

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

METAL PROPERTIES, LLC,)	
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 August, 2016.

Respectfully submitted,
METAL PROPERTIES, LLC, Petitioner

BY: LAW OFFICE OF PATRICK D. SHAW

BY: /s/ Patrick D. Shaw

Patrick D. Shaw
LAW OFFICE OF PATRICK D. SHAW
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Springfield, IL 62704
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

METAL PROPERTIES, LLC,)	
Petitioner,)	
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v.)	PCB _____
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ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
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PETITION FOR REVIEW OF AGENCY LUST DECISION

NOW COMES Petitioner, METAL PROPERTIES, LLC, pursuant to Section 57.8(i) of the Illinois Environmental Protection Act, 415 ILCS 5/57.8(i), and hereby appeals the Agency’s final decision, authorizing only partial payment, and in support thereof states as follows:

1. This appeal arises from a release from a used oil underground storage tank at a former service station, commonly known as C & J Automotive, in Trenton, County of Clinton, Illinois, owned by METAL PROPERTIES, LLC, and assigned LPC #0270500009.
2. On September 23, 2015, a release was reported from a used oil underground storage tank located inside a building, which was assigned Incident Number 20151033.
3. On September 25, 2015, Petitioner’s consultants asked the Agency to consider the location of the tank as a unusual or extraordinary circumstance.
4. Subsequently, the concrete floor above the tank was broken-up and removed, and the tank and immediately surrounding contaminated soil were removed as well. Thereafter, the pit was backfilled and ninety-nine square feet of concrete replaced inside the building.
5. The Agency subsequently approved the 45-day report, describing these early-action activities.
6. On April 14, 2016, Petitioner submitted an application for payment for these early

action costs in the amount of \$24,948.49.

7. On July 15, 2016, the Agency approved payment of \$13,073.16, after applying the \$5,000 deductible. Petitioner does not challenge the application of the \$5,000 deductible, nor the reduction in mileage for a Geologist III, but does dispute the remaining \$6,835.43 in cuts. A true and correct copy of the Agency decision is attached hereto as Exhibit A.

8. Included in the application was a subcontractor's invoice in the amount of \$1,100.00 for the collection of a waste characterization soil sample, which the Agency erroneously reduced to \$200.00. This reduction was erroneous because the application for payment included the documentation that may be required under Section 734.605(b) of the Board's regulations (35 Ill. Adm. Code § 734.605(b)), no rules applicable to applications for payment would be violated by payment of this invoice, and the charge is reasonable as a cost incurred by Petitioner and Petitioner's consultant as evidenced by the invoice.

9. Furthermore, the Agency erred in reasoning that the charges exceed prevailing wage rates, as those are the base rates that employees must receive, not the rate that the subcontractor charges to cover all wages, benefits, materials, taxes and profit for the services provided. The fundamental, underlying problem is that the Board ruled last year that its regulations had not been promulgated in light of new prevailing wage requirements, Burgess v. IEPA, PCB 15-186 (Nov. 5, 2015) (absence of provision for prevailing wage was unusual and extraordinary circumstance), and the Agency has taken no steps to address this issue.

10. In addition, the Agency deducted all consulting personnel costs for early action (\$5,328.13), based upon a subjective belief that it should have taken less time and that it was entitled to additional documentation than required the Board's procedural rules setting forth a

complete application for payment (35 Ill. Adm. Code § 734.605). The cost incurred was reasonable, and consistent with costs previously charged and approved by the Agency. Refusing to compensate Petitioner's consultant at all based upon documentation not required for payment applications was vexatious and unreasonable.

11. Finally, the Agency deducted \$607.30 in consulting material costs that were incurred performing early action, including:

- a. digital camera costs that the Agency has illegally decided by an unpromulgated are now indirect costs;
- b. disposable gloves of \$8.80 which the Agency claims is unreasonable without supporting documentation, whereas the application for payment was complete and the costs reasonable;
- c. \$270 for the use of a PID for two days which the Agency claims is unreasonable without supporting documentation, whereas the application for payment was complete and the costs reasonable;
- d. \$1.50 for zip lock baggies which the Agency claims is unreasonable without supporting documentation, whereas the application for payment was complete and the costs reasonable;
- e. \$267.00 for vehicle charges for a truck, reflecting a rate of \$178.00 per day incurred for 1 & ½ days for performing early action activities, which the Agency erroneously believes is not reimbursable at a daily vehicle rate, but only as a mileage rate, in contravention of Section 734.845 of the Board's regulations (35 Ill. Adm. Code § 734.845), and in any event the vehicle charge rate is reasonable

and has been approved by the Agency historically.

