

ORIGINAL

RECEIVED  
CLERK'S OFFICE

SEP 05 2003

**BEFORE THE POLLUTION CONTROL BOARD** STATE OF ILLINOIS  
**OF THE STATE OF ILLINOIS** Pollution Control Board

|                        |   |                |
|------------------------|---|----------------|
| DALEE OIL COMPANY,     | ) |                |
|                        | ) |                |
| Petitioner,            | ) |                |
|                        | ) | PCB No. 03-118 |
| vs.                    | ) | PCB No. 03-119 |
|                        | ) | PCB No. 03-150 |
| ILLINOIS ENVIRONMENTAL | ) | (UST Fund)     |
| PROTECTION AGENCY,     | ) |                |
|                        | ) |                |
| Respondent.            | ) |                |

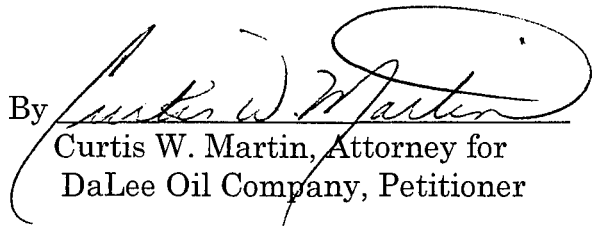
**NOTICE**

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

Carol Sudman  
Hearing Officer  
Illinois Pollution Control Board  
1021 North Grand Avenue East  
Springfield, IL 62794

PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board a Brief of Petitioner, a copy of which is herewith served upon you.

By   
Curtis W. Martin, Attorney for  
DaLee Oil Company, Petitioner

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, IL 62864  
Telephone (618) 244-1788

9-15

**ORIGINAL**  
**BEFORE THE POLLUTION CONTROL BOARD**  
**OF THE STATE OF ILLINOIS**

**RECEIVED**  
CLERK'S OFFICE

SEP 05 2003

STATE OF ILLINOIS  
*Pollution Control Board*

|                        |   |                |
|------------------------|---|----------------|
| DALEE OIL COMPANY,     | ) |                |
|                        | ) |                |
| Petitioner,            | ) |                |
|                        | ) | PCB No. 03-118 |
| vs.                    | ) | PCB No. 03-119 |
|                        | ) | PCB No. 03-150 |
| ILLINOIS ENVIRONMENTAL | ) | (UST Fund)     |
| PROTECTION AGENCY,     | ) |                |
|                        | ) |                |
| Respondent.            | ) |                |

**BRIEF OF PETITIONER**

NOW COMES the Petitioner, DaLee Oil Company, ("DaLee"), by one of its attorneys, Curtis W. Martin of Shaw & Martin, P.C., and for its Brief pursuant to the Hearing Report of the Hearing Officer filed August 6, 2003, states as follows:

This consolidated appeal is with regard to DaLee's three separate requests for reimbursement of corrective action costs covering the respective periods of time of September 1 through November 30, 2001, July 1 through September 30, 2001 and November 1, 2001 through August 31, 2002 under a lease with United Science Industries, Inc. ("USI") for a Groundwater Treatment and Soil Vapor Extraction Unit ("Unit"). DaLee sought reimbursement of the full \$3,750.00 per month lease fee charged by USI. The Illinois Environmental Protection Agency ("Agency") indicated its willingness to reimburse DaLee at the monthly rental rate of \$2,457.31. This consolidated appeal followed.

Joe Kelly, the Chief Financial Officer for USI, provided testimony concerning the Unit, its use, and the charges for its use. Mr. Kelly is a licensed professional

engineer in Illinois and other states, has been employed in the environmental remediation industry since 1991, is the certifying professional engineer with regard to the DaLee project, and was involved with the design of the Unit.

The DaLee site falls within the application of Section 731 of the regulations of petroleum leaking underground storage tanks, 35 Ill. Adm. Code Section 731, *et. seq.* The significance of a project being governed by Section 731 regulations, according to Mr. Kelly, is that remediation work under a Corrective Action Plan can begin without seeking or obtaining prior Agency approval for the costs budgeted for the work to be performed under the Corrective Action Plan. USI, however, sought and obtained prior Agency approval for the use of the Unit at the DaLee site.

Mr. Kelly testified that the DaLee site was unique in that there existed both soil and groundwater contamination which had also migrated to other sites. Therefore, USI employed a Unit which performed soil vapor extraction in addition to groundwater treatment. Mr. Kelly has been involved in the design and operation of eight (8) other units of the kind involved in this appeal. The Unit involved in the present case was larger than any other he had designed before.

The Unit uses a dual phase extraction connected to recovery wells placed on the DaLee site to extract both groundwater and soil vapor at the same time housed within the same Unit. Once the Unit's design was approved by the Agency, it was manufactured by Carbon Air Environmental Systems, Inc. ("Carbon Air"). USI chose the regenerative blower type of unit as opposed to the liquid ring pump system

because there was less maintenance and operation costs for the regenerative blower type unit.

