

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

L. KELLER OIL PROPERTIES, INC., TILTON )  
SUPER K )

Petitioner, )

v. )

ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY, )

Respondent. )

PCB No. \_\_\_\_\_  
(LUST Permit Appeal)

**NOTICE OF FILING AND PROOF OF SERVICE**

To: John T. Therriault, Clerk  
Illinois Pollution Control Board  
100 West Randolph Street  
State of Illinois Building, Suite 11-500  
Chicago, IL 60601

Division of Legal Counsel  
Illinois Environmental Protection Agency  
1021 North Grand Avenue East  
P.O. Box 19276  
Springfield, IL 62794-9276

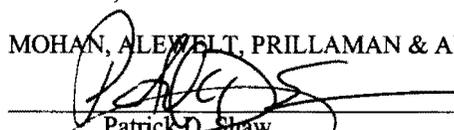
PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board, pursuant to Board Procedural Rule 101.302 (d), a Petition for Review of Agency Lust Decision , a copy of which is herewith served upon the Illinois Environmental Protection Agency.

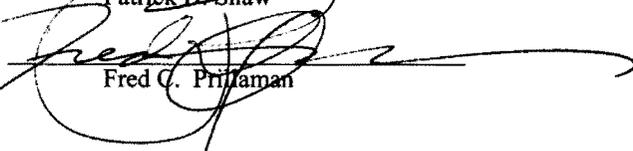
The undersigned hereby certifies that a true and correct copy of this Notice of Filing, together with a copy of the document described above, were today served upon the hearing officer and counsel of record to all parties to this cause by enclosing same in an envelope addressed to such attorneys at their business addresses as disclosed by the pleadings of record herein, with postage fully prepaid, and by depositing said envelope in a U.S. Post Office Mailbox in Springfield, Illinois on the 20th day of May, 2009.

Respectfully submitted,

L. KELLER OIL PROPERTIES, INC., TILTON  
SUPER K,

BY: 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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Telephone: 217/528-2517  
Facsimile: 217/528-2553

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

L. KELLER OIL PROPERTIES, INC., TILTON	)	
SUPER K,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB _____
	)	(LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

**PETITION FOR REVIEW OF AGENCY LUST DECISION**

NOW COMES Petitioner, L. Keller Oil Properties, Inc., Tilton Super K, pursuant to Sections 40 and 57.8 (i) of the Illinois Environmental Protection Act, 415 ILCS 5/40 and 5/57.8 (i), 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 April 15, 2009, by Respondent Illinois Environmental Protection Agency ("Agency"), in which the Agency failed and refused to approve the payment of \$116,041.71 for costs, and in support thereof states as follows:

**A. BACKGROUND**

1. L. Keller Oil Properties, Inc., Tilton Super K ("Tilton") is the owner of the underground petroleum storage tanks at the service station located at 100 East 2<sup>nd</sup> Street in Tilton, Vermilion County, Illinois, LPC #1830905040, Incident #20081231 -- 55903.

2. On December 17, 2008, the Agency received from Tilton its request for reimbursement for \$116,041.71, for the billing period of August 1, 2008 through October 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 Tilton, on the Agency's own forms,

as being correct and reasonable and submitted in accordance with applicable laws. Specifically, Tilton certified to the Agency that:

- 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 whose 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 April 15, 2009, the Agency prepared its letter notifying Tilton that it was refusing to approve for payment \$83,560.12 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 April 15, 2009 and, on information and belief, was served on or after April 15, 2009, making May 20, 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 \$17,481.79 FOR PAYMENT**

Tilton is not appealing the \$17,481.79 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 \$83,560.12 IN REJECTED COSTS**

1. The majority of the \$83,560.12 costs rejected by the Agency were costs for excavation, transportation, disposal and backfill, all of which were Subpart H minimums, yet the Agency wrongfully rejected them for reasons nowhere found in applicable statutes, regulations, or even on the Agency's own forms. Specifically, the Agency rejected \$72,153.06 of these costs for the reason that they "lack supporting documentation and justification", what the Agency claims are missing "invoices, receipts, and supportive

documentation showing the dates and descriptions of the work performed“.

