

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

NIEBRUGGE OIL COMPANY,)	
Petitioner,)	
v.)	PCB _____
)	(LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
Respondent.)	

NOTICE OF FILING AND PROOF OF SERVICE

To:	John T. Therriault, Acting Clerk	Bill Ingersoll
	Illinois Pollution Control Board	Illinois Environmental Protection Agency
	100 West Randolph Street	1021 North Grand Avenue East
	State of Illinois Building, Suite 11-500	P.O. Box 19276
	Chicago, IL 60601	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 THE AGENCY LUST DECISION, a copy of which is herewith served 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 counsel of record of all parties to this cause by enclosing same in envelopes addressed to such attorneys with postage fully prepaid, and by depositing said envelopes in a U.S. Post Office Mailbox in Springfield, Illinois on the 25th day of November, 2009.

Respectfully submitted,
JONES SERVICE STATION, Petitioner

BY: MOHAN, ALEWELT, PRILLAMAN & ADAMI

BY: /s/ Patrick D. Shaw

Patrick D. Shaw
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

NIEBRUGGE OIL COMPANY,)	
Petitioner,)	
)	
v.)	PCB _____
)	(LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
Respondent.)	

PETITION FOR REVIEW OF AGENCY LUST DECISIONS

NOW COMES Petitioner, Niebrugge Oil Company ("Niebrugge"), 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 the LUST decisions issued on October 22 & 23, 2009, by Respondent Illinois Environmental Protection Agency ("Agency"), in which the Agency conditionally approved plans and budgets, and in support thereof states as follows:

1. Niebrugge is the owner or operator of underground storage tanks located in Moweaqua, Shelby County, Illinois, and assigned LPC#1734205003.
2. On October 12, 2004, a release was reported to the Illinois Emergency Management Agency and the release was assigned Incident Number 20041412.
3. During early action, two additional unregistered tanks from prior to 1974 were discovered in the area of the former pump islands, bringing the total number of tanks at the site to five:

Product	Size (gal.)	Incident Number	Registered
Gasoline	6,000	20041412	Yes
Gasoline	4,000	20041412	Yes
Gasoline	4,000	20041412	Yes
Gasoline	1,000	20050232	No
Used Oil	1,000	20050232	No

4. In response to incident number 20041412, multiple site investigation plans and budgets have been approved and performed. A Stage 2 Site Investigation Plan and Budget were approved July 29, 2009.

5. During performance of the Stage 2 Site Investigation Plan, new free product was discovered in monitoring wells on either side of the two 4,000 gallon tanks. Free product had been discovered previously during excavation of tank fields containing eligible tanks, but not for the pre-1974 ineligible tanks.

6. On October 2, 2009, a Free Product Removal Plan & Budget was submitted for incident number 20041412 for the purpose of recovering free product recently observed at the site and to identify the extent of free product.

7. On October 12, 2009, a Stage 3 Plan & Budget was submitted for incident number 20041412 for the purpose of defining the extent of off-site soil and groundwater contamination.

8. On October 22, 2009, the Free Product Removal Plan and Budget were modified and denied, respectfully. A true and correct copy of the Agency's decision is attached hereto as Exhibit A.

9. On October 23, 2009, the Stage 3 Site Investigation Plan & Budget was

conditionally approved. While the Agency approved the Stage 3 budget, in an attachment to the letter, the Agency stated for the first time that the actual costs for the Stage 2 site investigation must be apportioned to account for ineligible tanks and the Agency has determined that a 15% deduction shall be applied. A true and correct copy of this decision is attached hereto as Exhibit B.

10. The Agency's apportionment determination is improper for the following reasons: (1) it is in violation of the Agency's previous budget approval, (2) it exceeds the Agency's authority to apportion Section 57.7 corrective action plans, as opposed to site investigation plans (415 ILCS 57.8(m)), (3) it violated fundamental fairness by making such a determination without opportunity for the owner or operator to respond, (4) the costs of the site investigation plan are attributable to requirements applicable to eligible tanks and consistent with evidence of free product near eligible tanks, and (5) there appears to be no mathematical basis for the 15% deduction, either based upon volume or number of tanks.

11. In addition, the Stage 3 Site Investigation Plan was rejected for being incomplete and excessive. Specifically, the Agency is requiring activities that are not required by its own forms and for which it is not willing to pay.

12. For related reasons the free product plan was erroneously modified to prevent removal of free product found in monitoring wells on either side of the former location of the 4,000 gallon gasoline USTs until the source is identified because (1) removal of free product is the purpose of the plan, and (2) the location that free product was discovered, other information available in the record and the Agency's own Free Product Guidance Document indicate that the source has been adequately identified for removal.

