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DEC - 5 2003
STATE OF ILLINOIS
Pollution Control Board

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

WEI ENTERPRISES,	)	
	)	
Petitioner,	)	
vs.	)	PCB No. 04-83
	)	(UST Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

NOTICE

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
State of Illinois Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

John J. Kim
Assistant Counsel
Special Assistant Attorney General
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, IL 62794-9276

PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board an Amended Petition for Review of Final Agency Leaking Underground Storage Tank Decision, a copy of which is herewith served upon you.

By Curtis W. Martin
Curtis W. Martin, Attorney for
Wei Enterprises, Petitioner

Robert E. Shaw
IL ARDC No. 03123632
Curtis W. Martin
IL ARDC No. 06201592
SHAW & MARTIN, P.C.
Attorneys at Law
123 S. 10th Street, Suite 302
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WEI ENTERPRISES, Petitioner,	)	
vs.	)	PCB No. 04-83 (UST Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

AMENDED PETITION FOR REVIEW OF FINAL AGENCY LEAKING UNDERGROUND STORAGE TANK DECISION

NOW COMES the Petitioner, Wei Enterprises, ("Wei"), by one of its attorneys, Curtis W. Martin of Shaw & Martin, P.C., and, pursuant to the Illinois Pollution Control Board's ("Board") Order of November 20, 2003, and pursuant to Sections 57.7(c)(4)(D) and 40 of the Illinois Environmental Protection Act (415 ILCS 5/57.7(c)(4)(D) and 40) and 35 Ill. Adm. Code 105.400-412, hereby requests that the Illinois Pollution Control Board ("Board") review the final decision of the Illinois Environmental Protection Agency ("Agency") in the above cause, and in support thereof, Wei respectfully states as follows:

1. On October 8, 2003, the Agency issued a Final Decision to Wei, a copy of which is attached hereto as Exhibit A.

2. 35 Ill. Adm. Code 105.404 provides in part that the petitioner must file a petition for review of the Agency's final decision with the Clerk of the Board within 35 days after the *date of service* of the Agency's final decision.

3. 35 Ill. Adm. Code 101.300(c) provides in part that in the case of service by U.S. mail, service is presumed complete four days after mailing, but such presumption can be rebutted by proper proof.

4. 35 Ill. Adm. Code 101.300(a) provides in part that the computation of time prescribed in the Rules of the Board will begin with the first calendar day following the day on which the act, event or development occurs and will run until the close of business on the last day.

5. 35 Ill. Adm. Code 101.300(b)(2) provides in part that documents will be considered filed in conformance with the filing requirements of the Rules of the Board if the document is filed by U.S. Mail and the postmark date precedes the filing deadline.

6. On October 9, 2003, Wei, through its consultant, United Science Industries, Inc. ("USI"), received the Agency's Final Decision, as is more specifically set forth in the Affidavit attached as Exhibit B.

7. Pursuant to 35 Ill. Adm. Code 101.300(a), the computation of the 35 days within which Wei was to file its Petition began on October 10, 2003.

8. Wei's original Petition for Review of Final Agency Leaking Underground Storage Tank Decision was file-marked by the Clerk on November 17, 2003 but was postmarked November 13, 2003. Therefore, pursuant to 35 Ill. Adm. Code 101.300(b)(2), the Petition must be considered filed November 13, 2003, within the time allowed for filing.

9. The grounds for the Petition herein are as follows:

Wei submitted to the Agency, through its consultant, USI, its Application for Payment from the Underground Storage Tank Fund pursuant to Section 57.8(a) of the Act and 35 Ill. Adm. Code 105.732, subpart F. The Application for Payment covered the period from March 1, 2002 to February 28, 2003 and requested $28,780.46.

In response to the Application for Payment, the Agency authorized a voucher for $5,794.79 to be submitted to the Comptroller's office for payment from the Underground Storage Tank Fund, making both technical and accounting deductions. As for the technical deductions, the Agency indicates that $15,565.25 of the costs requested in the Application for Payment lack supporting documentation such that the Agency cannot determine that these costs were not used for activities in excess of those necessary to meet the minimum requirements of Section 57.5(a) of the Act and 35 Ill. Adm. Code 732.606(o).

