

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

LESLIE C. KO,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 13-
	)	(UST Appeal)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

**NOTICE OF FILING**

To:	Pollution Control Board, Attn: Clerk	Division of Legal Counsel
	100 West Randolph Street	Illinois Environmental Protection Agency
	James R. Thompson Center, Suite 11-500	1021 North Grand Avenue, East
	Chicago, Illinois 60601-3218	P.O. Box 19276
		Springfield, Illinois 62794-9276

PLEASE TAKE NOTICE that today I have filed with the Office of the Clerk of the Pollution Control Board the Appearance of William D. Ingersoll on behalf of Leslie C. Ko and Petition for Review in the above matter. Copies of these documents are hereby served upon you.

By:           /s/William D. Ingersoll            
One of Its Attorneys

Dated: June 4, 2013

**BROWN, HAY & STEPHENS, LLP**  
William D. Ingersoll  
Registration No. 6186363  
205 S. Fifth Street, Suite 700  
P.O. Box 2459  
Springfield, IL 62705-2459  
(217) 544-8491  
wingersoll@bhslaw.com



BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

LESLIE C. KO,	)	
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Petitioner,	)	
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v.	)	PCB 13-
	)	(UST Appeal)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

**PETITION FOR REVIEW**

NOW COMES Petitioner, LESLIE C. KO (“Petitioner”), by and through her attorneys, BROWN HAY & STEPHENS, LLP, and pursuant to Section 40 and Section 57.8(i) of the Illinois Environmental Protection Act (“Act”), 415 ILCS 5/40 and 40, 57.8(i) and 35 Ill. Admin. Code Part 105, hereby requests review of the decision by the Illinois Environmental Protection Agency (“Agency” or “IEPA”) regarding Petitioner’s Amended Corrective Action Plan and Budget regarding budget amounts authorized for reimbursement from the Leaking Underground Storage Tank (“LUST”) Fund. In support of its Petition, Petitioner states as follows:

1. Petitioner was the owner of certain underground storage tanks (“USTs”) located at 502 S. Court Street, Marion, Illinois. The site has been assigned IEPA Bureau of Land Identification Number 1990555122. The USTs were removed on October 4, 1999.

2. A notification of release from the USTs were made to the Illinois Emergency Management Agency (“IEMA”) on September 7, 1999 (Incident No. 992090). The Office of the Illinois State Fire Marshal (“OSFM”) issued an Eligibility and Deductibility Determination on March 15, 2000 that the four tanks were eligible for reimbursement from the LUST Fund, with a \$10,000 deductible.

3. On April 5, 2013, Petitioner submitted an Amended Corrective Action Plan and Budget to the Agency for its approval.

4. By letter dated May 3, 2013, the Agency issued its decision on the April 5, 2013 submittal. *See Exhibit A.* The Agency's decision approved the proposed Amended Corrective Action Plan, but modified the corresponding budget to make certain reductions from the amounts requested. The reductions challenged by this Petition are found in Attachment A, Section 2, of the Agency's May 2, 2013 letter. Those are:

2. *\$152.10 for site investigation or correction action costs for Consulting Personnel Costs associated with plan certification 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).*

*2 hours are allowed for this activity.*

3. *\$152.10 for site investigation or corrective action costs for Consulting Personnel Costs associated with budget certification 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).*

*2 hours are allowed for this activity.*

10. *\$304.20 for site investigation or corrective action costs for Consulting Personnel associated with CACR certification 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).*

*2 hours are allowed for this activity.*

11. *\$280.76 for site investigation or corrective action costs for Consulting Personnel associated with CACR drafting/CAD 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).*

*10 hours are allowed for this activity.*

12. *\$234.00 for costs for Consulting Personnel associated with NFR letter recording by the Senior Project Manager, 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).*

*2 hours of Senior Administrative Assistant time is allowed for this activity.*

13. *\$52.65 for site investigation or corrective action costs for Consulting Personnel associated with NFR letter recording by the Senior Administrative Assistant 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).*

*2 hours are allowed for this activity.*

14. *\$129.00 for Consultant's Materials associated with copies, 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).*

*2110 total copies are allowed.*

5. This Petition for Review is filed within 35 days of the Agency's final decision and is timely in accordance with Section 40 of the Act and the Pollution Control Board procedural rule at 35 Ill. Admin. Code 105.404 ("Section 105.104").

