

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

MAZEL 8 LLC,)	
)	
Petitioner,)	
v.)	PCB No. _____
)	(UST Permit Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

NOTICE OF FILING AND PROOF OF SERVICE

To: Don Brown, Clerk	Division of Legal Counsel
Illinois Pollution Control Board	Illinois Environmental Protection Agency
60 E. Van Buren St., Ste. 630	1021 North Grand Avenue East
Chicago, IL 60605	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 (h), a PETITION FOR REVIEW OF ILLINOIS EPA UST DECISION, a copy of which is herewith served upon Respondent.

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 Respondent by enclosing same in envelopes addressed as above with postage fully prepaid, and by depositing said envelopes in a U.S. Post Office Mailbox in Springfield, Illinois on the 18^h day of September, 2024.

MAZEL 8 LLC,

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
pdshaw1law@gmail.com

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MAZEL 8 LLC,)	
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Petitioner,)	
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v.)	PCB No. _____
)	(UST Permit Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

PETITION FOR REVIEW OF ILLINOIS EPA UST DECISION

NOW COMES Petitioner, MAZEL 8 LLC, pursuant to Section 57.7(c)(4) of the Illinois Environmental Protection Act, 415 ILCS 5/57.7(c)(4), and hereby appeals the Illinois EPA's final decision, denying a corrective action budget amendment, stating as follows:

1. Petitioner is the owner of a former underground storage tank site in Hoopston, County of Vermilion, Illinois, assigned LPC #1830455051.
2. On September 27, 2005, a release was reported from two underground storage tanks, and the incident was assigned Incident Number 2005-1346.
3. The tanks were removed in 2006 and site investigation was completed and approved in 2010.
4. In 2012, the Illinois EPA approved a corrective action plan and budget which would have removed an estimated 3,678.92 cubic yards of contaminated soil.
5. This work was performed in 2013, except some contaminated soil could not be removed without threatening the structural integrity of a building, and therefore only 2,879.43 cubic yards of contaminated soil were removed.
6. Thereafter, groundwater sampling and analysis to track groundwater conditions occurred.

7. In 2015, Petitioner purchased the subject property and elected to proceed as owner in 2018.

8. In November of 2021, the Illinois EPA found that all remaining soil contamination had been addressed, which was confirmed in October of 2023.

7. Thereafter, Petitioner's consultant sought contractors to install 9,505.38 square feet of concrete at six inches of thickness that had been approved in the April 2012 budget. Petitioner's consultant was unable to find a contractor willing to perform this work within the approved maximum payment amount (\$47,526.90), and so the paving work was put out for bid.

8. On April 24, 2024, Petitioner submitted an amended corrective action plan budget to the Illinois EPA based upon the lowest bid received, which was \$20,911.84 more than previously approved. The budget amendment requested approval of a total of \$26,938.42 in paving costs, which is the sum of the increased costs derived from the lowest bid along with the consultant's costs associated with bidding.

9. On August 13, 2024, the Illinois EPA rejected the budget amendment claiming that bidding could not be used to alter previously approved amounts. A true and correct copy of the decision letter is attached hereto as Exhibit A.

10. The Illinois EPA explained its position as follows:

Pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.870(d)(1), for costs approved by the Illinois EPA in writing prior to the date the costs are incurred, the applicable maximum amounts must be the amounts in effect on the date the Illinois EPA received the budget in which the costs were proposed. Once the Illinois EPA approves costs, the applicable maximum amounts must not be increased, e.g., by proposing the costs in a subsequent budget.

(Exhibit A)

11. As an initial matter, the approach taken herein is entirely consistent with that taken in Singh v. IEPA, PCB 23-90 (Sept. 21, 2023) (approving budget amendment for concrete placement based upon competitive bid after budget had previously been approved pursuant to listed Subpart H rates).

12. As a matter of law, Section 734.870(d)(1) does not apply to competitive bidding. As narrated in the Agency's decision letter, there are three methods for determining maximum payment amounts, but only the first method, the one based upon the maximum amounts set forth in Subpart H, incorporates Section 734.870. (35 Ill. Adm. Code 734.800(a)(1)) The second and third method omit Section 734.870 from the provisions listed as being applicability to competitive bidding and unusual or extraordinary circumstances. (35 Ill. Adm. Code 734.800(a)(2) & (3)) This is not surprising because Section 734.870 contains the inflation factor used to increase maximum payment amounts yearly and has no relevancy to the second and third methods. Pursuant to the maxim *expressio unius est exclusio alterius*, the express inclusion of Section 734.870 for the first method, but not for the other two methods, indicates the intention to exclude that Section from consideration for the other two methods.

