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FEB 07 2005

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MAC'S CONVENIENCE STORES LLC,)
Petitioner,)
vs.)
ILLINOIS ENVIRONMENTAL PROTECTION)
AGENCY,)
Respondent.)

PCB 05-101
(UST APPEAL)

STATE OF ILLINOIS
Pollution Control Board

NOTICE OF FILING

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 West Randolph Street
Chicago, Illinois 60601-3218

John J. Kim
Assistant Counsel
Special Assistant Attorney General
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the Motion for Leave and Verified Petition to Appear *Pro Hac Vice* on behalf of Mac's in the above referenced matter, a copy of which is herewith served upon you.

Respectfully submitted,

HATCHETT & HAUCK LLP

Dated: February 3, 2005



David L. Hatchett, #19383-49
10 West Market Street, Suite 1025
Indianapolis, IN 46204
Telephone: (317) 464-2620
Facsimile: (317) 464-2629
david.hatchett@h2lawyers.com

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MOTION FOR LEAVE TO APPEAR PRO HAC VICE

Pursuant to 35 Illinois Administrative Code 101.400, David L. Hatchett respectfully moves for admission *pro hac vice*:

1. David L. Hatchett is a partner of the law firm Hatchett & Hauck LLP, 10 West Market Street, Suite 1025, Indianapolis, Indiana 46204.
2. David L. Hatchett received his J.D. degree from Indiana University School of Law in Indianapolis, Indiana and was admitted to the Bar in the State of Indiana in 1996.
3. David L. Hatchett is a member in good standing of the Bar in the State of Indiana, and no disciplinary proceedings have ever been filed and none are pending against him.
4. The Verified Petition in Support of *Pro Hac Vice* Admission of David L. Hatchett is attached to this motion as Exhibit A.

WHEREFORE, the undersigned respectfully requests that the Court grant him leave to appear as counsel *pro hac vice* in this action on behalf of Mac's Convenience Stores LLC.

Respectfully submitted,

HATCHETT & HAUCK LLP



Dated: February 3, 2005

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Telephone: (317) 464-2620
Facsimile: (317) 464-2629
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CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on February 3, 2005, I served a true and accurate copy of the foregoing, by placing a true and correct copy in a properly sealed and addressed envelope and by depositing said sealed envelopes in a U.S. mail drop box located within Indianapolis, Indiana, with sufficient First Class Mail postage affixed thereto, upon the following named persons:

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David L. Hatchett

FEB 07 2005

STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MAC'S CONVENIENCE STORES LLC,)
Petitioner,) PCB 05-101
) (UST APPEAL)
vs.)
)
)
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AGENCY,)
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VERIFIED PETITION OF DAVID L. HATCHETT IN SUPPORT OF
PRO HAC VICE ADMISSION

1. Pursuant to 35 Ill. Adm. Code 101.400, David L. Hatchett, as attorney for the Petitioner, Mac's Convenience Stores LLC, now petitions the Court for leave to appear in this action as counsel *pro hac vice*.

2. Mr. Hatchett is currently not a resident of the state of Illinois, is not regularly employed in the State of Illinois, and is not regularly engaged in business or professional activities in the State of Illinois.

3. Mr. Hatchett is employed at the law firm of Hatchett & Hauck LLP, 10 W. Market Street, Suite 1025, Indianapolis, Indiana 46204, (317) 464-2620, facsimile (317) 464-2629.

4. Mr. Hatchett is a member in good standing and licensed to practice law in the State of Indiana since 1996; his Indiana attorney registration number is 19383-49.

5. Mr. Hatchett has never been suspended or disbarred and has never resigned from the practice of law as a result of a disciplinary discharge, investigation, or proceeding in any jurisdiction.

6. No disciplinary proceedings are presently pending against Mr. Hatchett in any jurisdiction.

7. Mr. Hatchett currently has no matters before any court in Illinois.

8. There is good cause why Mr. Hatchett should be admitted to appear in that there has been an attorney-client relationship with the client, Mac's Convenience Store LLC, for an extended period of time.

