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MAR 08 2004

STATE OF ILLINOIS
Pollution Control Board

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

ILLINOIS AYERS OIL COMPANY,)
Petitioner,)
v.) PCB No. 03-214
ILLINOIS ENVIRONMENTAL) (LUST Appeal)
PROTECTION AGENCY,)
Respondent.)

NOTICE

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
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Carol Sudman, Hearing Officer
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1021 North Grand Avenue East
P.O. Box 19274
Springfield, IL 62794-9274

PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board a MOTION FOR EXTENSION OF TIME TO FILE RESPONSE TO PETITIONER'S BRIEF and an OBJECTION TO HEARING OFFICER'S RULING AND MOTION TO STRIKE, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

John J. Kim
Assistant Counsel
Special Assistant Attorney General
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
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217/782-5544
217/782-9143 (TDD)
Dated: March 5, 2004

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STATE OF ILLINOIS
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BEFORE THE POLLUTION CONTROL BOARD
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ILLINOIS AYERS OIL COMPANY,	)	
Petitioner,	)	
v.	)	PCB No. 03-214
ILLINOIS ENVIRONMENTAL	)	(LUST Appeal)
PROTECTION AGENCY,	)	
Respondent.	)	

MOTION FOR EXTENSION OF TIME TO FILE RESPONSE TO PETITIONER'S BRIEF

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, John J. Kim, Assistant Counsel and Special Assistant Attorney General, and, pursuant to 35 Ill. Adm. Code 101.522, hereby requests that the Illinois Pollution Control Board ("Board") grant the Illinois EPA an extension of time within which to file its Response to the Petitioner's Brief. In support of this motion, the Illinois EPA states as follows:

1. At the conclusion of the hearing held in this case, the parties agreed to a briefing schedule by which the Petitioner's brief was due February 9, 2004, the Illinois EPA's response was due March 2, 2004, and the Petitioner's reply, if any, was due March 8, 2004.

2. The decision deadline in this case is May 5, 2004. The date of the nearest Board meeting (without going past May 5, 2004) is April 15, 2004. The Illinois EPA recognizes that the Board requests at least 30 days to consider arguments by the parties prior to rendering a final decision.

3. The Petitioner filed its brief in this case in a timely manner. Unfortunately, counsel for the Illinois EPA is unable to meet the requisite time deadline for filing the Illinois EPA's response brief.

4. Since the receipt of the Petitioner's brief, counsel for the Illinois EPA has been involved in a number of cases that have been extremely time-consuming. The undersigned

counsel has prepared and filed a post-hearing reply brief in United Disposal of Bradley, Inc. v. Illinois EPA, PCB 03-235, and prepared and filed a number of discovery-related documents and preliminary motions, and also defended a deposition and prepared for and participated in a hearing in Saline County Landfill, Inc. v. Illinois EPA, PCB 04-117. These time-sensitive commitments have unfortunately prevented the Illinois EPA from completing its response to the Petitioner's brief in the present matter.

5. Counsel for the Illinois EPA deeply regrets the continued delay in filing its response brief, but hereby represents that work on the response brief has been diligently proceeding, though such work has been impeded by the afore-mentioned work product in other cases.

6. The Illinois EPA therefore requests that the Board grant an extension of time to file the response to the Petitioner's brief to March 8, 2004. The Illinois EPA would have no objection to the Petitioner receiving a corresponding extension of time to file its reply until March 15, 2004. This would allow the Petitioner one additional day to file its reply as compared to the time originally provided for in the briefing schedule (i.e., seven days versus six days), and would still allow the Board to receive all briefs within 30 days of the final decision deadline.

7. The Illinois EPA does not make this request lightly, but unfortunately counsel's recent heavy workload necessitates this request. No further requests for extension of time will be forthcoming.

WHEREFORE, for the reasons stated above, the Illinois EPA hereby respectfully requests that the Board grant the Illinois EPA an extension of time to file the response to the Petitioner's brief to March 8, 2004.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

John J. Kim
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Dated: March 5, 2004

This filing submitted on recycled paper.