The Agency also indicates that the Application for Payment includes costs for installation of a free product removal system that does not include information regarding activities necessary to install the system nor an estimate of the length of time the system will be required to operate in order to recover free product on the Wei site. The Agency further questions the personnel charges with respect to actual tasks completed by each individual for which costs are reflected and therefore requested a more specific breakdown of actual work completed by each individual each day per invoice. The Agency also requests clarification as to the purpose for the use a generator, a tractor with dump trailer, and a metal detector.

The Agency also determined that $4,575.00 Wei seeks to be reimbursed is in excess of that necessary to meet the minimum requirements of Section 57.5(a) of the Act and 35 Ill. Adm. Code 732.505(c) and 732.606(o), and is not associated with "corrective action costs" in compliance with Sections 57.6 and 57.7 of the Act and 35 Ill. Adm. Code 732.103. The Agency further questions the task/work performed by the personnel as not being specific to the actual work performed, and the Agency requested a more specific breakout of each individual/title and task/work performed each day per invoice. At the same time, however, the Agency, without the specific requested information, determined the costs to be unreasonable as submitted. Finally, the Agency also determined that $433.46 was unreasonable for a per bailer charge, for ten (10) groundwater monitoring well charges, for costs for gloves and for the cost for oil/water interface probe use.

For its accounting deductions, the Agency determined that $50.97 in costs submitted were unreasonable for various equipment and materials reflected in particular USI invoices. The Agency also deducted $2,360.99 of costs submitted as being duplicate billings previously reimbursed pursuant to a reimbursement claim received by the Agency on March 26, 2003.

The costs submitted by USI for payment are within generally accepted engineering practices and comply with the Act and the regulations promulgated thereunder. Specifically, the costs for the free product removal system installation are supported in the Agency created Payment Application and Free Product Removal forms from both a technical and accounting standpoint in that all

information regarding the equipment needed to build the system and the activities necessary to install it have been provided. Thus, the activities have been properly documented as required by Section 732.203 (a)(4). Further, basic common sense dictates that the best estimate of the duration of the need for the system is so long as the free product exists at the Wei site. The Agency essentially requests an estimate that cannot be provided and on that basis denies reimbursement for the actual costs incurred to date. Such an approach is both arbitrary and capricious.

In addition, the billing package, Free Product Removal Reports, and consultant and Agency correspondence, taken together, provide the necessary documentation to include costs and explanations for personnel with specific detail of the particular tasks performed to sufficiently and accurately advise the Agency of the necessity and reasonableness of the charges therefore and the equipment used in connection with the tasks performed. Is it impossible for Wei to specifically address the $15,565.25 technical deduction because the Agency has failed to provide Wei with any indication as to what particular activity or equipment it deems to be unreasonable. The descriptions of the task/work performed by the personnel as provided in the billing package are consistent with all previous billing site specific packages approved for payment by the Agency. To require a more specific breakout of the actual work completed by each individual performed each day is tantamount to requiring USI to provide every timesheet and invoice produced in the course of the project. Such a request is unreasonable, onerous, arbitrary and capricious.

Moreover, the Agency's position is inconsistent with the Act and the

Regulations. Pursuant to Section 732.203 (a)(2), owners or operators must remove free product to the maximum extent practicable and use abatement of free product migration as a minimum objective for design of the free product removal system. Section 732.203(a)(1) requires Wei to conduct free product removal by using recovery and disposal techniques appropriate to the hydrogeologic conditions at its site in a manner that minimizes the spread of contamination into previously uncontaminated zones. Further, section 732.605(a)(1) includes within eligible costs those associated with corrective action activities, including early action activities conducted pursuant to Subpart B, which pursuant to 732.203(a)(1), include free product removal. No prior approval from the Agency is necessary regarding free product removal. Wei's consultant performed the early action activities, i.e., free product removal, necessary to protect human health and the environment and the costs associated with such efforts is subject to reimbursement.

