

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

ABP PROPERTIES, LLC

Petitioner,

V.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

PCB No. _____
(UST Permit Appeal)

NOTICE OF FILING AND PROOF OF SERVICE

To: Don Brown, Clerk
Illinois Pollution Control Board
60 E. Van Buren St., Ste. 630
Chicago, IL 60605

Division of Legal Counsel
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 (h), a PETITION FOR REVIEW OF ILLINOIS EPA LUST DECISION, a copy of which is herewith served upon Respondent.

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 Respondent by enclosing same in envelopes addressed as above with postage fully prepaid, and by depositing said envelopes in a U.S. Post Office Mailbox in Springfield, Illinois on the 5th day of July, 2024.

ABP PROPERTIES, LLC

BY: LAW OFFICE OF PATRICK D. SHAW

BY: /s/ Patrick D. Shaw

Patrick D. Shaw
Law Office of Patrick D. Shaw
80 Bellerive Road
Springfield, IL 62704
217-299-8484
pdshaw1law@gmail.com

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ABP PROPERTIES, LLC)	
Petitioner,)	
)	
v.)	PCB No. _____
)	(UST Permit Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
Respondent.)	

PETITION FOR REVIEW OF ILLINOIS EPA LUST DECISION

NOW COMES Petitioner, ABP PROPERTIES, LLC pursuant to Section 57.7(c)(4) of the Illinois Environmental Protection Act, 415 ILCS 5/57.7(c)(4), and hereby appeals the Illinois EPA’s final decision, denying a corrective action budget amendment, stating as follows:

1. Petitioner owns a former self-service fueling station in Gibson City, County of Ford, Illinois, assigned LPC #0530100002.
2. On October 5, 2016, a release was reported from three underground storage tanks at the site, and the incident was assigned Incident Number 2016-0917.
3. Subsequently, the tanks were removed as a part of early action, and site investigation activities were performed.
4. On October 7, 2021, a corrective action plan and budget was submitted for the site, which proposed in relevant part excavating, transporting and disposing of 967.66 cubic yards of contaminated soil, and backfilling the excavation. The budget estimated the costs based upon the maximum payment amounts in the Board’s Subpart H regulations.
5. On February 9, 2022, the Illinois EPA approved the corrective action plan and budget, but reduced the amount of soil to be removed to 698 cubic yards with the agreement of Petitioner’s consultant.

6. Thereafter, Petitioner's consultant was unable to find a licensed contractor willing to perform the excavation and backfilling work within the maximum payment amounts approved in the budget, and so the approved work was put out for bid.

7. On November 22, 2023, Petitioner submitted a Corrective Action Budget Amendment based upon the lowest bid received, which was \$55,539.86 above the previously approved budget for that work. The budget amendment requested approval of \$62,890.94, which is the sum of the increased costs reflected in the lowest bid as well as the consultant's cost in preparing and conducting the bid pursuant to Board regulations.

8. On May 21, 2024, the Illinois EPA rejected the budget amendment in total claiming that bidding could not be used to alter previously approved amounts. A true and correct copy of the decision letter is attached hereto as Exhibit A.

9. The Illinois EPA explained its position as follows:

Pursuant to 35 Ill. Adm. Code 734.870(d)(1), for costs approved by the Illinois EPA in writing prior to the date the costs are incurred, the applicable maximum amounts must be the amounts in effect on the date the Illinois EPA received the budget in which the costs were proposed. Once the Illinois EPA approves costs, the applicable maximum amounts must not be increased, e.g., by proposing the costs in a subsequent budget. The owner or operator is attempting to increase the applicable maximum amounts by proposing the costs in a subsequent budget.

(Exhibit A)

9. As an initial matter, the approach taken herein is entirely consistent with that taken in Singh v. IEPA, PCB 23-90 (Sept. 21, 2023) (approving budget amendment for concrete placement based upon competitive bid after budget had previously been approved pursuant to Subpart H rates).

10. As a matter of law, Section 734.870(d)(1) does not apply to competitive bidding.

As narrated in the Agency's decision letter, there are three methods for determining maximum payment amounts, but only the first method, the one based upon the maximum amounts set forth in Subpart H, incorporates Section 734.870. (35 Ill. Adm. Code 734.800(a)(1)) The second and third method omit Section 734.870 from the provisions listed as being applicability to competitive bidding and unusual or extraordinary circumstances. (35 Ill. Adm. Code 734.800(a)(2) & (3)) This is not surprising because Section 734.870 contains the inflation factor used to increase maximum payment amounts yearly and has no relevancy to the second and third methods. Pursuant to the maxim *expressio unius est exclusio alterius*, the express inclusion of Section 734.870 for the first method, but not for the other two methods, indicates the intention to exclude that Section from consideration for the other two methods.

11. The Illinois EPA determination was received on June 3, 2024, which is less than thirty-five days from today and therefore this appeal is timely.

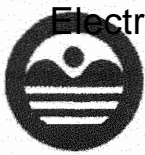
WHEREFORE, Petitioner ABP PROPERTIES, LLC prays that: (a) the Illinois EPA produce the Record; (b) a hearing be held; (c) the Board find the Illinois EPA erred in its decision, (d) the Board direct the Illinois EPA to pay the amounts erroneously deducted from the payment application, (e) the Board award payment of attorney's fees; and (f) the Board grant the Petitioner such other and further relief as it deems meet and just.

