BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

BIGGS BROTHERS SERVICE CENTER, *Petitioner,*	)	
v.	)	PCB No. 06-88 (LUST Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, *Respondent.*	)	

NOTICE OF FILING

To:

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

William D. Ingersoll
Managing Attorney
Illinois Environmental Protection Agency
1021 North Grand Ave. East
Springfield, IL 62702

PLEASE TAKE NOTICE that we have this day filed with the office of the Clerk of the Pollution Control Board the *Petition for Review* a copy of which is enclosed herewith and hereby served upon you.

March 9, 2006

BIGGS BROTHERS SERVICE CENTER

By: /s/ John T. Hundley
John T. Hundley
One of its Attorneys

John T. Hundley
THE SHARP LAW FIRM, P.C.
P.O. Box 906 - 1115 Harrison
Mt. Vernon, IL 62864
618-242-0246
Counsel for Petitioner Biggs Brothers Service Center

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that I caused copies of the foregoing document to served by placement in the United States Post Office Mail Box at Mt. Vernon, Illinois, before 6:00 p.m. this date in sealed envelopes with proper first-class postage affixed, addressed to:

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
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Suite 11-500
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_/s/ John T. Hundley_____
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PETITION FOR REVIEW

Pursuant to §§ 40 and 57.7 of the Environmental Protection Act ("Act"), 415 ILCS 5/40, 5/57.7, to the Board's regulations on Leaking Underground Storage Tank ("LUST") decisions, 35 ILL. ADM. CODE 105.400 *et seq.,* and to the Order adopted herein December 15, 2005, petitioner Biggs Brothers Service Center ("Biggs"), by its attorneys in this regard, The Sharp Law Firm, P.C., submits this *Petition for Review* of the Illinois Environmental Protection Agency ("Agency") decision attached hereto as Exhibit 1 ("Decision") denying Biggs approval of a Revised Amended High Priority Corrective Action Plan (the "Plan") and further denying approval of the budget associated therewith.

I. THE AGENCY'S FINAL DECISION

The Decision of which review is sought is contained in Exhibit 1 hereto.

II. SERVICE OF THE AGENCY'S FINAL DECISION

The Decision indicates it was mailed November 3, 2005. It was received by Biggs November 4, 2005. The date for filing of this appeal was extended to March 9, 2006 by Order of the Board adopted December 15, 2005.

III. GROUNDS FOR APPEAL

A. *Introduction.*

This appeal involves remediation of a site near Fairmont City which formerly was home to five underground storage tanks. Tests have shown that gasoline and diesel fuel were released from the tanks prior to their removal in 1999. As a result, the Agency conditionally approved "high priority" classification of the site. In accordance with a Corrective Action Plan ("CAP") approved November 7, 2002, certain soil abatement and groundwater monitoring activities commenced. After completion of conventional soil abatement activities, monitoring wells were sampled pursuant to the CAP to determine the effect on groundwater. The results were unsatisfactory, but the site's physical characteristics made further conventional remediation problematic. For example:

- The soil is very sandy, making excavation difficult because soil adjacent to areas being excavated collapses into the excavated cavity.
- The site has a building upon it, which, due to the point discussed above, was threatened with damage during earlier attempts to remove contaminated soil by excavation.
- The site is in an environmentally sensitive area, *i.e.,* in the floodplain of the Mississippi River, with a sand and gravel aquifer present beneath the site.
- There are water wells in the vicinity.
- The area has a water level of 12 to 16 feet below the ground surface.
- The site is adjacent to a highway, also making remediation problematic.

Because of such problems, Biggs and its environmental consultant, United Science Industries, Inc. ("USI"), proposed remediation utilizing alternative technology. Specifically, because of the site's problematic physical characteristics Biggs and USI proposed use of "*In Situ* Chemical Oxidation" ("ISCO") – a name for processes under which contaminants are not removed but are chemically oxidized in their original location. Biggs and USI proposed bench scale treatability and pilot studies[1] using two chemicals – hydrogen peroxide and sodium persulfate – which have been shown to react with petrochemical contaminants and break them down into non-dangerous substances.