The $4,575.00 technical deduction by the Agency for costs not associated with corrective action costs is therefore clearly erroneous as such costs were associated with corrective action activities. The Application for Payment includes costs associated with personnel tasks described as associated with the corrective action and clearly advised the Agency of the actual work performed by the personnel. The Agency, however, without warrant, finds this information lacking.

In addition, the Agency's deduction of $433.46 for costs it deems unreasonable associated with the bailer, gloves and interface probe use are

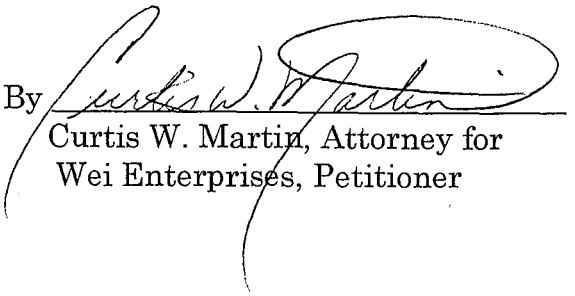
arbitrary and capricious. Further, the deduction for the costs for ten (10) groundwater monitoring wells is arbitrary and capricious as Wei is not advised as to which ten (10) groundwater monitoring wells the Agency deems unreasonable and the Agency arbitrarily determined that nine (9) wells are all that is necessary to complete the investigation.

The deduction of $50.97 by the Agency as unreasonable for the PID, bentonite and target concrete saw are arbitrary and capricious. Wei does not contest the $2,360.99 accounting deduction as the Agency is correct that a request for a voucher covering these costs was included in an Agency letter dated May 12, 2003 in response to an earlier payment application submitted by Wei.

For the foregoing reasons, the Agency's refusal to request a voucher for the $28,780.46 requested in Wei's Application for Payment, less the $2,360.99 deduction, was erroneous, arbitrary, and capricious, and should be reversed by this Board. Petitioner, Wei Enterprises, therefore requests that the Board reverse the decision of the Agency and rule in favor of the Petitioners' request for preparation of a voucher for submission to the Comptroller's Office for payment of its Application for Payment from the Underground Storage Tank Fund, less the $2,360.99 deduction, and that Petitioner recover its attorney's fees and costs incurred herein pursuant to 415 ILCS 5/57.8(l) and 35 Ill. Adm. Code 732.606(l).

Respectfully submitted,

SHAW & MARTIN, P.C.

By 
Curtis W. Martin, Attorney for
Wei Enterprises, Petitioner

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ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

1021 NORTH GRAND AVENUE EAST, P.O. BOX 19276, SPRINGFIELD, ILLINOIS 62794-9276, 217-782-3397
JAMES R. THOMPSON CENTER, 100 WEST RANDOLPH, SUITE 11-300, CHICAGO, IL 60601, 312-814-6026

ROD R. BLAGOJEVICH, GOVERNOR RENEE CIPRIANO, DIRECTOR

217/782-6762

OCT 0 8 2003

Wei Enterprises
Attention: Susan Wei
Post Office Box 834
O'Fallon, IL 62269

Re: LPC #1631255004 – St. Clair County
Shiloh/Wei Enterprises
529 Maple Street
LUST Incident No. 982804
LUST FISCAL FILE

Dear Ms. Wei:

The Illinois Environmental Protection Agency has completed the review of your application for payment from the Underground Storage Tank Fund for the above-referenced LUST incident pursuant to Section 57.8(a) of the Illinois Environmental Protection Act (Act), and 35 Ill. Adm. Code 732, Subpart F. This information is dated August 20, 2003 and was received by the Agency on August 22, 2003. The application for payment covers the period from March 1, 2002 to February 28, 2003. The amount requested is $28,780.46.

The deductible amount for this claim is $10,000.00, which was previously deducted from the Invoice Voucher dated February 16, 2000. Listed in Attachment A are the costs which are not being paid and the reasons these costs are not being paid.

