RECEIVED
CLERK'S OFFICE
MAR 1 5 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 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 11, 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 Response to the Agency's Objection To Hearing Officer's Ruling and Motion to Strike 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 Response to the Agency's Objection to Hearing Officer's Ruling and Motion to Strike, was served upon the Hearing Officer via U.S. mail and the Respondent via U.S. mail, on the 11th 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

C:\Mapa\CSD Environmental\NoticeofFiling031104.wpd\crk\3/11/04

RECEIVED
CLERK'S OFFICE
MAR 1 5 2004
STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

RESPONSE TO THE AGENCY'S OBJECTION TO HEARING OFFICER'S RULING AND MOTION TO STRIKE

NOW COMES Petitioner, Illinois Ayers Oil Company (hereinafter "Petitioner"), pursuant to Section 101.500(d) of the Board's Procedural Rules (35 Ill. Admin. Code §101.500(d)), in response to the Objection to Hearing Officer's Ruling and Motion to Strike, states as follows:

I. THE AGENCY HAS WAIVED ITS OBJECTION.

A. The Agency's Objection is Waived Pursuant to the Board's Procedural Rules.

The hearing in this matter was held on January 7, 2004, and the transcript of the hearing was available online on January 12, 2004.

> **An objection to a hearing officer ruling made at hearing or any oral motion to the Board made at hearing will be deemed waived if not filed within 14 days after the Board receives the hearing transcript.**

(35 Ill. Admin. Code § 101.502(b))

The Agency filed its "Objection to Hearing Officer's Ruling and Motion to Strike" on March 8, 2004. By waiting approximately 56 days to object to the hearing officer's ruling made at the hearing, the Agency has waived any objection.

Given the 120-day decision deadline imposed on this case, the Rule 101.502(b) deadline is imminently reasonable. Furthermore, the Agency compounded the problems of delay by waiting until after Petitioner had filed its post-hearing brief. An earlier and timely objection might have provided an opportunity for the brief to take into consideration any outstanding evidentiary issues. Such a stratagem is unjust and should not be countenanced.

B. The Agency's Objection is Waived by Failing to Present its Relevancy Objection at Hearing.

At the hearing, the Agency did not object to the proffered depositions on relevancy grounds. Instead, the Agency objected to the discovery depositions solely on the grounds that they were not evidentiary depositions. (Hrg. Trans. at pp. 7-9) By objecting to the admission of evidence on one specific ground, the Agency waived other grounds not specified. People v. Brown, 275 Ill. App. 3d 1105, 1113 (1st Dist. 1995) (objecting to evidence for lack of foundation and for lack of a proper chain of custody constituted waiver of any objection on grounds of relevancy).

The Agency appears to place the blame for its omission on the Petitioner and the Hearing Officer. First, the Agency complains that since these were discovery depositions, it had no notice of how they might be used as evidence. (Objection, at ¶ 4; Hrg. Trans. at p. 8)[1] The proper use of discovery depositions will be discussed in the next section. Suffice it to say at this point that the Illinois Supreme Court has ruled that there is no unfair surprise resulting from the use of

[1] Nor is there any rule that precludes a relevancy objection during a deposition; the Agency certainly made such objections. (e.g., Pet.'s Ex. 4, at pp. 22) The Board's procedural rules merely recognize that the scope of relevant inquiry may be broader prior to trial. (35 Ill. Admin. Code 101.617(d))

discovery depositions as evidence. In re Estate of Rennick, 181 Ill. 2d 395, 408 (1998) ("[A] party and his or her attorney know at the time of the party's deposition that any statement made could be used as an admission.") Next, the Agency complains that it did not receive the written motion to admit these depositions prior to the hearing. This is true, but motions made at hearing to admit evidence are typically made without advance notice and there is no requirement that the motion even be in writing. (35 Ill. Admin. Code § 101.500(b)) The Agency also seems to suggest that it did not know Petitioner intended to seek to admit the depositions into evidence. This is false. Petitioner unsuccessfully tried to get the Agency to agree to admit the depositions by stipulation. (Hrg. Trans. at p. 6) The Board should reject any inference that the Agency was unfamiliar with Petitioner's desire to admit the depositions into evidence in order to save time. All of this presupposes, of course, that the Agency has some entitlement to know exactly what legal arguments would be used by the Petitioner at the hearing anyway. Since the Agency's attorney attended the depositions, the deposition testimony was the least surprising part of Petitioner's case and the least difficult for which to prepare.

The Hearing Officer is faulted for not conducting some form of relevancy findings at the hearing. (Objection, at ¶ 8) This is ludicrous. The hearing officer rules on objections; it was not her province to read the depositions (or any other documents offered into evidence) in order to make a relevancy finding. The Hearing Officer, like a trial judge, is not expected, nor required, to make evidentiary rulings sua sponte. See Casson v. Nash, 74 Ill.2d 164, 171 (1978) ("A court is not required to exclude objectionable evidence absent an objection.") In the cases cited by the Agency, a preliminary relevancy finding was not made by the judge. See Schaffner v. Chicago & N.W. Transp. Co., 161 Ill. App. 3d 742, 757 (1st Dist. 1987) (ruling on specific objection to

relevancy of interrogatory answer); Skonberg v. Owens-Corning Fiberglas Corp., 215 Ill. App. 3d 735, 749 (1st Dist. 1991) (permitting portions of deposition to be read over plaintiff's objection, while denying other portions deemed duplicative of previous testimony). While a discovery deposition may be excluded on grounds of relevancy, it is the obligation of the party opposing admission of the evidence to make an objection if a ruling is sought.