13. The Illinois EPA further claims that “[n]o demonstration was provided that the paving could not be completed for the previously approved amount.” (Ex. A) This is false. Bids were solicited through public notice and nobody offered to complete the work for the previously approved amount. This is the only demonstration required by the Act and Board regulations.

14. The Illinois EPA further claims that “no demonstration was made to indicate that the increase in the Paving Costs is attributable to site specific costs, and not inflation over the 12-

year period” since the previously approved budget. Site specific conditions must be demonstrated for “unusual or extraordinary circumstances” (35 Ill. Adm. Code § 734.860), not for bidding. There is also no limitation period in the regulations. The regulations do provide that the costs of “concrete, asphalt, and paving must not be paid more than once” (35 Ill. Adm. Code § 734.625(a)(16)), which has the effect, if not intent, of discouraging installation of pavement until soil contamination has been addressed.

15. The submittal contained the information necessary to determine that corrective action cannot be performed for amounts less than or equal to maximum payment amounts set forth in the Board's regulations, included all information in the Agency's bid summary form, and otherwise was in substantial compliance with the Act and regulations promulgated thereto.

16. The Illinois EPA determination was received on August 16, 2024, which is less than thirty-five days from the date of this filing and therefore this appeal is timely.

WHEREFORE, Petitioner MAZEL 8 LLC, prays that: (a) the Illinois EPA produce the Record; (b) a hearing be held; (c) the Board find the Illinois EPA erred in its decision, (d) the Board direct the Illinois EPA to approve the budget amendment as submitted, (e) the Board award payment of attorney’s fees; and (f) the Board grant the Petitioner such other and further relief as it deems meet and just.

MAZEL 8 LLC,
Petitioner,

BY: LAW OFFICE OF PATRICK D. SHAW

BY: /s/ Patrick D. Shaw

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ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

1021 NORTH GRAND AVENUE EAST, P.O. BOX 19276, SPRINGFIELD, ILLINOIS 62794-9276 • (217) 782-3397

JB PRITZKER, GOVERNOR

JAMES JENNINGS, INTERIM DIRECTOR

(217) 524-3300

CERTIFIED MAIL

9589 0710 5270 0389 6492 79

AUG 13 2024

Fred Acker
Mazel 8 LLC
P.O. Box 353
Hoopeston, IL 60942

Re: 1830455051 – Vermilion County
Hoopeston Community Bank
202 South 2nd Avenue
Leaking UST Incident 20051346
Leaking UST Technical File

Dear Mr. Acker:

The Illinois Environmental Protection Agency (Illinois EPA) has reviewed the Corrective Action Plan Budget (budget) submitted for the above-referenced incident. This budget, dated April 24, 2024, was received by the Illinois EPA on April 26, 2024. 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).

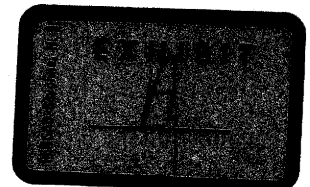
The budget is rejected for the reasons listed in Attachment A (Sections 57.7(b)(3) and 57.7(c) of the Act and 35 Ill. Adm. Code 734.505(b) and 734.510(b)).

All future correspondence must be submitted to

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

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

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



2125 S. First Street, Champaign, IL 61820 (217) 278-5800
115 S. LaSalle Street, Suite 2203, Chicago, IL 60603
1101 Eastport Plaza Dr., Suite 100, Collinsville, IL 62234 (618) 346-5120
9511 Harrison Street, Des Plaines, IL 60016 (847) 294-4000

595 S. State Street, Elgin, IL 60123 (847) 608-3131
2309 W. Main Street, Suite 116, Marion, IL 62959 (618) 993-7200
412 SW Washington Street, Suite D, Peoria, IL 61602 (309) 671-3022
4302 N. Main Street, Rockford, IL 61103 (815) 987-7760

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If you have any questions or need further assistance, please contact the undersigned at (217) 785-8378 or at Bradley.Dilbaitis@illinois.gov.

