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FEB 16 2005

STATE OF ILLINOIS
Pollution Control Board

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

MIDWEST PETROLEUM COMPANY,)
)
Petitioner,)
)
vs.)
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

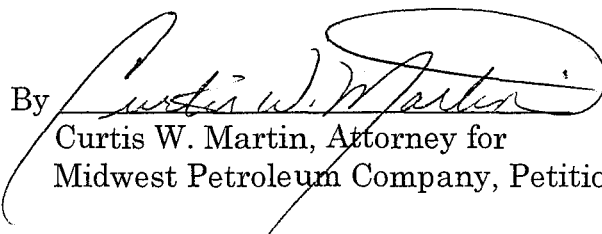
PCB No. 05-1515
(UST Appeal)

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 a Petition for Review of Final Agency Leaking Underground Storage Tank Decision, a copy of which is herewith served upon you.

By 
Curtis W. Martin, Attorney for
Midwest Petroleum Company, 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
P.O. Box 1789
Mt. Vernon, Illinois 62864
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MIDWEST PETROLEUM COMPANY,)
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ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondent.)

PCB No. 05-~~156~~ 155 JTR
(UST Appeal)

PETITION FOR REVIEW OF FINAL AGENCY
LEAKING UNDERGROUND STORAGE TANK DECISION

NOW COMES the Petitioner, Midwest Petroleum Company, ("Midwest"), by one of its attorneys, Curtis W. Martin of Shaw & Martin, P.C., 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, Midwest respectfully states as follows:

1. On January 11, 2005, the Agency issued a final decision which was received by Midwest on January 17, 2005, a copy of which is attached hereto as Exhibit A.

2. The basis for Midwest's appeal is as follows:

The Agency's January 11, 2005 letter addressed an Application for Payment from Midwest, through its consultant, United Science Industries, Inc. ("USI"), dated September 14, 2004 covering the period from May 1, 2000 to August

21, 2004 requesting payment of \$68,709.09. The Agency deducted a total of \$27,089.04 and indicated a voucher for \$41,620.05 would be prepared for submission to the Comptroller's Office for payment. Midwest does not contest the Agency's deduction of \$2,187.04 for costs that the Agency claims lacks supporting documentation. Midwest does contest the remaining \$24,902.00 in deductions.

The first deduction Midwest contests is for \$1,596.25 for what the Agency describes as "indirect corrective action costs" for personnel, materials, service, or equipment charged as direct corrective action costs. It appears the Agency's position is that reimbursement is not available for "communications between consultant and client or consultant and the Illinois EPA." First, this deduction is not based upon any specifically applicable statute or regulation. Second, this deduction is not based upon any past practice by the Agency. Third, the assertion by the Agency that these communication activities are "indirect corrective action costs" implies that they are not associated with compliance with the provisions of Sections 57.2, 57.6, and 57.7 of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/57.2, 57.6 and 57.7, or 35 Ill. Adm. Code 732.103. None of these statutes or the regulation specifically address such communication activities as "indirect corrective action costs" not subject to reimbursement.

35 Ill. Adm. Code 732.605(a) in particular sets forth the corrective action activities costs that are eligible for payment from the UST Fund, which include costs associated with engineering oversight services, remedial investigation and design, engineering costs associated with seeking reimbursement from the UST

Fund including, but not limited to, completion of applications for payment, obtaining eligibility and deductibility determinations from the Office of the State Fire Marshall or the Agency, preparation of site classification plans and associated budgets, site classification reports, groundwater monitoring plans and associated budgets, groundwater monitoring completion reports, high priority corrective action plans and associated budgets, and high priority corrective action completion reports just to name a few. These were the types of activities performed by USI on Midwest's behalf. Further, Section 57.7(f) requires all investigations, plans and reports to be conducted or prepared by licensed professional engineers, yet this same section places the responsibility for such work directly upon the owner or operator.

Thus, communications between the consultant and the client or the consultant and the Agency by telephone, e-mails, correspondence, and any other means are absolutely essential and directly relate to the necessary corrective action activities. As such, these costs are necessary in order to comply with Sections 57.6 and 57.7 of the Act and 35 Ill. Adm. Code 732.103 and are therefore eligible for payment from the UST Fund. Furthermore, within this particular project, the Agency has approved the reimbursement of the same type of costs associated with client correspondence by its letter dated August 21, 2003. For all the foregoing reasons, the \$1,596.25 deduction by the Agency is without merit, is arbitrary and capricious, and subject to reversal.

The next Agency deduction Midwest challenges is the \$23,049.50 deduction for costs associated with a non-approved budget. Although the Agency refers to the denial of two budgets dated September 23, 2002 and May 2, 2003, the very costs the Agency deducts by this January 11, 2005 letter are the costs associated with work performed and documented in Section D-1 of the Corrective Action Plan and associated Budget dated July, 2004 which were approved by Agency letter dated September 1, 2004. Therefore, the Agency's reliance upon 35 Ill. Adm. Code 732.601(f) is wholly without merit, and is arbitrary and capricious and should be reversed.

The final Agency deduction challenged by Midwest is for \$256.25 in costs associated with "duplicate billings" and lack of supporting documentation. According to Midwest's records, these costs are reflected in USI Invoice #18-8469 for preparation of UST paperwork, corrective action plan preparation and project administration between August 1, 2001 and August 31, 2001. No duplication of payment has been requested and these costs were not covered in the Agency letter dated August 21, 2003 as contended by the Agency. These costs are therefore subject to reimbursement from the UST Fund and the Agency's decision in this regard should be reversed.

