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FEB 10 2009

STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

BAILEY ENTERPRISES, INC.)
)
Petitioner,)
)
v.)
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

PCB 09-57
(LUST Permit Appeal)

NOTICE OF FILING AND PROOF OF SERVICE

To: Clerk
Illinois Pollution Control Board
State of Illinois Center
100 W. Randolph, Ste. 11-500
Chicago, IL 60601

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

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), a Petition for Review of Agency LUST Decision, a copy of which is herewith served upon the Illinois Environmental Protection Agency.

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 Illinois Environmental Protection Agency by enclosing same in an envelope addressed to Melanie A. Jarvis, Assistant Counsel, with postage fully prepaid, and by depositing said envelope in a U.S. Post Office Mailbox in Springfield, Illinois on the 10TH day of February, 2009.

Respectfully submitted,
BAILEY ENTERPRISES, INC.,

BY: MOHAN, ALEWELT, PRILLAMAN & ADAMI

BY: _____
Patrick D. Shaw

Fred C. Prillaman

Patrick D. Shaw
Fred C. Prillaman
MOHAN, ALEWELT, PRILLAMAN & ADAMI
1 North Old Capitol Plaza, Suite 325
Springfield, IL 62701-1323
Telephone: 217/528-2517
Facsimile: 217/528-2553

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PETITION FOR REVIEW OF AGENCY LUST DECISION

NOW COMES Petitioner, Bailey Enterprises, Inc. ("Bailey"), 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 January 7, 2009, by Respondent Illinois Environmental Protection Agency ("Agency"), in which the Agency failed and refused to approve the payment of \$20,460.07 for costs, and in support thereof states as follows:

A. BACKGROUND

1. Bailey is the owner of the underground petroleum storage tanks at the service station located at 105 North 4th Street in Albion, Edwards County, Illinois, LPC #0470055030, Incident #20080640 -- 55145.

2. On September 8, 2008, the Agency received from Bailey its request for reimbursement for \$54,189.78, for the billing period of May 1, 2008 through July 31, 2008, together with all required engineered certifications, owner/operator billing certifications, and related Agency forms duly completed, and all required supporting documentation and justification, as required by applicable law.

3. All line-item sums requested for reimbursement were within the Agency's previously-approved format for early action costs.

4. The amounts requested for reimbursement were certified by Bailey, on the Agency's own forms, as being correct and reasonable and submitted in accordance with applicable laws, as follows:

The attached application for payment and all documents submitted with it were

prepared under the supervision of the licensed professional engineer or licensed professional geologist and the owner and/or operator who signatures are set forth below and in accordance with a system designed to assure that qualified personnel properly gathered and evaluated the information provided. The information in the attached application for payment is, to the best of my knowledge and belief, true, and complete.

The costs for remediating the above-listed incident are correct, are reasonable, and if applicable, were determined in accordance with Subpart H: Maximum Payment Amounts, Appendix D. sample Handling and Analysis amounts, and Appendix E Personnel Titles and Rates of 35 Ill. Adm. Code 732 or 734.

5. Nevertheless, on January 7, 2009, the Agency prepared its letter notifying Bailey that it was refusing to approve for payment \$20,460.07 of said costs, the sole and entire reason for the rejection appearing in the Agency's final decision attached hereto as Exhibit A.

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

The Agency's final decision was dated January 7, 2009 and, on information and belief, was served on January 8, 2009, making February 12, 2009, the deadline for the filing of this appeal, pursuant to Section 40(a)(1) of the Illinois Environmental Protection Act, 415 ILCS 5/40(a)(1). This appeal is timely filed.

C. CONFIRMATION OF APPROVAL OF \$23,729.71 FOR PAYMENT

Bailey is not appealing the \$23,729.71 approved payment, and hereby confirms that the Agency will, in fact, prepare a voucher in that amount for submission to the Comptroller's Office for payment, as funds become available based upon the date the Illinois EPA received the application for payment.

