petitioner included three (3) bids in accordance with 35 Ill. Adm. Code 734.855, each bid covering all costs for the excavation, transportation and proper disposal of petroleum contaminated soil at a landfill, plus backfill excavation and cap with six inches of gravel, all three (3) bids having been submitted to the Agency on Agency forms, fully completed by each bidder, and specifically stating, in the Agency’s own words, the following:

By completing this bid, you are agreeing that:

* * *

- **Bidder is qualified and able to complete the tasks listed in the scope of work.**

7. All information requested to be submitted by Petitioner, on the forms prescribed and provided by the Agency, were so provided in the CAP Budget, and all three (3) were duly signed and dated by the qualified bidders.

8. In addition, as part of the CAP budget, Petitioner included three (3) “Bid Summary Forms“, on Agency forms, which summarized the bids obtained and presented to the Agency, in which Petitioner certified, to the best of his knowledge that, among nine (9) specific representations, the following:

The bids were obtained only from parties qualified and able to perform the work.

9. In addition, as part of the CAP budget, Petitioner's consultant included three (3) "Bid Summary Forms", on Agency forms, which summarized the bids obtained and presented to the Agency, in which Petitioner's consultant certified, to the best of his knowledge that, among nine (9) specific representations, the following:

The bids were obtained only from parties qualified and able to perform the work.

10. In addition, the information furnished to the Agency by the Petitioner regarding bidding in accordance with 35 Ill. Adm. Code 734.855, was provided on the same Agency forms that the Agency had consistently approved as complete on prior occasions involving 734.855 bids, in accordance with its long-standing practice of requiring only such information regarding bidder qualifications as is requested in such Agency forms.

11. At no time during the Agency's consideration of Petitioner's CAP Budget did the Agency request any further or additional information from Petitioner or from its consultant regarding the qualifications of the bidders, nor did the Agency at any time require that any bidders be pre-qualified in accordance with any established rule.

12. Nevertheless, on August 18, 2008, the Agency rejected Petitioner's CAP Budget, the sole and entire reason for the rejection being as follows:

The Agency deemed the potential bidders as unqualified. This is based on Agency conversations, and the failure of the bidders to provide information to the Agency.

B. THE AGENCY'S FINAL DECISION

The decision for which review is sought herein is contained in Exhibit A hereto.

C. DATE ON WHICH THE AGENCY'S FINAL DECISION WAS SERVED

The Agency's final decision was dated August 18, 2008, and served on August 19, 2008,

making the date for the filing of this appeal September 23, 2008. This appeal is timely filed.

D. GROUNDS FOR APPEAL

1. The Petitioner, by providing all of the information requested by the Agency concerning the qualifications of the bidders, and by doing so on the Agency's own forms, which were fully filled out and signed, certifying that the bidders were, in fact, all duly qualified, made out a prima facie case of the bidders' qualifications, which the Agency, by failing to request any further information from Petitioner regarding the bidders' qualifications, and by otherwise failing to indicate to Petitioner that the information concerning the qualifications of the bidders was insufficient or unsatisfactory in any way, failed to rebut Petitioner's prima facie case on this point.

2. The only evidence properly in the Record concerning the qualifications of the bidders is that which was furnished to the Agency by Petitioner, on Agency forms, all of which demonstrates that the bidders were, in fact, qualified, and none of which supports the Agency's determination that all 3 bidders are unqualified.

3. The Agency's determination that the subject bidders were "unqualified" is not supported by the Record and, in fact, is contrary to the evidence properly in the Record.

4. Petitioner provided to the Agency proof that its CAP Budget would not cause a violation of the Act or of Board regulations and, in fact, demonstrated compliance with both the Act and the Board's regulations. 415 ILCS 5-39 (a); Kathe's Auto Service Center v. IEPA, PCB 96-102, Slip Op. at 13 (August 1, 1996).

5. In rejecting Petitioner's CAP Budget, the Agency failed to explain whether and, if so, how, any Sections of the Act or any regulations of the Board may be violated if the Budget were approved. 35 Ill. Adm. Code 734.505 (b)(2) and (3).

