

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

SHARON BURGESS,)	
Petitioner,)	
v.)	PCB _____
)	(LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
Respondent.)	

NOTICE OF FILING AND PROOF OF SERVICE

To:	John T. Therriault, Acting Clerk	Division of Legal Counsel
	Illinois Pollution Control Board	Illinois Environmental Protection Agency
	100 West Randolph Street	1021 North Grand Avenue East
	State of Illinois Building, Suite 11-500	P.O. Box 19276
	Chicago, IL 60601	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 THE AGENCY LUST DECISION, a copy of which is herewith served 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 counsel of record of all parties to this cause by enclosing same in envelopes addressed to such attorneys with postage fully prepaid, and by depositing said envelopes in a U.S. Post Office Mailbox in Springfield, Illinois on the 22nd day of April, 2015

Respectfully submitted,
SHARON BURGESS, Petitioner

BY: LAW OFFICE OF PATRICK D. SHAW

BY: /s/ Patrick D. Shaw

Patrick D. Shaw
LAW OFFICE OF PATRICK D. SHAW
80 Bellerive Road
Springfield, IL 62704
217-299-8484

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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Petitioner,)	
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PETITION FOR REVIEW OF AGENCY LUST DECISION

NOW COMES Petitioner, SHARON BURGESS, pursuant to Section 57.7(c)(4) of the Illinois Environmental Protection Act, 415 ILCS 5/57.7(c)(4), and hereby appeals the Agency’s final decision which disallowed prevailing wage rates when it reduced the budget, and in support thereof states as follows:

1. This appeal arises from underground storage tanks formally located at the Fuel Fleet service station in Kankakee, County of Kankakee, Illinois, now owned by SHARON BURGESS, and assigned LPC #091055274.

2. On August 14, 2013, notice of a release from two underground storage tanks was given, and incident number 2013-0906 was assigned to the release.

3. Thereafter, the tanks were removed as part of early action and then site investigation activities were performed.

4. Pursuant to the Economic Development Act of 2013, when payment from the Underground Storage Tank will be requested, work must be paid on the basis of prevailing wages in the locality. (P.A. 98-0109, effective July 25, 2013 (amending 820 ILCS 130/2))

5. To assist owner/operators and their consultants in complying with the new laws, the Illinois EPA has published a fact sheet, a true and correct copy of which is attached hereto as

Exhibit A.

6. In relevant part, the fact sheet states:

Am I required to comply with prevailing wage provisions?

Yes. Public Act 98-109 expanded the definition of “public works” at Section 2 of the Prevailing Wage Act (820 ILCS 130) to include any activities performed pursuant to Title XVI of the Environmental Protection Act for which payment from the UST Fund is requested. This includes emergency situations, early action, all stages of site investigation, and corrective action. Please note that prevailing wage provisions apply regardless of whether the Illinois EPA determines that a PLA is required. Prevailing wage requirements are overseen and enforced by the Illinois Department of Labor. If you have questions about prevailing wage, please visit the Illinois Department of Labor Web site at www.illinois.gov/idol or dial (217) 782-1710.

(Ex. A, at p. 2)

7. In preparing the corrective action budget which is the subject of this appeal, Petitioner’s consultant reviewed information about prevailing wages on the Illinois Department of Labor web site for Kankakee County, and determined that the prevailing wage for trades required to perform the corrective action work were higher than Subpart H reimbursement rates. Printouts from the Illinois Department of Labor web site were attached to the submittal.

8. The legislative history of the Economic Development Act of 2013 indicates that a potential conflict between existing Subpart H rates and prevailing wages was foreseen, and the expectation from the floor debates was that the conflict was to be resolved by the LUST Fund paying prevailing wage rates through revised rules.

9. Pursuant to Part 734.875 of the Board’s regulations, the Agency is required to report to the Board as to the need to update Subpart H reimbursement rates:

No less than every three years the Agency must review the amounts set forth in this Subpart H and submit a report to the Board on whether the amounts

are consistent with the prevailing market rates. The report must identify amounts that are not consistent with the prevailing market rates and suggest changes needed to make the amounts consistent with the prevailing market rates. The Board must publish notice of receipt of the report in the Environmental Register and on the Board's web page.

(35 Ill. Adm. Code § 734.875; see also 415 ILCS 5/57.14A (“The Agency shall propose and the Board shall adopt amendments to the rules governing the administration of this Title to make the rules consistent with the provisions herein.”))

10. By reason and belief, the Agency has not reported to the Board as to the need to adopt prevailing wages required by the Economic Development Act of 2013.