Hydrogen peroxide (H_2O_2) is a water molecule with an extra atom of oxygen. In the presence of any number of substances which serve as catalysts, two molecules of it readily break down into two molecules of water (H_2O) and one of oxygen (O_2). See, *e.g.*, 6 ENCYCLOPAEDIA BRITANNICA 192 (15th ed. 2002); 15 *id.* 788-89, 1063. While hydrogen peroxide's ability to oxidize remnants of petroleum product releases is well established, so too are its risks. Indeed, because so many substances, sometimes in modest amounts, trigger

[1] In the bench scale study, one or more samples of soil from the actual site would have been collected and treated with the chemicals in a laboratory to simulate anticipated field conditions. In this regard, a key issue would have been to develop a proper design of chemicals for the sandy soil at the site. The Agency's hostility to sodium persulfate (more fully discussed later in this Petition) was based on its limitations in silty clay soils found elsewhere in Illinois. Under the chemical oxidation regimen more fully discussed below, if the laboratory study showed that the chemicals could be effective in the sandy soil, Biggs would have proceeded to a pilot study in the field, applying the results of the bench field test to actual conditions at the site. As discussed below, the objective in this regard would have been not solely to determine that the chemicals worked, but the amounts and methods of administration appropriate to make the treatment both effective and safe.

breakup of H_2O_2, a difficulty in its use stems from the fact that explosions can result depending on how much of such substances are present. *Id.*

In the use of sodium persulfate, a chemical is delivered to the vicinity of the contaminant in conjunction with a chemical catalyst,[2] causing creation of a free radical, SO_{4-}. This radical attacks the organic molecule and breaks it down. Although not established for so long historically, use of sodium persulfate as an oxidant in environmental remediation has received industry acceptance, as have new applications of hydrogen peroxide which minimize explosive risk.

The use of sodium persulfate and of the modern applications of hydrogen peroxide have received the approval of the Interstate Technology & Regulatory Council ("ITRC"), a state-led coalition of regulators and industry members which works to achieve regulatory acceptance of environmental technologies. Originating from an initiative of the Western Governors' Association (WGA) in 1995 and affiliating in 1999 with the Environmental Research Institute of the States, the nonprofit educational subsidiary of the Environmental Council of the States, ITRC consists of Illinois, 42 other states, the District of Columbia, multiple federal agencies, industry members and others. It receives support from WGA, the Southern States Energy Board, the U.S. Department of Energy, the U.S. Department of Defense and the U.S. Environmental Protection Agency.

In 2001, ITRC published *Technical and Regulatory Guidance for In Situ Chemical Oxidation of Contaminated Soil and Groundwater*, describing three

[2] Heat or ultraviolet light also can serve as catalysts, but were not proposed here.

common chemical oxidants and reporting on case studies concerning them. Thereafter, ITRC in 2005 published *Technical and Regulatory Guidance for In Situ Chemical Oxidation of Contaminated Soil and Groundwater* (2d ed.), which revised and expanded the original paper and went on to set forth technical and regulatory requirements for *in situ* chemical oxidation and to present key concepts of remedial design in using such technology. Its requirements and design approach were the basis for Biggs' Plan.

Notwithstanding the Plan's pedigree, the Agency, by and through Harry Chappel, a LUST unit manager with whom USI has had adverse relations on other matters,[3] has rejected it. Because Chappel's Decision is arbitrary, capricious and contrary to law, it must be reversed.

B. ***The Decision Violated Applicable Law In Summarily Rejecting Use of Sodium Persulfate.***

In the Decision, Chappel first objected that (emphasis added) :

> The plan indicates that two different chemical oxidants, hydrogen peroxide and sodium persulfate, will be addressed for potential alternative remedial technologies for this site. However, the Illinois EPA does not currently consider sodium persulfate as an acceptable remedial oxidant for LUST sites. Therefore, the Illinois EPA has the following concerns with the plan/proposal for the use of ***hydrogen peroxide*** as a potential chemical oxidant for remediation of soil and groundwater contamination:

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[3] As demonstrated in the *Petition for Review* filed on behalf of another USI client in *Dalee Oil Co. v. IEPA*, PCB No. 06-40, Chappel and members of his section were the architects of the unlawful rate sheet found to have been unlawfully applied in LUST cases (Illinois Ayers Oil Co. v. IEPA, PCB 03-214), and, upon being thwarted in that effort, they attempted to accomplish the same ends by rule-making (In the Matter of Proposed Amendments to Regulation of Petroleum Leaking Underground Storage Tanks, Nos. R04-22, R04-23). USI vigorously opposed those efforts, and it seems clear that Chappel has responded with bias against owner-operators who have utilized USI's services.

By this process, Chappel summarily rejected the use of sodium persulfate.

