

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

S&D REALTY, INC.,)
)
Petitioner,)
)
v.) PCB 09-33
) (UST Appeal)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
Respondent.)

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STATE OF ILLINOIS
Pollution Control Board

NOTICE

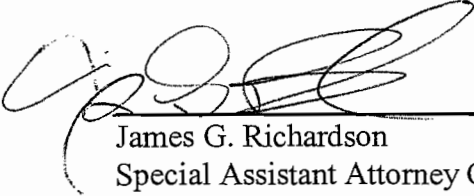
John Therriault
Acting Clerk
Illinois Pollution Control Board
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601-3218

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601-3218

Mike Abel
Cohen and Hussein, P.C.
6901 West 111th Street
Worth, Illinois 60482

PLEASE TAKE NOTICE that I have today caused to be filed a MOTION IN LIMINE DIRECTED TO THE HEARING OFFICER with the Illinois Pollution Control Board, copies of which are served upon you.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY



James G. Richardson
Special Assistant Attorney General

Dated: October 29, 2009
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544

THIS FILING IS SUBMITTED ON RECYCLED PAPER

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MOTION IN LIMINE DIRECTED TO THE HEARING OFFICER

NOW COMES the Respondent, the Illinois Environmental Protection Agency (“Illinois EPA”), by one of its attorneys, James G. Richardson, Assistant Counsel and Special Assistant Attorney General, and, pursuant to 35 Ill. Adm. Code 101.500 and 101.502, hereby respectfully moves the Hearing Officer to enter an order preventing Eric D. Hasman from testifying concerning, or the Petitioner presenting any other form of evidence arising from or related to, an August 27, 2009 report prepared by Hasman concerning the UST site that is the subject of this appeal. In support of this motion, the Illinois EPA states as follows:

I. FACTS AND LAW

1. On September 3, 2009, pursuant to Illinois Supreme Court Rule 213(f)(3), Petitioner disclosed Eric D. Hasman as a retained expert in this UST appeal, advised that he “will be testifying about the costs for the work that was completed on the remediation project for which the property owner does not have the physical receipts,” and provided a copy of his August 27, 2009 report containing his

conclusions, opinions, and their bases. (See Attachment A).

2. Item 2 of the Accounting Deductions in the Illinois EPA's October 10, 2008 decision letter indicates that \$98,760.00 of costs were deducted from Petitioner's claim because they lacked supporting documentation. (Note – This number and \$46,960.00 in the second paragraph of Item 2 should be \$92,221.50 and \$40,421.50, respectively. This was a typographical error that only appeared in the decision letter. The amount authorized for payment by the Illinois EPA was based upon the correct amounts). Administrative Record ("AR") p. 2. The costs that Hasman focuses on are contained within this deduction.

3. Petitioner has and continues to acknowledge that it does not have the necessary supporting documentation for these costs. In the June 13, 2008 cover letter to the reimbursement package underlying this case, Hasman writes that a previous consultant, Courtesy Services, Inc., "was not able or willing to provide complete invoicing and only the provided excel sheets which they stated was their invoice(s) for SD." AR p.12. In concluding his August 27, 2009 report, Hasman states "It is my opinion, based upon my experience and upon a reasonable degree of geological and engineering certainty, that the above mentioned remediation was performed on the subject property and that costs for the above work, *for which the property owner does not have the physical receipts*, totals the following" and references a Total of \$86,694.14. (Emphasis added) (See Attachment A).

4. Referencing Hasman's breakdown of this \$86,694.14, Illinois EPA comments applicable to these items from the review that resulted in the October 10, 2008 decision letter are as follows:

\$2,400.00 soil disposal – Hasman contends that 1050 cubic yards should have been authorized for payment, totaling \$21,000.00 (1050 x \$20.00 = \$21,000.00). In reality, the Illinois EPA authorized payment for \$21,300.00 for soil disposal costs to Community Landfill. Supporting documentation appears on pages 45 and 46 of the Administrative Record. However in preparing this Motion, it was discovered that the Illinois EPA actually overpaid the Petitioner for soil disposal by \$9,100.00. During the original review, the reviewer believed that the units

referenced on pages 45 and 46 were tons instead of cubic yards as tons were the measurement used in other parts of the package. As the unit of measurement is really cubic yards, only 610 cubic yards should have been authorized for payment ($610 \times \$20.00 = \$12,200.00$) since this is the maximum amount of soil allowed for payment under the regulations for the number and size of tanks removed at this site.