13. The Agency's denial of the budget for the free product plan is also erroneous for rejecting costs of removing free product by bailer for the reasons stated in the previous paragraph, but in addition use of monitoring wells to delineate the source of the free product would still require checking for the presence of free product by bailer in order to determine the extent of the free product. The boilerplate complaint that costs are inordinately high and appear excessive is without legal or evidentiary foundation and is in violation Section 57.7(c)(4) of the Act (415 ILCS 5/57.7(c)(4)). Furthermore, the budget denial requires a comparison of the cost of different methodologies while the Agency is requiring the use of a single methodology in its modified plan and its own Free Product Guidance Document, which makes no sense.

WHEREFORE, Petitioner, Niebrugge, prays that: (a) the Agency produce the Record; (b) a hearing be held; (c) the Board find the Agency erred in its decisions, (d) the Board direct the Agency to approve the plans and budget in full, (e) the Board award payment of attorney's fees; and (f) the Board grant Prime such other and further relief as it deems meet and just.

NIEBRUGGE OIL COMPANY,
Petitioner

By its attorneys,
MOHAN, ALEWELT, PRILLAMAN & ADAMI

By: /s/ Patrick D. Shaw

Patrick D. Shaw
MOHAN, ALEWELT, PRILLAMAN & ADAMI
1 N. Old Capitol Plaza, Ste. 325
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Telephone: 217/528-2517
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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) 782-2829
James R. Thompson Center, 100 West Randolph, Suite 11-300, Chicago, IL 60601 • (312) 814-6026

PAT QUINN, GOVERNOR

DOUGLAS P. SCOTT, DIRECTOR

217/782-6762

OCT 22 2009

CERTIFIED MAIL

7007 2560 0003 2090 0472

Niebrugge Oil Company
Attn: Jim Niebrugge
P.O. Box 165
Effingham, Illinois 62401

Re: LPC #1734205003 -- Shelby County
Moweaqua/Niebrugge Oil Company
100 South Main Street
Leaking UST Incident No. 20041412
Leaking UST Technical File

Dear Mr. Niebrugge:

The Illinois Environmental Protection Agency (Illinois EPA) has reviewed the Free Product Removal Plan (plan) submitted for the above-referenced incident. The plan, dated October 2, 2009, was received by the Illinois EPA on October 2, 2009. Citations in this letter 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).

The plan is modified, as follows (Section 57.7(c) of the Act and 35 Ill. Adm. Code 734.505(b) and 734.510(a)): The Plan shall be modified to remove the free product by bailer on a monthly basis until such time as the source is identified, delineation is complete, and the saturated soils are removed, in accordance with the Agency's Free Product Guidance Document.

In addition, the corresponding budget is rejected for the following reason(s) (Section 57.7(c) of the Act and 35 Ill. Adm. Code 734.505(b) and 734.510(b)):

1. The proposed costs are inordinately high. Pursuant to 35 Ill. Adm. Code 734.215(d), a comparison between the costs of the proposed method of free product removal and other methods of free product removal is required. Without this information, the budget cannot be approved. In addition, the Personnel Costs appeared to be excessive.
2. The budget includes costs for Free Product Removal that are inconsistent with the associated technical plan. One of the overall goals of the financial review is to assure that costs associated with materials, activities, and services shall be consistent with the associated technical plan. Such costs are ineligible for payment from the Fund pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.510(b). The activities

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proposed appeared to exceed the minimum requirements to comply with the Agency's Free Product Guidance Document.

If, following approval of the free product removal plan or associated budget, it is determined that a revised removal plan or budget is necessary in order to complete free product removal, an amended free product removal plan or budget, as applicable, must be submitted to the Illinois EPA for review (35 Ill. Adm. Code 734.215(g)). Any such plan and budget shall be submitted to the Illinois EPA for review and approval, rejection, or modification prior to payment for any related costs or the issuance of a No Further Remediation Letter (35 Ill. Adm. Code 734.215(f)).

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 assistance, please contact Sam Hale III at (217) 782-6762.

Sincerely,

Clifford L. Wheeler

Clifford L. Wheeler
Unit Manager
Leaking Underground Storage Tank Section
Division of Remediation Management
Bureau of Land

CLW:SH/

Attachment: Appeal Rights

cc:

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**

***** PCB 2010-037 *****



ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

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PAT QUINN, GOVERNOR

DOUGLAS P. SCOTT, DIRECTOR

217/782-6762

CERTIFIED MAIL

OCT 23 2009

7007 2560 0003 2090 0564

Niebrugge Oil Company
Attn: Jim Niebrugge
P.O. Box 165
Effingham, Illinois 62401

Re: LPC #1734205003 -- Shelby County
Moweaqua/Niebrugge Oil Company
100 South Main Street
Leaking UST Incident No. 20041412
Leaking UST Technical File

Dear Mr. Niebrugge:

The Illinois Environmental Protection Agency (Illinois EPA) has reviewed the Stage 3 Site Investigation Plan (plan) submitted for the above-referenced incident. This plan, dated October 12, 2009, was received by the Illinois EPA on October 13, 2009. Citations in this letter 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).