This arbitrary and capricious action cannot be justified. 35 ILL. ADM. CODE 732.407 specifically provides for consideration of alternative technology. No portion of the Decision claimed that Biggs had not met the procedural requirements for consideration of alternative technology, and no portion applied the substantive provisions of § 732.407 to the use of sodium persulfate as part of the Plan. Instead, Chappel applied a *per se* disqualification of sodium persulfate. This is directly contrary to § 732.407. Provisions for "alternative technology" are meaningless if the "alternative technology" must be on some pre-approved list of "acceptable remedial oxidant[s] for LUST sites."

The *per se* disqualification of sodium persulfate was a "statement of general applicability that implements, applies, interprets, or prescribes law or policy" and hence was a "rule" within the meaning of § 5 of the Illinois Administrative Procedure Act ("APA"), 5 ILCS 100/1-70. Accordingly, the *per se* disqualification of sodium persulfate can be affirmed only if the rule-making requirements of the APA (5 ILCS 100/5-5 *et seq.*) were complied with, and they were not. The summary rejection of sodium persulfate was unlawful under both the Agency's regulations and the APA.

C. ***Rejection of the Proposed Use of Hydrogen Peroxide Was Disingenuous, Contrary to Law and Science, and Reckless.***

Having summarily rejected use of sodium persulfate, Chappel then went on to reject the proposed use of hydrogen peroxide, claiming "the following

concerns for the plan/proposal for the use of hydrogen peroxide". First was the claim that "[t]heoretical calculations need to be provided indicating":

> 1. Desired contaminant concentrations in soil and groundwater post remediation;
>
> 2. Modeling for potential migration of the concentration left in the soil and groundwater post remediation- modeling [sic] should take into consideration the soil and groundwater contamination under the building as well;
>
> 3. Proposed technology will achieve the contaminant concentration desired in items #1 and #2 listed above.

The *substance* of each of those concerns in fact had been addressed in the Plan. To demand that they be addressed with "theoretical calculations" not based on actual findings at the site was nonsensical and contrary to the technology proposed to be applied.

Chappel then went on to offer as a "concern":

> Hydrogen peroxide is a proven alternative technology for remediation of petroleum products. Therefore, it is unclear to the Illinois EPA as to the purpose of a pilot study. A bench scale test with hydrogen peroxide can be conducted by Orin, however please note that if the chosen technology for remediation for this LUST site is other than hydrogen peroxide then the costs for the bench scale testing will not be reimbursable. In addition, if the purpose for a pilot study is to determine the radius of influence in the vadose zone and/or the groundwater then a field pilot study may be necessary. If a pilot study is deemed necessary then it shall consist of two (2) to three (3) injection points (maximum) within the most contaminated soils/groundwater to determine if the target contamination concentration will be achieved[[4]];

In claiming not to understand the reason for studies, Chappel ignored both the requirements of *in situ* chemical oxidation remediation as set forth in the ITRC

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[4] The suggested allowance of a pilot study consisting of 2-3 injection points was in fact illusory, since Chappel did not approve a budget for it.

publication and a specific explanation in the Plan, which stated (emph. added):

> The Illinois Licensed Professional Engineer (PE) at USI understands that the Agency prefers to avoid treatability studies and pilot studies for alternative technologies. However, due to the degree and the extent of the soil and groundwater contamination plumes associated with the Biggs Brothers LUST site, the PE has determined that the engineering design must utilize a conservative engineered approach which takes into account all site specific nuances which could influence oxidant application rates. The PE cannot certify a plan which proposes full scale ISCO remediation without a deliberate approach to engineering and design. The engineering prescribes the theoretical and practical issues related to field application and design processes of ISCO including a laboratory treatability study and pilot-scale study prior to proposing full scale implementation. Please note that ***the purpose of the treatability study and pilot study is not to prove the alternative technology. Rather, the studies are an important part of the ISCO engineering and design process.***

In ISCO, it is one thing to know that chemical oxidation is, as a general matter, "a proven alternative technology for remediation of petroleum products", and quite another to know the amount and method which will be both safe and effective in a particular location. ISCO technology is, after all, applied *in situ,* not in a laboratory.

