

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SIMONS AUTO SERVICE CENTER,)	
)	
Petitioner,)	
)	
v.)	PCB 09-37
)	(LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

NOTICE OF FILING AND PROOF OF SERVICE

To: Clerk	Melanie A. Jarvis, Assistant Counsel
Illinois Pollution Control Board	Division of Legal Counsel
State of Illinois Center	Environmental Protection Agency
100 W. Randolph, Ste. 11-500	1021 North Grand Avenue East
Chicago, IL 60601	PO 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 (d), a Petition for Review of Agency LUST Decision, a copy of which is herewith served upon the Illinois Environmental Protection Agency.

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 the Illinois Environmental Protection Agency by enclosing same in an envelope addressed to Melanie A. Jarvis, Assistant Counsel, with postage fully prepaid, and by depositing said envelope in a U.S. Post Office Mailbox in Springfield, Illinois on the 26 day of February, 2009.

Respectfully submitted,
SIMONS AUTO SERVICE CENTER, Petitioner

BY: MOHAN ALEWELT, PRILLAMAN & ADAMI

BY: 
Fred C. Prillaman

Fred C. Prillaman
MOHAN, ALEWELT, PRILLAMAN & ADAMI
1 North Old Capitol Plaza, Suite 325
Springfield, IL 62701-1323
Telephone: 217/528-2517
Facsimile: 217/528-2553

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SIMONS AUTO SERVICE CENTER,)	
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Petitioner,)	
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v.)	PCB 096-37
)	(LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

PETITION FOR REVIEW OF AGENCY LUST DECISION

NOW COMES Petitioner, Simons Auto Service Center ("Simons"), pursuant to Section 40 of the Illinois Environmental Protection Act, 415 ILCS 5/40, and Part 105 of the Illinois Pollution Control Board Rules, 35 Ill. Admin. Code Sections 105.400 through 105.412, and hereby appeals that portion of the LUST decision issued October 21, 2008, by Respondent Illinois Environmental Protection Agency ("Agency"), in which the Agency failed and refused to approve the payment of \$12,485.58 for costs, and in support thereof states as follows:

A. BACKGROUND

1. Simons is the owner of the underground petroleum storage tanks at the service station located at 10085 Lincoln Trail in Fairview Heights, St. Clair County, Illinois, LPC #1630525018, Incident #20071485 -- 54576.

2. On June 27, 2008, the Agency received from Simons its request for reimbursement for \$36,734.36, for the billing period of November 1, 2007 through May 31, 2008, together with all required engineer's certifications, owner/operator billing certifications, and related Agency forms duly completed, and all required supporting documentation and justification, as required by applicable law.

3. All line-item sums requested for reimbursement were within the Agency's previously-approved format for early action costs.

4. The amounts requested for reimbursement were certified by Simons, on the Agency's own forms, as being correct and reasonable and submitted in accordance with applicable laws, as follows:

- The attached application for payment and all documents submitted with it were prepared under the supervision of the licensed professional engineer or licensed professional geologist and the owner and/or operator who signatures are set forth below and in accordance with a system designed to assure that qualified personnel properly gathered and evaluated the information provided. The information in the attached application for payment is, to the best of my knowledge and belief, true, and complete.
- The costs for remediating the above-listed incident are correct, are reasonable, and if applicable, were determined in accordance with Subpart H: Maximum Payment Amounts, Appendix D. sample Handling and Analysis amounts, and Appendix E Personnel Titles and Rates of 35 Ill. Adm. Code 732 or 734.

5. Nevertheless, on October 21, 2008, the Agency prepared its letter notifying Simons that it was refusing to approve for payment \$12,485.58 of said costs, the sole and entire reason for the rejection appearing in the Agency's final decision attached hereto as Exhibit A.

B. DATE ON WHICH THE AGENCY'S FINAL DECISION WAS SERVED

The Agency's final decision was dated October 21, 2008. On December 1, 2008, the parties timely filed a request for 90-day extension of the appeal period, pursuant to Section 40(a)(1) of the Illinois Environmental Protection Act, 415 ILCS 5/40(a)(1), which request has since been granted, extending to March 1, 2009, the deadline for filing an appeal. This appeal is timely filed.

C. CONFIRMATION OF APPROVAL OF \$9,248.78 FOR PAYMENT

Simons is not appealing the \$9,248.78 approved payment, and hereby confirms that the Agency will, in fact, prepare a voucher in that amount for submission to the Comptroller's Office for payment, as funds become available based upon the date the Illinois EPA received the application for payment.

D. ACCEPTANCE OF \$105.00 DEDUCTION FOR COSTS FOR FP DISPOSAL

Simons, though not conceding that its application for payment of \$180.00 for FP Disposal lacks supporting documentation, does not appeal from that deduction.