On August 22, 2003, the Agency received your complete application for payment for this claim. As a result of the Agency's review of this application for payment, a voucher for $5,794.79 will be prepared for submission to the Comptroller's Office for payment as funds become available based upon the date the Agency received your complete request for payment of this application for payment. Subsequent applications for payment that have been/are submitted will be processed based upon the date complete subsequent application for payment requests are received by the Agency. This constitutes the Agency's final action with regard to the above application(s) for payment.

An underground storage tank owner or operator may appeal this final decision to the Illinois Pollution Control Board (Board) pursuant to Section 57.8(i) and Section 40 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

EXHIBIT A

Attachment A
Technical Deductions

Re: LPC #1631255004 – St. Clair County
Shiloh/Wei Enterprise
529 Maple Street
LUST Incident No. 982804
LUST Fiscal File

Citations in this attachment are from and the Environmental Protection Act (Act) and 35 Illinois Administrative Code (35 Ill. Adm. Code).

Item # Description of Deductions

1. $15,565.25, deduction for costs that lack supporting documentation (35 Ill. Adm. Code 732.606(gg)). Since there is no supporting documentation of costs, the Illinois EPA cannot determine that costs were not used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act (Section 57.5(a) of the Act and 35 Ill. Adm. Code 732.606(o)).

The billing package includes costs for free product removal system installation. While the Illinois EPA has received technical specs on the equipment needed to build the system, information regarding activities necessary to install the system has not been provided. In addition, an estimation of how long the system will be required to operate in order to recover free product on site has not been provided as previously requested in the Illinois EPA letter dated May 12, 2003.

Also, the billing package includes costs for Personnel that do not specify what actual task/work was completed by each individual/title on the days the work was charged for in the weekly worksheets. Please provide a more specific breakout of actual work completed by each individual/title performed each day per invoice as previously requested in the Illinois EPA letter dated May 12, 2003.

Further, the Illinois EPA is requesting clarification as to the purpose for the use of the following equipment as previously requested in the Illinois EPA letter dated May 12, 2003:

a. 115 volt generator;
b. Tractor with dump trailer (Invoice #18-12014); and
c. Metal detector.

2. $4,575.00, deduction for costs for an activity in excess of that necessary to meet the minimum requirements of Title XVI of the Act (Section 57.5(a) of the Act; 35 Ill. Adm. Code 732.505(c) and 732.606(o)). Costs for 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 (35 Ill. Adm. Code 732.606(o)) In addition, these costs are not corrective action costs. "Corrective action" means an activity associated with compliance with the provisions of Sections 57.6 and 57 7 of the Act (Section 57.2 of the Act and 35 Ill. Adm. Code 732.103). One of the eligibility requirements for accessing the Fund is that costs are associated with "corrective action" (Section 57.9(a)(7) of the Act).

These costs include personnel costs since the task/work performed descriptions were not specific as to the actual work that was performed. Please provide a more specific breakout of each individual/title and the task/work performed each day per invoice as previously requested in the Illinois EPA letter dated May 12, 2003.

In addition, these costs lack supporting documentation (35 Ill. Adm. Code 732.606(gg)). Since there is no supporting documentation of costs, the Illinois EPA cannot determine that costs were not used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act (Section 57.5(a) of the Act and 35 Ill. Adm. Code 732.606(o)).

Further, these costs are unreasonable as submitted. (Section 57.7(c)(4)(C) of the Act and 35 Ill. Adm. Code 732.606(hh)).

3. $433.46, deduction for costs which are unreasonable as submitted. (Section 57.7(c)(4)(C) of the Act and 35 Ill. Adm. Code 732.606(hh)). The following unreasonable costs include:

a. Costs per bailer;
b. Costs for ten (10) groundwater monitoring wells since nine (9) groundwater monitoring wells are necessary/reasonable for free product investigations.
c. Costs per glove; and
d. Costs per oil/water interface probe use.