\$33,004.03 backfill – The Illinois EPA authorized payment of \$7,400.00 for the hauling of the backfill based upon an invoice on pages 47 and 48 of the Administrative Record. No additional payments were authorized since there was no supporting documentation as to the cost of the backfill itself.

\$2,097.00 acquiring permits – Appears on a summary sheet (AR p.18) but there is no supporting documentation.

\$6,872.80 concrete removal – Appears on a summary form (AR p.22) but there is no supporting documentation.

\$32,320.33 concrete installation – Hasman recalculated this figure. In the original reimbursement package, it was \$34,927.20 on a summary form (AR p.22). Again, there was no supporting documentation.

\$10,000.00 paving and installation – Appears as dismantle & reassemble gasoline pumps and pipe lines on a summary form (AR p.22). No supporting documentation.

5. In reimbursement appeals, the applicant for reimbursement has the burden to demonstrate that costs are related to corrective action, properly accounted for, and reasonable. Rezmar Corporation v. Illinois EPA, PCB 02-91 (April 17, 2003) p. 9. In a recent appeal, the reimbursement applicant suggested that the Part 732, Subpart H rules on maximum payment amounts eliminated the need to account for all costs. T-Town Drive Thru, Inc. v. Illinois EPA, PCB 07-85 (April 3, 2008) pp.22-23. The Pollution Control Board (“Board”) declined the suggestion, noting the requirement of 35 Ill. Adm. Code 732.601(b)(9) that a complete application for payment 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” and the fact that the Illinois EPA had historically always requested such information.

6. Although it is unfortunate that Petitioner does not have the needed supporting documentation for these costs, it is neither the first nor will it be the last applicant that finds itself in this predicament. The Illinois EPA authorized the payment of costs that had supporting documentation. But expert opinions and the calculation of estimates are not substitutes for supporting documentation that identifies specific materials, services, quantities and costs. The Hasman report has no probative value for a review of the Illinois EPA's October 10, 2008 decision.

7. Let alone the fact that the Hasman report does not change the status quo, another basis for the granting of this Motion is that the Hasman report was not considered by the Illinois EPA in making its October 10, 2008 decision. Like the need to account for all costs, another historical principle concerning UST appeals is that the Board will not consider new information not before the Illinois EPA prior to its final determination regarding the issues on appeal. Kathe's Auto Service Center v. Illinois EPA, PCB 95-43 (May 18, 1995) p. 14. Dated August 27, 2009, the Hasman report could not have been considered by the Illinois EPA in making its October 10, 2008 decision and therefore should not be considered by the Board in this appeal.

CONCLUSION

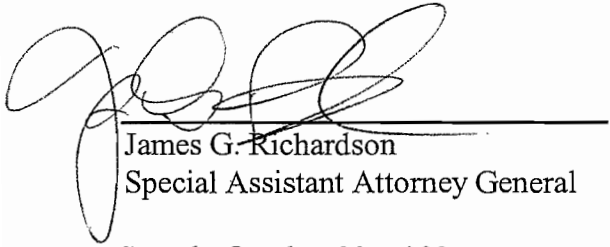
For the reasons stated herein, the Illinois EPA respectfully requests that the Hearing Officer grant this Motion in Limine and enter an order preventing Eric D. Hasman from testifying concerning, or the

Petitioner presenting any other form of evidence arising from or related to, an August 27, 2009 report prepared by Hasman concerning the UST site that is the subject of this appeal.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent



