

BEFORE THE  
ILLINOIS POLLUTION CONTROL BOARD

RECEIVED  
CLERK'S OFFICE

NOV 24 2008

STATE OF ILLINOIS  
Pollution Control Board

INTERMART, INC. )  
 )  
Petitioner, )  
 )  
vs. )  
 )  
ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY, )  
 )  
Respondent. )

PCB 09-34  
(UST Appeal)

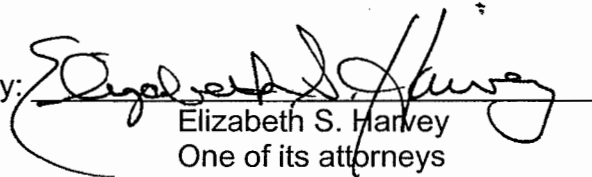
NOTICE OF FILING

To: Illinois Environmental Protection Agency  
Division of Legal Counsel  
1021 North Grand Avenue East  
Post Office Box 19276  
Springfield, Illinois 62794-9276

PLEASE TAKE NOTICE that on this 24<sup>th</sup> day of November 2008, the following was filed with the Illinois Pollution Control Board: **Petitioner Intermart, Inc.'s Petition for Review of IEPA L.U.S.T. Decision**, which is attached and herewith served upon you.

INTERMART, INC.

By:

  
Elizabeth S. Harvey  
One of its attorneys

Elizabeth S. Harvey  
SWANSON, MARTIN & BELL, LLP  
330 North Wabash Avenue  
Suite 3300  
Chicago, Illinois 60611  
Telephone: (312) 321-9100  
Firm I.D. No. 29558

CERTIFICATE OF SERVICE

I, the undersigned non-attorney, state that I served a copy of the above-described document to counsel of record in the above-captioned matter via U.S. Mail on or before 5:00 p.m. on November 24, 2008.

  
\_\_\_\_\_  
Jeanette M. Podlin

x] Under penalties as provided by law pursuant to 735 ILCS 5/1-109, I certify that the statements set forth herein are true and correct.

BEFORE THE  
ILLINOIS POLLUTION CONTROL BOARD

RECEIVED  
CLERK'S OFFICE  
NOV 24 2008  
STATE OF ILLINOIS  
Pollution Control Board

INTERMART, INC. )  
 )  
Petitioner, )  
 )  
vs. )  
 )  
ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY, )  
 )  
Respondent. )

PCB 09- 34  
(UST Appeal)

**PETITION FOR REVIEW OF IEPA LUST DECISION**

Petitioner INTERMART, INC. ("Intermart"), by its attorneys Swanson, Martin & Bell, LLP, hereby appeals from respondent the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY's ("Agency") decision denying Intermart's Corrective Action Plan and budget. This appeal is filed pursuant to Sections 40 and 57.7(c) of the Environmental Protection Act ("Act") (415 ILCS 5/40 and 5/57.7(c)), and Subpart D of Part 105 of the Board's procedural rules (35 Ill.Adm.Code 105.Subpart D).

1. Intermart owns a service station and mini-mart located at 24 South Lincolnway, North Aurora, Illinois. There is petroleum contamination on the site.

2. Intermart filed a High Priority Corrective Action Plan (CAP) and Budget with the Agency on September 29, 2008. On October 20, 2008, the Agency issued its decision, rejecting both the CAP and the budget. (The Agency's October 20, 2008 decision is attached as Exhibit A.) This appeal is timely, being filed within 35 days of the service of the Agency's decision.

3. The Agency denied the CAP based upon alleged deficiencies in the information submitted in support of the CAP. (See Exhibit A, Attachment A.) However,

1. 1000

2. 1000

3. 1000

4. 1000

5. 1000

6. 1000

7. 1000

8. 1000

9. 1000

10. 1000

11. 1000

12. 1000

13. 1000

14. 1000

15. 1000

16. 1000

17. 1000

18. 1000

Intermart has supplied all of the requested information to the Agency. The proposed CAP meets the requirements of the Act and the regulations.

4. Additionally, the Agency denied the associated budget, based upon the denial of the CAP upon which the budget is based, and upon: 1) costs which allegedly exceed maximum payment amounts; 2) concerns regarding costs for alternative technology versus conventional technology; 3) concerns regarding the bidding for remediation costs; and 4) allegations that the budget contains improper forms. However, the budget as submitted meets the requirements of the Act and the regulations.