Chappel then went on to demand a "cross-section map illustrating the excavation and the free product trench" when in fact there was no free product trench at the site and none had been mentioned in the Plan. He further objected to the proposal for vent wells, claiming "the plan does not include a discussion as to the purpose/necessity for the vent wells"; whether he failed to read the provision that "vent wells will be installed along the west side of the building for off-gas venting ***as a precaution***" (emph. added) or whether he blew off safety considerations in his belief that prior proof of peroxide's efficacy made

pilot study considerations unnecessary is unclear. What is clear is that the Plan's alternative technology proposal was based on sound scientific, engineering, and technical design principles which he utterly disregarded. Time and again in the Decision, Chappel's reasoning and his claims of Plan shortcomings reflected a failure to comprehend what the Plan in fact stated, a failure to comprehend the ITRC standards and methodology, or a willful and disingenuous disregard for both. In rejecting the Plan and suggesting that Biggs just shoot its land full of peroxide, he ignored sound scientific, engineering and technical design practices to the detriment of human health and safety.

The last point deserves elaboration. Prior to submission of the Plan now at issue, Biggs submitted its Amended Corrective Action Plan on November 19, 2004. The contamination of the groundwater aquifer and other threats to human health and safety were clearly shown in that submission. However, Chappel and his unit took 119 of the statutorily permitted 120 days to review that submission, and then rejected it – the functional equivalent of an order to do nothing – based on objections which paled in comparison to the health and safety threat. Biggs promptly proceeded to prepare the Plan now at issue, incorporating the material available through publication of the 2005 ITRC study, and submitted it with a cover letter expressly addressing the previous rejection points. Chappel and his unit then took *all* of the statutorily permissible 120 days to review the Plan, and rejected it on grounds that are meritless, disingenuous and inconsequential compared to the health and safety considerations at issue.

Such conduct can only be called dereliction of duty.

D. ***Rejection of the Free Product Removal Plan Was Disingenuous and Improper.***

At pp. 7-9, the Plan included a Free Product Removal Corrective Action Plan, and costs for free product removal were included in the budget submitted in conjunction with the Plan. The background for this material is as follows.

Under 35 ILL. ADM. CODE 732.203(b), "For purposes of reimbursement, owners or operators are not required to obtain Agency approval pursuant to Section 732.202(g) for free product removal activities conducted more than 45 days after initial notification to IEMA of a release." Nonetheless, the Agency requested in 2002 that the free product removal activities at the Biggs site be included in a free product removal plan and a budget, and Biggs agreed to do so. A Post Corrective Action Free Product Removal Plan and Budget were submitted with the Free Product Removal Report received by the Agency February 13, 2004. By letter dated June 10, 2004, the Free Product Removal Report was accepted but the Post Corrective Action Free Product Removal Plan was not approved and the associated budget was not reviewed. The Agency asked that the Free Product Removal Plan be submitted as part of an Amended Corrective Action Plan and Budget. As requested, Biggs then included the Free Product Removal Plan in an Amended Corrective Action Plan dated November 17, 2004. The removal plan was again rejected by letter dated March 18, 2005. Thus, a Free Product Removal Plan was again submitted in

the Plan which is the subject of this appeal, and it was again rejected.

The Decision's handling of this point is disingenuous, stating:

> The plan proposes to replace five (5) groundwater monitoring wells with recovery wells and utilize Petro-Trap EZY Skimmers in the recovery wells. However, according to the information provided in the plan it does not appear that the wells need replaced or the use of skimmers are [sic] necessary since the amount of free product being recovered is controlled by using the SoakEase Socks and monitoring (including hand bailing of [sic] necessary). Therefore, the replacement of the groundwater monitoring wells and use of Petro-EZY Skimmers is not approved at this time. In addition, if chemical oxidation of the contamination is utilized then it does not appear necessary to treat free product separately.

These comments are not only incorrect, they are a disingenuous excuse for denying Biggs reimbursement for free product recovery efforts not addressed in the rejection. The Agency's denial of ***three*** free product removal plans and associated budgets also has been a dereliction of duty by public officials in protection of human health and the environment in accordance with their statutory authority and duties.

E. ***The Iron and Sulfate Issues Were Not Grounds for Rejecting the Plan.***

Chappel went on to rule:

> The plan does not include documentation that injection of the chemical, or the impact of the treatment on existing soil and groundwater, will not cause an exceedence of the primary drinking water regulations at 35 Ill. Adm. Code 611 during or after remediation (Sections 12(a) and 12(d) of the Act and 35 Ill. Adm. Code 732.407(a)). Said documentation must be submitted to the Illinois EPA's Leaking Underground Storage Tank Section as part of the plan for review and approval. Further, you may be required to submit an application for a permit to the Illinois EPA's Underground Injection Control (UIC) Program, prior to injection, if an exceedence of the primary drinking water regulations will result during or after remediation. . . .