6. The Agency's May 2, 2013 letter does not provide an appropriate statutory or regulatory basis for the reductions enumerated above.

7. All seven of the reductions listed above cite to Section 57.7(c)(3) of the Act for authority. Items 2, 3, 10, 11 and 13 cite Section 734.630(dd) of the regulations. Items 12 and 14 cite Section 734.630(o) of the regulations. Those read:

Section 734.630 Ineligible Corrective Action Costs  
Costs ineligible for payment from the Fund include, but are not limited to:

\* \* \*

- o) Costs for corrective action activities and associated materials or services exceeding the minimum requirements necessary to comply with the Act;  
\* \* \*
- dd) Costs proposed as part of a budget that are unreasonable;

8. The rather vague statutory and regulatory provisions cited by the Agency as the legal authority do not lend themselves to support the very specific reduction rationales offered by the Agency. Claiming that a particular amount of time staffing title or copies “are allowed” for those budget items appears more as some rule or rules other than those cited, and not among any Petitioner can locate within Part 734.

9. Item 12 also improperly restricts reimbursement for NFR letter recording to only being performed by a Senior Administrative Assistant. Petitioner understands that the nature of the task should be important in determining what level of staff performs work on that task. However, there is no statutory or regulatory basis for limiting this to only one staffing title; and, surely none that are cited authorize this limitation. That ignores the real world situation where the higher level person has ultimate responsibility for the project, and must review and sign off on everything before it can be filed, submitted to the Agency, etc.

10. Item 14 limits the number of copies for reimbursement to 2110. How can the Agency so accurately predict, at the budget review stage, how many copies a project may require? There may be multiple drafts and markups of various submittals. The project may have more or less interaction with the Agency, subcontractors, owners, etc. depending on the nature and complexity of the project. The arbitrary limit of exactly 2110 shows that site-specific or project-specific considerations (which are required) were not used to arrive at the number. And, the appropriate exact number could really only be evaluated after the work has been done. It is also worth noting that the proposed budget rate for copies is \$0.10 per page, while the Agency’s rate for Freedom of Information copies is \$0.15.

WHEREFORE, for the above reasons, Petitioner respectfully requests that the Pollution Control Board grant the following:

- a. Find that the Agency's May 2, 2013 final decision is arbitrary, capricious and not supported by statutory or regulatory authority;
- b. Reverse the Agency's determination of the reductions in the Agency's letter as Attachment A, Section 2, Items 2, 3, 10, 11, 12, 13 and 14, and find that these items should be approved in the budget as proposed by Petitioner;
- c. Award Petitioner reasonable attorney's fees and expenses related to bringing this action;
- d. Other relief as the Pollution Control Board deems appropriate.

By:           /s/William D. Ingersoll            
One of Its Attorneys

Dated: June 4, 2013

**BROWN, HAY & STEPHENS, LLP**

William D. Ingersoll  
Registration No. 6186363  
205 S. Fifth Street, Suite 700  
P.O. Box 2459  
Springfield, IL 62705-2459  
(217) 544-8491  
[wingersoll@bhslaw.com](mailto:wingersoll@bhslaw.com)



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those necessary to meet the minimum requirements of the Act and regulations. Owners and operators are advised that they may not be entitled to full payment for this reason. The Illinois EPA will review your complete request for partial or final payment from the Fund after it is submitted to the Illinois EPA. In addition, please note that 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.

The activities in excess of those necessary to meet the minimum requirements of the Act and regulations are referenced in Attachment A. While it is technically acceptable that these activities be performed, payment from the Fund is not approved.

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—and must be provided at least three (3) working days prior to the scheduled field activities. Besides providing at least three days' 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](mailto: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.