6. The Agency's decision is contrary to its own prior actions, and contrary to its own prior interpretations of applicable laws and policies, and its own established custom and practice of determining the qualifications of bidders on the basis of information furnished on the

Agency's bid forms, and may not deviate from that custom and practice without announcing in advance its change in policy. Gatica v. Department of Public Aid, 98 Ill. App. 3d 101, 106-107 (1st Dist. 1981) (Administrative agencies are bound by their long-standing policies and customs of which affected parties had prior knowledge).

7. The Agency's decision is contrary to the law.

8. The term "qualified bidder" is not defined by the Act or by any relevant Board regulation, nor does it appear on any Agency bid form, nor has the Agency established by regulation a pre-qualification program for such bidders.

9. Absent such a definition in the Act, the Board regulations, or Agency forms, the Agency is without authority to simply "deem" a bidder as being unqualified.

10. No Board regulation requires that an applicant for a CAP Budget approval furnish the Agency with more specific information regarding the qualifications of bidders than that which is requested in the Agency's own bid forms.

11. To the extent that the Agency ascertained, during the pendency of the subject CAP application, that either the facts or conclusions presented by Petitioner were inaccurate or incomplete, the Agency had a duty to disclose such information in writing during the Agency's statutory review period, but it failed to do so, and failed to request additional or clarifying information concerning the qualifications of any, or all, of the bidders.

12. The Agency is without authority to reject a budget or deny a permit based merely upon its conversations with non-parties, or based upon the failure of a non-party to answer questions posed by the Agency.

13. The Agency's new, unannounced policy of making telephone calls to non-parties and rejecting budgets on the basis of those telephone conversations alone, without prior notice to the permit applicant, violates Petitioner's rights of due process and is fundamentally unfair.

E. REQUESTED RELIEF

WHEREFORE, Petitioner prays that: (a) the Agency produce the Record; (b) a hearing

be held; (c) the Board find that the Agency's new practice of deeming bidders to be unqualified based upon the undisclosed results of its own ex parte telephone conferences placed directly to the bidders is an invalid rule or, alternatively, that it is unauthorized under Board rules; (d) the Board determine that the three (3) bidders in this case are, in fact, qualified; (e) the Board direct the Agency to approve the subject CAP Budget; (f) the Board grant Petitioner its attorney's fees; and (g) the Board grant Petitioner such other and further relief as it just.

Respectfully submitted,

HANNEL OIL COMPANY, an Illinois corporation, Petitioner,

By its attorneys,
MOHAN, ALEWELT, PRILLAMAN & ADAMI

By:



Patrick D. Shaw

By:



Fred C. Prillaman

Patrick D. Shaw
Fred C. Prillaman
MOHAN, ALEWELT, PRILLAMAN & ADAMI
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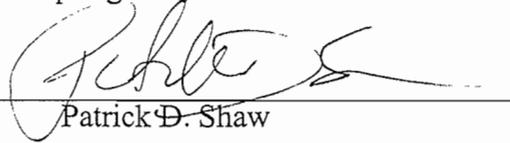
THIS FILING IS SUBMITTED ON RECYCLED PAPER

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby, certify that I caused copies of the foregoing document to served by placement in the United State Post Office Mail Box at Springfield, Illinois, before 6:00 p.m. on September 16, 2008, in sealed envelopes with proper first-class postage affixed, addressed to:

Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

Melanie A. Jarvis, Assistant Counsel
Special Assistant Attorney General
Division of Legal Counsel
Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276



Patrick D. Shaw

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Facsimile: 217/528-2553
Counsel for Petitioner Hannel Oil Company



ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

1021 NORTH GRAND AVENUE EAST, P.O. BOX 19276, SPRINGFIELD, ILLINOIS 62794-9276 - (217) 782-2829
JAMES R. THOMPSON CENTER, 100 WEST RANDOLPH, SUITE 11-300, CHICAGO, IL 60601 - (312) 814-6026

217/782-6762

ROD R. BLAGOJEVICH, GOVERNOR

DOUGLAS P. SCOTT, DIRECTOR

CERTIFIED MAIL

7007 0220 0000 0040 5021

AUG 18 2008

Hannel Oil Company
E. Dean Hannel
P.O. Box 758
Jacksonville, Illinois 62651

Re: LPC #1370200031 -- Morgan County
Jacksonville/Hannel Oil Company
1002 South Main Street
Leaking UST Incident No. 20070653
Leaking UST Technical File

Dear Mr. Hannel:

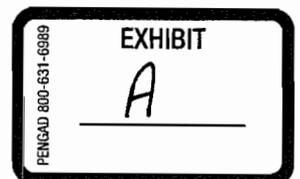
The Illinois Environmental Protection Agency (Illinois EPA) has reviewed the Corrective Action Plan (plan) submitted for the above-referenced incident. This plan, dated April 22, 2008, was received by the Illinois EPA on April 24, 2008. Citations in this letter are from the Environmental Protection Act (Act), as amended by Public Act 92-0554 on June 24, 2002, and 35 Illinois Administrative Code (35 Ill. Adm. Code).