HAC:MW:mw\982804FiscalAttachment A-2.DOC

Attachment A
Accounting Deductions

Re: LPC #1631255004 – St. Clair County
Shiloh/Wei Enterprises
529 Maple Street
LUST Incident No. 982804
LUST Fiscal File

Citations in this attachment are from and the Environmental Protection Act (Act) and 35 Illinois Administrative Code (35 Ill. Adm. Code).

Item # Description of Deductions

1. $50.97, deduction for costs which are unreasonable as submitted. (Section 57.7(c)(4)(C) of the Act and 35 Ill. Adm. Code 732.606(hh))

The following deductions were made on the following United Science Industries, Inc. invoices:

#18-9776A	$5.00 for a PID
	$6.00 for Bentonite (50 lb. bag)
#18/10163	$5.00 for a PID
	$4.00 for Bentonite (50 lb. bag)
#18-114744B	$22.00 for Target Concrete Saw
	$8.97 for balance carried forward on electricity costs

2. $2,360.99, deduction for costs associated with duplicate billings. (Section 57.7(c)(4)(C) of the Act and 35 Ill. Adm. Code 732.606(o))

The following deductions were made because the amounts were previously reimbursed in the claim received by the Agency on March 26, 2003. These deductions were made on the following United Science Industries, Inc. invoices:

#18-9776A	$325.00 for Equipment
	$317.12 for Stock Items
	$9.03 for Field Purchases
#18-10163	$325.00 for Equipment
	$576.60 for Stock Items
#18-11444B	$110.50 for Equipment
	$15.32 for Stock Items
	$82.65 for Field Purchases
#18-11852	$375.00 for Equipment
	$18.68 for Stock Items
	$66.65 for Field Purchases
#18-12014	$90.00 for Equipment
	$15.96 for Stock Items
	$33.48 for Field Purchases

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

WEI ENTERPRISES,	)	
	)	
Petitioner,	)	
	)	
vs.	)	PCB No. 04-83
	)	(UST Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
	)	
Respondent.	)	

AFFIDAVIT

STATE OF ILLINOIS)
) ss.
COUNTY OF JEFFERSON)

I, Duane Doty, being first duly sworn, on oath depose and state:

1. I have first hand knowledge of the facts as alleged herein, and if called to testify I could competently testify to such facts.

2. I am the General Manager for United Science Industries, Inc. ("USI"), the environmental consultant for Wei Enterprises ("Wei") with regard to Wei's Leaking Underground Storage Tank project located at Shiloh, St. Clair County, Illinois, and known as Incident No. 982804.

3. Among my duties as General Manager for USI, I maintain the records created during the course of the work performed by USI on behalf of Wei.

4. It is USI's ordinary course of business to maintain records created or received by Wei or USI, including Agency correspondence, during the course of the work performed on behalf of Wei.

EXHIBIT B

5. My review of the Wei file maintained by USI reveals that Wei and USI received the Agency letter dated October 8, 2003, which is the subject of the appeal in the above cause, on October 9, 2003.

Affiant states nothing further.

Duane Doty

Subscribed and sworn to before me this 2ND day of December, 2003.

Notary Public

"OFFICIAL SEAL"
CURTIS W. MARTIN
Notary Public, State of Illinois
My Commission Expires 09/01/05

Curtis W. Martin
IL ARDC No. 06201592
SHAW & MARTIN, P.C.
Mercantile Bank Building, Suite 302
P. O. Box 1789
Mt. Vernon, Illinois 62864
Telephone: (618) 244-1788

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on December 3, 2003, I served true and correct copies of an Amended Petition for Review of Final Agency Leaking Underground Storage Tank Decision, by placing true and correct copies in properly sealed and addressed envelopes and by depositing said sealed envelopes in a U.S. mail drop box located within Mt. Vernon, Illinois, with sufficient Certified Mail postage affixed thereto, upon the following named persons:

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
State of Illinois Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

John J. Kim
Assistant Counsel
Special Assistant Attorney General
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, IL 62794-9276

Curtis W. Martin, Attorney for
Petitioner, Wei Enterprises