James G. Richardson
Special Assistant Attorney General

Dated: October 29, 2009



LAW OFFICES OF
COHEN & HUSSIEN

A PROFESSIONAL CORPORATION

6901 W. 111th Street, Worth, IL 60482

Phone 708.361.3030 ♦ Fax 708.361.4207

attorneys@cohenandhussien.com

September 3, 2009

Edward A. Cohen

Sana'a Hussien

Michael L. Abel

PARALEGALS

Maisoun N. Farhoud

Linda C. Moles

James G. Richardson

Illinois Environmental Protection Agency

1021 North Grand Avenue East

P.O. Box 19276

Springfield, Illinois 62794-9276

CHICAGO OFFICE

30 N. LaSalle Street

Suite 2299

Chicago, Illinois 60602

Phone 312.658.3406

Fax 312.658.3419

RE: S&D Realty, Inc. v. Illinois Environmental Protection Agency
PCB 09-33

Dear Mr. Richardson:

In accordance with Illinois Supreme Court Rule 213(f)(3), please be advised that the Petitioner is disclosing Eric D. Hasman as a retained expert in the above-referenced case. Mr. Hasman will be testifying about the costs for the work that was completed on the remediation project for which the property owner does not have the physical receipts. Enclosed, please find a copy of Mr. Hasman's report for this case, which details his conclusions and opinions and the bases therefor. Also enclosed, please find a copy of Mr. Hasman's resume.

Should you have any questions, please feel free to contact me.

Sincerely,

Michael Abel

MLA/as

Enclosures:

RECEIVED
Division of Legal Counsel

SEP 08 2009

Environmental Protection
Agency

"Attachments + 1"



ENVIRONMENTAL ENGINEERING SERVICES

SINCE 1967

9914 DERBY LANE, WESTCHESTER, IL. 60154-3768
TELEPHONE 708-345-9450 • FAX 708-345-9460

August 27, 2009

Cohen & Hussien

6901 W. 111th Street
Worth, IL 60482
Attn.: Mr. Michael Abel

RE: Reimbursement
3935 S. Archer Avenue
Chicago, Illinois 60632
IEMA #20041421 & 20050020

Dear Mr. Abel:

The following is a summary of the reimbursement activities that were not covered by the IEPA.

On January 7, 2005 the USTs removed and disabled. At this point the concrete above the USTs was removed and transported off-site. In addition, backfill soil was transported off-site. I have a few pictures of the disabled USTs and the open UST excavation area. Based upon my experience it is required for the site to be secure when tank removal / replacement is occurring. "Secure" means placing temporary fencing around the project area to limit access. According to the "bill" there was 1 permit issued from the City of Chicago for the property for the cost of \$1,372 (fencing). According to the "bill" there were 2 permits issued for the property costing of \$450 (expedite permits) and \$275 (expedite permits). It is my opinion, based upon my experience and upon a reasonable degree of geological and engineering certainty, these costs are reasonable for the time required for a person to go to the City of Chicago to apply for the permit and the costs of the permits.

On January 10-11, 2005 contaminated soils were taken to Community Landfill Corporation in Morris, Illinois. According to records obtained from the landfill, a total of 70 – 15 cubic yard (y^3) loads (\$21000 for a total of 1050 y^3) from the site were disposed at the landfill. However, only manifests for 62 loads (\$18,600) were able to be obtained and billed for in the Early Action reimbursement package. Since there were 8 loads not billed for but there is a confirmation from the landfill that 8 additional loads were accepted by the landfill, it is my opinion to a reasonable degree of geological and engineering certainty that there should be an additional \$2,400 for the soil disposal.

Based upon Section 732 Appendix C Backfill Volumes and Weights the total amount of soil that is allowed to be removed/excavated is 610 y^3 or 1,025 tons for 2-8,000 gallon USTs and 1-6,000 gallon UST (not including the overburden area or the piping excavation). The amount of soil for piping removal / replacement was calculated using a minimum of 100 linear feet of piping x 3 feet wide x 4 feet deep which equals 44.45 y^3 or 66.67 tons. The total amount of soil removal allowed for the piping and USTs is 1,091.67 tons.

There are statements from KMW Trucking located at 5110 S. Laramie, Chicago 60638, Jerzy Rafacz Trucking located at 5110 S. Laramie, Chicago 60638 and J.M.S. Trucking Company of Illinois located at 8532 Thistlewood, Darien, Illinois 60561 that show they transported soil and/or fill material. The statements are listed below:

KMW: transported 25 loads of contaminated soil (\$9375), 2 loads of concrete (\$350) and 1 load of CA-6 stone (\$175).

