

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

JAMES C. NIEBRUGGE MARITAL))
SHARE TWO TRUST,))
Petitioner,))
v.)) PCB _____
)) (LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL))
PROTECTION AGENCY,))
Respondent.))

NOTICE OF FILING AND PROOF OF SERVICE

To: Don Brown, Clerk
Illinois Pollution Control Board
100 West Randolph Street
State of Illinois Building, Suite 11-500
Chicago, IL 60601

Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. 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 THE AGENCY LUST DECISION.

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 on the Respondent, by enclosing same in envelopes addressed to same, with postage fully prepaid, and by depositing said envelopes in a U.S. Post Office Mailbox in Springfield, Illinois on the 19th day of February, 2019.

Respectfully submitted,
JAMES C. NIEBRUGGE MARITAL SHARE
TWO TRUST,
Petitioner,

BY: LAW OFFICE OF PATRICK D. SHAW

BY: /s/ Patrick D. Shaw

Patrick D. Shaw
LAW OFFICE OF PATRICK D. SHAW
80 Bellerive Road
Springfield, IL 62704
217-299-8484
pdshaw1law@gmail.com

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

JAMES C. NIEBRUGGE MARITAL)	
SHARE TWO TRUST,)	
Petitioner,)	
)	
v.)	PCB _____
)	(LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
Respondent.)	

PETITION FOR REVIEW OF AGENCY LUST DECISION

NOW COMES Petitioner, JAMES C. NIEBRUGGE MARITAL SHARE TWO TRUST, pursuant to Section 57.7(c)(4) of the Illinois Environmental Protection Act (415 ILCS 5/57.7 (c)(4)), and hereby appeals the Agency's final decision to modify a corrective action plan and budget, stating as follows:

1. This appeal arises from a former service station, known as Jumpin' Jimmy's, in the city of Cisne, Wayne County, Illinois, which had been assigned LPC # 1910055011.
2. In July of 2005, releases were reported from six underground storage tanks, which were assigned Incident Number 2005-1048. The tanks were removed shortly thereafter, and a second incident number was assigned (2005-1324), which was deemed a re-reporting.
3. In 2005, the owner/operator of the tanks was Niebrugge Oil Company, whose President was James C. Niebrugge.
4. Following early action, on-site and off-site investigation was performed, though off-site investigations were complicated by access denial from neighboring residential properties.
5. In 2013, James C. Niebrugge passed away. Thereafter, an election to proceed as owner was filed by the James C. Niebrugge Marital Share Two Trust.

6. The site investigation completion report was approved June 18, 2014.

7. Thereafter, Petitioner's consultant met with the Agency reviewer and her supervisor to discuss remediation strategies to address on-site and off-site contamination of neighboring residential properties. It was agreed that Petitioner's consultant would submit a corrective action plan for removal of contaminated soils, including soils below the water table.

8. In October of 2015, a corrective action plan was submitted for removal of on-site and off-site contaminated soil, which was denied in February of 2016.

9. In September of 2016, a corrective action plan was submitted for removal of on-site and off-site contaminated soil, which was denied in January of 2017.

10. Sometime thereafter, the Agency reviewer assigned to this project transferred outside of the LUST Division and her supervisor retired. The new project manager communicated his view that corrective action should not take place at all at this time, but soil and groundwater investigation should be conducted to determine whether contamination levels have naturally attenuated over time, so as to be remediated through institutional controls. Also, the Agency has taken the position that the prior access denials are no longer valid, following the death of James C. Niebrugge, though the project manager does not believe the neighbors are likely to allow access.

11. Pursuant to the Agency reviewer's stated preferences, a corrective action plan was submitted in December of 2018, which calls for soil and groundwater investigation for the purpose of (a) defining the extent of groundwater contamination and/or obtaining renewed access denials from neighbors, (b) assessing current groundwater contaminant levels, and (c) determining whether soil contamination has been significantly reduced by natural attenuation.

12. On December 27, 2018, the plan was modified to add additional resampling, and the budget was modified by adding some money for drilling and laboratory cost, but no additional reimbursement for consulting personnel to perform the additional investigation. The budget was also modified by cutting \$8,998.24. A true and correct copy of the Agency decision letter is attached hereto as Exhibit A.