D. GROUNDS FOR APPEALING THE \$20,460.07 IN REJECTED COSTS

1. The majority of the \$20,460.07 costs rejected by the Agency were costs submitted per bidding, which the Agency wrongfully rejected for reasons nowhere found in applicable statutes, regulations, or even on the Agency's own forms. Specifically, the Agency rejected \$19,189.59 of the costs for four (4) reasons, none of which are reasons for rejection provided in applicable statutes, regulations, or even on the Agency's own forms, to-wit:

a. Per the Agency, "in order for the bids to be reviewed, . . . a breakdown of what is included

in the bid . . . must be provided.” This is legally incorrect. No statutes or regulations, nor even the Agency’s own forms, require such “breakdowns” to be provided, either for purposes of “reviewing” the bids or, pertinent to this appeal, for reimbursement of costs.

b. Per the Agency, “in order for the bids to be reviewed, . . . a breakdown of what . . . specific costs exceed the Subpart H rates must be provided.” This is equally incorrect, as a matter of law. No statutes or regulations, nor even the Agency’s own forms, require such “breakdowns” to be provided, either for purposes of “reviewing” the bids or, pertinent to this appeal, for reimbursement of costs.

c. Per the Agency, “in order for the bids to be reviewed, . . . justification must be provided to document why the bids were necessary.” The Agency is legally incorrect on this argument, as well, since no statutes or regulations, nor even the Agency’s own forms, require such “justification” to be provided, either for purposes of “reviewing” the bids or, pertinent to this appeal, for reimbursement of cost.

d. Per the Agency, “in order for the bids to be reviewed, . . . justification must be provided to document . . . why the Subpart H rates could not be met for this project.” This reason for rejection is equally flawed; no statutes or regulations, nor even the Agency’s own forms, require such “justification” to be provided, either for purposes of “reviewing” the bids or, pertinent to this appeal, for reimbursement of cost

2. If such “breakdowns” and/or “justifications” were required (which they were not; indeed, neither of these terms appear anywhere in the regulations), they would have been furnished by Bailey on the Agency’s own forms, in response to the Agency’s request to furnish same. However, the Board’s Regulations are very clear on this point: bids submitted in accordance with 35 Ill. Adm. Code 734.855 shall include only the degree of specificity required on the form itself, as prescribed by the Agency. The Agency’s forms did not ask for this so-called “breakdown” or “justification” information. Bailey did exactly what the Agency, in its forms, required, yet in its rejection letter the Agency, for the first time, demanded that the information requested on its own forms was not enough, and that more was needed. This is a fundamentally unfair reason to deny reimbursement, akin to rejecting bids on a

public project that fail to conform to the specifications first published after the bidding is closed.

3. None of these after-the fact requests for further information appear anywhere in the regulations or in the form prepared by the Agency itself, which form was fully completed by each of the bidders and by Bailey, as well as by Bailey's consulting engineer. The Agency does not complain that the form itself is incomplete.

4. Indeed, at no time during the Agency's consideration of Bailey's request for reimbursement did the Agency request any further or additional information concerning any particular item of remediation and disposal.

5. As to the remaining \$1,270.48 in wrongfully rejected costs, the Agency mistakenly believes that they lacked supporting documentation. Specifically, \$1,270.48 was deducted for the cost for direct push drilling, yet all required information and supporting documentation necessary to reimburse for this cost, was, in fact, submitted with the application, and is part of this record

6. To the extent that the Agency ascertained, during the pendency of the subject request for reimbursement, that either the facts or conclusions presented by Bailey 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 its purported reasons for denial.

7. In rejecting \$20,460.07 for costs of reimbursement for this remediation work, the Agency acted arbitrarily and contrary to the certified facts presented, contrary to its own prior interpretations of applicable laws and policies, contrary to its own established customs and practices, and contrary to the law.

E. REQUESTED RELIEF

WHEREFORE, Petitioner, Bailey Enterprises, Inc., prays that: (a) the Agency produce the Record; (b) a hearing be held; (c) the Board find that Bailey's application for LUST reimbursement contained all information and documentation necessary to support the \$20,460.07 for costs rejected by the Agency, and, accordingly; (d) the Board direct the Agency to restore the \$20,460.07 in costs

rejected and to prepare a voucher for \$20,460.07, and to submit that voucher to the Comptroller's Office for payment as funds become available, based upon the date the Agency received the subject application for payment; (e) the Board grant Bailey his attorney's fees; and (f) the Board grant Bailey such other and further relief as it just.