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

ILLINOIS AYERS OIL COMPANY,	)	
Petitioner,	)	
v.	)	PCB No. 03-214
ILLINOIS ENVIRONMENTAL	)	(LUST Appeal)
PROTECTION AGENCY,	)	
Respondent.	)	

OBJECTION TO HEARING OFFICER'S RULING AND MOTION TO STRIKE

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, John J. Kim, Assistant Counsel and Special Assistant Attorney General, and, pursuant to 35 Ill. Adm. Code 101.500, hereby requests that the Illinois Pollution Control Board ("Board") overrule a ruling entered by the assigned Hearing Officer and further strike any reference to the related subject material in the Petitioner's post-hearing briefs. In support of this objection and motion, the Illinois EPA states as follows:

I. BACKGROUND

1. On January 7, 2004, the Board held a hearing in the present case. At the outset of the hearing, the Hearing Officer asked the parties whether there were any preliminary matters that needed to be discussed prior to the calling of the first witness by the Petitioner. The Petitioner then produced a Motion to Admit Depositions ("Petitioner's motion") and served both the Hearing Officer and counsel for the Illinois EPA with copies of the motion; counsel for the Illinois EPA had not seen a copy of the Petitioner's motion prior to that time.

2. The Petitioner's motion sought to have depositions of Carol Hawbaker, Harry Chappel, and Brian Bauer introduced into as evidence. In support of that, the Petitioner cited to section 101.626 of the Board's procedural rules (35 Ill. Adm. Code 101.626), Section 10-40(a) of the Illinois Administrative Procedure Act (5 ILCS 100/10-40(a)), and rule 212(a)(5) of the

Supreme Court Rules (S. Ct. R. 212(a)(5)). The Petitioner further cited to case law it argued was persuasive on the subject.

3. All of the cases cited to by the Petitioner are distinguishable and not persuasive to the issue at hand. In the case of Skonberg v. Owens-Corning Fiberglass Corp., 215 Ill. App. 3d 735, 576 N.E.2d 28 (1st Dist. 1991), the court considered whether the reading of certain portions of a deposition transcript of a witness to a jury were appropriate. Factually, the Skonberg case is distinct because the deposition transcript was taken of a witness that testified at the trial itself; here, the Petitioner in lieu of soliciting testimony from the identified Illinois EPA witnesses offered the deposition transcripts. Further, the Skonberg court noted that in actuality, the lower court had ruled that some of the portions of the transcript sought to be read to the jury were not allowed since they did not constitute admissions. Skonberg, 215 Ill. App. 3d at 749, 576 N.E.2d at 36.

4. In Ogg v. City of Springfield, 121 Ill. App. 3d 25, 458 N.E.2d 1331 (4th Dist. 1984), again there is a clear factual distinction between that case and the present case; namely, the deposition transcript testimony in question was from witnesses that also actually testified at the trial. In Ogg, the deposition transcript readings were done in an attempt to impeach testimony provided by witnesses at trial. Ogg, 121 Ill. App. 3d at 39-40, 458 N.E.2d at 1340-1341. Such was not the case here.

5. Finally, in the matter of Estate of Lewis v. Reeser, 193 Ill. App. 3d 316, 549 N.E.2d 960 (4th Dist. 1990), the court expressly did not reach the question of whether there was error on the part of the lower court in admitting into evidence portions of the discovery deposition in question. Lewis, 193 Ill. App. 3d at 313, 549 N.E.2d at 964.

6. Compare all those cases with the factual situation at hand, and it is clear that the findings by the courts in the cited case law are not applicable here. In none of those situations was the discovery deposition in question offered as a substitute for actual testimony by the deponents at a trial or hearing. Further, in the Skonberg case, there was an important reference made for the consideration that for an admission to be admissible, it must also be relevant. See also, Schaffner v. Chicago and North Western Transportation Company, 161 Ill. App. 3d 742, 756, 515 N.E.2d 298, 307 (1st Dist. 1987). As will be argued below, that consideration was not made by the Hearing Officer in allowing admission of the discovery deposition transcripts.

7. Also included in the case law referenced in the Petitioner's motion was a citation to Saline County Landfill, Inc. v. Illinois EPA, PCB 02-108 (May 16, 2002). In the Saline County case, the Petitioner noted that the Board's Hearing Officer admitted the discovery depositions of three Illinois EPA employees over an opposing objection. The Board affirmed the hearing officer's ruling. Saline County, p. 3.

8. Specifically, the Board stated,

> "The Board affirms the hearing officer's allowance of the depositions as evidence.[Footnote] The Agency and the County were present to cross-examine the witnesses, and the deposition testimony explains the administrative record." Id.

9. Looking to the transcript of the hearing in Saline County, counsel for Saline County Landfill asked the Hearing Officer that transcripts taken from discovery depositions of certain Illinois EPA employees be admitted into evidence over the objection from counsel for the Intervenor and with the qualified objection from the Illinois EPA. Saline County Transcript, pp. 8-12.

10. The Hearing Officer then ruled that the discovery deposition transcripts could be allowed into evidence pursuant to Section 101.626(d) of the Board's procedural rules (35 Ill.