USI purchased the Unit in September, 2000 from Carbon Air at a cost of \$83,691.00. USI paid \$8,691.00 down for the Unit and financed the remaining purchase price on a lease to own basis with Preferred Capital Corporation over 36 months. USI chose a 36 month financing period to coincide with the length of time it anticipated the Unit would be necessary at the DaLee site. USI's monthly payment requirements for the financed \$75,000.00 portion of the Unit's purchase price was \$2,520.11. The sales tax applicable to the purchase was paid monthly at the rate of \$157.51, causing the total monthly payment by USI to be \$2,677.62.

As a for profit corporation, USI amortized the \$8,691.00 down payment over a 24-month period as an internal accounting method to recoup the return of its down payment over a shorter period of time. USI concluded its calculation of a monthly rental charge by adding a 25% overhead charge bringing the total charges to \$3,772.86. USI rounded this figure down to the current \$3,750.00. USI's intent was to charge the monthly rate supported by the industry as if USI were the manufacturer, but charged a lesser amount than the manufacturer would charge.

Mr. Kelly described the 25% overhead charge based upon his familiarity, as USI's Chief Financial Officer, with USI's costs of operation. In determining the monthly rental charge to assess DaLee, USI, in addition to simply "running the numbers" as described above, inquired of other industry professionals as to what a reasonable rental charge for a Unit at this type would be. USI was informed that

the rental charge for a Unit of this type would be approximately \$5,000.00 per month. Accordingly, USI's rental charge of \$3,750.00 is well within the industry standard for rental charges of a Unit of this type. In addition, Mr. Kelly testified that a smaller unit at an Alton, Illinois site which USI is remediating was charged and reimbursed by the Agency at a rate of \$3,000.00 per month.

The Unit was placed in use at the DaLee site in January or February of 2001 and the rental charges for the Unit were first assessed by USI in February of 2001. Although the Unit has been operating at the DaLee site for over two (2) years, Mr. Kelly testified that it may be required beyond the original three-year period estimated—the periodic contamination data will determine the necessity for the length of its use. Because the Unit was designed specifically for the DaLee site, it is unlikely to be adapted to a different site and an estimate of its salvage value is difficult, if not impossible, to calculate at this time. According to Mr. Kelly, the data collected following the operation of the Unit showed that the groundwater contamination and the concentration of vapors had diminished, which lead him to believe the Unit appeared to be performing the needed remediation.

Brian Bauer, a Project Manager with the Agency, who reviewed the reimbursement requests from USI with regard to the DaLee site, calculated the \$2,457.31 approved reimbursement rate by taking what he called the "system cost" of \$83,691.00 and subtracted a \$1,250.00 salvage value to reach an \$82,441.00 net system cost. He then calculated a handling charge based on the \$82,441.00 net

system cost, totaling \$6,022.05, for a total cost of \$88,463.05 amortized over 36 months.

Mr. Bauer also testified that in response to an Agency request for a written lease for the Unit between USI and DaLee the Agency received the lease to own document between USI and Preferred Capital. The lease to own document between USI and Preferred Capital was not the Agency's concern, according to Mr. Bauer, but rather the lease between USI and DaLee. The Lease between USI and DaLee provides for a \$3,750.00 monthly rental charge for the Unit. Yet, however, Mr. Bauer then uses the information provided by USI with regard to its lease to own arrangement with Preferred Capital to make his determination of a reasonableness of its reimbursement for the use of the Unit. This is the heart of DaLee's appeals.

The cost to USI to operate the Unit is not what determines the reasonableness of its monthly charges. Rather, it is what the reasonable charge in the industry is to DaLee for the rental of the Unit of this nature. Mr. Kelly testified that USI has never been requested by the Agency to provide information concerning the costs of its operation of a backhoe or a tractor/trailer or the wages it pays its laborers. It is precisely this type of information that is not available to the Agency when it is called upon to determine the reasonableness of a reimbursement request. Mr. Bauer flatly stated that the Agency makes its reasonableness determination based upon the costs of the system, the salvage value, and the appropriate handling charges, regardless of what the lessor may request from the owner/operator for such lease charge. DaLee submits that this is virtually impossible in every other

reimbursement request scenario because those costs and salvage values are proprietary information to a lessor. It is only in this particular case that the Agency was made privy to USI's costs, and the Agency has now used that information to approve a reimbursement of an amount even less than the costs USI incurs.