The Agency did not object to the relevancy of the deposition transcripts at the hearing and therefore, the Hearing Officer could not have erred in admitting the deposition transcripts. In fact, the hearing officer might have committed reversible error by refusing the offered depositions. See Security Savings & Loan Ass'n v. Commissioner of Savings & Loan Ass'ns, 77 Ill. App. 3d 606, 610 (3rd Dist. 1979) (hearing officer subject to similar administrative rules committed reversible error in refusing to admit depositions into evidence).

II. THE DISCOVERY DEPOSITIONS WERE PROPERLY USED AS ADMISSIONS AGAINST A PARTY OPPONENT.

The Agency's argument to the Hearing Officer was based upon a misconceived notion of the difference between discovery depositions and evidence depositions. The term "discovery deposition" originates from Illinois Supreme Court Rule 212, which specifies the various purposes to which depositions may be used:

> **Discovery depositions taken under the provisions of this rule may be used only:**
>
> **(1) for the purpose of impeaching the testimony of the deponent as a witness in the same manner and to the same extent as any inconsistent statement made by a witness;**

(2) as an admission made by a party opponent or by an officer or agent of a party in the same manner and to the same extent as any other admission made by that person;

(3) if otherwise admissible as an exception to the hearsay rule; or

(4) for any purpose for which an affidavit may be used.

(S. Ct. R. 212(a)(emphasis added))

"Different evidentiary rules apply to the use of deposition testimony depending on whether the deponent is a party." In re Estate of Rennick, 181 Ill. 2d 395, 408 (1998). The deposition of a nonparty witness is hearsay, which is generally admissible only for impeachment purposes. Id. In contrast, "[s]tatements of a party made during a deposition are admissible as an exception to the rule excluding hearsay when introduced by a party opponent." Id.[2] For this reason, "a party and his or her attorney know at the time of the party's deposition that any statement made could be used as an admission." Id. While an opposing party may have "preferred" that a deposition be limited to impeachment purposes, a party is not obliged to follow another party's wishes in the matter. Security Savings & Loan Ass'n v. Commissioner of Savings & Loan Ass'ns, 77 Ill. App. 3d 606, 612 (3rd Dist. 1979).

---

[2] It is for this reason that the Agency cannot admit into evidence depositions of its own staff. It is common practice for a party to read only favorable excerpts to the jury, not only for the sake of brevity, but in order to take strategic advantage of the opposing parties' inability to read its own selection of deposition excerpts. Nonetheless, it is not error to read the entire deposition to the jury. E.g., Rose v. City of Chicago, 317 Ill. App. 1, 35 (1st Dist. 1942) The potential abuse from the partial use of a deposition was reduced in 1956 by the enactment of Supreme Court Rule 212(c), which provides that "[i]f only a part of a deposition is read or used at the trial by a party, any other party may at that time read or use or require him to read any other part of the deposition which ought in fairness to be considered in connection with the part read or used." (S. Ct. R. 212(c)) In other words, it is the partial use of depositions which gives rise to concerns of fairness, not their full use.

An admission made by a party opponent in a discovery deposition or otherwise is treated as original or substantive evidence of the truth of the statements made or the existence of any facts which they have a tendency to establish. Security Savings & Loan Ass'n v. Commissioner of Savings & Loan Ass'ns, 77 Ill. App. 3d 606, 610 (3rd Dist. 1979). The admissions can be entered into evidence without prior examination of the deposed witness or any particular predicate or foundation. Id. It is reversible error for a hearing officer to exclude the discovery deposition of a party opponent from evidence. Id. at 613.

The discovery depositions were admitted into evidence in a manner consistent with Illinois civil practice. Even under federal law, which does not distinguish between discovery and evidentiary depositions, this practice is authorized. (Fed. R. Civ. Proc. 32(a)(2) ("The deposition of a party . . . may be used by an adverse party for any purpose.")) The Agency does not argue that the three deponents were not agents of the Agency and therefore their deposition testimony was admissible as any other party admission.

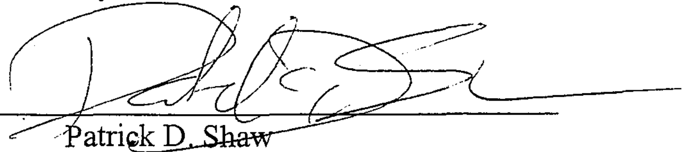
III. CONCLUSION.

The Hearing Officer properly admitted the discovery depositions of the Agency employees into evidence as party admissions pursuant to Supreme Court Rule 212. The Agency's belated assertion that there may be irrelevant statements in any of these depositions is belied by the fact that nearly sixty-days from the hearing, the Agency has still failed to identify a single irrelevant statement in any of the depositions. The Agency has no substantive objection to any of the deposition testimony; it merely seeks to invent an unprecedented procedural hurdle

that would allow one of the Agency employees's testimony to be unhindered by prior testimony taken under oath.

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