Adm. Code 101.626(d)). He then limited the evidence to only the relevant portions. Saline County Transcript, p. 13.

11. Therefore, in Saline County, the Board affirmed the Hearing Officer's decision to allow the introduction into evidence the discovery deposition transcripts on the basis that the transcripts were "Written Testimony." Specifically, Section 101.626(d) of the Board's rules provides:

> Written Testimony. Written testimony may be introduced by a party in a hearing only if provided to all other parties of record prior to the date of the hearing and only after the opposing parties have had an opportunity to object to the written testimony and to obtain a ruling on the objections prior to its introduction. Written testimony may be introduced by a party only if the persons whose written testimony is introduced are available for cross-examination at a hearing.

12. The Hearing Officer's ruling in Saline County, which was later affirmed by the Board and relied upon by the Petitioner in the present case, was thus made pursuant to the finding that the deposition transcript constituted written testimony.

13. Unfortunately, in the present case, that decision is not appropriate to the facts. In this case, the Petitioner made its motion seeking the deposition transcripts' admission at the very opening of the hearing record. Neither the Illinois EPA nor the Hearing Officer had received or reviewed the motion prior to the opening of the record. Hearing Transcript, pp. 7, 10. Therefore, the Petitioner did not provide the deposition transcripts as written testimony prior to the date of the hearing. That portion of Section 101.626(d) was clearly not satisfied, and reliance on that provision cannot be made here.

14. Further, the Illinois EPA did not have an opportunity to raise specific objections as to relevancy or other evidentiary matters on the deposition transcripts, nor to have those objections heard by the Hearing Officer. Rather, the Hearing Officer here entered the deposition transcripts as evidence, and further ordered that any portion of the depositions that constituted

admissions by the Illinois EPA would be deemed admitted as an offer of proof. Hearing Transcript, p. 14.

15. There would have been only two opportunities for the Illinois EPA to raise objections to the questions posed in the deposition, with an eye towards the possibility that the transcript of the deposition would later be offered into evidence. One would be during the deposition itself, and the other would be at the hearing when the transcript was offered. In this case, neither opportunity was allowed.

16. Pursuant to the Board's procedural rules, it would have been improper for the Illinois EPA to pose objections to questions during the deposition unless they related to a privilege. Section 101.616(e) of the Board's rules (35 Ill. Adm. Code 101.616(e)) provides that unless a claim of privilege is asserted, it is not a ground for objection that the testimony of a deponent or a person interrogated will be inadmissible at hearing, if the information sought is reasonably calculated to lead to relevant information. Thus, if the Illinois EPA believed a deposition question was either irrelevant or speculative or otherwise improper (for reasons other than privilege), the Board rules expressly provide that such objections cannot be made.

17. That being the case, apparently the only other time the Illinois EPA could try to argue each and every objectionable question before the Hearing Officer would be at the time the motion was made to offer the transcripts into evidence (setting aside the fact that the "written testimony" requirements have not been met). The deposition transcript of Carol Hawbaker (entered into evidence) was 101 pages long, the transcript of Harry Chappel (entered into evidence) was 77 pages long, and the transcript of Brian Bauer (entered into evidence) was 57 pages long.

18. Thus, well over 200 pages of deposition transcript were entered into evidence with the Illinois EPA given no opportunity to seek a ruling from the Hearing Officer on whether any of the questions contained therein sought information that was inadmissible at hearing. It is almost without question that contained within all that testimony, there are numerous examples of testimony that would and could have been objected to had they been posed during the hearing.

19. After the Hearing Officer ruled that the deposition transcripts were admitted, she did note that the Illinois EPA could raise objections to the transcript content at the end of the Petitioner's case. Hearing Transcript, p. 16. However, that was effectively an impossibility, since the hearing was scheduled for only one day, and the Petitioner did not rest its case until well into the afternoon. Hearing Transcript, pp. 166, 169. Counsel for the Illinois EPA did not have time from the moment he received the Petitioner's motion to the close of the Petitioner's case to review each of the over 200 pages of deposition transcript to try to identify objectionable questions, since the only time not taken up by the hearing itself was a one hour break for lunch.

20. Even if the Illinois EPA had identified objectionable portions, the time necessary to raise those objections and for the Hearing Officer to receive arguments would not have left any time for the Illinois EPA to present its case in chief. Therefore, there was no real opportunity for the Illinois EPA to review each line of testimony, compile those objections and argue them to the Hearing Officer, have the Hearing Officer receive arguments and make rulings, and then proceed with the its case. Indeed, it is quite possible the Petitioner would have then called more witnesses or sought more testimony, which would have further prolonged the hearing. The deposition transcripts were not reviewed prior to the hearing for objectionable questions, since there was no reason to believe (up until receipt of the Petitioner's motion at the start of the hearing) that the transcripts would be offered as evidence.