In addition, the Agency's approved reimbursement rate is only for a maximum of 36 months because "the system would be paid off in that period of time" according to Mr. Bauer. Again, this is based upon the 36 month lease to own arrangements between USI and Preferred Capital, information the Agency would not normally be privy to. The truth of the matter is the Unit could very well be required for the remediation at the DaLee site far beyond 36 months, but the Agency will not allow rental charges to be reimbursed beyond the 36 month period.

The Agency cites Section 22.1b(d)(4)(C) of the Environmental Protection Act, 415 ILCS 5/22.1b(d)(4)(c), as a basis for its disallowance of the rate of rent for the Unit requested by DaLee. Section 22.1b(d)(4)(C) has been repealed. Nevertheless, the gist of the Agency's position is that the charges requested by DaLee are unreasonable. The testimony of Mr. Kelly, the only witness with the experience and information necessary to determine the reasonableness of the charges for the Unit involved in this case, proved that the reasonable charge in the industry for a unit of this nature is the \$3,750.00 per month requested by DaLee rather than the \$2,457.31 approved by the Agency.

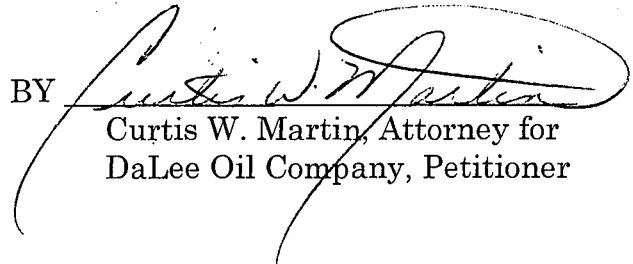
For the foregoing reasons, DaLee Oil Company requests that the Board reverse the decision of the Agency and rule in favor of its request for

reimbursement as being reasonable, justified, necessary, consistent with general accepting engineering practices and eligible for reimbursement from the Leaking Underground Storage Tank Fund, and that Petitioner recover its attorney's fees and costs incurred herein pursuant to 415 ILCS 5/57.8(l) and 35 Ill. Adm. Code 732.606(g).

Respectfully submitted,

SHAW & MARTIN, P.C.

BY

  
Curtis W. Martin, Attorney for  
DaLee Oil Company, Petitioner

Curtis W. Martin  
IL ARDC No. 06201592  
SHAW & MARTIN, P.C.  
Attorneys at Law  
123 S. 10<sup>th</sup> Street, Suite 302  
P.O. Box 1789  
Mt. Vernon, Illinois 62864  
Telephone (618) 244-1788



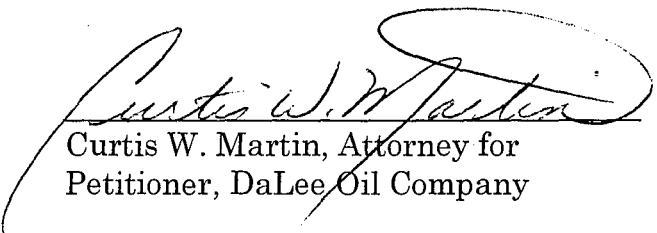
**CERTIFICATE OF SERVICE**

I, the undersigned attorney at law, hereby certify that on September 2nd 2003, I served true and correct copies of the Brief of Petitioner, 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 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  
P.O. Box 19276  
Springfield, IL 62794-9276

Carol Sudman  
Hearing Officer  
Illinois Pollution Control Board  
1021 North Grand Avenue East  
Springfield, IL 62794

  
Curtis W. Martin, Attorney for  
Petitioner, DaLee Oil Company

ORIGINAL  
SHAW & MARTIN, P.C.  
ATTORNEYS

RECEIVED  
CLERK'S OFFICE

SEP 05 2003

STATE OF ILLINOIS  
Pollution Control Board

Robert E. Shaw

123 SOUTH TENTH STREET - SUITE 302  
P.O. BOX 1789  
MT. VERNON, ILLINOIS 62864  
TELEPHONE: 618/244-1788  
FAX: 618/244-2588  
e-mail: shawmartin@mvn.net

Curtis W. Martin

September 2, 2003

VIA FAX 312-814-3669  
Ms. Dorothy Gunn  
Clerk of Illinois Pollution Control Board  
State of Illinois Center  
100 W. Randolph, Suite 11-500  
Chicago, IL 60601

RE: *DaLee Oil Company vs. Illinois Environmental  
Protection Agency; PCB Nos. 03-118; 03-119; 03-150*

Dear Ms. Gunn:

Pursuant to the hearing officer's Hearing Report, enclosed is a faxed copy of Petitioner's Brief in the above cause. The original of the Brief will follow by mail. Upon receipt of the original and copy of the Brief, please return a file-marked copy to me in the enclosed self-addressed, stamped envelope. Thank you for your assistance in this matter.

Very truly yours,

  
Curtis W. Martin

CWM/cm

Enclosures

cc: Duane Doty  
Carol Sudman  
John Kim