12. The subject Illinois EPA letter was received by certified mail on July 18, 2016, which is 35 days from the date this appeal is being filed, and therefore timely.

WHEREFORE, Petitioner, METAL PROPERTIES, LLC, 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.

METAL PROPERTIES, LLC,
Petitioner

By its attorneys,
LAW OFFICE OF PATRICK D. SHAW

By: /s/ Patrick D. Shaw

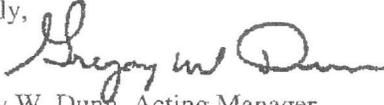
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THIS FILING IS SUBMITTED ON RECYCLED PAPER

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If you have any questions or require further assistance, please contact Brad Dilbaitis of my staff at (217) 785-8378 or Bradley.Dilbaitis@illinois.gov.

Sincerely,



Gregory W. Dunn, Acting Manager
Leaking Underground Storage Tank Section
Division of Remediation Management
Bureau of Land

GWD:BD 

Attachment: Attachment A
Appeal Rights

c: Chase Environmental Group, Inc.
Leaking UST Claims Unit

Attachment A
Accounting Deductions

Re: LPC #0270500009—Clinton County
Trenton/ Metal Properties, LLC
313 East Broadway
Incident-Claim No.: 20151033—67301
Queue Date: April 18, 2016
Leaking UST FISCAL FILE

Citations in this attachment are from the Environmental Protection Act (415 ILCS 5) (Act) and 35 Illinois Administrative Code (35 Ill. Adm. Code).

Item # Description of Deductions

1. \$5,328.13, deduction for Consulting Personnel Costs 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, the request is 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).

The Consulting Personnel Costs requests 43 hours for a Senior Project Manager for “45-Day Report Narrative; SWAP database search/ fact sheets” at a rate of \$123.91 per hour for a total of \$5,328.13. The 45-Day Report narrative in this request describes pages 1 through 4 of the 45-Day Report. There is nothing in the narrative to indicate that it should have taken any significant time to complete. The SWAP database search describes Figures 3 (200-ft Radius Well Map) and 4 (2,500-ft Radius Well Map) in the 45-Day Report. These SWAP searches and maps have previously been completed by IEPA Project Managers. The amount of time to complete the SWAP search and maps is familiar and is not substantial, taking possibly 1 to 2 hours to complete. Several attempts were made by the IEPA Project Manager (June 20, 2016 and July 5, 2016) to contact the consultant to clarify the request and no response was received. Without supporting documentation to clarify the request, the 40 requested hours for the completion of the 45-Day Report narrative and the two SWAP maps is unreasonable

2. \$60.00, deduction for indirect corrective action costs for equipment charged as direct costs. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 734.630(v). In addition, such costs are not approved pursuant to Section 57.7(c)(3) of the Act because they are not reasonable

The Consultant's Materials Costs requests 2 days use of a digital camera at a rate of \$30.00 per day for a total of \$60.00. The use of a digital camera is considered an indirect cost and is ineligible for payment.

3. \$8.80 for costs for disposable gloves, 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.

Pursuant to 35 Ill. Adm. Code 734.850(b) for costs associated with activities that do not have a maximum payment amount set forth in pursuant to 35 Ill. Adm. Code 734 Subpart H must be determined on a site specific basis and the owner/operator must demonstrate to the Agency the amounts sought for reimbursement are reasonable. The Agency has requested additional documentation to support the rate requested for the disposable gloves pursuant 35 Ill. Adm. Code 734.505(a). The documentation was either not provided or fails to provide sufficient information for the Agency to make a site specific reasonableness determination.

In addition, without supporting documentation for the rate requested the disposable gloves 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).

4. \$270.00 for costs for the use of a PID for two days 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.