13. The Agency cut \$2,062.88 in costs for the senior project manager to perform “review of analytical & exceedences, evaluate CA options” as being unreasonable or duplicative of time budgeted for preparing the corrective action plan. These costs should be reinstated because the Agency has directed Petitioner to reopen site investigation work deemed complete by the Agency at an earlier date, which will require re-review of extensive background data and analyticals. They are not duplicative of the costs to actually prepare the corrective action plan.

14. The Agency cut \$6,704.36 to prepare a revised corrective action plan and budget for the apparent reason that these costs should be submitted in the “next Corrective Action Plan budget.” This restriction is not based upon any requirement in the Board’s regulations. Unlike the previous corrective action plans rejected by the Agency, the subject corrective action plan is not designed to mitigate any threat to human health or the environment, but to obtain information to be used in a subsequent corrective action plan and thus this plan would be incomplete without providing for preparation and submittal of the next corrective action plan and budget. See 415 ILCS 5/57.7(b)(2). At a minimum, the results of the investigation need to be reported to the Agency in some plan or report, and thus that works must be budgeted as well.

15. The Agency cut \$231.00 for consultant’s materials that exceed the Agency’s secret rate sheet (PID: \$80.00 / day; Survey Equipment: \$50.00 / day; Bailers: \$8.00 each). Such

unpromulgated rules violate the Administrative Procedure Act. The Agency states that consultant agreed to the rate, though the e-mail exchange merely demonstrates confusion about how the standard of general applicability is being enforced.

16. The subject Illinois EPA letter was received by certified mail on January 15, 2019, and therefore this appeal is timely.

WHEREFORE, Petitioner, JAMES C. NIEBRUGGE MARITAL SHARE TWO TRUST, prays that: (a) the Agency produce the Record; (b) a hearing be held; (c) the Board find the Agency erred in its decision, (d) the Board direct the Agency to approve the payment application in total, (e) the Board award payment of attorney's fees; and (f) the Board grant Petitioner such other and further relief as it deems meet and just.

JAMES C. NIEBRUGGE MARITAL SHARE
TWO TRUST,
Petitioner

By its attorney,
LAW OFFICE OF PATRICK D. SHAW

By: /s/ Patrick D. Shaw

Patrick D. Shaw
LAW OFFICE OF PATRICK D. SHAW
80 Bellerive Road
Springfield, IL 62704
217-299-8484
pdshaw1law@gmail.com



ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

1021 NORTH GRAND AVENUE EAST, P.O. BOX 19276, SPRINGFIELD, ILLINOIS 62794-9276 • (217) 782-3397

BRUCE RAUNER, GOVERNOR

ALEC MESSINA, DIRECTOR

217/524-3300

CERTIFIED MAIL

7017 2680 0001 0207 9501

DEC 27 2018

James C. Niebrugge Marital Share Two Trust
Attn: Linda K. Niebrugge
15663 N. Lakeview Drive
Effingham, Illinois 62401

Re: LPC #1910055011 -- Wayne County
Cisne/Jumpin' Jimmy's
Illinois Route 45 North
Leaking UST Incident Nos. 20051048 and 20051324
Leaking UST Technical File

Dear Ms. Niebrugge:

The Illinois Environmental Protection Agency (Illinois EPA) has reviewed the Corrective Action Plan (plan) submitted for the above-referenced incident. This plan, dated November, 2018, was received by the Illinois EPA on December 4, 2018. Citations in this letter are from the Environmental Protection Act (415 ILCS 5) (Act) and Title 35 of the 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 following modifications are necessary, in addition to those provisions already outlined in the plan, to demonstrate compliance with Title XVI of the Act (Sections 57.7(b)(2) and 57.7(c) of the Act and 35 Ill. Adm. Code 734.505(b) and 734.510(a)):

Soil sample locations SI-6A and SI-7A should be resampled to determine the current degree of contamination at these areas. Samples should be collected at the same depth interval as the interval that previously exhibited the highest benzene concentration.

Please note that all activities associated with the remediation of this release proposed in the plan must be executed in accordance with all applicable regulatory and statutory requirements, including compliance with the proper permits.

In addition, the budget is modified pursuant to Sections 57.7(b)(3) 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 A, the amounts listed in Section 1 of Attachment A have been approved. Please note that the costs must be incurred in accordance with the approved plan. Be aware that the amount of payment from the Fund may be limited by Sections 57.7(c), 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.