JRT: transported 12 loads of contaminated soil (\$4500)-not sure where these were disposed at, 2 loads of contaminated soil-Morris (\$450).

JMS: transported 37 loads out (\$7400) – the statement does not say soil or concrete.

Howell Trucking is listed on manifests but there is not a statement from them. In my experience, the same trucking companies who transport the soil / concrete often pickup backfill stone on the return trip from the landfill.

Based upon the 70 loads (1050 y³) of soil disposed at the Landfill, Laicon calculated the tons which is $1050 * 110$ (lbs/cubic feet - the conversion factor for clay) = 1,559 tons of soil was excavated (1,091.67 tons for piping/USTs and 467.33 tons for overburden). Laicon surmised that a minimum of 1,559 tons of backfill would be needed to fill the excavation area ($1050 * \$21.17 = \$33,004.03$). Based upon Section 732 Appendix C Backfill Volumes and Weights the total amount of backfill that is allowed to be removed/excavated is 1,235 tons for 2-8,000 gallon USTs and 1-6,000 gallon UST (not including the overburden area or the piping excavation).

Based upon the square footage of the land (12,869 sf) – minus the square footage of the building (2,166 sf) and landscaping (1,750 sf) which equals 8,953 sf Laicon calculated the amount of concrete to be removed and disposed of $8,953 * 1.306$ sf = \$6,872.80 for the concrete. The square footages were obtained from the Cook County Assessor.

On March 5, 2005 framing for the concrete to be poured on-site was occurring. The entire site except where the building stands had 1" stone fill visible thus indicating that the excavation area (the USTs and piping) have been filled in with stone. In my experience, excavations are filled with 3" stone to prevent "floating" and topped off with 1" stone then either asphalted/concreted. In addition, no gasoline pumps or pump islands were on the site. I mention this because the pumps / islands had to be disabled/removed in order to install new piping, pumps and islands. The concrete was poured a few days later. I have pictures of the site showing the framing and pump island area.

On August 23, 2005 monitoring wells MW1, MW2, MW3 and MW4 were installed. MW1 and MW3 were installed within the new concrete that was replaced in March 2005. The concrete was approximately 4" thick in these areas. Based upon the 4" thick concrete in the areas of MW1 and MW3, I assumed 4" thick concrete across the site and used the IEPA July 1, 2007 to June 30, 2008 pay rate for 4" concrete of \$3.61 per square foot. If the concrete is 6" thick then the pay rate is \$4.62 per sf.

Based upon the square footage of the land (12,869 sf) – minus the square footage of the building (2,166 sf) and landscaping (1,750 sf) which equals 8,953 sf Laicon calculated the amount of 4" concrete used. $8,953 * 3.61$ sf = \$32320.33 for the concrete. This number is different than the amount submitted in the original EA submittal due to recalculating and basing the multiplier on 4" concrete instead of 6" concrete.

In order for the dismantling of the pipe lines and pumps to occur the concrete had to be broken, removed and transported which it was as based upon the new concrete and the pictures.

It is my opinion, based upon my experience and upon a reasonable degree of geological and engineering certainty that the above mentioned remediation was performed on the subject property and that costs for the above work, for which the property owner does not have the physical receipts, totals the following:

\$ 2,400 soil disposal
\$ 33,004.03 backfill
\$ 2,097 acquiring permits
\$ 6,872.80 concrete removal
\$ 32,320.33 concrete installation
\$ 10,000 paving and installation

\$ 86,694.14 Total

It should be noted that for each step of the tank removal and installation a representative from the City of Chicago Department of Environment or the Fire Department is on-site to document or inspect the removal or installation of the USTs and piping.

If you have any question regarding the above or the enclosed, please feel free to call me at (708) 345-9450.

Sincerely,



Eric D. Hasman
Professional Geologist

ERIC D. HASMAN, L.P.G.
5140 Shadow Creek Drive #5
Oak Forest, IL 60452
708-535-0260

PROFESSIONAL EXPERIENCE

Laicon, Inc. - Licensed Professional Geologist: June 1993 to Present

Responsibilities include generating proposals, budgets, schedules / invoicing and involved in client relations.