ABP PROPERTIES, LLC
Petitioner,

BY: LAW OFFICE OF PATRICK D. SHAW

BY: /s/ Patrick D. Shaw

Patrick D. Shaw
LAW OFFICE OF PATRICK D. SHAW
80 Bellerive Road
Springfield, IL 62704
217-299-8484
pdshaw1law@gmail.com



ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

1021 NORTH GRAND AVENUE EAST, P.O. BOX 19276, SPRINGFIELD, ILLINOIS 62794-9276 • (217) 782-3397

JB PRITZKER, GOVERNOR

JOHN J. KIM, DIRECTOR

(217) 524-3300

CERTIFIED MAIL

MAY 21 2024

9589 0710 5270 0477 0525 85

Yogi Bhardwaj
ABP Properties, LLC
159 North Greenleafd Street, Suite #2
Gurnee, IL 60031

Re: 0530100002 -- Ford County
Gibson City/ABP Properties, LLC
120 West 1st Street
Leaking UST Incident 20160917
Leaking UST Technical File

Dear Yogi Bhardwaj:

The Illinois Environmental Protection Agency (Illinois EPA) has reviewed the Corrective Action Plan Budget (budget) submitted for the above-referenced incident. This budget, dated November 22, 2023, was received by the Illinois EPA on November 27, 2023. Citations in this letter are from the Environmental Protection Act (415 ILCS 5) (Act) and Title 35 of the Illinois Administrative Code (35 Ill. Adm. Code).

The budget is rejected for the reason(s) listed in Attachment A (Sections 57.7(b)(3) and 57.7(c) of the Act and 35 Ill. Adm. Code 734.505(b) and 734.510(b)).

All future correspondence must be submitted 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.

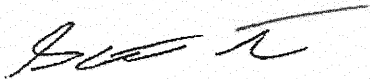
An underground storage tank system owner or operator may appeal this decision to the Illinois Pollution Control Board. Appeal rights are attached.



Page 2

If you have any questions or need further assistance, please contact the undersigned at (217) 785-1858 or at Scott.Rothering@illinois.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott Rothering", written in a cursive style.

Scott Rothering
Project Manager
Special Projects and Financial Unit
Leaking Underground Storage Tank Section
Bureau of Land

Attachments: Attachment A
Appeal Rights

c: Carol Rowe, CWM Company (electronic copy)
BOL File

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 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:

Clerk of the Board
Illinois Pollution Control Board
James R. Thompson 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
PO Box 19276
Springfield, IL 62794-9276
(217) 782-5544

Attachment A

Re: 0530100002 -- Ford County
Gibson City / ABP Properties, LLC
120 West 1st Street
Leaking UST Incident 20160917
Leaking UST Technical File

Citations in this attachment are from the Environmental Protection Act (415 ILCS 5) (Act) and Title 35 of the Illinois Administrative Code (35 Ill. Adm. Code).

The budget includes Remediation and Disposal Costs, Consulting Personnel Costs, and Consultant's Material Costs that exceed the maximum payment amounts set forth in Subpart H of 35 Ill. Adm. Code 734. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 734.630(zz).

Pursuant to 35 Ill. Adm. Code 734.800(a), Subpart H of 35 Ill. Adm. Code 734 provides three methods for determining the maximum amounts that can be paid from the Fund for eligible corrective action costs. The first method for determining the maximum amount that can be paid for each task is to use the maximum amount for each task set forth in 35 Ill. Adm. Code 734.810 through 734.850 and 734.870. The second method for determining the maximum amount that can be paid for each task is bidding in accordance with 35 Ill. Adm. Code 734.855. The third method for determining the maximum amount that can be paid for each task is to determine the maximum amount for unusual or extraordinary circumstances in accordance with 35 Ill. Adm. Code 734.860. The owner or operator previously requested approval of the maximum amounts set forth in 35 Ill. Adm. Code 734.810 through 734.850 and 734.870. In a letter dated February 9, 2022, the Illinois EPA approved the maximum amounts set forth in 35 Ill. Adm. Code 734.810 through 734.850 and 734.870. Pursuant to 35 Ill. Adm. Code 734.870(d)(1), for costs approved by the Illinois EPA in writing prior to the date the costs are incurred, the applicable maximum amounts must be the amounts in effect on the date the Illinois EPA received the budget in which the costs were proposed. Once the Illinois EPA approves costs, the applicable maximum amounts must not be increased, e.g., by proposing the costs in a subsequent budget. The owner or operator is attempting to increase the applicable maximum amounts by proposing the costs in a subsequent budget.

In addition, bidding costs for which the Illinois EPA approved the maximum amounts set forth in 35 Ill. Adm. Code 734.810 through 734.850 and 734.870 exceeds the minimum requirements necessary to comply with the Act. Costs for corrective action activities and associated materials or services exceeding the minimum requirements necessary to comply with the Act are ineligible for payment from the Fund pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.630(o).

Furthermore, bidding costs for which the Illinois EPA approved the maximum amounts set forth in 35 Ill. Adm. Code 734.810 through 734.850 and 734.870 violates a provision of the Act or Illinois Pollution Control Board (Board), Office of the Illinois State Fire Marshal (OSFM), or Illinois EPA regulations. Costs associated with activities that violate any provision of the Act or Board, OSFM, or Illinois EPA regulations are ineligible for payment from the Fund pursuant to Section 57.6(a) of the Act and 35 Ill. Adm. Code 734.630(i).

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 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:

Clerk of the Board
Illinois Pollution Control Board
James R. Thompson 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
PO Box 19276
Springfield, IL 62794-9276
(217) 782-5544