> Please note that pursuant to 35 Il. [sic] Adm. Code Section 742.Appendix B includes a cleanup objective for iron for the Soil Component of the Groundwater Ingestion Route and the Groundwater Route of 5 mg/L for both Class I and Class II groundwater. Calculations will be necessary to indicate that the residual iron will not exceed the cleanup objective(s).

The bulk of this objection had been made in response to a previous version of the Plan and was addressed by Biggs in a cover letter submitted with the Plan:

> As previously stated in the ACAP and repeated in the Revised ACAP, both chemical oxidants (either hydrogen peroxide or sodium persulfate) breakdown into carbon dioxide and water. The catalyst that is being considered with the use of both chemical oxidants is ferrous sulfate heptahydrate ($FeSO_4*7H_2O$) (Appendix J). The amount of iron in this compound is 500 ppm. Please note that there are no primary drinking water standards for either iron or sulfate. Iron and sulfate are secondary standards which are 0.3 mg/L and 250 mg/L, respectively (USEPA National Primary Drinking Water Regulations and National Secondary Drinking Water Regulations). However, considering gasoline free product is present in some wells and in other wells the groundwater is at very high levels of benzene (up to a maximum 24 ppm) which greatly exceed drinking water standards, the addition of iron or sulfate in small amounts to reduce the BTEX contaminants will not be an issue when it comes to drinking water standards. Also given the neutral pH conditions, the iron will not remain in solution but precipitate and will not be a potential contaminant to the groundwater. Acidic conditions are necessary for iron to remain in the dissolved state.
>
> Considering the use of institutional controls, the ACAP does not propose clean up the groundwater to drinking water standards. The Plan is to reduce the contaminants to levels which do not exceed the TACO Tier 1, Class 1 Objectives when modeled to the offsite property boundary across Kingshighway using the R-26 equation. A R-26 equation has been modeled at RW-3 which currently is the most contaminated onsite well (24 ppm) and represents the worst-case scenario. Using R-26 equation and a proposed remediation objective level of 115 for benzene, RW-3 shows a migration of 60 feet which lies just short of the offsite property across Kingshighway (Appendix I). Monitor Well MW-1 was also modeled because of its proximity to the right-of-way (Appendix I). Nevertheless, a Groundwater Deed Restriction is necessary for the Biggs Bros property proper thus mitigating the use of groundwater for drinking purposes as well as a Highway Authority Agreement for groundwater contamination under Kingshighway.

> As USI has done in the past with the complicit approval of the Agency, an Illinois EPA UIC Inventory Information form will be submitted following Agency approval of the Revised ACAP. The information submitted to the UIC Program will include what chemical oxidants and catalyst are expected to be used. Four nearby monitor wells will be sampled following remediation. USI as a precaution will add iron and sulfate to the list of analytes for the pilot study to determine if the water is impacted. However, iron is expected to absorb to particulate matter during remediation rather than remain in a dissolved state thereby not affecting groundwater quality.

Here, as stated in the Plan and as demonstrated by elementary chemistry (see pp. 3-4 above), the breakup of hydrogen peroxide would create water and oxygen and the resultant oxidation of the petrochemical remnants would create carbon dioxide. Hence the use of hydrogen peroxide would have created as a "contaminant" of potential concern only the catalyst used in connection with the peroxide breakdown – in this case, iron and sulfate. Chappel's citation to "Sections 12(a) and 12(d) of the Act and 35 Ill. Adm. Code 732.407(a)" was disingenuous fear-mongering. 415 ILCS 5/12(a) provides that no person shall:

> Cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board . . . .

Similarly, under § 12(d), no person shall "[d]eposit any contaminants upon the land in such place and manner so as to create a water pollution hazard." However, under 415 ILCS 5/3.545 (emphasis added), "water pollution" is

> such alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State, as will or is likely to ***create a nuisance or render such waters harmful or detrimental or injurious*** to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legi-

timate uses, or to livestock, wild animals, birds, fish, or other aquatic life.

The trace amounts of iron or sulfate which would result from chemical oxidation with hydrogen peroxide would not constitute "water pollution" within the meaning of that statutory provision. As to 35 ILL. ADM. CODE 732.407(a), Chappel apparently referred to the requirement in § 732.407(a)(2) that alternative technology plans "demonstrate that the proposed technology will not adversely affect human health or the environment", also a spurious issue.