2. However, all required supporting documentation was, in fact, provided. Moreover, no statutes or regulations, nor even the Agency's own forms, require more documentation to be provided than that which Tilton provided here, for purposes of reimbursement particularly where (as here) the costs are the Subpart H minimums.

3. The Agency does not state what it means by the lack of “justification” for rejecting \$72,153.06 for these costs. Indeed, no statutes or regulations, nor even the Agency's own forms, require such “justification” to be provided for purposes of reimbursement.

4. If such “justifications” were required (which they were not; indeed, the term nowhere appears in the regulations), they would have been furnished by Tilton on the Agency's own forms, in response to the Agency's request to furnish same. However, the Agency's forms did not ask for this so-called “justification” information. Tilton 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, even though the costs were the Subpart H minimums. This is a fundamentally unfair reason to deny reimbursement.

5. In addition, the Agency wrongfully denied or rejected \$1,308.60 for costs for direct push minimum charge, and \$8,850.00 for canopy demolition and removal charge, both for what the Agency claims is a “lack of supporting documentation.” However, all required information and supporting documentation necessary to reimburse for these cost items were, in fact, submitted with the request itself.

6. At no time during the Agency's consideration of Tilton's request for reimbursement did the Agency request any further or additional information or documentation concerning any particular item of the request.

7. To the extent that the Agency ascertained, during the pendency of the subject request for reimbursement, that either the facts or conclusions presented by Tilton 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.

8. In addition, the Agency wrongfully denied \$112.01 in costs for bidding, \$1,000.00 for asbestos inspection, \$120.00 for handling charges, and \$16.45 for hotel charges, all of which were rejected for reasons that are not factually or legally correct.

9. In fact, in rejecting all \$83,560.12 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.

10. In addition, a free-standing sentence appears at the bottom of the second page of Attachment A to the Agency's denial letter (Exhibit A hereto), which appears to be an additional reason for the Agency's denial of the \$8,850.00 in costs for canopy demolition and removal charges, but could have been intended by the Agency to apply to all of the rejected items. That sentence provides as follows:

"A time and materials breakdown and copies of invoices from all subcontractors is required to be submitted."

11. Nowhere in the Act or in the Board rules are downstream "time and materials breakdowns" -- that is, itemization from downstream subcontractors, sub-subcontractors, and material suppliers to subcontractors -- required, and to deny requests for reimbursement for failure to supply such "breakdowns" is contrary to the law, as well as contrary to the Agency's own past practices.

**E. REQUESTED RELIEF**

WHEREFORE, Petitioner, Tilton Super K, prays that: (a) the Agency produce the Record; (b) a hearing be held; (c) the Board find that Tilton's application for LUST reimbursement contained all information and documentation necessary to support the \$83,560.12 for costs rejected by the Agency, and, accordingly; (d) the Board direct the Agency to restore the \$83,560.12 in costs rejected and to prepare a voucher for \$83,560.12, and to submit that voucher to the Comptroller's Office for payment as funds

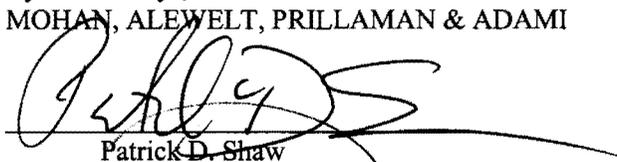
become available, based upon the date the Agency received the subject application for payment; (e) the Board grant Tilton its attorney's fees; and (f) the Board grant Tilton such other and further relief as it just.

Respectfully submitted,

L. KELLER OIL PROPERTIES, INC./TILTON  
SUPER K,  
Petitioner

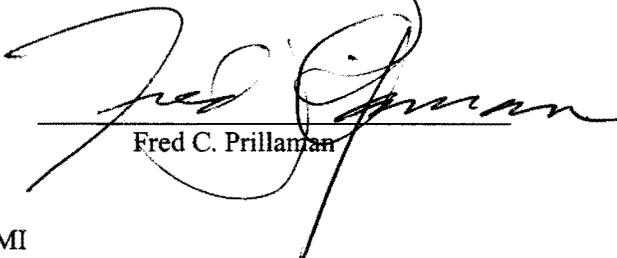
By its attorneys,  
MOHAN, ALEWELT, PRILLAMAN & ADAMI