11. LUST projects are required by law to pay prevailing wages in the locality in which the work is performed. (820 ILCS 130/1) Consequently, reimbursements rates under Subpart H may be insufficient, depending on the location of the underground storage tank site and the rates established in the locality.

12. On February 20, 2015, Petitioner submitted a corrective action plan and budget. The budget submittal expressly sought reimbursement for certain labor costs above Subpart H rates, and instead based upon prevailing wages in the locality. The budget submittal explained how these rates were determined, and attached the most recent prevailing wage rates for Kankakee county, as well as excerpts from the legislative history.

13. On March 19, 2015, the Illinois EPA approved the corrective action plan and budget, with the exception of those amounts based upon prevailing wage rates in Kankakee County, and modified those items by reimposing the lower Subpart H rates. A true and correct copy of the Agency determination is attached hereto as Exhibit B.

14. Specifically, the Illinois EPA reduced the excavation, transportation and disposal

costs by \$11,438.70, when \$42,947.45 was requested, and the costs for backfilling the excavation by \$4,013.10, when \$15,069.60 was requested.

15. The Agency's reductions should be reversed, because the Illinois EPA is only authorized to modify a plan and budget if a statute or regulation would be violated, and since July 25, 2013, the Leaking Underground Storage Program has been required by law to reimburse prevailing wage rates in the locality.

16. Since the Agency modification letter does not identify any additional information that would be necessary for the Illinois EPA to determine applicable prevailing wage rates in the locality, the information submitted was adequate to establish prevailing wage rates as a matter of law. (415 ILCS 5/57.7(c)(4)(C))

17. The Agency's denial reason that the prevailing wage rates are not reasonable should be rejected, as the prevailing wage rate is required by law.

18. Finally, the Agency is authorized to reimburse non-Subpart H reimbursement when local conditions differ:

If, as a result of unusual or extraordinary circumstances, an owner or operator incurs or will incur eligible costs that exceed the maximum payment amounts set forth in this Subpart H, the Agency may determine maximum payment amounts for the costs on a site-specific basis. Owners and operators seeking to have the Agency determine maximum payment amounts pursuant to this Section must demonstrate to the Agency that the costs for which they are seeking a determination are eligible for payment from the Fund, exceed the maximum payment amounts set forth in this Subpart H, are the result of unusual or extraordinary circumstances, are unavoidable, are reasonable, and are necessary in order to satisfy the requirements of this Part.

(35 Ill. Adm. Code § 734.860)

19. The current Subpart H reimbursement rates were enacted without reference to the subsequent prevailing wage amendments, and as a result, where prevailing wages in the locality

are higher than those contemplated by Subpart H, they are the result of unusual or extraordinary circumstances. Furthermore, prevailing wage rates are unavoidable, reasonable and necessary because they are required by law.

20. The Agency's determination was received March 21, 2015, which is less than 35 days from the date this appeal is being filed, and therefore timely.

WHEREFORE, Petitioner, SHARON BURGESS, prays that: (a) the Agency produce the Record; (b) a hearing be held; (c) the Board find the Agency erred in its decision, (d) the Board direct the Agency to approve the budget as submitted, (e) the Board award payment of attorney's fees; and (f) the Board grant Petitioner such other and further relief as it deems meet and just.

SHARON BURGESS,
Petitioner

By its attorneys,
LAW OFFICE OF PATRICK D. SHAW

By: /s/ Patrick D. Shaw

Patrick D. Shaw
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80 Bellerive Road
Springfield, IL 62704
217-299-8484

THIS FILING IS SUBMITTED ON RECYCLED PAPER

Fact Sheet

Project Labor Agreements and the Leaking Underground Storage Tank Program (Public Act 98-109)

What changes were made to the Leaking Underground Storage Tank Program by Public Act 98-109?

The Economic Development Act of 2013 (Public Act 98-109), in part, amended the Environmental Protection Act at 415 ILCS 5/57.7, 57.8, and 57.11; the Prevailing Wage Act at 820 ILCS 130/2; and the Project Labor Agreements Act at 30 ILCS 571/10, generally as follows:

- If payment from the UST Fund is to be requested, in approving any site investigation or corrective action plan, the Illinois EPA must determine, pursuant to the Project Labor Agreements Act, whether the site investigation or corrective action shall include a project labor agreement (PLA).
- If the Illinois EPA determines that site investigation or corrective action must include a PLA, a complete application for payment from the UST Fund must include, in part, a PLA certification from the UST owner or operator that the site investigation or corrective action was (1) performed under a PLA that meets the requirements of Section 25 of the Project Labor Agreements Act and (2) implemented in a manner consistent with the terms and conditions of the Project Labor Agreements Act and in full compliance with all statutes, regulations, and executive orders as required under the Project Labor Agreements Act and the Prevailing Wage Act.

