

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

DISTRESSED PROPERTIES, INC.,)	
)	
Petitioner,)	
)	
v.)	PCB 16 --
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

NOTICE OF FILING

To:	John Therriault, Clerk	Scott B. Sievers
	Illinois Pollution Control Board	Special Assistant Attorney General
	100 West Randolph Street	IEPA
	Suite 11-500	1021 North Grand Avenue East
	Chicago, Illinois 60601	P.O. Box 19276
		Springfield, Illinois 62794-9276

PLEASE TAKE NOTICE that on this 3rd day of September 2015, the following were filed electronically with the Illinois Pollution Control Board: **Petitioner Distressed Properties, Inc.'s Petition for Review and Motion to Consolidate**, which are attached and herewith served upon you.

DISTRESSED PROPERTIES, INC.

By: s/Elizabeth S. Harvey
One of its attorneys

Elizabeth Harvey
SWANSON, MARTIN & BELL, LLP
330 North Wabash, Suite 3300
Chicago, Illinois 60611
312.923.8260 (direct)
312.321.9100 (main)
312.321.0990 (facsimile)
eharvey@smbtrials.com

CERTIFICATE OF SERVICE

I, the undersigned, state that a copy of this notice and the above-described documents were served electronically upon all counsel of record on September 3, 2015.

s/Elizabeth S. Harvey

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

DISTRESSED PROPERTIES, INC.,)	
)	
Petitioner,)	
)	
v.)	PCB 16 --
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

PETITION FOR REVIEW

Petitioner DISTRESSED PROPERTIES, INC. ("DPI"), by its attorneys Swanson, Martin & Bell, LLP, seeks review of respondent the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY's ("the Agency") July 31, 2015 decision denying reimbursement of some costs incurred under the Underground Storage Tank ("UST") program. This petition is brought pursuant to Sections 40 and 57.8(i) of the Environmental Protection Act ("Act") (415 ILCS 5/40, 5/57.8(i)) and 35 Ill. Adm. Code Part 105.

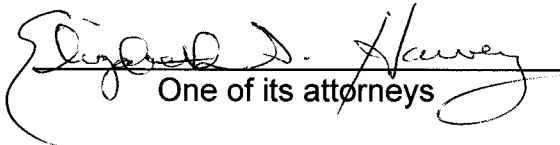
1. On July 31, 2014, DPI filed its initial application for payment of costs from the UST Fund. The Agency issued its decision on that application on November 26, 2014, approving payment of some, but not all, of the costs requested. The amount at issue is \$69, 518.77.
2. DPI appealed the Agency's November 26, 2014 decision. That appeal is pending before the Board as *Distressed Properties, Inc. v. Illinois Environmental Protection Agency*, PCB 15-108.

3. On June 18, 2015, the Agency issued a second decision on DPI's reimbursement application. That June 18, 2015 decision approved reimbursement of \$21,642.00 of the \$69,518.77 at issue.
4. DPI appealed the Agency's June 18, 2015 decision. That appeal is pending before the Board as *Distressed Properties, Inc. v. Illinois Environmental Protection Agency*, PCB 16-032. On August 6, 2015, the Board granted DPI's motion to consolidate the two appeals.
5. On July 31, 2015, the Agency issued a third decision, approving reimbursement of an additional \$5,241.96. That decision is attached as Exhibit 1.
6. There are still denied costs of \$42,634.81. DPI continues to work with the Agency to resolve the dispute. However, the parties will not have been able to reach an agreement until after the appeal period for the July 31, 2015 letter expires.
7. This appeal arises from the same circumstances as the currently-pending appeals, *Distressed Properties, Inc. v. Illinois Environmental Protection Agency*, PCB 15-108 and PCB 16-32. As it did in the PCB 16-32 appeal, DPI will file a motion to consolidate this appeal with the two consolidated appeals.
8. DPI seeks a review of the denial of all costs (\$42,634.81) still at issue after the Agency's July 31, 2015 decision. The denied costs were incurred in executing an approved corrective action plan, and were part of an approved budget. The costs should be reimbursed.

WHEREFORE, DPI seeks review of the Agency's July 31, 2015 denial of reimbursable costs, an award of those denied costs, and such other relief as the Board deems appropriate.

Respectfully submitted,

DISTRESSED PROPERTIES, INC.

By:  One of its attorneys

Dated: September 3, 2015

Elizabeth S. Harvey
SWANSON, MARTIN & BELL LLP
330 North Wabash, Suite 3300
Chicago, Illinois 60611
312.923.8260 (direct)
312.321.9100 (main)
312.321.0990 (facsimile)
eharvey@smbtrials.com

Exhibit 1



ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

1021 NORTH GRAND AVENUE EAST, P.O. BOX 19276, SPRINGFIELD, ILLINOIS 62794-9276 • (217) 782-2829
PAT QUINN, GOVERNOR LISA BONNETT, DIRECTOR

217/524-3300

JUL 31 2015

Att
Ms Elizabeth Harvey
fax 312 321 0990

CERTIFIED MAIL #

7013 2630 0001 4708 3135

Distressed Properties, Inc.