E. GROUNDS FOR APPEALING THE \$12,380.58 IN REJECTED COSTS

1. The majority of the \$12,380.58 costs rejected by the Agency were costs submitted per bidding, which the Agency wrongfully rejected for reasons nowhere found in applicable statutes, regulations, or even

on the Agency's own forms. Specifically, the Agency rejected \$10,708.45 of the costs for five (5) reasons, none of which are reasons for rejection provided in applicable statutes, regulations, or even on the Agency's own forms, the first 4 of which are as follows:

a. Per the Agency, "in order for the bids to be reviewed, . . . a breakdown of what is included in the bid . . . must be provided." This is legally incorrect. No statutes or regulations, nor even the Agency's own forms, require such "breakdowns" to be provided, either for purposes of "reviewing" the bids or, pertinent to this appeal, for reimbursement of costs.

b. Per the Agency, "in order for the bids to be reviewed, . . . a breakdown of what . . . specific costs exceed the Subpart H rates must be provided." This is equally incorrect, as a matter of law. No statutes or regulations, nor even the Agency's own forms, require such "breakdowns" to be provided, either for purposes of "reviewing" the bids or, pertinent to this appeal, for reimbursement of costs.

c. Per the Agency, "in order for the bids to be reviewed, . . . justification must be provided to document why the bids were necessary." The Agency is legally incorrect on this argument, as well, since no statutes or regulations, nor even the Agency's own forms, require such "justification" to be provided, either for purposes of "reviewing" the bids or, pertinent to this appeal, for reimbursement of cost.

d. Per the Agency, "in order for the bids to be reviewed, . . . justification must be provided to document . . . why the Subpart H rates could not be met for this project." This reason for rejection is equally flawed; no statutes or regulations, nor even the Agency's own forms, require such "justification" to be provided, either for purposes of "reviewing" the bids or, pertinent to this appeal, for reimbursement of cost.

2. If such "breakdowns" and/or "justifications" were required (which they were not; indeed, neither of these terms appear anywhere in the regulations), they would have been furnished by Simons on the Agency's own forms, in response to the Agency's request to furnish same. However, the Board's Regulations are very clear on this point: bids submitted in accordance with 35 Ill. Adm. Code 734.855 shall include only the degree of specificity required on the form itself, as prescribed by the Agency. The Agency's forms did not ask for this so-called "breakdown" or "justification" information. Simons did

exactly what the Agency, in its forms, required, yet in its rejection letter the Agency, for the first time, demanded that the information requested on its own forms was not enough, and that more was needed. This is a fundamentally unfair reason to deny reimbursement, akin to rejecting bids on a public project that fail to conform to the specifications first published after the bidding is closed.

3. None of these after-the fact requests for further information appear anywhere in the regulations or in the form prepared by the Agency itself, which form was fully completed by each of the bidders and by Simons, as well as by Simons' consulting engineer. The Agency does not complain that the form itself is incomplete.

4. Indeed, at no time during the Agency's consideration of Simons request for reimbursement did the Agency request any further or additional information concerning any particular item of remediation and disposal.

5. As and for its fifth reason for rejecting costs arising from bidding, the Agency mistakenly argues that Simons' request for reimbursement exceeds the lowest bids. This is simply not true. Simons' application for payment included \$7,991.77 for Excavation, Transportation and Disposal (E, T & D), which was substantially less than the \$11,399.36 which the lowest bidder, Kevin Williams Excavating, LLC, bid on this item, for the reason that Simons excavated only 78.52 cubic yards of contaminated soil, not the 112 cubic yards estimated by Williams in making his bid. Similarly, Simons' application for payment included a \$2,716.68 item for Backfill, which was also substantially below the \$3,599.48 bid of Williams, the lowest of the three bidders, also for the reason that less clean fill (87.55 cubic yards) was used than estimated by Williams (116 cubic yards) in bidding on Backfill. However, despite the fact that Simons' application for reimbursement for these two items used the lowest rates appearing in the three bids (Williams' bid rates were \$101.78/cubic yard for E, T & D and \$31.03/cubic yard for Backfill, and both were the lowest of the 3), the Agency inexplicably states that Simons requested reimbursement at rates much higher than Williams' bids, rates that nowhere appear anywhere in the Record, and certainly not in the request for reimbursement. The Agency is simply refusing to acknowledge a typographical error appearing in Simons' request for

reimbursement, on the "Equipment" form, where the quantities and rates for E, T & D and Backfill are expressed in tons rather than in cubic yards, an obvious typo that should not have affected the outcome, yet, the Agency failed to contact Simons or his consultant upon discovering this typo, and failed to give Simons or his consultant the opportunity to explain and/or clarify, choosing instead to use this against Simons.