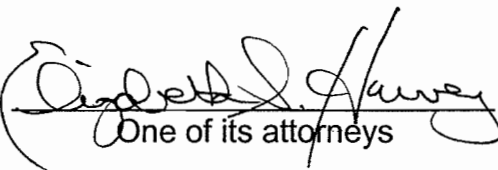
5. Because the CAP and associated budget as submitted demonstrate compliance with the requirements of the Act and the regulations, the Agency erred in denying the CAP and budget. (415 ILCS 5/39(a).)

6. Thus, Intermart seeks an order directing the Agency to approve the CAP and associated budget.

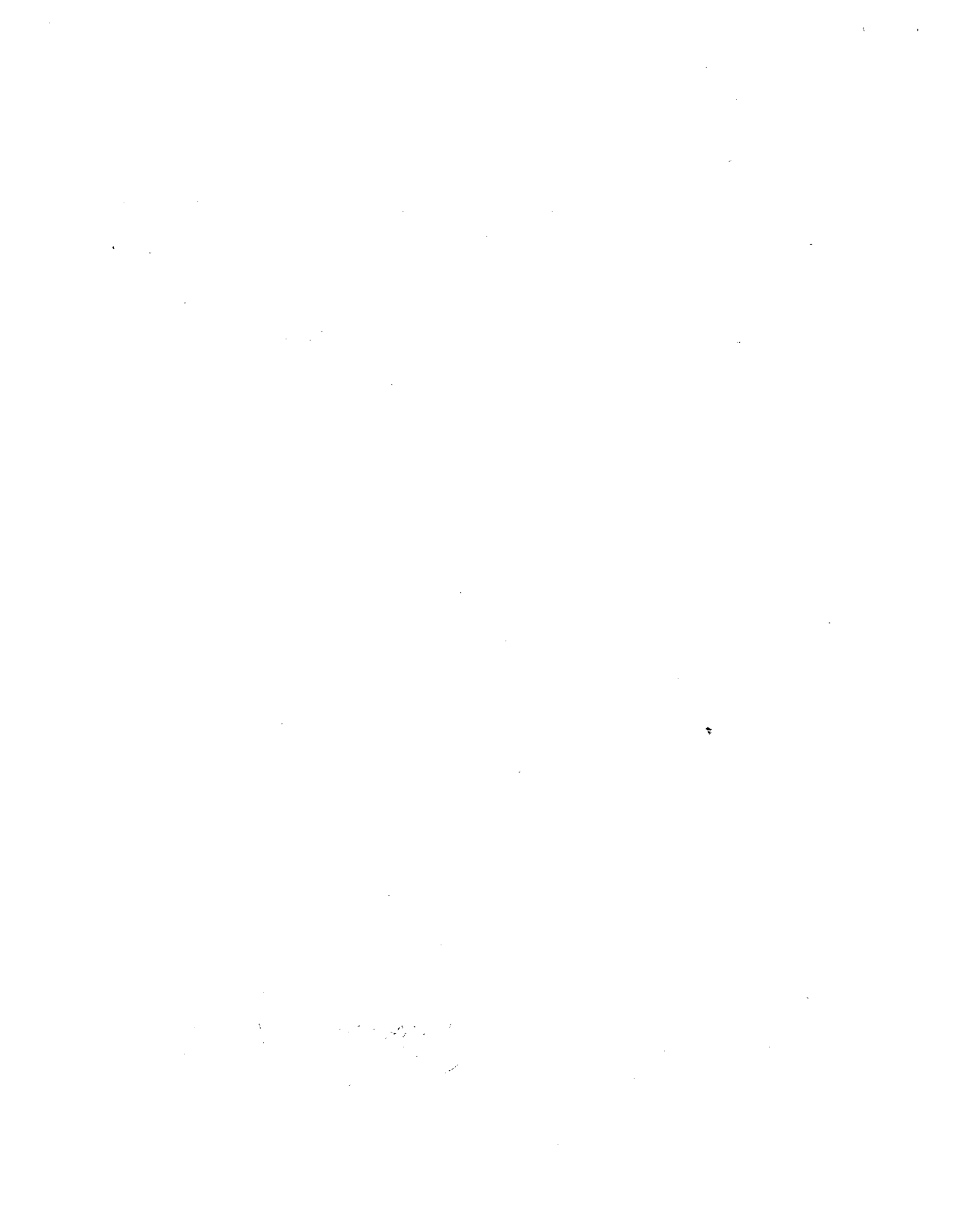
WHEREFORE, petitioner INTERMART INC. asks the Board to enter an order finding that the CAP and budget demonstrate compliance with the requirements of the Act and the regulations, and ordering the Agency to approve the CAP and budget, and for such other relief as the Board deems appropriate.