How do these changes affect UST owners and operators?

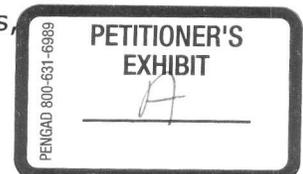
UST owners and operators who seek payment from the UST Fund must have a PLA for site investigation or corrective action fieldwork where the Illinois EPA reviews a site investigation or corrective action plan on or after July 25, 2013, and determines that a PLA is required for such activities. Subsequent applications for payment from the UST Fund for costs related to such activities must include a PLA certification signed by the UST owner or operator.

What is a PLA?

A PLA is a form of pre-hire collective bargaining agreement entered into pursuant to the Project Labor Agreements Act (30 ILCS 571) that covers all terms and conditions of employment on a specific project. The PLA, in part, sets forth procedures for resolving disputes and grievances; contains guarantees against strikes, lockouts, or similar actions; ensures a reliable source of skilled and experienced labor; sets forth goals for hours to be performed by underrepresented minorities and females; permits the selection of the lowest qualified responsible bidder; and binds all contractors and subcontractors on the public works project.

What activities require a PLA?

Activities that require a PLA include Stage 2 site investigation fieldwork, Stage 3 site investigation fieldwork, or corrective action fieldwork where the Illinois EPA determines that a PLA shall be included. Generally, the fieldwork activities would be those performed by personnel such as laborers, truck drivers, electricians,



plumbers, equipment operators, or mechanics. Determinations as to whether a PLA is required are made by the Illinois EPA on a project-by-project basis. Please contact Leaking UST Program staff if you have questions about whether the PLA requirement applies to the site investigation or corrective action activities at your site.

Is there a model PLA that may be used?

Yes. The [model PLA](#) is linked herein.

Are emergency situations subject to PLAs?

No.

Are early action activities subject to PLAs?

No. The amendments to the Environmental Protection Act apply to Section 57.7 for site investigation and corrective action. (See below regarding the timing of the Illinois EPA's decision regarding whether a PLA will be required.)

Are Stage 1 site investigation activities subject to PLAs?

No. The Illinois EPA's authority to require the use of a PLA is limited to making such determination while reviewing and approving a site investigation plan or a corrective action plan (Section 57.7(c)(3) of the Environmental Protection Act). The Illinois EPA does not review Stage 1 site investigation plans. Rather, such plans consist of a certification pursuant to 35 Ill. Adm. Code 734.315(b).

What types of activities are not subject to PLAs?

Non-fieldwork activities performed off-site such as laboratory analysis, report preparation, calculation of Tier 2 remediation objectives, negotiation of highway authority agreements, etc., as well as fieldwork performed by professional consulting firm staff such as sample collection, are examples of activities that would not require the use of a PLA.

If the Illinois EPA required a PLA but my application for payment from the UST Fund does not include a signed PLA certification, will my application for payment be approved?

No. For site investigation or corrective action activities that must include a PLA, a complete application for payment must contain the PLA certification from the UST owner or operator in order for payment from the UST Fund to be approved (415 ILCS 5/57.8(a)(6)(F)).

Are there any other new reporting requirements associated with the use of a PLA?

Yes. Pursuant to Section 37 of the Project Labor Agreements Act, workforce participation under the PLA by minorities and females must be reported. The *Workforce Participation Quarterly Reporting Form* is provided as part of the Application for Payment Forms.

Am I required to comply with prevailing wage provisions?

Yes. Public Act 98-109 expanded the definition of "public works" at Section 2 of the Prevailing Wage Act (820 ILCS 130) to include any activities performed pursuant to Title XVI of the Environmental Protection Act for which payment from the UST Fund is requested. This includes emergency situations, early action, all stages of site investigation, and corrective action. Please note that prevailing wage provisions apply regardless of whether the Illinois EPA determines that a PLA is required. Prevailing wage requirements are overseen and enforced by the Illinois Department of Labor. If you have questions about prevailing wage, please visit the Illinois Department of Labor Web site at www.illinois.gov/idol or dial (217) 782-1710.

When did Public Act 98-109 become effective?

The law became effective July 25, 2013.

Who should I contact if I have questions?

You may contact the project manager on-call for the Leaking UST Section at 217-524-3300.

This fact sheet is for general information only and is not intended to replace, interpret, or modify laws, rules, or regulations.