**Please be advised that, pursuant to Public Act 96-0908, effective June 8, 2010, all releases of petroleum from USTs are subject to Title XVI of the Act, as amended by Public Act 92-**

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0554 on June 24, 2002, and Public Act 96-0908 on June 8, 2010, and 35 Ill. Adm. Code 734. The regulations at 35 Ill. Adm. Code 732 no longer exist, and the only releases subject to 35 Ill. Adm. Code 731 are those from hazardous substance USTs.

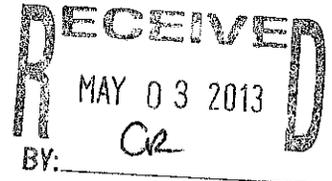
An underground storage tank system owner or operator may appeal this decision to the Illinois Pollution Control Board. Appeal rights are attached.

If you have any questions or need further assistance, please contact Dave Myers at 217/785-7491.

Sincerely,



Thomas A. Henninger  
Unit Manager  
Leaking Underground Storage Tank Section  
Division of Remediation Management  
Bureau of Land



TAH:dm: \CAPappBUDmod.doc

Attachments: A, Appeal Rights

c: CWM Company, Inc.  
BOL File

## Attachment A

Re: LPC # 1990555122--Williamson  
 Marion/ Dr. Ko's Office  
 502 South Court St.  
 LUST Incident No. 992090/ 992254  
 LUST 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:

\$2807.92	Drilling and Monitoring Well Costs
\$1050.65	Analytical Costs
\$0.00	Remediation and Disposal Costs
\$0.00	UST Removal and Abandonment Costs
\$0.00	Paving, Demolition, and Well Abandonment Costs
\$36,795.43	Consulting Personnel Costs
\$949.44	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.

Please note, this budget replaces previous budgets approved in an old format.

**SECTION 2**

1. \$309.43 for costs for Analytical Costs associated with geo tech analysis, 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).

Costs associated with the sampling and analysis for geo technical parameters were approved in a budget March 21, 2008 and approved for payment in a billing package September 18, 2008.

2. \$152.10 for site investigation or corrective action costs for Consulting Personnel Costs associated with plan certification that are not reasonable as submitted. Such costs are

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BY: CR

ineligible for payment from the Fund pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.630(dd).

2 hours are allowed for this activity.

3. \$152.10 for site investigation or corrective action costs for Consulting Personnel Costs associated with budget certification 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).

2 hours are allowed for this activity.

4. \$215.26 for costs for Consulting Personnel Costs associated with 2 hours of drilling oversight by the Professional Geologist, 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).

Costs associated with a geotech boring were previously approved.

5. \$234.00 for costs for Consulting Personnel Costs associated with 2 hours of drilling and sampling oversight by the Engineer III, 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).

Costs associated with a geotech boring were previously approved.

6. \$117.00 for costs for Consulting Personnel Costs associated with 1 hour of analytical review by the Senior Project Manager, 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).

Costs associated with geotech review were previously approved.

7. \$117.00 for costs for Consulting Personnel Costs associated with 1 hour of field activity documentation by the Senior Project Manager, 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).

Costs associated with geotech documentation were previously approved.

8. \$234.00 for costs for Consulting Personnel Costs associated with 2 hours of boring log preparation by the Engineer III, 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).

Costs associated with geotech boring were previously approved.

9. \$1287.00 for costs for Consulting Personnel Costs associated with 10 hours of TACO calculations by the Senior Professional Geologist, 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).

Costs associated with TACO calculations were previously approved for payment September 18, 2008. Calculations were provided to the Agency in a status report dated May 11, 2010 and received May 13, 2010.

10. \$304.20 for site investigation or corrective action costs for Consulting Personnel associated with CACR certification 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).

2 hours are allowed for this activity.

11. \$280.76 for site investigation or corrective action costs for Consulting Personnel Costs associated with CACR drafting/CAD 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).

10 hours are allowed for this activity.

12. \$234.00 for costs for Consulting Personnel associated with NFR letter recording by the Senior Project Manager, 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).

2 hours of Senior Administrative Assistant time is allowed for this activity.

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2110 total copies are allowed.

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### 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:

Dorothy Gunn, Clerk  
Illinois Pollution Control Board  
State of Illinois 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

