

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

GARY COOPER,)	
Petitioner,)	
v.)	PCB _____
)	(LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
Respondent.)	

NOTICE OF FILING AND PROOF OF SERVICE

To:	John T. Therriault, Acting Clerk	Bill Ingersoll
	Illinois Pollution Control Board	Illinois Environmental Protection Agency
	100 West Randolph Street	1021 North Grand Avenue East
	State of Illinois Building, Suite 11-500	P.O. Box 19276
	Chicago, IL 60601	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 (d), a PETITION FOR REVIEW OF THE AGENCY LUST DECISION, a copy of which is herewith served upon the attorneys of record in this cause.

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 counsel of record of all parties to this cause by enclosing same in envelopes addressed to such attorneys with postage fully prepaid, and by depositing said envelopes in a U.S. Post Office Mailbox in Springfield, Illinois on the 1st day of June, 2011.

Respectfully submitted,
GARY COOPER, Petitioner

BY: MOHAN, ALEWELT, PRILLAMAN & ADAMI

BY: /s/ Patrick D. Shaw

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PETITION FOR REVIEW OF AGENCY LUST DECISION

NOW COMES Petitioner, GARY COOPER, pursuant to Section 40 of the Illinois Environmental Protection Act, 415 ILCS 5/40, and Part 105 of the Illinois Pollution Control Board Rules, 35 Ill. Admin. Code Sections 105.400 through 105.412, and hereby appeals the LUST decision issued on a April 27, 2011, by Respondent Illinois Environmental Protection Agency ("Agency"), in which the Agency denied payment of early action costs, and in support thereof states as follows:

1. On or before March 27, 2009, Mr. Cooper purchased a former service station property, commonly known as the Royal Station, in Royal, Champaign County, Illinois, and assigned LPC #0190705001.

2. On or about April 6, 2009, a consultant hired by Mr. Cooper called the Illinois Emergency Management Agency to report a suspected gasoline leak or spill at the subject property of unknown amount, unknown cause and unknown extent. As a result of this phone call, incident number 20090334 was assigned.

3. No work was performed to confirm the suspected release, nor was corrective action taken in response to incident number 20090334 (hereinafter "2009 Incident").

4. Mr. Cooper was unaware of any leaks or holes in the existing tanks when the

consultant decided to report a suspected release. After investigating these events with owner/operators of underground storage tanks, he decided to hire a new environmental consultant to conduct an investigation of site conditions.

5. On September 22, 2010, a subsurface investigation was conducted at the subject property. Organic vapor concentrations in a soil boring revealed the presence of a release. A soil sample was then collected and sent to a laboratory. The soil analytical results revealed concentrations above remediation objectives for one or more indicator constituents.

6. On October 14, 2010, the Illinois Emergency Management Agency was notified of a release from three underground storage tanks at the subject property, as evidenced by the soil analytical results. The report was assigned incident number 20101122 (hereinafter "2010 Incident").

7. Thereafter, Mr. Cooper's consultant conducted corrective action work in the form of removing tanks and immediately surrounding fill material. This work constituted "early action," as contemplated by the Illinois Environmental Protection Act. (415 ILCS 5/57.6(b))

8. On November 18, 2010, Mr. Cooper, through his consultants, submitted a forty-five day report, detailing the corrective action activities taken as of that date in response to the 2010 Incident and certifying that additional corrective action activities would be necessary.

9. On December 17, 2010, the Office of the State Fire Marshall issued an eligibility and deductibility determination for the 2010 Incident, finding that corrective action taken in response to this incident is eligible for reimbursement from the LUST fund, and assessing a \$5,000 deductible.

10. On or about January 3, 2011, Mr. Cooper submitted an application for payment

for early action activities performed within 59 days after the 2010 Incident was reported.

11. On April 27, 2011, the Agency denied the application, and a true and correct copy of the decision is attached hereto as Exhibit A. The Agency's reason for denying the application is that it determined that the 2010 Incident was a re-reporting of the 2009 Incident, and consequently early action activities had to have taken place the previous year. This petition is filed thirty-five days from the day the Agency issued its decision.

12. There is no basis for the Agency concluding that the two incidents were re-reportings of a single incident. Indeed, there is no evidence that there was a release in 2009, other than a telephone call from the owner's former consultant. By reason and belief the Agency has never believed that such information could constitute sufficient evidence of a release. See Dickerson Petroleum v. IEPA, PCB 9-87 (Feb. 4, 2010) (Agency position that visual, olfactory and PID readings alone are insufficient evidence of a release).

13. Furthermore, the Agency has acted outside of its jurisdiction in determining that the incidents were re-reportings of a single incident. OSFM has determined that the 2010 Incident 20101122 is separately eligible for reimbursement from the LUST Fund from the 2009 Incident.

14. Alternatively, the owner/operator was not required by OSFM regulations to investigate and confirm the suspected release (the 2009 Incident) since the 2009 Incident did not require reporting (42 Ill. Adm. Code § 170.580(b)), nor did the owner or operator report it. (Id. § 170.560). Under the Illinois Environmental Protection Act, early action activities may be performed without a pre-approved budget in accordance with the regulations of the OSFM. (415 ILCS 5/57.6)

15. Accordingly, the Agency's decision should be set aside, and the application for payment of early action costs should be approved, subject to whatever deductible is appropriate.

WHEREFORE, Petitioner, GARY COOPER, prays that: (a) the Agency produce the Record; (b) a hearing be held; (c) the Board find the Agency erred in its decision, (d) the Board direct the Agency to approve the application for payment in full, subject to any deductible, (e) the Board award payment of attorney's fees; and (f) the Board grant Knapp such other and further relief as it deems meet and just.

GARY COOPER,
Petitioner

By its attorneys,
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THIS FILING IS SUBMITTED ON RECYCLED PAPER