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APR 19 2007

STATE OF ILLINOIS
Pollution Control Board

**BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS**

HARLEY FREY,)
)
Petitioner,)
)
v.)
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

PCB No. **07-105**

NOTICE OF FILING

TO:	Melanie Jarvis	Carol Webb
	Illinois Environmental Protection Agency	Hearing Officer
	1021 North Grand Avenue East	Illinois Pollution Control Board
	P.O. Box 19276	1021 North Grand Avenue East
	Springfield, Illinois 62794-9276	P.O. Box 19274
		Springfield, Illinois 62794-9274

PLEASE TAKE NOTICE that on April 19, 2007, filed with the Clerk of the Illinois Pollution Control Board of the State of Illinois an original, executed copy of a Petition for Review of Illinois Environmental Protection Agency Decision.

Dated: April 19, 2007

Respectfully submitted,

Harley Frey

By: Carolyn S Hesse
One of Its Attorneys

Carolyn S. Hesse
Barnes & Thornburg LLP
One North Wacker Drive
Suite 4400
Chicago, Illinois 60606
(312) 357-1313
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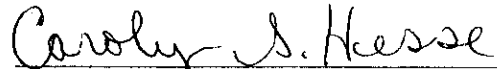
CERTIFICATE OF SERVICE

I, on oath state that I have served the attached Petition for Review of Illinois Environmental Protection Agency Decision by placing a copy in an envelope addressed to:

Melanie Jarvis
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, Illinois 62794-9274

from One North Wacker Drive, Suite 4400, Chicago, Illinois, before the hour of 5:00 p.m., on this 19th Day of April, 2007.



Carolyn S. Hesse

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ILLINOIS ENVIRONMENTAL)
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PCB No. 07-105

**PETITION FOR REVIEW OF ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY DECISION**

Harley Frey, by his attorney, Carolyn S. Hesse of Barnes & Thornburg, pursuant to the Illinois Environmental Protection Act, 415 ILCS 5/1 *et. seq.* (the "Act") and 35 Illinois Administrative Code Section 105.400 *et. seq.*, hereby appeals certain decisions by the Illinois Environmental Protection Agency (the "Agency").

1. Harley Frey ("Petitioner"), is the owner of property where a former gasoline service station was located at R.R. 4, Highway 45 South, Barnhill, Wayne County, Illinois (the "Station"). This gasoline service station had two underground storage tanks (UST's) on the property, which stored gasoline and diesel fuel.
2. LUST Incident Number 20060066 was obtained following a site investigation during which it was determined that the USTs leaked. The site has also been assigned LPC #1918015005 - Wayne County.

3. Pursuant to a request from Petitioner, Illinois EPA extended the 45-day early action period for which early action costs shall be considered reimbursable to June 30, 2006. (*See* Exhibit 1.)
4. Early action removal activities were performed at the site and a 45-day report and addendum to the 45-day report were submitted to the Agency. The addendum to the 45-day report documents that 614.57 tons (409.71 cubic yards) of contaminated backfill material were removed from the UST excavation site and disposed of at the Wayne County landfill. (Exhibit 2, page 3, P-0041.) In addition, clean backfill material was brought to the site. (*See* Exhibit 3, p. 11, P-0235)
5. On November 20, 2006, CW³M, consultant for Petitioner, submitted a reimbursement request to the Agency seeking reimbursement for specified early action costs, including the costs of excavation, transportation and disposal of contaminated soil and purchasing, transportation, and placement of clean backfill material. The remediation Costs and Disposal Form specifically states that “The cubic yard rate includes all costs associated with the excavation, transportation and disposal of contaminated soil and/or backfill material . . . [including but] not limited to all personnel, equipment, materials and other expenses. . . .” The cubic yard rate for backfilling the excavation “includes all costs associated with the purchase, transportation and placement of clean backfill material . . .

[including but] not limited to all personnel, equipment, materials, and other expenses. . . .” See Exhibit 3, p. 11, P-0235.

6. The amount requested for excavation, transportation and disposal of contaminated soil was based on the rate of \$57.00 per cubic yard in accordance with 35 Ill. Admin. Code 734.825(a). The amount requested for purchase, transportation and placement of clean backfill was based on the rate of \$20.00 per cubic yard in accordance with 35 Ill. Admin. Code 734.825(b). See Exhibit 3, p. 11. P-0235.
7. The Agency received this reimbursement request on November 27, 2006. See Exhibit 4, P-0215.
8. The Agency sent a letter dated March 23, 2007 to Petitioner approving certain requests for reimbursement and denying others. The Agency deducted \$16,448.99 for the costs for “backfill, trucking and excavation” claiming that supporting documentation was lacking. Of this amount, the Agency deducted “\$8,935.48 from the purchase, transportation and placement of the clean backfill material.” In addition, the Agency deducted “\$7,513.51 from the costs for excavation, transportation and disposal.” The Agency requested invoices for the hauling of the clean backfill and contaminated soil. (See Exhibit 4, P-0217.)
9. The Agency’s request for this additional documentation is contrary to the language and the intent of the specific payment amounts set forth in subpart H to 35 Ill. Admin. Code 734.

10. The purpose of Subpart H is to establish lump sum payment amounts to improve efficiency and to save time for both the Agency and tank owners and operators by avoiding the submission and review of costs based on time and materials.

11. Section 734.825 Soil Removal and Disposal provides:

Payment for costs associated with soil removal, transportation, and disposal must not exceed the amounts set forth in this Section. Such costs must include, but are not limited to, those associated with the removal, transportation, and disposal of contaminated soil . . . and the purchase, transportation, and placement of material used to backfill the resulting excavation.

a. Payment for costs associated with the removal, transportation, and disposal of contaminated soil exceeding the applicable remediation objectives, visibly contaminated fill removed pursuant to Section 734.210(f) of this Part, and concrete, asphalt, or paving overlying such contaminated soil or fill must not exceed a total of \$57 per cubic yard.

b. Payment for costs associated with the purchase, transportation, and placement of material used to backfill the excavation resulting from the removal and disposal of soil must not exceed a total of \$20 per cubic yard.

12. The rules at Subpart H of Part 734 do not require that invoices for the hauling of clean backfill and contaminated soil be included in reimbursement requests.

13. The specified lump sum amount per cubic yard of material covers the various costs and work associated with the specified activities. It is not necessary to list each line item activity covered by Section 734.825 because reimbursement under Section 734.825 is not based on time and materials.

14. The Agency also deducted \$28.00 for handling charges on hotel costs. (See Exhibit 4, P-0217.)
15. Lodging at a hotel in order to perform corrective action at a site that is remote from the tank removal contractor's and consultant's offices is an expense that is related to corrective action.
16. Thus, Petitioner believes that handling charges on hotel costs are reimbursable from the Fund similar to other handling charges that are allowed for field purchase and subcontractor costs. See 35 Ill. Admin. Code 734.635.
17. Petitioner is appealing the Agency's final decision letter dated March 23, 2007. (Exhibit 4.) The Agency's decision set forth in the letter from which this appeal is being taken is without merit and is contrary to the regulations set forth at 35 Ill. Admin. Code 734.

WHEREFORE, Harley Frey respectfully requests that the Board enter an order reversing the Agency's letter dated March 23, 2007 and requiring the Agency to reimburse Petitioner for all of its requested costs and for Petitioner's attorneys' fees and costs in bringing this appeal.

Respectfully submitted,

Harley Frey

By: Carolyn S. Hesse
One of Its Attorneys

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