9. By letter dated December 16, 2004, the Illinois Pollution Control Board indicated that an attorney licensed to practice in another state could represent Mac's Convenience

Stores LLC in the above-captioned matter, so long as the Board grants a motion to appear *pro hac vice* pursuant to 35 Ill. Adm. Code 101.400(a)(3).

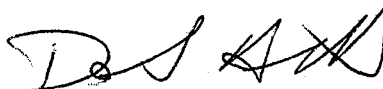
WHEREFORE, Mr. Hatchett respectfully requests this Court to grant him leave to appear in this cause.

I affirm, under the penalties of perjury, that the foregoing representations are true.

Dated: February 3, 2005

Respectfully submitted,

HATCHETT & HAUCK LLP



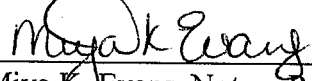
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STATE OF INDIANA)
) SS:
COUNTY OF MARION)

Before me, the undersigned, a Notary Public in and for said County and State, personally appeared David L. Hatchett, who acknowledged the execution of the foregoing instrument for and on behalf of said entity.

Witness my hand and Notarial Seal this 3rd day of Feb, 2005.

My Commission Expires: June 23, 2009



Miya K. Evans, Notary Public
Residing in Henry County, Indiana

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ORDER FOR ADMISSION OF DAVID L. HATCHETT PRO HAC VICE

On consideration of the Verified Petition of David L. Hatchett in Support of *Pro Hac Vice* Admission, it is hereby ordered that the Motion for Leave to Appear *Pro Hac Vice* is granted. David L. Hatchett's appearance for Mac's Convenience Stores LLC shall be entered as a matter of record.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on _____, 2005, by a vote of ____.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

DISTRIBUTION:

David L. Hatchett
Hatchett & Hauck LLP
10 W. Market Street, Suite 1025
Indianapolis, Indiana 46204

John J. Kim
Assistant Counsel
Special Assistant Attorney General
Division of Legal Counsel
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Respectfully submitted,

HATCHETT & HAUCK LLP

Dated: February 3, 2005



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APPEARANCE

I hereby file my Appearance in this proceeding, on behalf of Mac's Convenience Stores LLC.

Respectfully submitted,

HATCHETT & HAUCK LLP

Dated: February 3, 2005



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PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board Mac's Amended Petition for Review of the Final Agency Underground Storage Tank Decision in the above referenced matter, a copy of which is herewith served upon you.

Respectfully submitted,

HATCHETT & HAUCK LLP

Dated: February 3, 2005



David L. Hatchett, #19383-49
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(UST APPEAL))
STATE OF ILLINOIS)
Pollution Control Board)

AMENDED PETITION FOR REVIEW OF FINAL AGENCY
UNDERGROUND STORAGE TANK DECISION

The petitioner, Mac's Convenience Stores LLC ("Mac's") hereby files its Amended Petition and requests that the Illinois Pollution Control Board ("Board") review the final decision of the Illinois Environmental Protection Agency ("Agency") in the above-referenced case. In support thereof, Mac's respectfully states as follows:

Facts and Procedural History

1. Mac's owns and operates a gasoline service station on property located at 105 South Front Street, Braidwood, Will County, Illinois ("Site"). On December 31, 2003, Mac's reported a release of petroleum at the Site. The Site was assigned Incident No. 20031894 based on the presence of hydrocarbon odors in the convenience store building and elevated concentrations of gasoline constituents in groundwater. Mac's retained American Environmental Corporation ("American") to complete Early Action and Site Investigation and Corrective Action, including release investigation and confirmation, preparation of a 45-Day Report, and preparation of a Site Investigation Plan ("SIP") and Budget.

2. On February 12, 2004, American timely submitted on behalf of Mac's a 45-Day Report to document Early Action activities conducted at the site.

3. On June 21, 2004, American submitted on behalf of Mac's a SIP and Budget for investigation to determine the nature, concentration, direction of movement, rate of movement and extent of contamination as well as the physical features of the site and surrounding area that may affect contaminant transport and risk to human health and safety and the environment.

4. On October 21, 2004, the Agency issued a Final Decision to Mac's in which the SIP and associated Budget and the 45-Day Report were rejected.¹

5. On November 11, 2004, American submitted a Request for Re-Review to the Agency.

6. On November 24, 2004, counsel for the Agency timely filed a joint notice to extend the 35-day response period, and the Board extended the appeal period to February 24, 2005, as was requested.

