

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

NIEBRUGGE OIL COMPANY,)
Petitioner,)
v.) PCB 2010-40
) (LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
Respondent.)

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STATE OF ILLINOIS
Pollution Control Board

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

Bill Ingersoll
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 AMENDED 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 17th day of December, 2009.

Respectfully submitted,
NIEBRUGGE OIL COMPANY, Petitioner

BY: MOHAN, ALEWELT, PRILLAMAN & ADAMI

BY: /s/ Patrick D. Shaw

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

NIEBRUGGE OIL COMPANY,)	
Petitioner,)	
)	
v.)	PCB 2010-40
)	(LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
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AMENDED PETITION FOR REVIEW OF AGENCY LUST DECISION

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 **decision issued on October 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:

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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 decision, (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

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