The Illinois EPA requires modification of the plan; therefore, the plan is conditionally approved with the Illinois EPA's modifications. The Illinois EPA has determined that the modifications listed in Attachment A are necessary to demonstrate compliance with Title XVI of the Act and 35 Ill. Adm. Code 734 (Sections 57.7(a)(1) and 57.7(c) of the Act and 35 Ill. Adm. Code 734.505(b) and 734.510(a)).

The actual costs for Stage 2 are modified pursuant to Sections 57.7(a)(2) and 57.7(c) of the Act and 35 Ill. Adm. Code 734.505(b) and 734.510(b). Based on the modifications listed in Section 2 of Attachment B the amounts listed in Section 1 of Attachment B are approved. Be aware that the amount of payment from the Fund may be limited by Sections 57.8(d), 57.8(e), and 57.8(g) of the Act, as well as 35 Ill. Adm. Code 734.630 and 734.655.

In addition, the proposed budget for Stage(s) 3 is approved for amounts determined in accordance with Subpart H, Appendix D, and Appendix E of 35 Ill. Adm. Code 734 (35 Ill. Adm. Code 734.310(b)). Costs must be incurred in accordance with the approved plan. Please be advised that costs associated with materials, activities, and services must be reasonable, must

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be consistent with the associated technical plan, must be incurred in the performance of corrective action activities, must not be used for corrective action activities in excess of those necessary to meet the minimum requirements of the Act and regulations, and must not exceed the maximum payment amounts set forth in Subpart H, Appendix D, and Appendix E of Part 734 (Section 57.7(c) of the Act and 35 Ill. Adm. Code 734.510(b)).

NOTE: Pursuant to Section 57.8(a)(5) of the Act, if payment from the Fund will be sought for any additional costs that may be incurred as a result of the Illinois EPA's modifications, an amended budget must be submitted. Amended plans and/or budgets must be submitted and approved prior to the issuance of a No Further Remediation (NFR) Letter. Costs associated with a plan or budget that have not been approved prior to the issuance of an NFR Letter will not be paid from the Fund.

Further, pursuant to 35 Ill. Adm. Code 734.145, it is required that the Illinois EPA be notified of field activities prior to the date the field activities take place. This notice must include a description of the field activities to be conducted; the name of the person conducting the activities; and the date, time, and place the activities will be conducted. This notification of field activities may be done by telephone, facsimile, or electronic mail.

Pursuant to Sections 57.7(a)(5) and 57.12(c) and (d) of the Act and 35 Ill. Adm. Code 734.100 and 734.125, the Illinois EPA requires submittal of a Stage 3 Site Investigation Plan, and budget if applicable, or Site Investigation Completion Report within 30 days after completing the site investigation 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.

Page 3

If you have any questions or need further assistance, please contact Sam Hale III at (217) 782-6762.

Sincerely,

Clifford L. Wheeler

Clifford L. Wheeler
Unit Manager
Leaking Underground Storage Tank Section
Division of Remediation Management
Bureau of Land

CLW:SH/

Attachment: Appeal Rights
Attachment A
Attachment B

cc: CSD Environmental Services, Inc.
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

Re: LPC #1734205003 -- Shelby County
Moweaqua/Niebrugge Oil Company
100 South Main Street
Leaking UST Incident No. 20041412
Leaking UST Technical 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).

The investigation of the release must proceed in three stages as set forth in 35 Ill. Adm. Code 734. If, after the completion of any stage, the extent of the soil and groundwater contamination exceeding the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants as a result of the release has been defined, the owner or operator must cease investigation and proceed with the submission of a site investigation completion report in accordance with 35 Ill. Adm. Code 734.330. (Section 57.1(a) of the Act and 35 Ill. Adm. Code 734.310). Further, the Agency has determined that the Stage 3 Plan was not complete, in accordance with the Agency's Site Investigation Plan Technical Form. Also, the Agency has determined that the Stage 3 Budget appears to be excessive. Therefore, the Agency has determined that following modifications will be necessary to meet the minimum requirements to comply with the Act, in an effort to assure that costs associated with materials, activities, and services are consistent with the associated technical plan:

1. The Plan shall include the submittal of the following Technical Form deficient information; 4(b) with the sample results depicted; 4(c) with a depiction of the known extents of soil and groundwater contamination, with the sample results depicted; 4(d) with the sample results depicted;
2. The number of soil borings/monitoring wells shall be reduced to eight from the ten proposed, by the elimination of the two sample points North and across East Main Street;
3. The Plan shall be modified to collect (1) soil sample from the remaining eight soil borings/monitoring wells;
4. The Plan shall include the re-sampling of Monitoring Well #2;
5. The Plan shall include the submittal of iso-concentration maps, based upon all applicable sample results, for soil and groundwater impact, for the constituents of concern that exceed the most stringent Tier 1 remediation objectives;
6. The activities and costs proposed shall be reasonable and kept in accordance with the minimum requirements to comply with Act, where justification for the associated measures shall reference a regulatory Subpart H rate and eligibility statute, summarized by an engineering practice, industry standard, and/or other applicable validation.

CLW:SH\

Attachment B

Re: LPC #1734205003 -- Shelby County
Moweaqua/Niebrugge Oil Company
100 South Main Street
Leaking UST Incident No. 20041412
Leaking UST Technical File

SECTION 1**STAGE 2 Actual Costs**

As a result of the Illinois EPA's modifications in Section 2 of this Attachment B, the following amounts are approved:

\$1,429.43	Drilling and Monitoring Well Costs
\$2,294.23	Analytical Costs
\$709.10	Remediation and Disposal Costs
\$0.00	UST Removal and Abandonment Costs
\$0.00	Paving, Demolition, and Well Abandonment Costs
\$8,333.09	Consulting Personnel Costs
\$192.10	Consultant's Materials Costs

Handling charges will be determined at the time a billing package is reviewed by the Illinois EPA. The amount of allowable handling charges will be determined in accordance with Section 57.1(a) of the Environmental Protection Act (Act) and 35 Illinois Administrative Code (35 Ill. Adm. Code) 734.635.

NOTE: This is your notification that payment of costs will be apportioned upon review and approval of your application for payment from the UST Fund. Eligibility of tanks is based upon the determination made by the Office of the State Fire Marshal. The Illinois EPA will determine, based on volume or number of tanks, which method of apportionment will be most favorable to the owner or operator. The Illinois EPA will notify the owner or operator of such determination in writing. Based upon the above calculations and the determination as to which method is more favorable to the owner or operator, any payments from the UST Fund made to the owner or operator will be apportioned at 85% percent of the total amount approved. Therefore, 15% percent will be deducted from the payment amount due to apportionment.

SECTION 2**STAGE 2 Modifications**

1. The budget contains costs that require an apportionment of costs pursuant to 35 Ill. Adm. Code 734.640. Pursuant to Section 57.8(m) of the Act, the Illinois EPA may apportion

payment of costs for plans submitted under Section 57.7 of the Act. The Agency has determined that a 15% deduction shall be applied as follows:

\$252.25	Drilling and Monitoring Well Costs
\$404.86	Analytical Costs
\$125.14	Remediation and Disposal Costs
\$0.00	UST Removal and Abandonment Costs
\$0.00	Paving, Demolition, and Well Abandonment Costs
\$1,470.55	Consulting Personnel Costs
\$33.90	Consultant's Materials Costs

2. The budget includes costs for increases in the maximum payment amounts approved by the Illinois EPA. The applicable maximum payment amounts must be the amounts in effect on the date the Illinois EPA received the budget in which the costs were proposed. Once the Illinois EPA approves a cost, the applicable maximum payment amount for the cost must not be increased (e.g., by proposing the cost in a subsequent budget). (Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.870(d)(1)). Further, the line items for costs for Stage 2 as proposed are inconsistent with the associated technical plan. One of the overall goals of the financial review is to assure that costs associated with materials, activities, and services are consistent with the associated technical plan. Such costs are ineligible for payment from the Fund pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.510(b). The Agency has determined that the line items proposed and approved in accordance with the Subpart H language, in correspondence dated July 29, 2009, were inconsistent with the actual costs submitted for Stage 2. The increase was determined to be excessive, given the repetition of effort that promulgated the meeting of July 8, 2009, in the delineation of a site where apportionment will be applied. Therefore, the Agency has determined that the deduction shall be applied as follows:

\$1,215.58	Drilling and Monitoring Well Costs
\$191.91	Analytical Costs
\$0.00	Remediation and Disposal Costs
\$0.00	UST Removal and Abandonment Costs
\$0.00	Paving, Demolition, and Well Abandonment Costs
\$6,764.01	Consulting Personnel Costs
\$591.03	Consultant's Materials Costs

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