Respectfully submitted,

BAILEY ENTERPRISES, INC.,
Petitioner

By his attorneys,
MOHAN, ALEWELT, PRILLAMAN & ADAMI

By: _____
Patrick D. Shaw

By: _____
Fred C. Prillaman

Patrick D. Shaw
Fred C. Prillaman
MOHAN, ALEWELT, PRILLAMAN & ADAMI
1 N. Old Capitol Plaza, Ste. 325
Springfield, IL 62701
Telephone: 217/528-2517
Facsimile: 217/528-2553

THIS FILING IS SUBMITTED ON RECYCLED PAPER



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

ROD R. BLAGOJEVICH, GOVERNOR DOUGLAS P. SCOTT, DIRECTOR

217/782-6762

CERTIFIED MAIL #

JAN 07 2009

7004 2510 0001 8618 2164

Bailey Enterprises, Inc.
Attn: Edward Bailey
P.O. Box 571
Carlinville, Illinois 62626

Re: LPC #0470055030 -- Edwards County
Albion/Bailey Enterprises, Inc.
105 North 4th Street
Incident-Claim No.: 20080640 -- 55145
Queue Date: September 8, 2008
Leaking UST FISCAL FILE

Dear Mr. Bailey:

The Illinois Environmental Protection Agency has completed the review of your application for payment from the Underground Storage Tank Fund for the above-referenced Leaking UST incident pursuant to Section 57.8(a) of the Illinois Environmental Protection Act (Act), and 35 Ill. Adm. Code 732, Subpart F. This information is dated September 1, 2008 and was received by the Agency on September 8, 2008. The application for payment covers the period from May 1, 2008 to July 31, 2008. The amount requested is \$54,189.78.

The deductible amount to be assessed on this claim is \$10,000.00, which is being deducted from this payment. In addition to the deductible, there are costs from this claim that are not being paid. Listed in Attachment A are the costs that are not being paid and the reasons these costs are not being paid.

On September 8, 2008, the Agency received your application for payment for this claim. As a result of the Agency's review of this application for payment, a voucher for \$23,729.71 will be prepared for submission to the Comptroller's Office for payment as funds become available based upon the date the Agency received your complete request for payment of this application for payment. Subsequent applications for payment that have been/are submitted will be processed based upon the date complete subsequent application for payment requests are received by the Agency. This constitutes the Agency's final action with regard to the above application(s) for payment.



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An underground storage tank owner or operator may appeal this final decision to the Illinois Pollution Control Board (Board) pursuant to Section 57.8(i) and Section 40 of the Act by filing a petition for a hearing within 35 days after the date of issuance of the final decision. However, the 35-day period may be extended for a period of time not to exceed 90 days by written notice from the owner or operator and the Illinois EPA within the initial 35-day appeal period. If the applicant wishes to receive a 90-day extension, a written request that includes a statement of the date the final decision was received, along with a copy of this decision, must be sent to the Illinois EPA as soon as possible.

For information regarding the request for an extension, please contact:

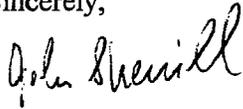
Illinois Environmental Protection Agency
Division of Legal Counsel
1021 North Grand Avenue East
Springfield, Illinois 62794-9276
217/782-5544

For information regarding the filing of an appeal, please contact:

Illinois Pollution Control Board, Clerk
State of Illinois Center
100 West Randolph, Suite 11-500
Chicago, Illinois 60601
312/814-3620

If you have any questions or require further assistance, please contact Theresa Sitton or Brian Bauer of my staff at 217/782-6762.

Sincerely,



John Sherrill, Manager
Financial Management Unit
Bureau of Land

JS:TS:m\080073.doc

cc: CW3M Company
LCU File
Theresa Sitton

Attachment A
Technical Deductions

Re: LPC #0470055030 -- Edwards County
Albion / Bailey Enterprises
105 North 4th Street
Incident-Claim No.: 20080640 -- 55145
Queue Date: September 8, 2008
Leaking UST Fiscal File

Citations in this attachment 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).

Item # Description of Deductions

1. \$20,460.07 for costs that lack supporting documentation and justification. Pursuant to 35 Ill. Adm. Code 734.605(b)(9) and 734.630(cc), application for payments must include an accounting of all costs, including but not limited to, invoices, receipts, and supporting documentation showing the dates and descriptions of the work performed. In addition, reasonableness of costs cannot be determined without documentation. Pursuant to 734.630(ee), costs incurred during early action that are unreasonable are ineligible.

*\$ 1,270.48 Direct Push Drilling.

*\$ 15,884.41 Excavation, Transportation, and Disposal.

*\$ 3,305.18 Backfill.

\$19,189.59 of the costs above were submitted per bidding. In order for the bids to be reviewed pursuant to 35 Ill. Adm. Code 734.855, a breakdown of what is included in the bid and what specific costs exceed the Subpart H rates must be provided. Justification must be provided to document why the bids were necessary and why the Subpart H rates could not be met for this project.

Therefore, such costs are not approved pursuant to Section 57.7(c)(3) of the Act because they may be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of Title XVI of the Act.