21. Further, the Hearing Officer noted that any portion of the deposition that constituted an admission was admitted immediately as an offer of proof. However, there was never any ruling on what portions, if any, of the depositions indeed constituted admissions. It would be inappropriate for the Hearing Officer and the Board to abdicate that authority (i.e., to rule on evidentiary matters) to the Petitioner and allow it to determine what testimony does or does not constitute an admission. Yet that is the exact result of the Hearing Officer's ruling.

22. The question of admissibility of a discovery deposition transcript, already alluded to in the cases cited to by the Petitioner and distinguished by the Illinois EPA above, warrants further consideration. In Schaffner v. Chicago and North Western Transportation Company, 161 Ill. App. 3d 742, 757, 515 N.E.2d 298, 397 (1st Dist. 1987), the court held that in order for an admission in a discovery deposition to be admissible, it must be relevant to the issues.

23. Here, there is no specific finding by the Hearing Officer as to what portions, if any, of each of the three deposition transcripts in question was properly deemed an admission. Further, there is no ruling by the Hearing Officer on whether any portions of the transcripts, let alone those that would have been deemed admissions, were relevant. And as noted above, the Illinois EPA could not raise relevancy objections during the course of the discovery deposition and was not given any opportunity to do so prior to the transcripts being admitted.

24. Given the clear direction in Schaffner, since there was no finding of relevancy nor a finding as to what portions of the transcripts were admissions, none of the content of any of the deposition transcripts should have been admitted.

25. In conclusion, the Illinois EPA argues that it was been placed into an untenable, no-win situation. The Illinois EPA could not raise relevancy objections during the course of the deposition (pursuant to Board rule), and did not have an opportunity to raise relevancy objections

to any or all of the transcript content prior to the transcripts being admitted into evidence. The Hearing Officer did not make any findings of relevancy on any portion of the deposition transcripts, nor did she make any findings that any portions of the transcripts were admissions. Indeed, it would have been impossible of her to do so, since at the time of her decision she had not reviewed any portion of any of the deposition transcripts in question. Hearing Transcript, p. 10.

26. Here, the Hearing Officer clearly based her decision on the precedent seemingly set by the Board in Saline County. She did so without the benefit of the transcript of that hearing that explained the Hearing Officer's decision. Hearing Transcript, pp. 10, 14. The determination in Saline County is not applicable here, since the provision relied upon by the Hearing Officer in Saline County (i.e., Section 101.626(d)) was not complied with. From both a legal and factual standpoint, the Hearing Officer's ruling was in error.[1]

27. Therefore, the only reasonable and possible remedy to this situation is to overrule the Hearing Officer's decision and to strike the deposition transcripts from evidence. Further, the Board should strike any and all arguments presented by the Petitioner that rely upon, or refer to, in any way any portion of the deposition transcripts.

WHEREFORE, for the reasons stated above, the Illinois EPA respectfully requests that the Board enter an order finding in favor of the Illinois EPA on this objection and request for relief.

[1] Counsel for the Illinois EPA wishes to make very clear that he appreciates the difficult position the Hearing Officer was put in, as the motion from the Petitioner was made with no advance warning and without adequate supporting documentation (i.e., the transcript of the hearing). The exigent circumstances surrounding the request by the Petitioner were not the doing of the Hearing Officer, and her conduct is not being called into question in any way.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

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Dated: March 5, 2004

This filing submitted on recycled paper.

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on March 5, 2004, I served true and correct copies of a MOTION FOR EXTENSION OF TIME TO FILE RESPONSE TO PETITIONER'S BRIEF and an OBJECTION TO HEARING OFFICER'S RULING AND MOTION TO STRIKE, 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 Springfield, Illinois, with sufficient First Class Mail postage affixed thereto, upon the following named persons:

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
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Suite 11-500
Chicago, IL 60601

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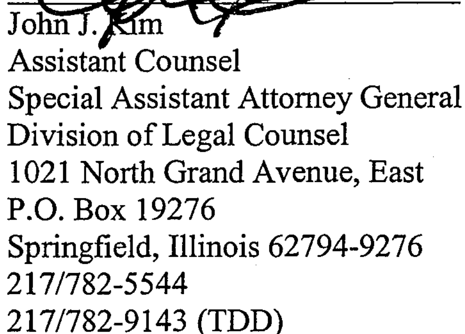

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