Pursuant to 35 Ill. Adm. Code 734.850(b) for costs associated with activities that do not have a maximum payment amount set forth in pursuant to 35 Ill. Adm. Code 734 Subpart H must be determined on a site specific basis and the owner/operator must demonstrate to the Agency the amounts sought for reimbursement are reasonable. The Agency has requested additional documentation to support the rate requested for a PID pursuant 35 Ill. Adm. Code 734.505(a). The documentation was either not provided or fails to provide sufficient information for the Agency to make a site specific reasonableness determination.

In addition, without supporting documentation for the rate requested the PID costs 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).

5. \$1.50 for costs for zip lock baggies 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.

Pursuant to 35 Ill. Adm. Code 734.850(b) for costs associated with activities that do not have a maximum payment amount set forth in pursuant to 35 Ill. Adm. Code 734 Subpart H must be determined on a site specific basis and the owner/operator must demonstrate to the Agency the amounts sought for reimbursement are reasonable. The Agency has requested additional documentation to support the rate requested for the zip lock baggies pursuant 35 Ill. Adm. Code 734.505(a). The documentation was either not provided or fails to provide sufficient information for the Agency to make a site specific reasonableness determination.

In addition, without supporting documentation for the rate requested the zip lock baggies 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).

6. \$39.90, deduction for Consultant's Materials Costs associated with mileage for a Geologist III 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.

The Consultant's Materials Costs requests 143 miles at a rate of \$0.57 per mile for a Geologist III to document the UST removal and soil sampling activities for a total of \$81.51. This would appear to represent two round trips to the site at 35.75 miles between Centralia and Trenton. The 45-Day Report indicates that the field activities began on November 10, 2015. The UST was uncovered, excavated and disposed on November 10, 2015. All of the confirmation soil samples were delivered to the laboratory on November 10, 2015. In addition, the Personnel Work Sheet provided by the consultant indicates only one trip to the site by a Geologist II, on November 10, 2015.

7. \$267.00 for costs for vehicle charges, 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.

Pursuant to 35 Ill. Adm. Code 734.850(b) for costs associated with activities that do not have a maximum payment amount set forth in pursuant to 35 Ill. Adm. Code 734 Subpart H must be determined on a site specific basis and the owner/operator must demonstrate to the Agency the amounts sought for reimbursement are reasonable. The Agency has requested additional documentation to support the rate requested for vehicle charges pursuant 35 Ill. Adm. Code 734.505(a). The documentation was either not provided or fails to provide sufficient information for the Agency to make a site specific reasonableness determination.

In addition, without supporting documentation for the rate requested for vehicle costs 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).

The Consultant's Materials Costs requests 1.5 days use of a company vehicle at a rate of \$178.00 per day for a total of \$267.00. Several attempts were made by the IEPA Project Manager (June 20, 2016 and July 5, 2016) to contact the consultant to inquire as to how the daily vehicle rate was determined and why the consultant was requesting a daily vehicle rate instead of mileage. No response was received.

8. \$720.00, deduction for Consultant's Materials Costs associated with the labor costs for the collection of the waste characterization sample 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, this request is 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).

The Consultant's Materials Costs requests a total of \$1,100.00 for the equipment and labor supplied by Earth Services for the collection of a waste characterization soil sample. The invoice that was provided from Earth Services to document the hand auger drilling cost includes a request for 6 hours for a laborer at a rate of \$120.00 per hour for a total cost of \$720.00. The Illinois Department of Labor's web page describing historical prevailing wage rates (<http://www.illinois.gov/idol/Laws-Rules/CONMED/Pages/Rates.aspx>) lists a wage for a laborer in Clinton County of approximately \$50.00 per hour, which would indicate that the requested \$120.00 per hour is an unreasonable rate to charge for a laborer in Clinton County.

9. \$180.00 for costs for subcontractor vehicle charges associated with the collection of the waste characterization sample, 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.

Pursuant to 35 Ill. Adm. Code 734.850(b) for costs associated with activities that do not have a maximum payment amount set forth in pursuant to 35 Ill. Adm. Code 734 Subpart H must be determined on a site specific basis and the owner/operator must demonstrate to the Agency the amounts sought for reimbursement are reasonable. The Agency has requested additional documentation to support the rate requested for vehicle charges pursuant 35 Ill. Adm. Code 734.505(a). The documentation was either not provided or fails to provide sufficient information for the Agency to make a site specific reasonableness determination.

In addition, without supporting documentation for the rate requested for vehicle costs 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).

BD

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
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