The observation that 35 ILL. ADM. CODE Part 742 Appendix B includes a cleanup objective for iron was correct, but the objectives in Appendix B are *less restrictive* than the secondary drinking water standards addressed in the July 5, 2005 cover letter. The prospect of the chemical oxidation process creating an amount of either ferrous or sulfate residue in excess of those standards is extremely remote. However, in the cover letter submitted with the Plan, Biggs agreed "as a precaution [to] add iron and sulfate to the list of analytes for the pilot study to determine if the water is impacted."

In short, these issues were adequately addressed by the Plan and are not a reasonable rejection point for a LUST site which already is contaminated by a petroleum release and in need of "high priority" remediation in order to protect human health and the environment.

F. ***Rejection of the Budget Was Improper.***

In the Decision, Chappel also denied the budget associated with the Plan. His first rationale for doing so was that the budget could not be approved

without an approvable plan, a ground which would have been valid had Chappel's rejection of the Plan had merit. Upon reversal of the denial of the Plan, this objection evaporates, however.

In addition, Chappel objected:

> The budget includes costs that lack supporting documentation (35 Ill. Adm. Code 732.606(gg)). A corrective action plan budget for a site classified as high priority must include, but not be limited to, an accounting of all costs associated with the development, implementation, and completion of the applicable activities (Section 57.7(c)(1)(B)[5] of the Act and 35 Ill. Adm. Code 732.405(b)[6]). 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 (Section 57.5(a) of the Act and 35 Ill. Adm. Code 732.606(o)).

The claim that there was "no supporting documentation of costs" was simply incorrect.[7] Moreover, as required (35 ILL. ADM. CODE 732.405(b),

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[5] Chappel apparently cited § 57.7(c)(1)(B) as amended by P.A. 92-574, 92-651 and 92-735:

> If the owner or operator intends to seek payment from the Fund, prior to performance of any corrective action beyond that required by Section 57.6 and subsection (a) of Section 57.7, the owner or operator shall submit to the Agency for the Agency's approval or modification a corrective action plan budget which includes, but is not limited to, an accounting of all costs associated with the implementation and completion of the corrective action plan.

[6] 35 Ill. Adm. Code 732.405(b) provides in pertinent part that

> any owner or operator intending to seek payment from the Fund shall submit to the Agency a groundwater monitoring or corrective action budget plan. Such budget plans shall include, but not be limited to. a copy of the eligibility and deductibility determination of the OSFM and a line item estimate of all costs associated with the development, implementation and completion of the applicable activities. Formulation of budget plans should be consistent with the eligible and ineligible costs listed at Sections 732.605 and 732.606 of this Part. Groundwater monitoring and corrective action budget plans shall be submitted on forms prescribed and provided by the Agency and, if specified by the Agency by written notice, in an electronic format.

[7] For example, bids from proposed subcontractors who would apply the alternative technology were attached.

732.501), Biggs submitted its budget proposal on Agency forms. Chappel's penchant for claiming that use of the required forms is inadequate documentation in some cases but ignoring this aspect in others is a guise for arbitrary and capricious decision-making.

Chappel speculates that the proposed costs may be used for unpermitted purposes. However, both owner and engineer swore that "costs ineligible for payment from the [LUST] Fund pursuant to 35 Illinois Administrative Code Section 732.606 are not included in the budget proposal". Chappel claims the budget was denied because he could not determine that this was so. However, multiple provisions refute the claim that the Agency has no way of determining whether the reimbursement costs are for improper purposes. See, *e.g.*, 415 ILCS 5/57.7(c)(4)(C) as amended by P.A. 92-554; 415 ILCS 5/57.7(c)(4)(D)(iii) as amended by P.A. 92-574, P.A. 92-651 and P.A. 92-735; 415 ILCS 5/30; 35 ILL. ADM. CODE 732.502(b), 732.502(d).

Lastly, Chappel rejected the budget because:

> The budget fails to include the following:
>
> > a. Documentation/explanation of the amount hours [sic] estimated per title per task for Personnel Costs. It is unclear to the Illinois EPA why the costs for Personnel have increased over $25,000.00 in this budget from the last budget since the majority of the revised corrective action plan is a copy of the last plan submitted;
> >
> > b. Soil PNA analysis does not appear necessary since the soil sample results post soil excavation do not indicate PNAs above the Tier I Cleanup Objectives.

As pointed out in the cover letter submitted with the Plan, the soil PNA analyses

were included in the Plan in response to the Agency's criticism of the previous proposal. Chappel's first requiring something and then decreeing it excessive is the epitome of arbitrary and capricious action. Moreover, the personnel costs were submitted on Agency forms as required with appropriate details filled out, and were in fact addressed in the submission.

