BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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

NOTICE OF FILING AND PROOF OF SERVICE

TO: Dorothy Gunn, Clerk, Illinois Pollution Control Board, James R. Thompson Center, 100 W. Randolph, Suite 11-500, Chicago, IL 60601-3218

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

John Kim, Illinois Environmental Protection Agency, Division of Legal Counsel, 1021 North Grand Avenue East, P.O. Box 19276, Springfield, IL 62794-9276

PLEASE TAKE NOTICE that on March 12, 2004, I sent to the Clerk of the Illinois Pollution Control Board the original and nine (9) copies, via U.S. mail, of Petitioner's Reply Brief for filing in the above-entitled cause, a copy of which is attached hereto.

The undersigned hereby certifies that a true and correct copy of the Notice of Filing together with a copy of Petitioner's Reply Brief, was served upon the Hearing Officer via U.S. mail and the Respondent via U.S. mail, on the 12th day of March, 2004.

Patrick D. Shaw

MOHAN, ALEWELT, PRILLAMAN & ADAMI
1 North Old Capitol Plaza, Suite 325
Springfield, IL 62701-1323
Telephone: 217/528-2517
Facsimile: 217/528-2553

THIS FILING SUBMITTED ON RECYCLED PAPER

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ILLINOIS AYERS OIL CO.,	)	
	)	
Petitioner,	)	
	)	**PCB No. 03-214**
vs.	)	**(UST Appeal)**
	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

PETITIONERS' REPLY BRIEF

NOW COMES Petitioner, Illinois Ayers Oil Company (herein "Petitioner"), by its undersigned attorneys, and in reply to the Response to Petitioner's Brief filed by the Illinois Environmental Protection Agency (hereinafter "the Agency"), state as follows:

I. REGULATORY BACKGROUND.

While the parties largely cite many of the same legal authorities which define the issues in this case, the Agency largely discards these standards in its argument.

First, the issues in this case are defined by the Agency's denial letter, Kathe's Auto Service Center v. IEPA, PCB 96-102 (Aug. 1, 1996), and the Agency does not appear to make any reference to its denial letter in its response. The denial letter should contain specific reasons why the Act and the regulations require denial or modification. (415 ILCS 5/57.7(c)(4)) Whether or not the Agency satisfied this requirement in this case is debatable, the Board can only affirm the Agency's decision by making the legal and factual findings to support the Agency's stated reasons. See IEPA v. IPCB, 138 Ill. App. 3d 550, 551 (3rd Dist. 1985). By avoiding reference to its reasons for denial, the Agency hopes to prevail on other grounds. For example,

the Agency reduced the number of borings from ten to three, finding the number to be "excessive." (Rec. at p. 90) Instead of justifying the reasonableness of using only three borings in its response brief, the Agency argues that it had insufficient information to know the purpose of any of the borings. (Resp. Brief at 11) Petitioner rejects that contention entirely, but it is an entirely different issue.

In addition to ignoring the reasons given in its denial letter, the Agency would appear to have the Board ignore all evidence not contained in the corrective action plan and budget. The hearing before the Board is the first opportunity given to the Petitioner to challenge the basis for the Agency's decision. IEPA v. IPCB, 138 Ill. App. 3d 550, 551-52 (3rd Dist. 1985). The Board hearing "includes consideration of the record before the EPA together with the receipt of testimony and other proofs under the full panoply of safeguards normally associated with a due process hearing." Id. This includes not only information "within the possession of the Agency" at the time of its decision. Waste Mgt. v. IEPA, PCB No. 84-45, at pp. 17-18 (Nov. 26, 1984), but also testimony explaining how the Agency record demonstrates that a corrective action plan and/or budget should have been approved. Todd's Service Station v. IEPA, PCB 03-2 (Jan. 22, 2004). In this case, such information includes unchallenged explanations Petitioner provided to the Agency in meetings initiated in anticipation of the revised corrective action plan and budget (Hrg. Trans. at pp. 33-34, 67-70),[1] documents given to the Agency in those meetings (Pet.'s Exs. 9 &10), documents arising from the original plan and budget (Pet.'s Ex. 6) and the hearing testimony which explained how the Agency erred in its decision. (Hrg. Trans. at p. 121-58, 234-

[1] Neither Harry Chappel, nor Carol Hawbaker, disputed any of the testimony relating to the substance of their meetings with Truesdale. (Hrg. Trans. at p. 29)

45) The Agency either ignores this evidence or argues that it has no legal significance. (Response, at pp. 12 & 14) The only decision cited to support this position is a Board decision which was actually critical of that petitioner's failure to offer explanatory testimony. Todd's Service Station v. IEPA, PCB 03-2, at p. 15 (Jan. 22, 2004).