Respectfully submitted,

INTERMART, INC.

By:   
One of its attorneys

Dated: November 24, 2008



Michael J. Maher  
Elizabeth S. Harvey  
Swanson, Martin & Bell, LLP  
330 North Wabash Avenue  
Suite 3300  
Chicago, Illinois 60611  
312/321-9100







**ILLINOIS ENVIRONMENTAL PROTECTION AGENCY**

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

**CERTIFIED MAIL**

7007 2560 0003 2087 7583

**OCT 20 2008**

Intermart, Inc.  
Attn: Shahnaz Anjum  
24 South Lincolnway  
North Aurora, IL 60547

Re: LPC #0890605030 -- Kane County  
North Aurora/North Aurora 76  
24 South Lincolnway  
Leaking UST Incident No. 970184  
Leaking UST Technical File

Dear Ms. Anjum:

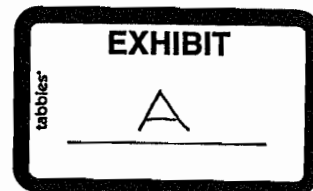
The Illinois Environmental Protection Agency (Illinois EPA) has reviewed the High Priority Corrective Action Plan (plan) submitted for the above-referenced incident. This information, dated September 29, 2008, was received by the Illinois EPA on October 6, 2008. Citations in this letter are from the Environmental Protection Act (Act) in effect prior to June 24, 2002, and 35 Illinois Administrative Code (35 Ill. Adm. Code).

Pursuant to Section 57.7(c)(4) of the Act and 35 Ill. Adm. Code 732.405(c), the plan is rejected for the reasons listed in Attachment A.

Pursuant to Sections 57.7(a)(1) and 57.7(c)(4) of the Act and 35 Ill. Adm. Code 732.405(e) and 732.503(b), the associated budget is rejected for the reasons listed in Attachment B.

Pursuant to 35 Ill. Adm. Code 732.401, the Illinois EPA requires submittal of a revised plan, and budget if applicable, within ninety (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 Chris Covert at 217/785-3943.

Sincerely,

A handwritten signature in black ink, appearing to read 'T. Henninger', with a long horizontal line extending to the right.

Thomas A. Henninger  
Unit Manager  
Leaking Underground Storage Tank Section  
Division of Remediation Management  
Bureau of Land

TAH:CC\

Attachment: Attachment A (Technical Denial Reasons)  
Attachment B (Budget Denial Reasons)

c: USET Corporation  
Steve Sylvester, Assistant Attorney General  
BOL 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) 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 request for 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

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

Illinois Pollution Control Board, Clerk  
State of Illinois Center  
100 West Randolph, Suite 11-500  
Chicago, IL 60601  
312/814-3620

Attachment A (Technical Denial)

Re: LPC #0890605030 -- Kane County  
North Aurora/North Aurora 76  
24 South Lincolnway  
Leaking UST Incident No. 970184  
Leaking UST TECHNICAL FILE

Citations in this attachment are from the Environmental Protection Act (Act) in effect prior to June 24, 2002, and 35 Illinois Administrative Code (35 Ill. Adm. Code).

1. Pursuant to 35 Ill. Adm. Code 732.404(e), in developing the corrective action plan, additional investigation activities beyond those required for the site evaluation and classification may be necessary to determine the full extent of soil or groundwater contamination and of threats to human health or the environment. Such activities may include, but are not limited to, additional soil borings with sampling and analysis or additional groundwater monitoring wells with sampling and analysis. Such activities as are technically necessary and consistent with generally accepted practices may be performed without submitting a work plan or receiving prior approval from the Illinois EPA, and associated costs may be included in a High Priority corrective action budget plan. A description of these activities and the results shall be included as a part of the corrective action plan.

