

ILLINOIS AYERS OIL CO.,)

DEC 1 2003

Petitioner,)

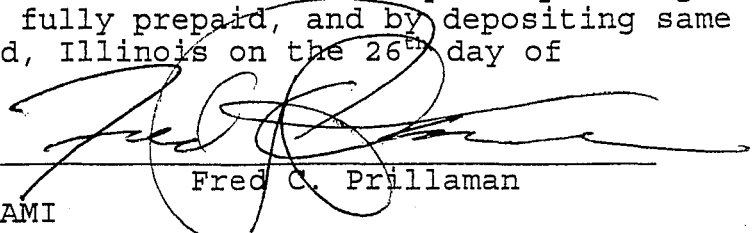
v.)

PCB 03-214
(UST Appeal)ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,)

Respondent.)

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STATE OF ILLINOIS
Pollution Control Board
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State of Illinois
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PLEASE BE ADVISED THAT we are today filing with the Pollution Control Board the original and four copies of Emergency Motion to Compel Discovery and Notice of Hearing, a copy of which is attached hereto.

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 the hearing officer and counsel of record of all parties to this cause via facsimile transmission and by enclosing same in envelopes addressed to such attorneys at their business addresses as disclosed by the pleadings of record herein, with postage fully prepaid, and by depositing same in the U.S. Mail in Springfield, Illinois on the 26th day of November, 2003.
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THIS FILING SUBMITTED ON RECYCLED PAPER

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ILLINOIS AYERS OIL CO.,)	
)	
Petitioner,)	
)	
v.)	PCB 03-214
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

EMERGENCY MOTION TO COMPEL DISCOVERY

NOW COMES Petitioner, ILLINOIS AYERS OIL CO., by its undersigned attorneys, pursuant to the Rules of the Illinois Pollution Control Board ("the Board"), and hereby requests an emergency motion to compel discovery and states as follows:

1. On or about March 28, 2003, the Agency rendered its final determination on Petitioner's HPCAP and proposed budget for corrective action costs, modifying both the HPCAP and the proposed budget, primarily reducing the hourly rates charged by the consultant, and the estimated hours required by the consultants to complete the tasks.

2. On or about May 3, 2003, Petitioner filed a notice of appeal of the Agency's March 28, 2003 final determination.

3. The matter is set for hearing for December 3, 2003.

4. On or about October 30, 2003, Petitioner filed discovery requests, calling for documents to be produced for inspection and copying, to which the Agency responded on November 20, 2003, supplying only one document, and objecting to the majority of the requests made. Copies of the Agency's Response to Petitioner's First Set of Interrogatories and the Agency's Response to

Petitioner's First Request to Produce Documents are attached hereto as Exhibits 1 and 2, respectively. Petitioner requested documents that it identified in its Request to Produce Documents and that the Agency identified in its Response to Petitioner's First Set of Interrogatories.

5. On November 24, 2003, Petitioner again requested that the Agency produce documents as more specifically set forth on Exhibit 3, attached hereto. At yesterday's deposition of Agency personnel a January 2003 "Rate Sheet" was produced, but redacted to show only five (5) line items; no other documents responsive to the requests were produced.

6. Specifically, the Agency has wrongfully refused to produce the documents requested on unfounded grounds:

"It is not a ground for objection that the testimony will be admissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence or is relevant to the subject matter involved in the pending action." 35 Ill. Adm. Code Section 103.161(a); Illinois Supreme Court Rule 214. "'Discovery before trial' presupposes a range of relevance and materiality which includes not only what is admissible at the trial, but also that which leads to what is admissible at the trial." Krupp v. Chicago Transit Authority, 8 Ill.2d 37, 41 (1956).

7. This appeal presents the question of whether the Agency's modification of the proposed HPCAP and budget is reasonable and, as part of the reasonableness inquiry, whether the bases of the Agency's decision (including the generation of a "rate sheet" from random sampling) are valid. By rejecting certain items, estimated time, and hourly rates in this budget as "unreasonable," the Agency is implicitly and necessarily invoking

a standard, rule, policy or guidance of some kind, since by its very nature the term "reasonable" is a relative term, and must, therefore, relate to something. It is that "something" that is used by the Agency to determine reasonableness that Petitioner has a right to know.

8. As to the subject of Paragraph 4(c) of Petitioner's Request to Produce (the "LUST Managers' Handbook"), the Agency refuses to produce it for invalid reasons, claiming that the request of "overly broad," and "unrelated and irrelevant to the present appeal," and that the document is not required for review, and is not used in review. However, the Agency has consistently reported to the USEPA that it has issued to its LUST Managers, for administration of the various LUST programs, a "LUST Managers' Handbook," which it describes as a "comprehensive guidance manual for project managers."

9. In addition, at yesterday's depositions, Brian Bauer testified that the "LUST Managers' Handbook" and "IRT 500.003" (the latter being described in the one-page exhibit attached to the Agency's response to Petitioner's First Request to Produce Documents as a document which "explains the process for reviewing an excessively submitted budget and gives allowable line items and unit costs") are documents that he, as a LUST project manager, doesn't always review because he is already familiar with them, but which the newer LUST project managers, less familiar with their terms, do review. Carol Hawbaker, who was

the project manager on the subject budget review, has only been with the Agency for a little over 3 years.

