BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

PRIME LOCATION PROPERTIES, LLC, Petitioner,	)	
v.	)	PCB 09-67
	)	(LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

NOTICE OF FILING AND PROOF OF SERVICE

To: John T. Therriault, Acting Clerk
Illinois Pollution Control Board
100 West Randolph Street
State of Illinois Building, Suite 11-500
Chicago, IL 60601

Carol Webb
Hearing Officer
Illinois Pollution Control Board
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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 PETITIONER'S REPLY BRIEF, a copy of which is herewith served upon the hearing officer and upon the attorneys of record in this cause.

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 hearing officer and counsel of record of all parties to this cause by enclosing same in envelopes addressed to such attorneys and to said hearing officer with postage fully prepaid, and by depositing said envelopes in a U.S. Post Office Mailbox in Springfield, Illinois on the 13th day of July, 2009 and to counsel of record via email.

Respectfully submitted,
PRIME LOCATION PROPERTIES, LLC, Petitioner

BY: MOHAN, ALEWELT, PRILLAMAN & ADAMI

BY: /s/ Patrick D. Shaw

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PETITIONER'S REPLY BRIEF

NOW COMES Petitioner, Prime Location Properties, LLC, by its undersigned counsel, and for its reply brief, states as follows:

I. OBJECTIONS TO THE BURDEN OF PROOF

The Agency's statement of the burden of proof tellingly omits the all important detail, which is what exactly the petitioner must prove. "That burden is to show that the plan, as proposed by the applicant, will not result in the violation of the Act . . .." Browning-Ferris Industries of Illinois v. Pollution Control Bd., 179 Ill. App. 3d 598, 607 (2nd. Dist. 1989); see also John Sexton Contractors Co. V. PCB, 201 Ill. App. 3d 415, 425 (1st Dist. 1990)("To prevail before the Board, [petitioner] had the burden of establishing that its proposed . . . plan would not result in any future violations of the Act or regulations . . .."); Prairie Rivers Network v. Ill. Pollution Control Bd., 335 Ill. App. 3d 391, 400-401 (4th Dist. 2002) ("the petitioner has the burden of proving that the requested permit would not violate the Act or the Board's regulations").

Since the burden is to prove the plan would not violate the Act or regulations, the starting

point should be the law that Agency believes has been violated. Unfortunately, the Agency's Response Brief is twelve pages that fail to identify the provisions of the Act or regulations that would be violated, plus twenty-one single-spaced pages of the "Relevant Law." One can only assume that the Agency either wants the Board to find a legal violation, or hopes that the Board misconstrues the nature of the burden of proof in these proceedings.

II. OBJECTIONS TO STATEMENTS OF FACT

The factual background provided by the Agency is sparse and incomplete and Petitioner recommends it's longer, more detailed statement. Herein, Petitioner will simply raise objections to those statements that are not supported by the record:

1. Oddly, the first statement of fact is based upon a document that is not in the administrative record. It is an exhibit to the petition for review that the Board rejected (Order, March 19, 2009), and the Agency contends is a void document. (Mot. Dism., May 26, 2009) Furthermore, the Agency's characterization of the instrument is incorrect. The deed does not show that the property was sold "for the consideration of $10.00 on March 26, 2006." (Agency Resp. Brief, at p. 3) The deed actually states "consideration of the sum of $10.00 (TEN AND 00/100 DOLLARS) and other good and valuable consideration." (Pet. Ex. 4) A deed can state the actual consideration, but more frequently a deed will merely state a "[n]ominal dollar amount, and other good and valuable consideration." Callaghan's Illinois Legal Forms, § 1A.500 (1999).

7. The area map does not show "that there were clean borings surrounding the area"

of excavation. (Agency Resp. Brief, at p. 7) The consultant was never able to sample inside of the area of the tanks and repeatedly sought permission to remove the site obstacles that would permit such borings. (R. 19) The area map is accompanied by this explanation from the engineer:

> **Previously, the IEPA has requested that it be determined which tanks had releases, and at this point it is impossible to tell which tanks have caused the contamination. The OSFM representative on-site during the tank pull will make the determination as to which tanks have leaked and at that time the eligibility will be amended in order to reflect his determination and only those tanks and excavation deemed eligible will be requested for reimbursement.**

(R. 23, at p. 12 (emphasis added)).

III. THE "ISSUE" IDENTIFIED BY THE AGENCY NEED NOT BE DECIDED.

As discussed in the Burden of Proof section, the actual issue is whether the plan and budget would violate the Act or regulations. Even if we were to assume for the sake of argument that a new incident occurred in 2006 during the ongoing cleanup of the 2001 incident, there is nothing in the Act or the regulations that would make such a finding material. The LUST program is premised on cleaning up an underground storage tank "site." (415 ILCS 5/57.8(a)(4)) The number of occurrences on a site doesn't matter, and it certainly doesn't require a new deductible. Mac Investments v. OSFM, PCB No. 01-129 (Dec. 19, 2002); Swif-T-Food Mart, PCB No. 03-185 (May 20, 2004).

IV. WHERE DID THE ALLEGED 2006 PRODUCT COME FROM WHEN THE TANKS WERE EMPTIED AND OUT OF SERVICE LONG BEFORE 2006?

This simple question is unanswered and unaddressed by the Agency. The tanks were out of service before the 2001 incident was reported. (R.4) The consultant drained the tanks, a fact confirmed by the Agency in an October 3, 2003 letter, in which the Agency stated that "as much of the regulated substance as possible had been removed." (R. 22)[1]

The Agency appears to believe that Petitioner disagrees with the prior Agency decisions in this matter. It is clear that the course of remediation was ill-conceived in hindsight, but the reason to review the investigation and correction activities at the site is merely to show that those activities were insufficient to rule out releases from the seven tanks for which the Office of the State Fire Marshall ("OSFM") issued an eligibility determination for the 2001 release. (R. 15) The Agency sought to delay the investigation into all seven tanks by refusing to authorize removal of site obstructions that would permit soil borings next to the tanks, as well as removal of the tanks themselves, which the licensed professional engineer indicated made it "impossible" to rule out releases from all of the tanks.