6. As to the remaining \$1,672.13 in wrongfully rejected costs, the Agency mistakenly believes that they lacked supporting documentation. Specifically, \$1,270.48 was deducted for the cost for direct push drilling, yet all required information and supporting documentation necessary to reimburse for this cost, was, in fact, submitted with the application, and is part of this record. Moreover, the Agency erroneously deducted \$401.65 for concrete replacement, even though that particular request for reimbursement was supported by adequate documentation which was required at the time. Agency policy did not require the application to include names of the laborers who performed the framing, pouring, screeding and finishing, or their hours of works or rates of pay, so, in accordance with long-standing Agency policy, Simons furnished only the paid invoice itself (totaling \$614.75)¹.

7. To the extent that the Agency ascertained, during the pendency of the subject request for reimbursement, that either the facts or conclusions presented by Simons were inaccurate or incomplete, the Agency had a duty to disclose such information in writing during the Agency's statutory review period, but it failed to do so, and failed to request additional or clarifying information concerning its purported reasons for denial.

8. In rejecting \$12,380.58 for costs of reimbursement for this remediation work, the Agency acted arbitrarily and contrary to the certified facts presented, contrary to its own prior interpretations of applicable laws and policies, contrary to its own established customs and practices, and contrary to the law.

F. REQUESTED RELIEF

¹It was only after the Agency first advised Simons that it was changing its policy and was now requiring such labor records that Simons, in fact, provided them to the Agency, showing that \$401.65 was spent on labor for concrete replacement, so the Agency knows that this particular item is fully supported by required documentation.

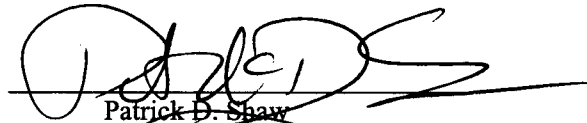
WHEREFORE, Petitioner, Simons Auto Service Center, prays that: (a) the Agency produce the Record; (b) a hearing be held; (c) the Board find that Simons application for LUST reimbursement contained all information and documentation necessary to support the \$12,380.58 for costs rejected by the Agency, and, accordingly; (d) the Board direct the Agency to restore the \$12,380.58 in costs rejected and to prepare a voucher for \$12,380.58 and to submit that voucher to the Comptroller's Office for payment as funds become available, based upon the date the Agency received the subject application for payment; (e) the Board grant Simons his attorney's fees; and (f) the Board grant Simons such other and further relief as it just.

Respectfully submitted,

SIMONS AUTO SERVICE CENTER,
Petitioner

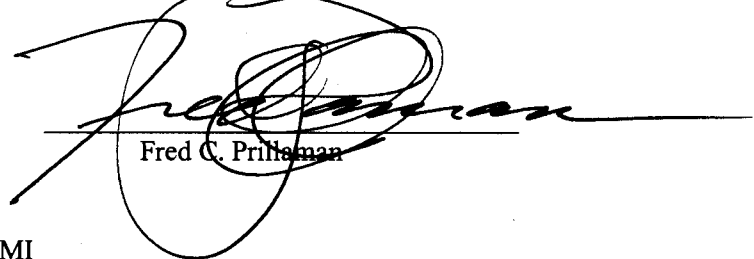
By his attorneys,
MOHAN, ALEWELT, PRILLAMAN & ADAMI

By:



Patrick D. Shaw

By:



Fred C. Prillaman

Patrick D. Shaw
Fred C. Prillaman
MOHAN, ALEWELT, PRILLAMAN & ADAMI
1 N. Old Capitol Plaza, Ste. 325
Springfield, IL 62701
Telephone: 217/528-2517
Facsimile: 217/528-2553

THIS FILING IS SUBMITTED ON RECYCLED PAPER



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) 814-6025

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

217/782-6762

OCT 21 2008

CERTIFIED MAIL #

7007 0220 0000 0150 7076

Simons Service Auto Service Center
Attention: Robert Simons
CW³M Company Inc.
PO Box 571
Carlinville, Illinois 62626

Re: LPC #1630525018 - St. Clair County
Fairview Heights/Simons Auto Service Center
10085 Lincoln Trail
Leaking UST Incident No. 20071485
Claim No. 54576
Leaking UST FISCAL FILE

Dear Mr. Simons:

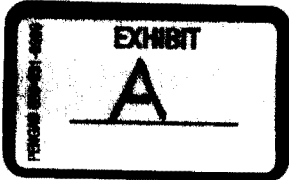
The Illinois Environmental Protection Agency has completed the review of your application for payment from the Underground Storage Tank Fund for the above-referenced Leaking UST incident pursuant to Section 57.8(a) of the Illinois Environmental Protection Act (Act), and 35 Ill. Adm. Code 732, Subpart F. This information is dated June 27, 2008 and was received by the Agency on June 27, 2008. The application for payment covers the period from November 1, 2007 to May 31, 2008. The amount requested is \$36,734.36.