7. Because American had not yet received notice of the extension filing, on November 24, 2004, Mac's filed its Petition for Review with the Board.

8. On December 16, 2004, the Board asked Mac's to file an amended petition filed by an attorney and clarifying Mac's position on the Agency's rejection of the 45-Day Report. The Board set February 3, 2005 as the filing deadline for this Amended Petition. Thus, this Amended Petition is timely filed.

**Statement of Issues for Review and
Legal Basis for Challenge to Determination**

9. Mac's seeks administrative review of the Agency's Final Decision rejecting the SIP, Budget, and 45-Day Report submitted by Mac's. Mac's challenges the form and basis of the Agency's Final Decision and believes that the Agency's Final Decision is without factual

¹ As instructed by the Clerk Office personnel and to avoid duplication, the attachments from the original Petition are not attached to this Amended Petition. However, we do incorporate by reference all of those attachments into this Amended Petition.

basis or legal support, is arbitrary and capricious and is otherwise not in accordance with applicable law for multiple reasons, including but not limited to the following reasons enunciated below.

10. Mac's consultant, American, prepared the June 21, 2004 SIP and Budget in accordance with the Environmental Protection Act ("Act") and generally accepted engineering practices. American's Kenneth M. Miller, P.E., P.G., who participated in preparing the SIP and Budget, is a Licensed Professional Engineer and Geologist with fourteen (14) years of experience in the environmental consulting industry. The SIP detailed the procedures necessary to determine the nature, concentration, direction of movement, rate of movement and extent of contamination as well as the physical features of the site and surrounding area that may affect contaminant transport and risk to human health and safety and the environment.

11. In accordance with 415 ILCS 5/57.7(a), the Budget included an accounting of all costs associated with the implementation and completion of the SIP. These costs are reasonable and are necessary to perform the site investigation activities included in the SIP.

12. In its Final Decision, the Agency cited as one reason for rejecting the SIP and the 45-Day Report the purported failure to investigate and confirm the nature and amount of a release. However, Mac's consultant performed release investigation and confirmation steps including UST systems tightness testing in accordance with 35 Ill. Adm. Code 170.580. Mac's conducted a site assessment to measure for the presence of a release where contamination is most likely to be present based on the known environmental contamination and hydrocarbon odor inside the store building. The site assessment consisted of air, soil and groundwater sampling and analysis. Laboratory analyses confirmed the presence of gasoline indicator contaminants in soil and groundwater in concentrations in excess of the Tier I remediation objectives at 35 Ill.

Adm. Code Part 742. Elevated concentrations of hydrocarbons were also detected by laboratory analysis of air samples from inside the store building and from a recovery well installed for soil vapor extraction.

13. Also as grounds for rejecting the SIP and the 45-Day Report, the Agency asserted that an UST system release has not been confirmed and alleges that the length of time between the tank testing and the release reporting is excessive and there is no report of a spill. However, the regulations acknowledge that situations exist where test results for an UST system do not indicate that a leak exists but environmental contamination is the basis for suspecting a release (41 Ill. Adm. Code 170.580(b)(3)). Further, the State Fire Marshal routinely requires the reporting of releases based solely on environmental contamination in the absence of evidence of an UST system leak. Based on the available information indicating an absence of UST system leaks and the presence of environmental contamination in soil, groundwater and air near the current UST systems, American concluded the release was likely caused by overfilling of one or more of the three existing USTs. Although Mac's is not currently aware of a specific event involving a spill or overfill, either or both may have occurred at this Site without Mac's knowledge. No potential sources of contamination were identified on adjacent properties to the southeast or southwest, and roadways border the property in the other two directions. By way of additional information, American submitted additional information, including tightness testing results, to the Agency on or around November 11, 2004.

14. In addition, the Agency rejected the SIP and 45-Day Report because the plan allegedly does not include the investigation of the area most likely to be contaminated (i.e., the UST field and system). However, this area has already been investigated, and evidence of a release has been identified and reported as discussed herein. Further investigation is proposed in