Finally, with respect to the burden-shifting issues, the basic point to be drawn from the caselaw is that the petitioner has the burden of going forward with some evidence that its proposal would not violate the Act or regulations or that the reduction in hours, scope of work or costs were not necessary to accomplish the purposes of the Act. John Sexton Contractors v. IPCB, 201 Ill. App. 3d 415, 425 (1st Dist. 1990). Whether or not such a *prima facie* case is sufficient to carry petitioner's ultimate burden of persuasion, however, varies greatly depending upon what, if any, evidence the Agency presents to refute it. Id. at 425-26. Therefore, it is just as important that the Agency has no evidence from which to base its modifications, as it is for the petitioner to demonstrate the legality of its plan and budget. The Agency has no intelligible basis for reducing the number of borings from thirteen to three or concluding that the borings can be completed in two days. These reductions were not necessary to ensure compliance with the Act.

II. THE AGENCY'S RATE-SHEET IS INDEFENSIBLE.

The Agency erroneously believes that it can manufacture internal guidance to be used in assessing LUST reimbursement requests without full public disclosure either through rulemaking or during the course of an adjudication. It is true, as the Agency argues, that "not all statements of agency policy must be announced by means of published rules." Kaufman Grain Co. v. Director, 179 Ill. App. 3d 1040, 1047 (4th Dist. 1989). "When an administrative agency interprets

statutory language as it applies to a particular set of facts, adjudicated cases are a proper alternative method of announcing agency policies." Id. (emphasis added) Published rules, however, are required for "each agency statement of general applicability that implements, applies, interprets, or prescribes law or policy." Id. at 1046 (quoting 5 ILCS 100/1-70) (emphasis added) Barring statutory mandate, "administrative agencies may establish standards of conduct in applying statutes either by rulemaking or adjudication, a decision left to the informed discretion of the agency." In re J.R., 302 Ill. App. 3d 87 (1st Dist. 1998).

Petitioner is not challenging the Agency's choice of adjudication or rulemaking, particularly since the Board has implicitly recognized that this choice was available to the Agency in making LUST reimbursement decisions. Platolene 500 v. IEPA, PCB No. 92-9, at p. 7 (May 7, 1992). Instead, Petitioner challenges the Agency's refusal to accept the consequences of its choices. There appear to be two choices: (1) If the Agency wants to create generalized standards to assist in the processing of numerous reimbursement requests, rules of general applicability must be promulgated; (2) If the Agency does not want to promulgate rules, then it cannot rely upon secret "internal guidance" in making external decisions. The Agency wants it both ways – it desires to avoid the inconvenience and public scrutiny of a rulemaking, while using the "internal guidance" as the basis for its decisions.

The Agency's response makes clear that the rate sheet is being used as an unpromulgated rule, not as part of an adjudicatory decision. The Agency states that the rate sheet is a "tool to assist project managers in their review of numerous budget sumittal from different consultants." (Response, at p. 9) The rate sheet "help to ensure consistency" between the numerous budget submitals. (Response, at p. 8) In other words, the rate sheet was not created specifically for

Illinois Ayers Oil Company or CSD Environmental based upon the particular facts of the budget sumittal, but is a standard of general applicability that applies to every budget submittal. The case cited by the Agency is simply not applicable since it involved an adjudicatory analysis that "relate[d] solely to this particular nursing home." Highland Park Conv. v. Health Fac. Plan., 217 Ill. App. 3d 1088, 1096 (1st Dist. 1991).

Given that the Agency's explanation of the rate sheet concedes that the rate sheet is intended to operate as a standard of general applicability, the only question remaining is whether the rate sheet falls within one of the statutory exceptions for rulemaking. The Agency identifies only one: "statements concerning only the internal management of an agency and not affecting private rights or procedures available to persons or entities outside the agency." (5 ILCS 100/1-70(i)) As examples of lawful internal management standards, the Agency points to the Secretary of State's creation of staff positions charged with reviewing hearing officer decisions to issue or not issue restricted driver's licenses. Donnelly v. Edgar, 117 Ill.2d 59, 63 (1987). Notably, the Secretary of State did not create internal guidance directing the hearing officers to a certain result if, for example, the driver had a certain number of previous license suspensions. This was entirely a matter of internal staffing and quality control. The Agency has created similar bodies without rulemaking, such as its enforcement decision group and its budget assessment group.[2] That an administrative agency can create internal supervisory positions to promote consistency does not mean that all agency actions to promote consistency are exempt from rulemaking. See Berrios v. Rybacki, 190 Ill. App. 3d 338, 346 (1st Dist. 1989) (holding that a rulemaking was

[2] The Budget Assessment Group was formed in the fall of 2003 with the responsibility of reviewing budget decisions prior to their issuance in order to ensure consistency. (Pet.'s Ex. 4, at pp. 22-23) This organization was not in existence at the time of the underlying decision. (Id.)

required for "an internal method for maintaining consistency among the arbitrators who hear worker's compensation claims [which] had a substantial effect on the rights and obligations of persons outside the agency").