Pursuant to Sections 57.7(b)(2) and 57.7(c) of the Act and 35 Ill. Adm. Code 734.505(b) and 734.510(a), the plan is approved. The activities proposed in the plan are appropriate to demonstrate compliance with Title XVI of the Act. Please note that all activities associated with the remediation of this release proposed in the plan must be executed in accordance with all applicable regulatory and statutory requirements, including compliance with the proper permits.

Pursuant to 57.7(c)(4) of the Act and 35 Ill Adm. Code 734.505(b) and 734.510(b) the budget is rejected for the reason(s) listed below:

In accordance with 35 Ill Adm. Code, Section 734.855, as an alternative to the maximum payment amounts set forth in this Subpart H, one or more maximum payment amounts may be determined via bidding in accordance with this Section. Each bid must cover all costs included in the maximum payment amount that the bid is replacing.

- a) A minimum of three written bids must be obtained. The bids must be based upon the same scope of work and must remain valid for a period of time that will allow the owner or operator to accept them upon the Agency's approval of the associated budget. Bids must be obtained only from persons qualified and able to perform the work being bid. Bids must not be obtained from persons in which the



owner or operator, or the owner's or operator's primary contractor, has a financial interest.

- b) The bids must be summarized on forms prescribed and provided by the Agency. The bid summary form, along with copies of the bid requests and the bids obtained, must be submitted to the Agency in the associated budget. If more than the minimum three bids are obtained, summaries and copies of all bids must be submitted to the Agency.
- c) The maximum payment amount for the work bid must be the amount of the lowest bid, unless the lowest bid is less than the maximum payment amount set forth in this Subpart H, in which case the maximum payment amount set forth in this Subpart H must be allowed. The owner or operator is not required to use the lowest bidder to perform the work, but instead may use another person qualified and able to perform the work, including, but not limited to, a person in which the owner or operator, or the owner's or operator's primary consultant, has a direct or indirect financial interest. However, regardless of who performs the work, the maximum payment amount will remain the amount of the lowest bid.

The Agency deemed the potential bidders as unqualified. This is based on Agency conversations, and the failure of the bidders to provide information to the Agency.

NOTE: Pursuant to Section 57.8(a)(5) of the Act, if payment from the Fund will be sought for any additional costs that may be incurred as a result of the Illinois EPA's modifications, an amended budget must be submitted. Amended plans and/or budgets must be submitted and approved prior to the issuance of a No Further Remediation (NFR) Letter. Costs associated with a plan or budget that have not been approved prior to the issuance of an NFR Letter will not be paid from the Fund.

Pursuant to Sections 57.7(b)(5) and 57.12(c) and (d) of the Act and 35 Ill. Adm. Code 734.100 and 734.125, the Illinois EPA requires that a Corrective Action Completion Report that achieves compliance with applicable remediation objectives be submitted within 30 days after completion of the plan to:

Illinois Environmental Protection Agency
Bureau of Land - #24
Leaking Underground Storage Tank Section
1021 North Grand Avenue East
Post Office Box 19276
Springfield, IL 62794-9276

Please submit all correspondence in duplicate and include the Re: block shown at the beginning of this letter.

Please note that, if within four years after the approval of this plan, compliance with the applicable remediation objectives has not been achieved and a Corrective Action Completion Report has not been submitted, the Illinois EPA requires the submission of a status report pursuant to Section 57.7(b)(6) of the Act.

If you have any questions or need further assistance, please contact Steve Kasa at 217-557-7048.

Sincerely,



Thomas A. Henninger
Unit Manager
Leaking Underground Storage Tank Section
Division of Remediation Management
Bureau of Land

TAH:SK

Attachment: Attachment A

c: CW3M Company, Inc.
Leaking UST Claims Unit
BOL File