

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

MARTIN & BAYLEY, INC.,)
 Petitioner,)
 v.) PCB _____
) (LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
 Respondent.)

NOTICE OF FILING AND PROOF OF SERVICE

To: Don Brown, Acting Clerk Division of Legal Counsel
 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 4th day of September, 2018.

Respectfully submitted,
MARTIN & BAYLEY, INC.,
Petitioner,

BY: LAW OFFICE OF PATRICK D. SHAW

BY: /s/ Patrick D. Shaw

Patrick D. Shaw
LAW OFFICE OF PATRICK D. SHAW
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

MARTIN & BAYLEY, INC.,)	
Petitioner,)	
)	
v.)	PCB _____
)	(LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
Respondent.)	

PETITION FOR REVIEW OF AGENCY LUST DECISION

NOW COMES Petitioner, MARTIN & BAYLEY, INC., pursuant to Section 57.8(i) of the Illinois Environmental Protection Act, 415 ILCS 5/57.8(i), and hereby appeals the Agency's final decision to not pay corrective action costs in full, stating as follows:

1. Petitioner owns a convenience store known as Huck's #134, in the City of Mt. Vernon, County of Jefferson, Illinois, which had been assigned LPC # 0810305287.
2. On December 5, 2017, a leak or spill was reported from the two underground storage tanks at the property, which was assigned Incident Number 2017-1116.
3. In January of 2018, the tanks were removed, as well as the surrounding visibly contaminated fill material and contaminated groundwater in the excavation.
4. On February 3, 2018, a 45-Day Report was submitted to the Illinois Environmental Protection Agency (herein "the Agency"), detailing early action activities and reporting that early action had not proven sufficient to meet remediation objectives.
5. On March 1, 2018, the 45-Day Report was approved, including the Stage 1 Site Investigation Plan.
6. On April 13, 2018, an application for reimbursement for early action activities was submitted to the Agency in the amount of \$75,067.86. The application included the costs of

removing and transporting concrete overlying the contaminated soil. Since the concrete was ultimately recycled, reimbursement for concrete disposal costs were not sought. The total amount requested was at or below the maximum payment amounts set forth in Subpart H regulations.

7. There was e-mail correspondence regarding the treatment of said concrete prior to the Agency decision herein. The exchange indicated that the Agency has a policy of only reimbursing the transportation costs associated with concrete that is recycled, and will not reimburse the costs of personnel time and equipment to break-up and load the concrete on-site.

8. On July 26, 2018, the Agency issued its decision herein, making several cuts, but only the first decision is appealed herein, which cut \$1,897.39 for the cost of removing concrete above the contaminated soil being removed. A true and correct copy of the decision is attached hereto as Exhibit A.

9. Pursuant to Board regulations, the cost of “removal, transportation, and disposal” of contaminated soil and concrete, asphalt, or paving overlying such contaminated soil must not exceed a total of \$72.05 per cubic yard. (35 Ill. Adm. Code §734.825(a) (inserting the applicable inflation-adjusted rate from the Agency’s website)) The Agency’s policy to refuse reimbursement for the removal of concrete if it is to be recycled is not supported by the regulations, which expressly contemplate reimbursement for concrete removal.

10. Breaking-up concrete and loading it onto trucks is a substantial activity and the Agency policy is not only inconsistent with the Board regulations, it is inconsistent with public policy “to promote the conservation of natural resources and minimize environmental damage by . . . encouraging and effecting the recycling and reuse of waste materials.” (415 ILCS 5/20(b))

Under the Agency policy, reimbursement for the cost of removing concrete is only available if the truck is directed to a landfill, not a recycler. Thus the Agency policy acts as a material disincentive to recycling. Moreover, if the result of the policy increases concrete disposal, then an additional charge for landfilling would be assessed to the LUST Fund, which is inconsistent with whatever cost-savings agenda the Agency believes itself to be implementing.

11. With respect to the allegation of “lack of supporting documentation,” the submittal was complete, containing all of the information required by statute, regulation and the applicable form. In pre-decision e-mail exchanges, no documentation was requested; the Agency reviewer just informed the consultant of the policy. Furthermore, the Agency decision letter does not explain the specific type of information that the Agency needed to complete its review.