Rates that can be charged by outside contractors are clearly not matters of internal management. The legislature has specifically directed agencies involved in ratemaking to promulgate rules governing its ratemaking practices and procedures. (5 ILCS 100/5-25) The significance of this provision is made more clear under the federal Administrative Procedure Act, which also defines a rule as "an agency statement of general . . . applicability . . . designed to implement, interpret, or prescribe law or policy . . . and includes the approval or prescription for the future of rates . . ." (5 U.S.C. § 551(4)) Thus, even if one were to conclude that the rate sheet was solely an internal matter, the rate provisions of the Illinois Administrative Procedure Act were clearly intended to encompass ratemaking activities within the obligation of rulemaking.

Finally, and although this point may be moot if the Board agrees that the rate sheet is a *de facto* rule (Pet.'s Brief, at pp.14-18), the Agency cannot hide behind the Board's discovery order to defend its refusal to disclose all of the rates relied upon by the Agency and disclose the basis of all of its rates. In its motion to the Board, the primary argument made by the Agency was that it would be premature and inappropriate for the Board to make any determination as to the proper role of the rate sheet prior to a hearing which would allow the Agency an opportunity to present its own witnesses and conduct cross-examination. (Resp. to Mot. Inerloc. Appeal, at p. 3) Now that the Agency had its hearing, the question remains as to whether that rate sheet is competent evidence of anything. In Platolene 500 v. IEPA, PCB No. 92-9, at p. 8 (May 7, 1992), the Board made a legal finding in its final order which gave an Agency guidance document no legal or

regulatory effect in proceeding. Even if the underlying documents were non-discoverable, the rate sheet was not admissible evidence without disclosure of the underlying documents. Wirtz v. Baldor Electric Co., 337 F.2d 518 (D.C. Cir. 1964).

III. TECHNICAL REVIEW.

Missing from the Agency's justification of its technical review of the corrective action plan is the technical reviewer's failure to read the corrective action plan and her misassumptions that derived therefrom. The Agency denied the corrective action plan on the basis of a mistake. The assertion that insufficient information was contained in the corrective action plan is belied by the fact that the technical reviewer did not have enough time to review the information that was available.

The purpose of the thirteen borings -- indeed the entire purpose of the investigation plan – was clearly set forth. After meeting with the Agency and agreeing to submit a plan solely "associated with defining the extent of BTEX contamination," (Rec. at p. 1), Petitioner submitted a corrective action plan that proposed thirteen borings "to better define and evaluate the extent and relative distribution of petroleum contaminants in the subsurface." (Pet.'s Ex. 1, at p. 6) The Agency did not reject the plan because this work did not need to be done, nor because it did not know the purpose of the borings; it rejected the plan because it thought the actual number of borings was "excessive." (Rec. at 86) If the Agency did not understand the purpose of the borings, it would have rejected all of the borings. The Agency's denial letter frames the issues in this appeal, not *post hoc* rationalizations. Kathe's Auto Service Center v. IEPA, PCB 96-102 (Aug. 1, 1996). The Agency reviewer testified that she thought the number of borings was

excessive because of her mistaken understanding of local soil conditions. (Pet.'s Ex. 2, at pp. 21-22, 100-101) She agreed that more borings would have been justified if Petitioner had found some heterogenous soil layers at the site. (Pet.'s Ex. 2, at pp. 21-22)

Ignoring the above stated purposes of the borings, the Agency claims that Petitioner intended to perform work that had already been performed at the site classification stage because Petitioner intended to perform and report this work "in accordance with" standards found in the Board's classification section of the LUST regulations. (Pet.'s Ex. 1, at p. 68) No reasonable person would confuse the plan's statement of means with it's statement of intent. Again, if the Agency truly believed that "each of the thirteen (13) locations" were being investigated for soil classification purposes, the Agency would have rejected the entire plan outright. These reductions were made under a misapprehension that soil conditions were uniform and therefore the soil and groundwater investigation could be performed with far fewer borings.

IV. FINANCIAL REVIEW.

1. There Is No Evidence to Support a Finding That the Number of Hours to Perform the Investigation Activities Was Excessive.