The deductible amount to be assessed on this claim is \$15,000.00, which is being deducted from this payment. In addition to the deductible, there are costs from this claim that are not being paid. Listed in Attachment A are the costs that are not being paid and the reasons these costs are not being paid.

On June 27, 2008, the Agency received your application for payment for this claim. As a result of the Agency's review of this application for payment, a voucher for \$9,248.78 will be prepared for submission to the Comptroller's Office for payment as funds become available based upon the date the Agency received your complete request for payment of this application for payment. Subsequent applications for payment that have been/are submitted will be processed based upon the date complete subsequent application for payment requests are received by the Agency. This constitutes the Agency's final action with regard to the above application(s) for payment.

An underground storage tank owner or operator may appeal this final decision to the Illinois Pollution Control Board (Board) pursuant to Section 57.8(i) and Section 40 of the Act by filing a petition for a hearing within 35 days after the date of issuance of the final decision. However,

ROCKFORD - 4302 North Main Street, Rockford, IL 61105 - (815) 967-7760 • DES PLAINES - 9511 W. Harrison St., Des Plaines, IL 60016 - (847) 294-4000
ELGIN - 395 South State, Elgin, IL 60120 - (847) 698-3131 • PEORIA - 5415 N. University St., Peoria, IL 61614 - (309) 693-5463
BUREAU OF AIR AND PEORIA - 7626 N. University St., Peoria, IL 61614 - (309) 693-5462 • CHAMPAIGN - 2125 South First Street, Champaign, IL 61820 - (217) 247-5800
SPRINGFIELD - 4500 S. Sixth Street Rd., Springfield, IL 62706 - (217) 786-6892 • COLTONVILLE - 3009 Main Street, Coltonville, IL 62234 - (618) 346-8130
MADISON - 2309 N. Main St., Suite 110, Madison, IL 62238 - (618) 993-7200



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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 applicant 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
Springfield, Illinois 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, Illinois 60601
312/814-3620

If you have any questions or require further assistance, please contact Theresa Sitton or Brian Bauer of my staff at 217/782-6762.

Sincerely,



E. William Radlinski, Manager
Planning and Reporting Section
Bureau of Land

EWR:TS:bjh\08753.doc

cc: CW³M Company Inc.
LCU File
Theresa Sitton

Attachment A
Technical Deductions

Re: LPC # 1630525018 - St. Clair County
Fairview Heights Simon Auto Service
10085 Lincoln Trail
Leaking UST Incident No. 20071485
Claim No. 54576
Leaking UST Fiscal File

Citations in this attachment are from the Environmental Protection Act (Act), as amended by Public Act 92-0554 on June 24, 2002, and 35 Illinois Administrative Code (35 Ill. Adm. Code).

Item # Description of Deductions

1. \$105.00, deduction for costs for FP disposal, which lack supporting documentation. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 734.630(cc). Since there is no supporting documentation of costs, the Illinois EPA cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act. Therefore, such costs are not approved pursuant to Section 57.7(e)(3) of the Act because they may be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of Title XVI of the Act.

The invoice from Safety Klean Systems was for \$75.00, the amount requested was \$180.00.

2. \$11,978.93 for costs that lack supporting documentation and justification. Pursuant to 35 Ill. Adm. Code 734.605(b)(9) and 734.630(cc), application for payments must include an accounting of all costs, including but not limited to, invoices, receipts, and supporting documentation showing the dates and descriptions of the work performed. In addition, reasonableness of costs cannot be determined without documentation. Pursuant to 734.630(ee), costs incurred during early action that are unreasonable are ineligible.

*\$ 1,270.48 Direct Push Drilling.

*\$ 7,991.77 Excavation, Transportation, and Disposal.

*\$ 2,716.68 Backfill.

\$10,708.45 of the costs in #1 above were submitted per bidding. In order for the bids to be reviewed pursuant to 35 Ill. Adm. Code 734.855, a breakdown of what is included in the bid and what specific costs exceed the Subpart H rates must be provided.

Justification must be provided to document why the bids were necessary and why the Subpart H rates could not be met for this project.

In addition, the amount (\$10,708.45) submitted for reimbursement exceeds the lowest rates that were submitted in the lowest bid by \$3,541.42. The lowest bid for ET&D was \$101.78 per cubic yard and backfill was \$31.03 per cubic yard however the request for reimbursement requested \$150.70 per cubic yard ET&D and \$47.63 per cubic yard for backfill. Pursuant to 35 Ill. Adm. Code 734.630(cc) these cost lack supporting documentation.

4. \$401.65, deduction for costs for concrete replacement, which lack supporting documentation. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 734.630(cc). Since there is no supporting documentation of costs, the Illinois EPA cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act. Therefore, such costs are not approved pursuant to Section 57.7(c)(3) of the Act because they may be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of Title XVI of the Act.

The invoices from Metro Concrete total \$614.75, the amount requested was \$1,016.40.

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