July 2013/revised September 2014



ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

1021 NORTH GRAND AVENUE EAST, P.O. BOX 19276, SPRINGFIELD, ILLINOIS 62794-9276 • (217) 782-2829

BRUCE RAUNER, GOVERNOR

LISA BONNETT, DIRECTOR

217/524-3300

CERTIFIED MAIL

MAR 19 2015

7012 0470 0001 2974 2378

Sharon Burgess
Attn: Sharon Burgess
2020 W. Budd Blvd.
Kankakee, Illinois 60901

RECEIVED
MAR 23 2015
BY: CR

Re: LPC #0910555274 -- Kankakee County
Kankakee/Fleet Fuel
2835 US Highway 52
Leaking UST Incident No. 20130906
Leaking UST Technical File

Dear Ms. Burgess:

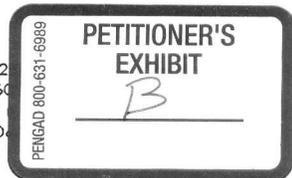
The Illinois Environmental Protection Agency (Illinois EPA) has reviewed the Corrective Action Plan (plan) submitted for the above-referenced incident. This plan, dated February 20, 2015, was received by the Illinois EPA on February 20, 2015. Citations in this letter are from the Environmental Protection Act (415 ILCS 5) (Act) and Title 35 of the 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.

In addition, the budget is modified pursuant to Sections 57.7(b)(3) and 57.7(c) of the Act and 35 Ill. Adm. Code 734.505(b) and 734.510(b). Based on the modifications listed in Section 2 of Attachment B, the amounts listed in Section 1 of Attachment B have been approved. Please note that the costs must be incurred in accordance with the approved plan. Be aware that the amount of payment from the Fund may be limited by Sections 57.7(c), 57.8(d), 57.8(e), and 57.8(g) of the Act, as well as 35 Ill. Adm. Code 734.630 and 734.655.

If the owner or operator agrees with the Illinois EPA's modifications, submittal of an amended plan and/or budget, if applicable, is not required (Section 57.7(c) of the Act).

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



Page 2

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.

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.

An underground storage tank system owner or operator may appeal this decision to the Illinois Pollution Control Board. Appeal rights are attached.

If you have any questions or need further assistance, please contact Karl Kaiser at (217) 524-4650.

Sincerely,



Michael T. Lowder
Unit Manager
Leaking Underground Storage Tank Section
Division of Remediation Management
Bureau of Land

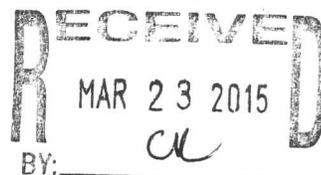
MTL::KEK\

Attachment: Attachment A

c: Carol Rowe, CW3M Company, Inc.
BOL File

Attachment A

Re: LPC #0910555274 -- Kankakee County
Kankakee/Fleet Fuel
2835 US Highway 52
Leaking UST Incident No. 20130906
Leaking UST Technical File



SECTION 1

As a result of Illinois EPA's modification(s) in Section 2 of this Attachment B, the following amounts are approved:

\$1,457.81	Drilling and Monitoring Well Costs
\$4,027.21	Analytical Costs
\$42,565.25	Remediation and Disposal Costs
\$0.00	UST Removal and Abandonment Costs
\$656.10	Paving, Demolition, and Well Abandonment Costs
\$45,016.43	Consulting Personnel Costs
\$2,303.50	Consultant's Materials Costs

Handling charges will be determined at the time a billing package is reviewed by the Illinois EPA. The amount of allowable handling charges will be determined in accordance with Section 57.1(a) of the Environmental Protection Act (Act) and 35 Illinois Administrative Code (35 Ill. Adm. Code) 734.635.

SECTION 2

1. \$11,438.70 for Excavation, Transportation, and Disposal costs that exceed the maximum payment amounts set forth in Subpart H, Appendix D, and/or Appendix E of 35 Ill. Adm. Code 734. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 734.630(zz). In addition, such costs are not approved pursuant to Section 57.7(c)(3) of the Act because they are not reasonable.
2. \$4,013.10 for Backfilling the Excavation costs that exceed the maximum payment amounts set forth in Subpart H, Appendix D, and/or Appendix E of 35 Ill. Adm. Code 734. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 734.630(zz). In addition, such costs are not approved pursuant to Section 57.7(c)(3) of the Act because they are not reasonable.

:KEK\

Appeal Rights

An underground storage tank owner or operator may appeal this final decision to the Illinois Pollution Control Board pursuant to Sections 40 and 57.7(c)(4) 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 owner or operator 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 filing of an appeal, please contact:

John Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph, Suite 11-500
Chicago, IL 60601
312/814-3620

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

Illinois Environmental Protection Agency
Division of Legal Counsel
1021 North Grand Avenue East
Post Office Box 19276
Springfield, IL 62794-9276
217/782-5544