Sincerely,



Brad Dilbaitis
Project Manager
Leaking Underground Storage Tank Section
Bureau of Land

sf
SP

Attachments: Attachment A
Appeal Rights

c: Carol Rowe, CWM Company, Inc. (electronic copy)
BOL File

Attachment A

Re: 1830455051 – Vermilion County
Hoopston/Community Bank
202 South 2nd Avenue
Leaking UST Incident 20051346
Leaking UST Technical File

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

- I. Pursuant to Sections 57.7(b)(3) and 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.800(a), Subpart H of 35 Ill. Adm. Code 734 provides three methods for determining the maximum amounts that can be paid from the Fund for eligible corrective action costs. The first method for determining the maximum amount that can be paid for each task is to use the maximum amount for each task set forth in 35 Ill. Adm. Code 734.810 through 734.850 and 734.870. The second method for determining the maximum amount that can be paid for each task is bidding in accordance with 35 Ill. Adm. Code 734.855. The third method for determining the maximum amount that can be paid for each task is to determine the maximum amount for unusual or extraordinary circumstances in accordance with 35 Ill. Adm. Code 734.860.

Pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.870(d)(1), for costs approved by the Illinois EPA in writing prior to the date the costs are incurred, the applicable maximum amounts must be the amounts in effect on the date the Illinois EPA received the budget in which the costs were proposed. Once the Illinois EPA approves costs, the applicable maximum amounts must not be increased, e.g., by proposing the costs in a subsequent budget.

Pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.870(d)(3), the owner or operator must have the burden of requesting the appropriate maximum amounts.

Pursuant to Section 57.7(c)(3) of the Act, 35 Ill. Adm. Code 734.630(dd), unreasonable costs proposed as part of a budget are ineligible for payment from the Fund. Owners and operators seeking payment must demonstrate to the Illinois EPA that the amounts sought are reasonable pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.850(b).

The Paving Costs requests \$20,911.84 for 9,505.38 square feet of concrete replacement at 6" in thickness at \$2.20 per square foot. The Paving Costs for the 9,505.38 square feet of concrete were approved in the Corrective Action Plan and Budget decision letter dated August 1, 2012. Approval of the requested costs would violate 35 Ill. Adm. Code 734.870(d)(1). Once Paving Costs have been approved by the Illinois EPA for the concrete replacement, the applicable maximum payment amount cannot be increased by proposing the cost in a subsequent budget. Please note that an amount determined via bidding is considered a maximum payment amount pursuant to 35 Ill. Adm. Code 734.855. The following line items are deducted:

- a. *\$20,911.84 for Remediation and Disposal Costs associated with Paving Costs for 9,505.38 square feet of concrete at six inches in thickness at \$2.20 per square foot.*
- b. *\$5,688.58 for Consulting Personnel Costs associated with bidding, preparing the budget for the bidding costs, and additional reimbursement claim costs for the bidding.*
- c. *\$338.00 for Consultant's Materials Costs associated with additional costs for bidding.*

2. Pursuant to Section 57.7(c)(3)(C)(ii) of the Act and 35 Ill. Adm. Code 734.855, bidding is allowed only if the owner or operator demonstrates that corrective action cannot be performed for amounts less than or equal to maximum payment set forth in 35 Ill. Adm. Code 734.Subpart H.

No demonstration was provided to indicate that the paving could not be completed for the previously approved maximum payment amount. In addition, no demonstration was made to indicate that the increase in the Paving Costs is attributable to site-specific costs, and not inflation over the 12-year period between the original approval for the Paving Costs in the Illinois EPA decision letter dated August 1, 2012, and the bidding performed in February 2024. Bidding is used as an alternative to the maximum payment amount for non-inflationary costs if a Subpart H maximum payment amount cannot be met, not as an option to increase a previously approved maximum payment amount.

3. Pursuant to Section 57.7(c)(3)(B)(ii) and 35 Ill. Adm. Code 855(a)(2), at least 14 days prior to the date set in the invitation for the opening of bids, public notice of the invitation for bids must be published by the owner or operator in a local paper of general circulation for the area in which the site is located. The owner or operator must also provide a copy of the public notice to the Illinois EPA. The notice must be received by the Illinois EPA at least 14 days prior to the date set in the invitation for the opening of bids.

The date set in the invitation for the opening of bids was February 19, 2024. The Illinois EPA was not informed of the bidding until March 1, 2024.

4. Pursuant to Section 57.7(c)(3)(B)(iii) of the Act and 35 Ill. Adm. Code 734.855(a)(3)(C), the person opening the bids may not serve as a witness. The names of the persons opening the bids and the names of all witnesses must be recorded and submitted to the Illinois EPA on the bid summary form required under 35 Ill. Adm. Code 734.855(b).

The names of the persons opening the bids and the names of all witnesses were not submitted to the Illinois EPA.

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 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

Clerk of the Board
Illinois Pollution Control Board
60-East Van Buren Street, Suite 630
Chicago, IL 60605
(312) 814-3461

For information regarding the filing of an extension, please contact

Illinois Environmental Protection Agency
Division of Legal Counsel
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276
(217) 782-5544