Attn: Sal Diab

14007 South Bell Road # 220

Homer Glen, IL 60491

Re: LPC #0312975187 -- Cook County
South Holland / Distressed Properties, Inc.
15401 South Park Avenue
Incident-Claim No.: 20010053 -- 66169
Queue Date: March 12, 2015
Leaking UST Fiscal File

Dear Mr. Diab:

The Illinois Environmental Protection Agency (Illinois EPA) has completed the review of your application for payment from the Underground Storage Tank (UST) Fund for the above-referenced Leaking UST incident pursuant to Section 57.8(a) of the Illinois Environmental Protection Act (Act), as amended by Public Act 92-0554 on June 24, 2002, and 35 Illinois Administrative Code (35 Ill. Adm. Code) 734.Subpart F.

This information is dated June 30, 2015 and was received by the Illinois EPA on July 6, 2015. The application for payment covers the period from June 1, 2012 to July 31, 2014. The amount requested is \$23,379.24

On July 6, 2015, the Illinois EPA received your application for payment for this claim. As a result of Illinois EPA's review of this application for payment, a voucher for \$5,241.96 will be prepared for submission to the Comptroller's Office for payment as funds become available based upon the date the Illinois EPA 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 Illinois EPA. This constitutes the Illinois EPA's final action with regard to the above application(s) for payment.

The deductible amount for this claim is \$10,000.00, which was previously withheld from your payment(s). Pursuant to Section 57.8(a)(4) of the Act, any deductible, as determined pursuant to

4302 N. Main St., Rockford, IL 61103 (815) 987-7760
595 S. State, Elgin, IL 60123 (847) 608-3131
2125 S. First St., Champaign, IL 61820 (217) 278-5800
2009 Main St., Collinsville, IL 62234 (618) 346-5120

9511 Harrison St., Des Plaines, IL 60016 (847) 294-4000
412 SW Washington St., Suite D, Peoria, IL 61602 (309) 671-3022
2309 W. Main St., Suite 116, Morton, IL 62959 (618) 993-7200
100 W. Randolph, Suite 10-300, Chicago, IL 60601 (312) 814-6026

Page 2

the Office of the State Fire Marshal's eligibility and deductibility final determination in accordance with Section 57.9 of the Act, shall be subtracted from any payment invoice paid to an eligible owner or operator.

There are costs from this claim that are not being paid. Listed in Attachment A are the costs that are not being paid and the reasons these costs are not being paid.

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 Brian Bauer at 217-782-3335.

Sincerely,



Joyce L. Munné
Acting Manager, Leaking Underground Storage Tank Section
Division of Remediation Management
Bureau of Land

ILM:CSE 

ATTACHMENT

c: O2Tube Technology
Leaking UST Claims Unit
Cathy Elston
Scott Sievers - DLC
Brian Bauer

Attachment A
Accounting Deductions

Re: LPC #0312975187 -- Cook County
South Holland / Distressed Properties, Inc.
15401 South Park Avenue
Incident-Claim No.: 20010053 -- 65705
Queue Date: March 12, 2015
Leaking UST FISCAL FILE

Citations in this attachment are from the Environmental Protection Act (Act), as amended by Public Act 92-0554 on June 24, 2002, and 35 Illinois Administrative Code (35 Ill. Adm. Code).

Item # Description of Deductions

1. \$6,472.00, deduction for drilling/investigation costs 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.

- a. **The claim did not include an invoice from the driller that actually preformed the drilling, or well logs in the technical report. In addition, based on the technical report groundwater samples were never collected from these "monitoring wells".**

The investigation costs are inconsistent with the associated technical plan. One of the overall goals of the financial review is to assure that costs associated with materials, activities, and services are consistent with the associated technical plan. Such costs are ineligible for payment from the Fund pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.510(b).

- b. **The drilling was not done in accordance with the plan/budget approved by the Agency. The plan/budget approved by the Agency did not include the installation of these monitoring wells.**
- c. **The costs were billed as monitoring wells to a depth of 17 feet however, the technical documentation stated as four soil borings to 15 feet were conducted.**
- d. **The invoice provide indicate that the drilling event was conducted over a period of two days based on the technical documentation it appears that everything was completed in one day.**

4/6

These 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).

- e. **The drilling costs submitted exceed the adjusted Subpart H maximum payment amounts pursuant to Section 57.8(a)(1) of the Act and 35 Ill. Adm. Code 734.870(d)(1)(2)(3).**
- f. **The drilling costs submitted include additional charges that are part of the unit rates of Subpart H maximum payment amounts. The additional charges include mobilization/demobilization, decontamination, driller, and technicians.**

- 2. \$5,565.28, deduction for analytical costs 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 analytical costs are inconsistent with the associated technical plan. One of the overall goals of the financial review is to assure that costs associated with materials, activities, and services are consistent with the associated technical plan. Such costs are ineligible for payment from the Fund pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.510(b).