12. Furthermore, the remaining statutory and regulatory provisions cited in the decision letter do not apply to payment applications. See 415 ILCS 5/57.7(c)(3)) (governing site investigation plans and corrective action plans); 35 Ill. Adm. Code 734.630(dd) (governing budgets)

13. The subject Illinois EPA letter was received by certified mail on July 31, 2018, making September 4, 2018, the deadline for any appeal, and therefore this appeal is timely.

WHEREFORE, Petitioner, MARTIN & BAYLEY, INC., 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 payment application with respect to concrete removal costs, (e) the Board award payment of attorney’s fees; and (f) the Board grant Petitioner such other and further relief as it deems meet and just.

MARTIN & BAYLEY, INC.,
Petitioner

By its attorneys,
LAW OFFICE OF PATRICK D. SHAW

By: /s/ Patrick D. Shaw

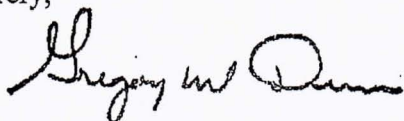
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An underground storage tank system owner or operator may appeal this decision to the Illinois Pollution Control Board. Appeal rights are attached.

If you have any questions or require further assistance, please contact Melissa Owens of my staff at (217)785-9351.

Sincerely,



Gregory W. Dunn, Manager
Leaking Underground Storage Tank Section
Division of Remediation Management
Bureau of Land

GWB
mao



Attachments

c: Martin & Bayley, Inc.
Leaking UST Claims Unit

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 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 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
Post Office Box 19276
Springfield, IL 62794-9276
217/782-5544

Attachment A
Deductions

Re: LPC #0810305287 -- Jefferson County
Mt. Vernon / Martin & Bayley, Inc.
540 Airport Road
Incident-Claim No.: 20171116 -- 69210
Queue Date: April 16, 2018
Leaking UST FISCAL FILE

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

Item # Description of Deductions

- ✱ 1. \$1,897.39, deduction for costs for Remediation and Disposal, which lack supporting documentation. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 734.630(cc). Since there is no supporting documentation of costs, the Illinois EPA cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act. Therefore, such costs are not approved pursuant to Section 57.7(c)(3) of the Act because they may be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of Title XVI of the Act.

In addition, the costs are not reasonable as submitted. Such costs are ineligible for payment from the Fund pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.630(dd).

The Agency is reimbursing 350.24 cubic yards of ETD at \$72.05 per cubic yard plus \$450.00 for concrete trucking for a total of \$25,684.79.
2. \$604.50, deduction for costs for Remediation and Disposal, which lack supporting documentation. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 734.630(cc). Since there is no supporting documentation of costs, the Illinois EPA cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act. Therefore, such costs are not approved pursuant to Section 57.7(c)(3) of the Act because they may be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of Title XVI of the Act.

The Agency is reimbursing \$955.50, which is the amount indicated on the documentation provided.
3. \$22.50, deduction for costs for Consultant's Materials, which lack supporting documentation. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 734.630(cc). Since there is no supporting documentation of costs, the

Illinois EPA cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act. Therefore, such costs are not approved pursuant to Section 57.7(c)(3) of the Act because they may be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of Title XVI of the Act.

Postage is being cut because documentation was not provided.

4. \$30.00 for costs for copy charges, which lack supporting documentation. Such costs are ineligible for payment from the Fund pursuant to 35 Ill. Adm. Code 734.630(cc). Since there is no supporting documentation of costs, the Illinois EPA cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act. Therefore, such costs are not approved pursuant to Section 57.7(c)(3) of the Act because they may be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of Title XVI of the Act.

Pursuant to 35 Ill. Adm. Code 734.850(b) costs associated with activities that do not have a maximum payment amount set forth pursuant to 35 Ill. Adm. Code 734 Subpart H must be determined on a site specific basis and the owner/operator must demonstrate to the Agency the amounts sought for reimbursement are reasonable. The owner/operator has not provided sufficient documentation to support the rate requested for copy charges and/or the quantity of copies requested pursuant to 35 Ill. Adm. Code 734.505(a). The documentation was either not provided or fails to provide sufficient information for the Agency to make a site specific reasonableness determination.

In addition, without supporting documentation the rate and/or the quantity of copies requested are not reasonable as submitted. Such costs are ineligible for payment from the Fund pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.630(dd).

mao