

BEFORE THE POLLUTION CONTROL BOARD  
OF THE STATE OF ILLINOIS

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OCT 28 2005

STATE OF ILLINOIS  
Pollution Control Board

|                         |   |               |
|-------------------------|---|---------------|
| E & L TRUCKING COMPANY, | ) |               |
| Petitioner,             | ) |               |
| v.                      | ) | PCB No. 06-50 |
| ILLINOIS ENVIRONMENTAL  | ) | (UST Appeal)  |
| PROTECTION AGENCY,      | ) |               |
| Respondent.             | ) |               |

NOTICE

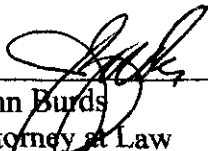
Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board  
James R. Thompson Center  
100 West Randolph Street  
Suite 11-500  
Chicago, IL 60601

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

PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board a RESPONSE TO THE AGENCY'S MOTION TO DISMISS PETITION copies of which are herewith served upon you.

Respectfully submitted on behalf of Petitioner,

E & L TRUCKING COMPANY,

  
\_\_\_\_\_  
John Burds  
Attorney at Law  
1170 South Plymouth Court - Suite 2NE  
Chicago, IL 60605  
Phone: (312) 341-0037  
Facsimile: (312) 341-9394

Dated: October 28, 2005

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**RESPONSE TO AGENCY'S MOTION TO DISMISS PETITION**

NOW COMES the Petitioner, E & L TRUCKING COMPANY, by and through its attorney, John Burds and, pursuant to 35 Ill. Adm. Code 101.500, 105.408(b) and 105.408(c), hereby respectfully moves the ILLINOIS POLLUTION CONTROL BOARD ("Board") to deny the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S ("Agency") Motion to Dismiss Petition.

1. On September 14, 2005, the Agency issued a final determination "[f]or purposes of appeal . . .," indicating that the application for reimbursement, allegedly received from E & L Trucking Company on May 19, 2005, is incomplete.

2. The Agency allegedly sent the September 14, 2005, final determination via certified mail; however, the actual date of receipt/service of this final determination by E & L Trucking Company from the Agency is not known.

3. Only after repeated and unsuccessful attempts to contact both, Agency Counsel, Mr. John Kim, as well as the author of the Agency's final determination, Mr. Douglas E. Oakley, in order to resolve any alleged deficiencies and/or secure the Agency's agreement to file a joint extension of time to file any necessary Petition for Review pursuant to 35 Ill. Adm. Code 105.406, was a timely Petition for Review filed by E & L Trucking Company on October 11, 2005 with the Board.

4. Counsel for the Agency in discussions previous and subsequent to the filing of the above referenced Petition for Review by E & L Trucking has indicated that it is the Agency's position that final determinations concluding that applications and/or submittals are incomplete are not subject to Board review.

5. Pursuant to 35 Ill. Adm. Code 105.404, a petitioner may file either a petition for review or request for an extension of time to file a petition within 35 days of the date of service of the Agency's final decision. Although the actual date of service upon E & L Trucking Company of the Agency's September 14, 2005, final determination is unknown it is clear that the Petition for Review filed on October 11, 2005, is both timely and that the E & L Trucking disputes the Agency's incompleteness finding within the final determination issued on September 14, 2005.

6. The Petition for Review clearly establishes that the E & L Trucking Company disputes the Agency's incompleteness determination. The prayer for relief specifically requests the Board to reverse the determination and within the content of the Petition, E & L Trucking Company clearly identifies the Agency's own previous approval of the High Priority Corrective Action Plan and Budget, including these same costs, as a basis for the dispute within numbered paragraph 3.

7. More importantly, the final determination issued by the Agency on September 14, 2005, is both confusing and inconsistent with prior Agency determinations related to these same and/or identical costs. See, E & L Trucking Company v. IEPA, PCB# 2002-053. Specifically, the Agency alleges that the reimbursement application does not identify costs previously applied to the applicable deductible; however, it was the Agency who assigned these costs without specifying and/or notifying E & L Trucking which were applied to the applicable deductible.

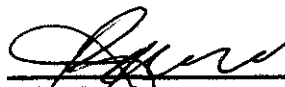
8. To date E & L Trucking Company's efforts to identify these costs and reconcile previous reimbursements with the Agency have received no response from the Agency despite repeated assurances from Agency Counsel that the Agency would identify and provide any detail necessary to address the Agency's concerns. Thus E & L Trucking was left with no alternative but to file the Petition for Review. It is not possible or reasonable to require E & L Trucking Company to identify all possible grounds for appeal at the initial time of filing. Likewise in the context of an administrative hearing/proceeding, it is not reasonable to expect the repeated and continuous filing of amended petitions as information is developed as new and/or additional basis and/or grounds for appeal are developed throughout the exchange of information or over the course of discovery.

9. The Agency has not alleged and/or established any prejudice, material or otherwise, as a result of the alleged deficiencies within the Petition for Review filed, October 11, 2005.

WHEREFORE, the Petitioner, E & L TRUCKING COMPANY, respectfully requests that the Board deny the Agency's Motion to Dismiss Petition or, in the alternative, grant the Petitioner leave to file an Amended Petition as necessary.

Respectfully submitted on behalf of the Petitioner,

E & L TRUCKING COMPANY,

  
\_\_\_\_\_  
John Burds  
Attorney at Law  
1170 South Plymouth Court - Suite 2NE  
Chicago, IL 60605  
Phone: (312) 341-0037  
Facsimile: (312) 341-9394

Dated: October 25, 2005

This filing submitted on recycled paper.

### **CERTIFICATE OF SERVICE**


I, the undersigned attorney at law, hereby certify that on October 28, 2005, I served true and correct copies of RESPONSE TO AGENCY'S MOTION TO DISMISS PETITION by placing true and correct copies thereof in properly sealed and addressed envelopes and by depositing said sealed envelopes in a U.S. mail drop box located within Chicago, Illinois, with sufficient First Class postage affixed thereto, upon the following named persons:

Dorothy M. Gunn, Clerk (also via E-Filing)  
Illinois Pollution Control Board  
James R. Thompson Center  
100 West Randolph Street  
Suite 11-500  
Chicago, IL 60601

John Kim  
Illinois Environmental Protection Agency  
1021 North Grand Avenue, East  
P.O. Box 19276  
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