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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

APR 13 2005

MAC'S CONVENIENCE STORES LLC,)
Petitioner,)
vs.)
ILLINOIS ENVIRONMENTAL PROTECTION)
AGENCY,)
Respondent.)

PCB 05-124 STATE OF ILLINOIS
(UST APPEAL) Pollution Control Board

NOTICE OF FILING

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 West Randolph Street
Chicago, Illinois 60601-3218

John J. Kim
Assistant Counsel
Special Assistant Attorney General
Division of Legal Counsel
1021 North Grand Avenue, East
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Springfield, Illinois 62794-9276

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board Mac's Petition for Review of the Final Agency Underground Storage Tank Decision in the above referenced matter, a copy of which is herewith served upon you.

Respectfully submitted,

HATCHETT & HAUCK LLP

Dated: April 11, 2005



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ATTORNEYS FOR MAC'S
CONVENIENCE STORES LLC

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Pollution Control Board

**MAC'S PETITION FOR REVIEW OF FINAL AGENCY
UNDERGROUND STORAGE TANK DECISION**

Mac's Convenience Stores LLC ("Mac's") hereby files its Petition and requests that the Illinois Pollution Control Board ("Board") review the December 6, 2004 final decision of the Illinois Environmental Protection Agency ("Agency") in the above-referenced case. In support, Mac's respectfully states as follows:

Facts and Procedural History

1. Mac's owns and operates a convenience store and gasoline service station on property located at 2901 Stevenson Drive, Springfield, Sangamon County, Illinois ("Site").
2. On or around September 19, 2002, Mac's commenced excavation of certain former gasoline and diesel USTs at the Site. At that time, Mac's encountered free product and contaminated soil in the excavation pit for the old gasoline USTs, as well as contaminated backfill in the old diesel UST excavation. As a result, on September 19, 2002, Mac's reported a release of gasoline at the Site, as well as a release of diesel. Because the two excavations were greater than 100 feet apart, the Site was assigned Incident No. 20021336 for the gasoline release, and Incident No. 20021337 for the diesel release. Because the Agency has not disputed the fund eligibility of the diesel release, Incident No. 20021337 is not at issue in this appeal; all further references to the "release" will refer solely to the gasoline release.

3. Mac's retained American Environmental Corporation ("American") to complete Early Action and Site Investigation and Corrective Action, including release investigation and confirmation, preparation of a 45-Day Report, and preparation of a Site Investigation Plan ("SIP") and Budget.

4. The 45-Day Report, attached as Exhibit A, was submitted to the Agency on November 4, 2002, and approved on February 24, 2003.

5. On March 31, 2004, American submitted to the Agency on behalf of Mac's a SIP and Budget for investigation to determine the nature, concentration, direction of movement, rate of movement and extent of contamination as well as the physical features of the site and surrounding area that may affect contaminant transport and risk to human health and safety and the environment ("First SIP"). This First SIP is attached as Exhibit B. The First SIP and Budget were rejected by the Agency in a letter dated June 23, 2004 ("First Denial"), attached as Exhibit C. As the reasons for denial, that letter stated:

The plan fails to indicate the extent of soil and groundwater contamination will be defined as associated with the gas and diesel fuel LUST incidents listed above (*sic*). It will be necessary to include soil borings/groundwater monitoring wells W-SW and North of soil sample GWNW and E-NE of soil sample GWE of the previous gas excavation area. This may include off-site investigations.

In addition, it will be necessary to provide documentation that the current USTs in use have not had a release due to the close proximity of those USTs to the previous gas excavation area.

6. On August 4, 2004, American submitted to the Agency on behalf of Mac's a Revised SIP and Budget ("Revised SIP"), attached as Exhibit D. This Revised SIP contained the additional soil borings and monitoring wells as requested in the First Denial. On December 6, 2004, the Agency issued a Final Decision to Mac's in which the Revised SIP and associated

Budget were rejected ("Second Denial"). This Second Denial, attached as Exhibit E, stated as the reason for denial:

The plan indicates the LUST incident 20021336 was from gasoline USTs. All information currently in the Illinois EPA's possession indicates the gas contamination on site (and potentially off site) was due to the release in 1992 that has been "remediated" and has received a No Further Remediation letter dated May 7, 2002. Please provide information to indicate that LUST incident 20021336 is not a re-reporting of the closed LUST incident 920410.

The soil borings/monitoring wells may not be necessary if it cannot be proven that the LUST incident 20021336 is not a re-reporting of the closed LUST incident 920410 as requested above.

7. On January 13, 2005, counsel for the Agency timely filed a joint notice to extend the 35-day response period, and the Board extended the appeal period to and including April 11, 2005, as was requested. Thus, this Petition is timely filed.

8. By way of additional information, on February 2, 2005, American submitted another Revised SIP and Budget to the Agency ("Second Revision"). However, this second revision was not reviewed by the Agency prior to the appeal deadline.