Petitioner fully completed the Agency's form for investigation costs, completing every blank and inserting additional information in footnotes where possible. (Pet.'s Ex. 1, at p. 68) In particular, the Agency form sought a breakdown of drilling costs on the basis of "feet to be bored." (Id.) Frustratingly, the Agency does not coordinate the information solicited in its form with its rate sheet. The rate sheet calculated reasonable costs on a "per day" basis (Pet.'s Ex. 2, at Att 3), so the reviewer asked her supervisor how many direct push borings could be used in a

day. (Hrg. Trans. at p. 179) She did not tell him other relevant information in the plan and budget, such as the number of feet to be drilled (the actual focus of the Agency's form), the fact that groundwater samples would be taken, or any other site or soil conditions. (Pet.'s Ex. 2, at pp. 32-33; Pet.'s Ex. 3, at pp. 34-36; Hrg Trans. at pp. 209-10)[3] In addition to the information in the plan and budget, Truesdale explained the investigation plan to the Agency in pre-decision meetings and again explained the record at the Board hearing. The Agency's decision was not based upon the absence of any necessary information in the budget form, but the Agency's failure to consider all of the information available to it.

2. The Other Costs are Supported by the Record.

The Agency's statement that its reductions were correctly "based on past experience of the Illinois EPA staff" must be rejected. (Response, at p. 13) The reductions were made by a single individual at the Agency whose experience in the environmental field began in September of 2000 when she joined the Agency. (Pet.'s Ex. at p. 5) She does not have a technical or scientific background, has never prepared a budget or conducted any type of subsurface investigation. (Pet.'s Ex. at pp. 6 & 26) Most of her cost reductions made were based upon the rate sheet, and her reductions of time to perform different tasks can be fairly summarized as her feeling that the tasks could be performed in less time. (E.g., Pl.'s Ex. 2, at p. 28; Hrg. Trans. at p.

[3] If the Agency needed different information than that which was solicited in its forms, it would appear to be a circumstance where the Agency was required to give Petitioner an opportunity to submit information. See Wells Mfg. Co. v. EPA, 195 Ill. App. 3d 593, 597 (1st Dist. 1990).

189 & 191)[4] Her supervisor is a licensed professional engineer, but he did not review the plan and budget (Pet.'s Ex. 3, at p. 25) and he did not offer any testimony in support of the Agency's decision. The supervisor simply offered an answer to a hypothetical that failed to contain all of the information he admits would have been relevant. (Pet.'s Ex. 3, at pp. 34-36) In contrast to employing the experience of the Agency's staff, it is clear that the underlying decision was not the result of staff experience, but the Agency's increasing reliance on rate sheets as a substitute for that experience.

Although Petitioner denies that there was insufficient information before the Agency, it must be pointed out that the Agency in this appeal is demanding to be fed more information in the plan and budget for which it refuses to pay. The project reviewer is charged with preparing the plan and budget, meeting and corresponding with the client and the Agency, coordinating the project and preparing the reimbursement request – all tasks Petitioner believes will take 156 hours. (Rec. at pp. 72-73) The Agency feels that 40 hours is sufficient – a reduction of approximately 75%. (Hrg. Trans. at p. 59) If the Agency is to be taken seriously in claiming that budget items such as $10 pH tests need substantially more documentation, then the time allotted for the project reviewer should be at least doubled. However, the Agency cannot be

---

[4] The Agency states that the reviewer currently has 201 sites assigned to her, which is certainly too many for anyone. Given this type of workload, the Agency has most certainly misconstrued its statutory mandate to ensure that the costs associated with the corrective action plan are reasonable. (415 ILCS 5/57.7(c)(3)) The Agency was not directed to set maximum rates are try to force costs down, but to reimburse costs that are not excessive. That the Agency is running a program in which a $10 pH test is at issue, not because Petitioner failed to complete all of the information in the form, but because the reviewer was not sure of the purpose of the pH teat, indicates that the Agency's approach is completely unreasonable.

taken seriously given that its forms do not request any information that was not provided and not all of the information that was provided was considered by the Agency.

V. CONCLUSION.

Petitioner renews its request that the Board reverse the Agency's changes in the corrective action plan, reverse the Agency's cuts to the associated budget, and provide such other relief as the Board deems meet and just.

ILLINOIS AYERS OIL CO., Petitioner,

BY: MOHAN, ALEWELT, PRILLAMAN & ADAMI,
Its attorneys

By _____
Patrick D. Shaw

MOHAN, ALEWELT, PRILLAMAN & ADAMI
One North Old State Capitol Plaza
Suite 325
Springfield, IL 62701
Tele: 217/528-2517
Fax: 217/528-2553

M:\My Documents\IllinoisAyersReply.wpd\crk\3/12/04