IV. CONCLUSION.

For all the foregoing reasons, petitioner Biggs Brothers Service Center respectfully submits that the Decision should be reversed and the Agency ordered to approve the Revised Amended High Priority Corrective Action Plan and the budget associated therewith. Because the matter has been pending before an official and unit which have evidenced bias against Biggs' consultant and prejudice against the alternative technology at issue, Biggs respectfully requests that the Board order that on remand the matter be assigned to another unit in the LUST section.

March 9, 2006

BIGGS BROTHERS SERVICE CENTER

By: /s/ John T. Hundley
One of its Attorneys

John T. Hundley
THE SHARP LAW FIRM, P.C.
P.O. Box 906 – 1115 Harrison
Mt. Vernon, IL 62864
618-242-0246
Counsel for Petitioner Biggs Brothers Service Center

CERTIFICATE OF SERVICE

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Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

William D. Ingersoll
Managing Attorney
Illinois Environmental Protection Agency
1021 North Grand Ave. East
Springfield, IL 62702

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P.O. Box 906 - 1115 Harrison
Mt. Vernon, IL 62864
618-242-0246
Counsel for Petitioner Biggs Brothers Service Center

sara\wpdocs\USI-Biggs\Petition for Review

1899032 B.P.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

1021 NORTH GRAND AVENUE EAST, P.O. BOX 19276, SPRINGFIELD, ILLINOIS 62794-9276 – (217) 782-3397
JAMES R. THOMPSON CENTER, 100 WEST RANDOLPH, SUITE 11-300, CHICAGO, IL 60601 – (312) 814-6026

ROD R. BLAGOJEVICH, GOVERNOR DOUGLAS P. SCOTT, DIRECTOR

217/782-6762

NOV 0 3 2005

CERTIFIED MAIL
7004 2510 0001 8648 3568

Biggs Brothers Service Center
Attention: Sonny Biggs
2540 Kingshighway
Fairmont City, Illinois 62201

Re: LPC #1634255004 – St. Clair County
Fairmont City/Biggs Brothers Service Center
2540 Kingshighway
LUST Incident No. 990762 & 991840
LUST Technical File

Dear Mr. Biggs:

The Illinois Environmental Protection Agency (Illinois EPA) has reviewed the Revised Amended High Priority Corrective Action Plan (plan) submitted for the above-referenced incident. This information, dated July 5, 2005, was received by the Illinois EPA on July 6, 2005. Citations in this letter are from the Environmental Protection Act (Act) and 35 Illinois Administrative Code (35 Ill. Adm. Code).

Pursuant to Section 57.7(c)(4)(D) of the Act and 35 Ill. Adm. Code 732.405(c), the plan is rejected for the following reason(s):

1. The plan indicates that two different chemical oxidants, hydrogen peroxide and sodium persulfate, will be addressed for potential alternative remedial technologies for this site. However, the Illinois EPA does not currently consider sodium persulfate as an acceptable remedial oxidant for LUST sites. Therefore, the Illinois EPA has the following concerns with the plan/proposal for the use of hydrogen peroxide as a potential chemical oxidant for remediation of soil and groundwater contamination:
   a. Theoretical calculations need to be provided indicating the following:
      1. Desired contaminant concentrations in soil and groundwater post remediation;
      2. Modeling for potential migration of the concentration left in the soil and groundwater post remediation- modeling should take into consideration the soil and groundwater contamination under the building as well;
      3. Proposed technology will achieve the contaminant concentration desired in items #1 and #2 listed above.

EXHIBIT 1

b. Hydrogen peroxide is a proven alternative technology for remediation of petroleum products. Therefore, it is unclear to the Illinois EPA as to the purpose of a pilot study. A bench scale test with hydrogen peroxide can be conducted by Orin, however please note that if the chosen technology for remediation for this LUST site is other than hydrogen peroxide then the costs for the bench scale testing will not be reimbursable. In addition, if the purpose for a pilot study is to determine the radius of influence in the vadose zone and/or the groundwater then a field pilot study may be necessary. If a pilot study is deemed necessary then it shall consist of two (2) to three (3) injection points (maximum) within the most contaminated soils/groundwater to determine if the target contamination concentration will be achieved;

c. The plan fails to discuss the potential effects of obstacles that may inhibit or influence the preferential pathway of the chemical oxidant once injected. This would require an adequate cross-section map illustrating the excavation and the free product trench;

d. The plan indicates if a pilot study is performed the injection points will begin at a depth at 22' below ground surface but fails to indicate the depth of the "contaminant zone." The injection of the chemical oxidant above the native material is not approved since the excavation area was filled with clean backfill beginning at 15' below ground surface; and

e. The plan indicates three (3) vent wells will be installed. However, the plan does not include a discussion as to the purpose/necessity for the vent wells. It appears that the vent wells may not be necessary considering the depth of the proposed injections.