It may or may not have been reasonable for the Agency to direct the investigation toward the tanks closest to the property line and farthest from the building, but its willful blindness to conclude that once the tanks were examined, the releases from them had to have originated from recent events.

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[1] Petitioner asserts this statement has particular significance because of its independent importance. Abandoned tanks containing petroleum products are a threat to human health and the environment. Had the LUST reviewer believed the tanks still contained product, he would almost certainly ordered them drained.

V. THE OSFM MAKES THE ELIGIBILITY AND DEDUCTIBILITY DETERMINATION, AS WELL AS REVIEWS THE TANKS.

Another oddity in this case is that the Agency does not appear to know that it no longer has responsibility for deductibility determinations. The Agency states:

> **The Petitioner also seems to contend that the Office of State Fire Marshal (OFSM) should determine the applicable deductible. The law is well settled that the OSFM's decisions do not determine the applicable deductible. Section 22.18(d)(3)(G) of the Act provides that the deductible application must be submitted to the Illinois EPA and that the Illinois EPA makes the deductible determination. Mick's Garage v. IEPA, PCB 03-126 (Dec. 18, 2003).**

(Resp. Brief, at p. 9)

Of course, Section 22.18(d)(3)(G) was amended, as noted by the very case the Agency cites:

> **[U]nder the original section of the Environmental Protection Act (Act) regarding UST Fund reimbursement the Agency was responsible for making eligibility and deductibility determinations. 415 ILCS 5/22.18b(d)(3) (1992). This section was repealed and a new Title XVI enacted, effective September 13, 1993, changing the agency responsible for making eligibility and deductibility determinations to the OSFM. 415 ILCS 5/57.9(c) (2002).**

Mick's Garage v. IEPA, PCB 03-126, at p. 4 n.2 (Dec. 18, 2003)(finding that the 1991 incident was governed by pre-1993 law).

The 1993 change has broader implications as well. Under the 1993 changes, "the OSFM now has a much greater role in the present UST program than in the previous ones. In particular, the OSFM must provide on-site assistance to the owner/operator for leak confirmation, evaluation and eligibility information. The OSFM is also the state entity responsible for making eligibility and deductibility determinations (access to the fund issues)." Kathe's Auto Service Center v. IEPA, PCB 96-102 (Aug. 1, 1996).

On February 4, 2002, OSFM issued an eligibility and deductibility determination, finding that all seven tanks were eligible for reimbursement from the Fund, subject to a $15,000 deductible. (R. 15) A representative of OSFM was also on-site during the 2006 incident: "The OSFM official on-site during tank removal activities confirmed that all seven (7) tanks on-site had releases. As a result, Incident No. 20061558 was issued on December 13, 206 and was noted as being a re-reporting of the 20011314 incident." (R. 36) The Agency is overstepping its role by disputing deductibility determinations and on-site activities entrusted by law to the OSFM.

VI. THE TANK OWNER/OPERATOR HAD NO DUTY TO APPEAL PRIOR AGENCY DENIAL LETTERS.

The Agency appears to argue that this is an impermissible effort to seek reconsideration of a prior Agency decision. This argument, if accepted, would essentially gut the LUST program. The complication with remediating underground storage tanks are that all of the activities take place under the ground. Consequently, investigation and remediation may uncover new data that give rise to more investigation and remediation. The Agency's letters in the record reflect this. For example, the October 22, 2002, denial letter refused to allow removal of the USTs, contaminated backfill, the building, canopy, and underground retaining walls, but stated that "[a]fter further investigation has been performed and the full extent defined, some or all of the above activities may be approved." (R.18) To say that new information obtained from on-site activities cannot be presented to the Agency to seek approval of a new plan would be to force the premature closing of any underground storage tank site with conditions worse than may have been expected.

Furthermore, the Agency seems to place particular importance on the November 23, 2005 decision letter. (R. 24) As an initial matter, that decision letter, required modifications, and consequently, a new plan and budget were submitted on February 23, 2006. (R. 25) That documents stated: "While we disagree with the Agency's contention that only USTs #2 & #3 have shown evidence of a possible release, in order to move the site forward, the budget has been modified so that nothing beyond the proposed excavation and removal of USTS #2 & #3 is included in this budget. Furthermore, if other USTs are found to have released while on-site, they will be appropriately addressed." (R.25) On February 24, 2006, the Agency issued a decision letter, stating that "the plan is approved." (R.27) Subsequent on-site activities confirmed releases from the remaining USTs, and thus further corrective action is appropriate.

VII. CONCLUSION

Petitioner has met its *prima facie* burden of demonstrating that there is no violation of any statute or regulation that would occur by approving the plan and budget. In fact, the Agency's notion that underground storage tank releases at a property are remediated via discrete cleanups of separate "incidents," subject to separate deductibles, clearly violates the Act. 415 ILCS 5/ 57.8(a)(4) ("Only one deductible shall apply per underground storage tank site."). Wherefore, Petitioner renews its request for reversal of the Agency's decision denying the plan and budget, along with the other relief requested in the brief.

Respectfully submitted,

PRIME LOCATION PROPERTIES, LLC,
Petitioner,

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