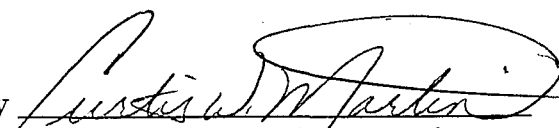
WHEREFORE, Petitioner, Midwest Petroleum Company, prays that the Agency's decision of January 11, 2005, except for the deduction of \$2,187.04, be reversed, that its request for payment be approved as reasonable, justifiable, necessary, consistent with generally accepted engineering practices, and eligible for

reimbursement from the UST Fund and that Petitioner recover its attorney's fees and costs incurred herein pursuant to 415 ILCS 5/57.8(1) and 35 Ill. Adm. Code 732.606(g).

Respectfully submitted,

SHAW & MARTIN, P.C.

By



Curtis W. Martin, Attorney for
Midwest Petroleum Company,
Petitioner

Robert E. Shaw
IL ARDC No. 03123632
Curtis W. Martin
IL ARDC No. 06201592
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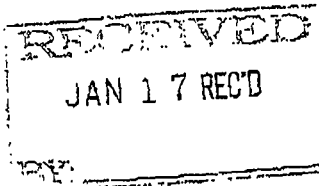
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

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

JAN 11 2005



Midwest Petroleum Company
Attn: Mike McNutt
Post Office Box 3765
Evansville, Indiana 47736

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

Dear Mr. McNutt:

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 September 14, 2004 and was received by the Agency on September 15, 2004. The application for payment covers the period from May 1, 2000 to August 21, 2004. The amount requested is \$68,709.09.

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 September 15, 2004, 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 \$41,620.05 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

ROCKFORD - 4302 North Main Street, Rockford, IL 61103 - (815) 987-7760 • DES PLAINES - 9511 W. Harrison St., Des Plaines, IL 60016 - (847) 294-4000
ELGIN - 595 South State, Elgin, IL 60123 - (847) 608-3131 • PEORIA - 5415 N. University St., Peoria, IL 61614 - (309) 693-5463
BUREAU OF LAND - PEORIA - 7620 N. University St., Peoria, IL 61614 - (309) 693-5462 • CHAMPAIGN - 2125 South First Street, Champaign, IL 61820 - (217) 278-5800
SPRINGFIELD - 4500 S. Sixth Street Rm., Springfield, IL 62706 - (217) 786-6892 • COLLINSVILLE - 2009 Mall Street, Collinsville, IL 62234 - (618) 346-5120
MARION - 2309 W. Main St., Suite 116, Marion, IL 62959 - (618) 993-7200

PRINTED ON RECYCLED PAPER

EXHIBIT A

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 applicant 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:

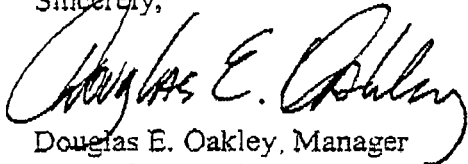
Dorothy Gunn, Clerk
Illinois Pollution Control Board
State of Illinois Center
100 West Randolph, Suite 11-500
Chicago, Illinois 60601
312/814-3620

For information regarding the filing of an extension, please contact:

Illinois Environmental Protection Agency
Division of Legal Counsel
1021 North Grand Avenue East
Springfield, Illinois 62794-9276
217/782-5544

If you have any questions or require further assistance, please contact Mindy Weller of Harry Chappel's staff at 217/782-6762.

Sincerely,



Douglas E. Oakley, Manager
LUST Claims Unit
Planning & Reporting Section
Bureau of Land

DEO:NM:ct\0503593.doc

cc: United Science Industries

Attachment A
Technical Deductions

Re: LPC #163125;004 – 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), as amended by Public Act 92-0554 or June 24, 2002, and 35 Illinois Administrative Code (35 Ill. Adm. Code).

Item # Description of Deductions

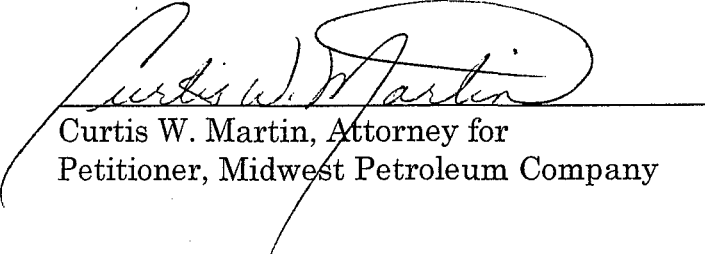
1. \$2,187.04, deduction for costs that lack supporting documentation (35 Ill. Adm. Code 732.606(gg)). Since there is no supporting documentation of costs, the Illinois EPA cannot determine that costs were not used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act (Section 57.5(a) of the Act and 35 Ill. Adm. Code 732.606(o)).
2. \$1,596.25, deduction for indirect corrective action costs for personnel, materials, service, or equipment charged as direct costs (35 Ill. Adm. Code 732.606(v)). 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). The Illinois EPA LUST Fund does not reimburse for communications between consultant and client or consultant and the Illinois EPA. *appeal*
3. \$23,049.50, deduction for costs associated with a non-approved budget (35 Ill. Adm. Code 732.601(f)). The Illinois EPA denied two (2) budgets with which these costs are associated with dated September 23, 2002 and May 2, 2003. *appeal* *budget approved* *reimbursed* *same denied!*
4. \$256.25, deduction for costs associated with duplicate billings. (Section 57.7(c)(4)(C) of the Act and 35 Ill. Adm. Code 732.606(o)). 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)). The Illinois EPA cannot determine what the costs are associated with considering the dates the work was performed. These costs should have been covered in the Illinois EPA letter dated August 21, 2003. *18-8469*

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on February 14, 2005, I served true and correct copies of a 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
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Springfield, IL 62794-9276


Curtis W. Martin, Attorney for
Petitioner, Midwest Petroleum Company