Performs Phase I Environmental Site Assessments and Transaction Screens to determine environmental liabilities of industrial, commercial and residential properties throughout the United States.

Engages in all phases associated with Underground Storage Tank (UST) removal / abandonment, Leaking Underground Storage Tank (LUST) and Site Remediation Program (SRP) reporting. Composes 45 Day, Site Investigation, Corrective Action Plan, Corrective Action Completion Reports including Tiered Approach to Cleanup Objectives (TACO) Closure. Completes billing / budgeting reimbursement packages associated with site closures.

Other tasks include investigation and selection of remediation strategies for the clean up of sites. Site Supervisor / Professional Geologist for the installation and maintenance LUST/SRP remediation technologies such as air sparging / vapor extraction systems, bioremediation / biopiling / landfarming and active skimmer systems.

Project manager and on-site Professional Geologist for the advancement and placement of soil borings, installation of monitoring wells. Conducts and directs sampling to determine extent of soil / water contamination of LUST / SRP / non-hazardous or hazardous waste sites. Interprets data collected and reports findings. Projects have been completed following standards as provided by various financial institutions, government agencies, and ASTM

In charge of sampling for disposal, RCRA landfill or incineration permits various petroleum materials in bulk storage tanks. Performs air quality testing / waste water sampling at commercial and industrial buildings. Additional duties include writing and / or interpretation of Health & Safety Plans, Spill Prevention Control and Countermeasure Plans (SPCC). Executes asbestos surveys at properties and completing subsequent sampling reports / permitting. Involved in sewer flow and waste water treatment investigations and design.

Independent Contractor:

Duties included conducting, writing and reviewing Phase I Environmental Site Assessments.

Nova Environmental Services, Inc. - Environmental Specialist II:

Responsible for completing Phase I & II Environmental Site Assessments and UST removal throughout the United States for commercial and residential sites and composing subsequent reports. Supervised water well abandonment projects and assisted with UST closure reports. Responsible for Project management for UST and asbestos removal projects, collected bulk / dust / air quality samples and analyzing air samples during asbestos abatement projects in schools and industrial buildings using a polarized microscope. Other duties included writing asbestos (bulk and air) sampling reports. In addition, supervised training of employees. Involved in client relations, scheduling / budgeting and invoicing.

PROFESSIONAL REGISTRATION / SPECIAL TRAINING

Licensed Professional Geologist #196-000793: State of Illinois, Department of Professional Regulation

OSHA 40 Hour Hazardous Waste Worker / Supervisor Training: Moraine Valley Community College, IESMC refreshers

Illinois Asbestos Building Inspector (IDPH #100-1483): Midwest Asbestos Information Center, OTS refresher classes

Transportation Workers Identification Card: Transportation Security Administration

First Aid #6597: American Health Care Academy

Lead Paint Abatement Training: Midwest Asbestos Information Center

Management Planning: Midwest Asbestos Information Center

Contractor Supervisor Asbestos Abatement: Midwest Asbestos Information Center

EDUCATION

**Bachelor of Science
Geology Field Camp**

Northern Illinois University, DeKalb, Illinois Major: Geology Minor: Biology
South Dakota School of Mining and Technology, Rapid City, South Dakota

COMPUTER SKILLS

Office Professional, WordPerfect, Corel Draw, Super Slug and AutoCad LT.

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on October 29, 2009 I served true and correct copies of a MOTION IN LIMINE DIRECTED TO THE HEARING OFFICER upon the persons and by the methods as follows:

[1st Class U.S. Mail]

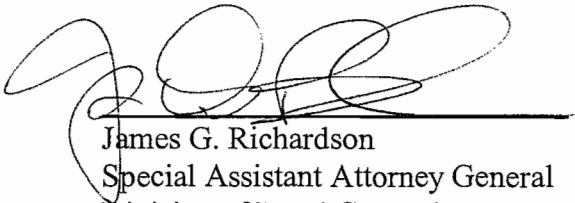
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