**Statement of Issues for Review and
Legal Basis for Challenge to Determination**

9. Mac's seeks administrative review of the Agency's Second Denial rejecting the Revised SIP and Budget submitted by Mac's. Mac's challenges the form and basis of the Agency's Second Denial and believes that the Agency's Second Denial is without factual basis or legal support, is arbitrary and capricious, is inconsistent, and is otherwise not in accordance with applicable law for multiple reasons, including but not limited to the following reasons enunciated below.

10. Mac's consultant, American, prepared the August 4, 2004 Revised SIP and Budget in accordance with the Environmental Protection Act ("Act") and generally accepted

engineering practices. American's Kenneth M. Miller, P.E., P.G., who participated in preparing the SIP and Budget, is a Licensed Professional Engineer and Geologist with fourteen (14) years of experience in the environmental consulting industry. Both SIPs detailed the procedures necessary to determine the nature, concentration, direction of movement, rate of movement and extent of contamination as well as the physical features of the site and surrounding area that may affect contaminant transport and risk to human health and safety and the environment.

11. In accordance with 415 ILCS 5/57.7(a), the Budget included an accounting of all costs associated with the implementation and completion of the Revised SIP. These costs are reasonable and are necessary to perform the site investigation activities included in the Revised SIP.

12. In its December 6, 2004 final decision, the Agency cited as the reason for rejecting the Revised SIP and Budget the purported failure to provide information indicating that the gasoline contamination found at the Site was from a new release, and not attributable to a 1992 release at the Site, such former release having received a No Further Remediation letter dated May 7, 2002. However, the 45-Day Report submitted by American to the Agency stated that free product was encountered in the bottom of the gasoline UST excavation during the September 2002 tank removal – a fact which strongly indicates that a new release occurred subsequent to the 1992 release. Additionally, laboratory analyses of both the soil samples collected from the sidewalls of the excavation pit and the groundwater sample taken from the bottom of the gasoline excavation pit – all of which were included in the First SIP – revealed high levels of benzene. These results also indicate a new release has occurred at the Site. Finally, groundwater analytical results included in Table 2 in the first SIP show that

concentrations are at or above earlier concentrations reported by the former Site owner during and shortly after the 1992 release.

13. In addition, Mac's objects to the Agency's assertion of entirely new reasons for its Second Denial of the SIP. Mac's submitted information regarding the 1992 release in its 45-Day Report and First SIP. In its First Denial, the Agency did not set forth as a reason for denial its concern that the contamination at the Site may be attributable to the earlier 1992 release which had received a No Further Remediation letter. The Agency also told Mac's in the First Denial that "[i]t will be necessary to include soil borings/groundwater monitoring wells" in the area surrounding the excavation area. Mac's then included in its Revised SIP the requested additional soil borings and monitoring wells. However, the Agency denied the Revised SIP and informed Mac's that it was now concerned about the 2002 release being a re-reporting of the 1992 release, even going so far as to state that the additional soil borings and monitoring wells which had specifically been requested in the First Denial "may not be necessary if it cannot be proven that the LUST incident 20021336 is not a re-reporting of the closed LUST incident 920410...."

14. In rejecting a SIP, the written denial must contain "[a] statement of specific reasons why the cited Sections of the Act or regulations may be violated if the plan or report is approved." 35 Ill. Adm. Code 732.503. Due process and fundamental fairness require that the Agency cannot re-review the same information and change its reasons for denial.

WHEREFORE, Mac's Convenience Stores LLC respectfully requests that the Board direct the Agency to approve the Revised SIP and Budget submitted by Mac's, and grant such other and further relief as the Board may deem just and proper.

Respectfully submitted,

HATCHETT & HAUCK LLP



DATED: APRIL 11, 2005

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ATTORNEYS FOR MAC'S
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CERTIFICATE OF SERVICE

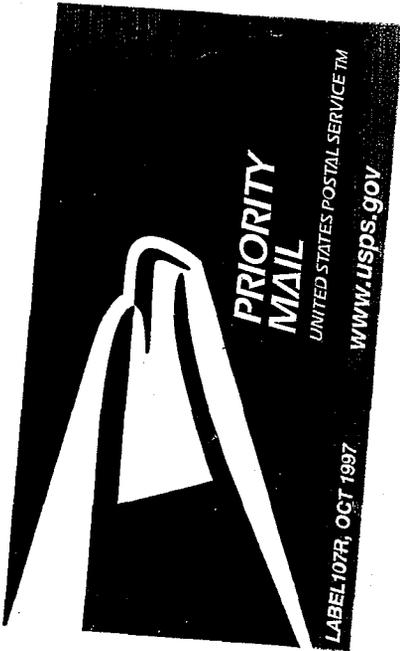
I, the undersigned attorney at law, hereby certify that on April 11, 2005, I served a true and accurate copy of the foregoing, by placing a true and correct copy in properly sealed and addressed envelopes and by depositing said sealed envelopes in a U.S. mail drop box located within Indianapolis, Indiana, with sufficient First Class Mail postage affixed thereto, upon the following named persons:

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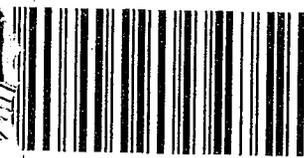
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