2. The plan proposes to replace five (5) groundwater monitoring wells with recovery wells and utilize Petro-Trap EZY Skimmers in the recovery wells. However, according to the information provided in the plan it does not appear that the wells need replaced or the use of skimmers are necessary since the amount of free product being recovered is controlled by using the SoakEase Socks and monitoring (including hand bailing of necessary). Therefore, the replacement of the groundwater monitoring wells and use of Petro-EZY Skimmers is not approved at this time. In addition, if chemical oxidation of the contamination is utilized then it does not appear necessary to treat free product separately.

3. The plan does not include documentation that injection of the chemical, or the impact of the treatment on existing soil and groundwater, will not cause an exceedence of the primary drinking water regulations at 35 Ill. Adm. Code 611 during or after remediation (Sections 12(a) and 12(d) of the Act and 35 Ill. Adm. Code 732.407(a)). Said documentation must be submitted to the Illinois EPA's Leaking Underground Storage Tank Section as part of the plan for review and approval. Further, you may be required to submit an application for a permit to the Illinois EPA's Underground Injection Control

(UIC) Program, prior to injection, if an exceedence of the primary drinking water regulations will result during or after remediation. For additional information regarding the UIC Program, please contact Bur Filson at 217/782-6070.

Please note that pursuant to 35 Il. Adm. Code Section 742.Appendix B includes a cleanup objective for iron for the Soil Component of the Groundwater Ingestion Route and the Groundwater Route of 5 mg/L for both Class I and Class II groundwater. Calculations will be necessary to indicate that the residual iron will not exceed the cleanup objective(s).

Pursuant to Sections 57.7(a)(1) and 57.7(c)(4)(D) of the Act and 35 Ill. Adm. Code 732.405(e) and 732.503(b), the associated budget is rejected for the following reason(s):

1. Pursuant to Sections 57.7(a) and 57.7(c)(4) of the Act and 35 Ill. Adm. Code 732.405 and 732.503(b), the associated budget is rejected for the following reason:

   A full financial review shall consist of a detailed review of the costs associated with each element necessary to accomplish the goals of the plan as required pursuant to the Act and regulations. Items to be reviewed shall include, but not be limited to, costs associated with any materials, activities, or services that are included in the budget plan. The overall goal of the financial review shall be to assure that costs associated with materials, activities, and services shall be reasonable, shall be consistent with the associated technical plan, shall be incurred in the performance of corrective action activities, and shall not be used for corrective action activities in excess of those necessary to meet the minimum requirements of the Act and regulations (Section 57.7(c)(4)(C) of the Act and 35 Ill. Adm. Code 732.505(c)).

   Without an approvable plan, the proposed budget cannot be fully reviewed.

2. The budget includes costs that lack supporting documentation (35 Ill. Adm. Code 732.606(gg)). A corrective action plan budget for a site classified as high priority must include, but not be limited to, an accounting of all costs associated with the development, implementation, and completion of the applicable activities (Section 57.7(c)(1)(B) of the Act and 35 Ill. Adm. Code 732.405(b)). 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 (Section 57.5(a) of the Act and 35 Ill. Adm. Code 732.606(o)).

   The budget fails to include the following:

   a. Documentation/explanation of the amount hours estimated per title per task for Personnel Costs. It is unclear to the Illinois EPA why the costs for Personnel have increased over $25,000.00 in this budget from the last budget since the majority of the revised corrective action plan is a copy of the last plan submitted;

b. Soil PNA analysis does not appear necessary since the soil sample results post soil excavation do not indicate PNAs above the Tier I Cleanup Objectives.

Pursuant to 35 Ill. Adm. Code 732.401, the Illinois EPA requires submittal of a revised plan, and budget if applicable, within 90 days of the date of this letter 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.

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 information, please contact Mindy Weller at 217/782-6762.

Sincerely,

Harry A. Chappel, P.E.
Unit Manager
Leaking Underground Storage Tank Section
Division of Remediation Management
Bureau of Land

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cc: Robert Pulfrey, USI, Inc.
Division File

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)(D) 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:

Dorothy Gunn, Clerk
Illinois Pollution Control Board
State of Illinois 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