By:



Patrick D. Shaw

By:



Fred C. Prillaman

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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

DOUGLAS P. SCOTT, DIRECTOR

217/782-6762

APR 15 2009

CERTIFIED MAIL #

7008 1140 0004 7344 0711

L. Keller Oil Properties, Inc.  
Attn: CW3M Company  
P.O. Box 571  
Carlinville, Illinois 62626

Re: LPC #1830905040 - Vermilion County  
Tilton/Tilton Super K  
100 East 2nd Street  
Incident-Claim No.: 20081231 -- 55903  
Queue Date: December 17, 2008  
Leaking UST FISCAL FILE

Dear Mr. Keller:

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 December 10, 2008 and was received by the Agency on December 17, 2008. The application for payment covers the period from August 1, 2008 to October 31, 2008. The amount requested is \$116,041.71.

The deductible amount to be assessed on this claim is \$15,000.00, 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 December 17, 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 \$17,481.59 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 Catherine S. Elston of my staff and Brian Bauer of Harry Chappel's staff at 217/762-6762.

Sincerely,



John Sherrill, Manager  
Financial Management Unit  
Bureau of Land

JS:CSE:mis\092612.doc

Attachment

cc: CWJM Company  
LCU File  
Cathy Elston  
Brian Bauer

Attachment A  
Technical Deductions

Re: LPC #1833095040 -- Vermilion County  
Tilton / L. Keller Oil Properties, Inc.  
100 East 2<sup>nd</sup> Street  
Incident-Claim No.: 20081231 -- 55903  
Queue Date: December 17, 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. \$112.01, deduction for costs for bidding, which lack supporting documentation. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 734.630(cc). Since there is no supporting documentation of costs, the Illinois EPA cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act. 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.

2. \$1,308.60, deduction for costs for direct push minimum charge, which lack supporting documentation. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 734.630(cc). Since there is no supporting documentation of costs, the Illinois EPA cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act. 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.

In addition these costs exceed the minimum requirements necessary to comply with the Act. Costs associated with site investigation and corrective action activities and associated materials or services exceeding the minimum requirements necessary to comply with the Act are not eligible for payment from the Fund pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.630(o).

3. \$72,153.06 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(cc), costs incurred during early action that are unreasonable are ineligible.

\*\$ 50,473.92

Excavation, Transportation, and Disposal.

\*\$ 21,679.14

Backfill.

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.

4. \$1,000.00, deduction for costs for asbestos inspection, which exceed the minimum requirements necessary to comply with the Act. Costs associated with site investigation and corrective action activities and associated materials or services exceeding the minimum requirements necessary to comply with the Act are not eligible for payment from the Fund pursuant to Section 57.7(e)(3) of the Act and 35 Ill. Adm. Code 734.630(o).
5. \$120.00, adjustment in the handling charges due to the deduction(s) of ineligible costs. Such costs are ineligible for payment from the Fund pursuant to Section 57.1(a) of the Act and 35 Ill. Adm. Code 734.635.
6. \$8,850.00, deduction for costs for canopy demolition and removal charge, which lack supporting documentation and justification. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 734.630(cc). Since there is no supporting documentation of costs, the Illinois EPA cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act. 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.

In addition these costs exceed the minimum requirements necessary to comply with the Act. Costs associated with site investigation and corrective action activities and associated materials or services exceeding the minimum requirements necessary to comply with the Act are not eligible for payment from the Fund pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.630(o).

A time and materials breakdown and copies of invoices from all subcontractors is required to be submitted.

**Attachment A**  
**Accounting Deductions**

Re: **LPC #1830905040 -- Vermilion County**  
**Tilton/Tilton Super K**  
**100 East 2nd Street**  
**Incident-Claim No.: 20081231 -- 55903**  
**Queue Date: December 17, 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.      **\$16.45, deduction for site investigation or corrective action costs for handling on hotel charges that are not reasonable as submitted. Such costs are ineligible for payment from the Fund pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.630(dd).**

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