10. In light of the above, it is clear that LUST project managers have been instructed to use manuals containing guidance and policies in connection with their administration of LUST programs, including the program which is the subject of this appeal. Clearly, the "LUST Managers' Handbook" and "IRT 500.003," as amended from time to time, if not directly relevant, could lead to relevant information, and therefore are discoverable. For example, even though the Agency may assert that the "LUST Managers' Handbook" and/or "IRT 500.003" were not used by the person who reviewed the file in this appeal (Ms. Hawbaker), the documents themselves may disclose that they should have been used, or that if they had been used, the result may have been different. There is no way to tell until we receive and review the documents.

11. Moreover, the Board has previously overruled the Agency's objections to these same or similar categories of requested documents in the case of Brunetto Brothers Mobil v. IEPA, PCB 95-168, in which case the Agency's "Emergency Motion to Hearing Officer for Protective Order and Request to Limit Discovery" was denied on March 4, 1996 by Hearing Officer Michael Wallace, and the Agency was ordered to produce the requested documents on the strength of Petitioners' "Objection to Agency's Emergency Motion for Protective Order" in that case.

12. The request to produce these documents is an entirely legitimate request, since the regulated public has a right to know by what rules, standards and policies its LUST budgets are being judged. To the extent that the requested documents may provide guidance relating to reasonableness of corrective action costs, they must be produced, since they are either relevant or, at the very least, could lead to relevant evidence in this appeal.

13. As to the subject of Paragraphs 1(c) and 1(d) of Petitioner' Request to Produce ("Agency policy and guidance memos"), such policy and/or guidance is contained in the LUST Managers' Handbook and in "IRT 500.003," at the very least; but to the extent that they are contained elsewhere, and to the extent that they may provide guidance relating to reasonableness of corrective action costs, they must be produced, since they are either relevant or, at the very least, could lead to relevant evidence in this appeal.

15. As to the subject of Paragraph 1(e) of Petitioner's Request to Produce ("data bases and/or schedules or summaries of rates, fees, charges and/or expenses"), attached hereto as Exhibit 4 is an excerpt from the transcript of hearing in Southern Food Park v. IEPA, PCB 92-88, in which the parties stipulated and agreed that a data base containing rate information used by the Agency in determining reasonableness could be used for a limited purpose, but no effort was made to enter it into evidence and no ruling of any kind was made on

either its discoverability or admissibility, except for the ruling at page 158, wherein the hearing officer ordered the Agency to produce a computerized printout of reimbursable rates and charges, and at page 206, wherein the hearing officer ordered the Agency to produce "memoranda, letters, whatever" having any bearing on determinations of reasonableness.

16. In connection with the requested data base, Brian Bauer, who is identified in the Agency's Answers to Interrogatories as being the person who prepared the data base, testified in yesterday's deposition that the data base that he used to prepare the rate sheet that was used by the project manager (Ms. Hawbaker) in this case is still on his computer. Therefore, it is very easily retrievable, within a few minutes' time, and should be produced, even if subject to an in camera review, since the entire question of how the Agency prepared the data base and, from it, generated the rate sheet that was used in this case, and the validity of the statistical methods employed in doing each, are at the heart of this case and must be brought out into the open and tested for accuracy. Otherwise, the Agency is being allowed to simply impose an arbitrary, untested, standard to the Petitioner in this case.

17. Also attached hereto as Exhibit 5 is an excerpt from the transcript of hearing in Owens Oil Co. v. IEPA, PCB 98-32, wherein the hearing officer ordered the Agency to produce the LUST Project Manager's Handbook and documents having any bearing on determinations of reasonableness.

18. The standards or criteria by which Petitioner's challenged rates were judged may be contained in these data bases or schedules compiled from data received, openly and publicly, by the Agency over time. These documents could lead to relevant, admissible evidence in this case on the question of what the Agency considers to be reasonable, how it compiled the statistics and generated the rate sheet, and how it makes a determination as to what is reasonable.

19. It would be significant to know if Agency personnel providing this review deviated from generally accepted established procedure or protocol, if such persons were not properly qualified or trained, or if they were acting outside of their areas of responsibilities. Subjective determinations made by such persons under such circumstances as to what is reasonable, would be subject to serious question, would certainly be relevant or could lead to relevant information, and therefore all items requested bearing on those issues are appropriate to review during discovery.

Petitioner, ILLINOIS AYERS OIL CO., respectfully requests that the Hearing Officer convene an emergency hearing in Springfield at 8:30 a.m. on Wednesday, December 3, 2003, to hear further arguments of counsel, if any, and to decide the issues presented in this motion. Petitioner respectfully requests that its motion be allowed in its entirety, and that the Agency be required to produce all of the requested items reasonably in

advance of the hearing presently scheduled to take place at 9:00
a.m. on Wednesday, December 3, 2003.

Respectfully submitted,

ILLINOIS AYERS OIL CO., Petitioner

By MOHAN, ALEWELT, PRILLAMAN & ADAMI

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