Page 2

If the owner or operator agrees with the Illinois EPA's modifications, submittal of an amended plan and/or budget, if applicable, is not required (Section 57.7(c) of the Act).

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 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 and shall be made to EPA.FieldNotifications@illinois.gov. This notification of field activities must be provided at least two weeks prior to the scheduled field activities. Besides providing at least two weeks' notice to Leaking UST Section staff in Springfield, notification must be provided to Rob Mileur either by telephone at (618) 993-7223 or by e-mail at Robert.Mileur@illinois.gov.

Pursuant to Sections 57.7(b)(5) and 57.12(c) and (d) of the Act and 35 Ill. Adm. Code 734.100 and 734.125, the Illinois EPA requires that a Corrective Action Completion Report that achieves compliance with applicable remediation objectives be submitted within 30 days after completion of the plan 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.

If within four years after the approval of this plan, compliance with the applicable remediation objectives has not been achieved and a Corrective Action Completion Report has not been submitted, the Illinois EPA requires the submission of a status report pursuant to Section 57.7(b)(6) of the Act.

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 Steve Putrich at 217-524-4827.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael T. Lowder", with a long horizontal flourish extending to the right.

Michael T. Lowder
Unit Manager
Leaking Underground Storage Tank Section
Division of Remediation Management
Bureau of Land

MTL:sp

Attachment: A
Appeal Rights

c: CSD Environmental Services, Inc.(electronic copy),
BOL File

Attachment A

Re: LPC #1910055011 -- Wayne County
Cisne/Jumpin' Jimmy's
Illinois Route 45 North
Leaking UST Incident Nos. 20051048 & 20051324
Leaking UST Technical File

SECTION 1

As a result of Illinois EPA's modification(s) in Section 2 of this Attachment A, the following amounts are approved:

\$4,002.24	Drilling and Monitoring Well Costs
\$7,915.32	Analytical Costs
\$2,578.64	Remediation and Disposal Costs
\$0.00	UST Removal and Abandonment Costs
\$0.00	Paving, Demolition, and Well Abandonment Costs
\$22,845.61	Consulting Personnel Costs
\$2,529.90	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.

SECTION 2

1. \$2,062.88 for site investigation or corrective action costs for reviewing/corrective action (CA) options that are not reasonable as submitted. Such costs are ineligible for payment from the Fund pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.630(dd).

These tasks appear to be duplicative as they should be part of developing a Corrective Action Plan for which 50 hours is approved. The Illinois EPA notes that 50 hours for preparation of this plan also appears to be excessive given this plan proposes only limited soil investigations and groundwater sampling. These costs were deducted from Consulting Personnel Costs.

2. \$6,704.36 for costs for preparation of an Amended CAP, which exceed the minimum requirements necessary to comply with the Act. Costs associated with site investigation and corrective action activities and associated materials or services exceeding the

minimum requirements necessary to comply with the Act are not eligible for payment from the Fund pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.630(o).

These costs should be submitted in the next Corrective Action Plan budget. These costs were deducted from Consulting Personnel Costs.

3. \$20.00 for site investigation or corrective action costs for PID rental that are not reasonable as submitted. Such costs are ineligible for payment from the Fund pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.630(dd).

These costs were deducted from Consultant's Materials Costs. These deductions were approved by Shane Thorpe (CSD Environmental Services) via email on December 18, 2018.

4. \$161.00 for site investigation or corrective action costs for bailers that are not reasonable as submitted. Such costs are ineligible for payment from the Fund pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.630(dd).

These costs were deducted from Consultant's Materials Costs. These deductions were approved by Shane Thorpe (CSD Environmental Services) via email on December 18, 2018.

5. \$50.00 for site investigation or corrective action costs for survey equipment that are not reasonable as submitted. Such costs are ineligible for payment from the Fund pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.630(dd).

These costs were deducted from Consultant's Materials Costs. These deductions were approved by Shane Thorpe (CSD Environmental Services) via email on December 18, 2018.

6. Please be advised that \$371.36 was added to the Drilling and Monitoring Costs for the addition of two (2) borings (direct-push) to a depth of 8 feet below ground surface.

7. Please be advised that \$438.36 was added to Analytical Costs for the addition of four (4) soil BETX analysis.

STP

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 filing of an appeal, please contact:

John Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph, Suite 11-500
Chicago, IL 60601
312/814-3620

For information regarding the filing of 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