The plan fails to meet the above requirements for the following reason(s):

The full **physical** extent of contamination remains to be defined. The plan proposed is based off of an estimated extent, which is not sufficient when considering a remediation method. In addition, the maps presented show the estimated contamination plumes beyond the physical edges of the paper on which they are submitted, as well as do not accurately depict the locations and designations of soil borings, monitoring wells, and their respective contaminant levels.

2. Pursuant to 35 Ill. Adm. Code 732.407(a), an owner or operator may choose to use an alternative technology for corrective action in response to a release of petroleum at a High Priority site. Corrective action plans proposing the use of alternative technologies shall be submitted to the Illinois EPA in accordance with 35 Ill. Adm. Code 732.405. In addition to the requirements for corrective action plans contained in 35 Ill. Adm. Code 732.404, the owner or operator who seeks approval of an alternative technology shall submit documentation along with the corrective action plan demonstrating that:
  - a. The proposed alternative technology has a substantial likelihood of successfully achieving compliance with all applicable regulations and all corrective action remediation objectives necessary to comply with the Act and regulations to protect human health or the environment;

- b. The proposed alternative technology will not adversely affect human health or the environment;
- c. The owner or operator will obtain all Illinois EPA permits necessary to legally authorize use of the alternative technology;
- d. The owner or operator will implement a program to monitor whether the requirements of 35 Ill. Adm. Code 732.407(a)(1) have been met; and
- e. Within one year from the date of Illinois EPA approval, the owner or operator will provide to the Illinois EPA monitoring program results establishing whether the proposed alternative technology will successfully achieve compliance with 35 Ill. Adm. Code 732.407(a)(1) and any other applicable regulations. The Illinois EPA may require interim reports as necessary to track the progress of the alternative technology. The Illinois EPA will specify in the approval when those interim reports shall be submitted to the Illinois EPA.

The plan fails to meet the above requirements for the following reason(s):

The alternative technology proposed is compared to conventional technology, however the consultant's definition of conventional technology includes groundwater "pump and treat." Any alternative technology must be compared to the Illinois EPA standard for conventional technology consisting of excavation, transportation, and disposal of contaminated soil with groundwater monitoring to determine the effectiveness of source removal.

The plan proposes an alternative technology pilot study, with immediate implementation of a full-scale system following the pilot study. Per Illinois EPA procedures, as well as generally accepted engineering procedures, a pilot study will be performed with an amended CAP entailing the results of such pilot study submitted to the Agency before implementing a full-scale system.

In conjunction with the above, the full physical extent of contamination must be delineated prior to the submittal of an alternative technology pilot study. With regards to the proposed technology, the mass of contaminants must be determined in order to design a pilot study which will not only determine the radius of influence, but also the amount of contaminant which will be removed at each point, as well as the time for removal so that a full-scale system may be proposed.

With regards to the proposed Air Sparging Curtain, the design does not demonstrate how this is a necessary element to the design given that contamination has already migrated offsite.

The plan cites previous incidents within the Leaking UST Program where this technology

was “effective and proven.” Upon review of these sites, the Illinois EPA has determined that this technology did not remediate the sites noted. Rather, institutional controls and restrictions were utilized for the example sites to achieve closure. Furthermore, these example sites submitted numerous amendments calling for additional remediation events which went far beyond the initial time projections.

3. Pursuant to 35 Ill. Adm. Code 732.408, for sites requiring High Priority corrective action or for which the owner or operator has elected to conduct corrective action pursuant to 35 Ill. Adm. Code 732.300(b), 732.400(b), or 732.400(c), the owner or operator shall propose remediation objectives for applicable indicator contaminants in accordance with 35 Ill. Adm. Code 742. Owners and operators seeking payment from the Fund that perform on-site corrective action in accordance with Tier 2 remediation objectives of 35 Ill. Adm. Code 742 must determine the following parameters on a site-specific basis:

Hydraulic conductivity (K)

Soil bulk density ( $\rho_b$ )

Soil particle density ( $\rho_s$ )

Moisture content (w)

Organic carbon content ( $f_{oc}$ )

Board Note: Failure to use site-specific remediation objectives on-site and to utilize available groundwater ordinances as institutional controls may result in certain corrective action costs being ineligible for payment from the Fund. See Section 732.606(ddd) and (eee) of Part 732.

The plan fails to meet the above requirements for the following reason(s):

Tier II objectives have not been calculated, and a plan must propose to remediate soil to Tier II objectives. This plan fails to do such.