- a. **The plan and budget did not allow for the sampling of material using a Drager Tube or a PID.**
- b. **It is unclear how the Drager Tube analysis was conducted. Drager Tubes are typically used in the collection of gas samples. The invoices submitted indicated that soil and water Drager Tube samples were collected and analyzed.**

- 3. \$6,000.00, deduction for costs for equipment exceeds those contained in the budgets approved by the Agency on May 20, 2004 and November 2, 2005. The costs included in the application for payment exceeds the approved budget amount and, as such, is ineligible for payment from the Fund pursuant to Section 57.8(a)(1) of the Act and 35 Ill. Adm. Code 734.605(g) and 734.630(m).

5/6

Corrective action costs for equipment 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).

In addition, pursuant to 35 Ill. Adm. Code 734.870(d)(1), for costs approved by the Agency in writing prior to the date the costs were incurred, the applicable maximum payment amounts must be the amounts in effect on the date the Agency received the budget in which the costs were proposed. Once the Agency approves the cost, the applicable maximum payment amount for the cost must not be increased

The equipment costs 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.

- a. The additional documentation provided lists \$12,000.00 for the Vapor Extraction System rental and \$8,000.00 for the Steam Injection System rental. The Agency has already reimbursed \$6,000.00 for the Vapor Extraction System and all of the \$8,000.00 for the Steam Injection System.
- b. The Corrective Action Completion Report indicated that remediation system was started on October 3, 2012 and ran for six months. The reimbursement request 10 months of rental from August 2102 through June 2013. The original invoice in the reimbursement claim submitted August 4, 2014 had a monthly rate of \$1,200.00 per month for 10 months. The invoice submitted in this claim requests a rate of \$1,000.00 per month but adds on \$2,000.00 for 2 mobilizations at \$250.00 each and 10 system checks at \$150.00 per check. The mobilization and system checks are not supported by documentation of when these costs were actually incurred.
- c. Supporting documentation as to why the system was billed for 1 month prior to the start of the system and 3 months after the March 29, 2013 collection of soil samples that demonstrated non detectable contamination.

616

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:

Dorothy Gunn, Clerk
Illinois Pollution Control Board
State of Illinois 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

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

DISTRESSED PROPERTIES, INC.,)	
)	
Petitioner,)	
)	
v.)	PCB 16--
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

MOTION TO CONSOLIDATE

Petitioner DISTRESSED PROPERTIES, INC. ("DPI"), by its attorneys Swanson, Martin & Bell, LLP, moves the Board to consolidate its third petition for review with the currently-pending appeals *Distressed Properties, Inc. v. Illinois Environmental Protection Agency*, PCB 15-108 and PCB 16-032 (consolidated). This motion is brought pursuant to Section 101.406 of the Board's procedural rules.

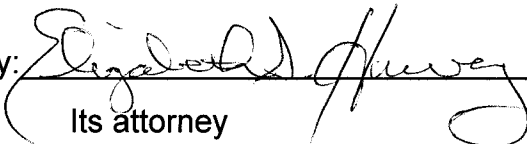
1. This appeal seeks review of the Illinois Environmental Protection Agency's ("Agency") July 31, 2015 decision regarding DPI's application for payment of costs from the Underground Storage Tank ("UST") Fund. The July 31 decision grew out of additional discussion of costs denied by the Agency in a November 26, 2014 decision. DPI appealed the November 26, 2014 decision, and that appeal is pending before the Board as *Distressed Properties, Inc. v. Illinois Environmental Protection Agency*, PCB 15-108 ("*Distressed Properties I*").

2. Following another Agency decision on June 18, 2015, DPI filed its second petition for review. That petition is *Distressed Properties, Inc. v. Illinois Environmental Protection Agency*, PCB 16-032 ("*Distressed Properties II*").
3. On August 6, 2015, the Board granted DPI's motion to consolidate the two appeals.
4. DPI has filed its appeal of the Agency's third decision (dated July 31, 2015) contemporaneously with this motion to consolidate.
5. The three appeals all arise from Agency decisions on the same application for reimbursement. The issues presented differ only in the specific amount approved. Consolidating this third appeal with the previously consolidated appeals will allow for efficient, convenient, and complete determinations of all claims. Consolidation will allow the proceedings to proceed together. If not consolidated, there will be two almost identical status conferences and hearings as the cases proceed.
6. If all appeals are consolidated, DPI will ensure that the decision deadlines in each case are extended together, so there will not be different decision deadlines.
7. Consolidation will not cause prejudice to any party. In fact, consolidation will assist all parties, the hearing officer, and the Board in an efficient resolution of the appeals.
8. Counsel for the Agency has no objection to this motion.

WHEREFORE, DPI asks the Board to consolidate this appeal, *Distressed Properties III*, PCB 16-XXX, with the pending consolidated appeals *Distressed Properties*, PCB 15-108 and PCB 16-032, and for such other relief as the Board deems appropriate.

Respectfully submitted,

DISTRESSED PROPERTIES, INC.

By: 
Its attorney

Dated: September 3, 2015

Elizabeth S. Harvey
SWANSON, MARTIN & BELL LLP
330 N. Wabash Avenue, Suite 3300
Chicago, IL 60611
312.923.8260 (direct)
312.321.9100 (main)
312.321.0990 (facsimile)
eharvey@smbtrials.com