TAH:CC\

Attachment B (Budget Denial)

Re: LPC # 0890605030 -- Kane County  
North Aurora/North Aurora 76  
24 South Lincolnway  
Leaking UST Incident No. 970184  
Leaking UST Technical File

Citations in this attachment are from the Environmental Protection Act (Act) in effect prior to June 24, 2002, and 35 Illinois Administrative Code (35 Ill. Adm. Code).

1. Pursuant to Sections 57.7(c) of the Act and 35 Ill. Adm. Code 732.305 or 732.405 and 732.503(b), the associated budget is rejected for the following reason:

The Illinois EPA has not approved the plan with which the budget is associated. Until such time as the plan is approved, a determination regarding the associated budget— i.e., a determination as to whether costs associated with materials, activities, and services are reasonable; whether costs are consistent with the associated technical plan; whether costs will be incurred in the performance of corrective action activities; whether costs will not be used for corrective action activities in excess of those necessary to meet the minimum requirements of the Act and regulations, and whether costs exceed the maximum payment amounts set forth in Subpart H of 35 Ill. Adm. Code 732 cannot be made (Section 57.7(c)(4)(C) of the Act and 35 Ill. Adm. Code 732.505(c)).

2. The budget includes costs that exceed the maximum payment amounts set forth in Subpart H, Appendix D, and/or Appendix E of 35 Ill. Adm. Code 732. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 732.606(ccc). In addition, such costs are not approved pursuant to Section 57.7(c)(4)(C) of the Act because they are not reasonable.

Subpart H rates are available on the Internet at:

<http://www.epa.state.il.us/land/lust/forms/budget-forms/forms-1/max-payments-jul08.pdf>

- \* 3. The budget includes costs for an alternative technology that exceed the costs of conventional technology. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 732.606(bb). In addition, such costs are not approved pursuant to Section 57.7(c)(4)(C) of the Act because they are not reasonable.

Since the full mass of contamination has not been sufficiently defined, the costs for alternative technology versus conventional technology cannot be adequately evaluated at this time. Additionally, the Illinois EPA standard of conventional technology consists of the excavation, transportation, and disposal of contaminated soil with groundwater monitoring following source removal. The comparison must not include costs for groundwater "pump and treat."

4. The budget includes costs for remediation that were obtained via bidding. Pursuant to 35 Ill. Adm. Code 732.855(a), a minimum of three written bids must be obtained. (Sections 57.1(a) and 57.7(c)(4)(C) of the Act)

- N/A available

The budget contains only one bid.

5. The budget includes costs for remediation that were obtained via bidding. Pursuant to 35 Ill. Adm. Code 732.855(b), the bids must be summarized on forms prescribed and provided by the Illinois EPA. The bid summary form, along with copies of the bid requests and the bids obtained, must be submitted to the Illinois EPA in the associated budget. If more than the minimum three bids are obtained, summaries and copies of all bids must be submitted to the Illinois EPA. (Sections 57.1(a) and 57.7(c)(4)(C) of the Act)

The bid contained in the budget was not included on the appropriate Illinois EPA forms.

6. All plans, budgets, and reports must be submitted to the Illinois EPA on forms prescribed and provided by the Illinois EPA and, if specified by the Illinois EPA in writing, in an electronic format pursuant to Section 57.6(a) of the Act and 35 Ill. Adm. Code 732.110(a). The budget was not prepared and submitted on Illinois EPA forms.

The budget contains a mix of forms, and does not fit into the appropriate line items as prescribed by the Illinois EPA. One example is the budget summary. Furthermore, costs are not properly contained in the applicable sections, an example of which is remediation system costs that were included under the the form titled "Consultant's Materials Costs Form." These costs should be placed in the form titled "Remediation and Disposal Costs Form." All required Illinois EPA budget forms as well as instructions may be found and completed on the Internet at:

<http://www.epa.state.il.us/land/lust/forms/budget-forms/forms-1/table-of-contents.html>

Additionally, all tasks must be presented with regards to specific tasks and hours for each task performed.

With regards to future submittals, the Agency is requesting that past budget proposals not be included, as this creates confusion with determining the full proposed budget. Additionally, for ease of future reviews, please type and submit all required information to further avoid confusion or illegibility.

TAH:CC\