BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

DALEE OIL COMPANY, *Petitioner,*	)	
v.	)	PCB No. 06-40
	)	(LUST Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, *Respondent.*	)	

NOTICE OF FILING

To:

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

John J. Kim, Assistant Counsel
Special Assistant Attorney General
Division of Legal Counsel
Environmental Protection Agency
1021 North Grand Ave. East
P.O. Box 19276
Springfield, IL 62794-9276

PLEASE TAKE NOTICE that we have this day filed with the office of the Clerk of the Pollution Control Board the *Petition for Review* a copy of which is enclosed herewith and hereby served upon you

December 27, 2005

DALEE OIL CO.

By:_____
John T. Hundley
One of its Attorneys

John T. Hundley
LAW OFFICE OF TERRY SHARP, P.C.
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John\USI\OkwavilleNotice

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that I caused copies of the foregoing document to served by placement in the United States Post Office Mail Box at Mt. Vernon, Illinois, before 6:00 p.m. on December 27, 2005, in sealed envelopes with proper first-class postage affixed, addressed to:

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Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
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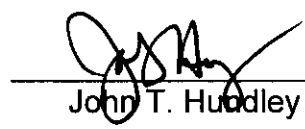

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PETITION FOR REVIEW

Pursuant to §§ 40 and 57.8(i) of the Environmental Protection Act ("Act"), 415 ILCS 5/40, 5/57.8(i), to the Board's regulations on Leaking Underground Storage Tank ("LUST") decisions, 35 ILL. ADM. CODE 105.400 *et seq.*, and to the Order adopted herein September 15, 2005, petitioner DaLee Oil Co. ("DaLee") submits this Petition for Review of the Illinois Environmental Protection Agency ("Agency") decision attached hereto as Exhibit 1 ("Decision") denying DaLee budget approval for $11,100 in costs incurred under the LUST program.

Pursuant to § 57.8(l) of the Act, DaLee further requests the Board to order the Agency to pay DaLee's legal costs for seeking payment in this appeal.

I. THE AGENCY'S FINAL DECISION

The Decision of which review is sought is contained in Exhibit 1 hereto.

II. SERVICE OF THE AGENCY'S FINAL DECISION

The Decision indicates it was mailed August 19, 2005. It was received by DaLee August 22, 2005. The date for filing of this appeal was extended to December 27, 2005 by Order of the Board adopted September 15, 2005.

III. GROUNDS FOR APPEAL

A. *Introduction*.

This appeal involves four USTs formerly located at 905 N. Hen House Road near Okawville in Washington County. In 1993 an over-fill occurred, which was reported to the Illinois Emergency Management Administration ("IEMA") and assigned IEMA No. 933050. After a Method II analysis, the site was given "No Further Action" status in 1995.

In 1997 the four tanks were removed. As required by 415 ILCS 5/57.8(c), an Office of the State Fire Marshal ("OSFM") agent was at the removal. He asked that an incident report be made, and one was. The Agency was asked to treat this incident – assigned No. 972197 – as a continuation of 933050, and for some time it appeared that that had occurred. However, in December 2002 Harry Chappel, a unit manager in the Agency's LUST Section, on the advice of Brian Bauer, a project manager in Chappel's unit, ruled that 972197 was not a continuation of 933050. Exhibit 2. The work now at issue thus was required.

In October 2003 DaLee submitted its Site Classification Work Plan & Budget ("SCWPB"), a copy of which is attached as Exhibit 3. In February 2004 Chappel replied with a letter (copy, Exhibit 4) modifying the budget "pursuant to Section 57.7(a)(1) of the Act and 35 Ill. Adm. Code 732.305(c) or 732.312(j)". How § 57.7(a)(1) justified that action was baffling.[1] The cited regulations were

[1] Of four versions of § 57.7 resulting from acts of the 92nd legislature, the only § 57.7(a)(1) to address financial matters was the provision, as amended by P.A. 92-574, 92-651 and 92-735, that prior to conducting soil classification and groundwater investigation the owner-operator is to submit "a request for payment of costs associated with eligible early action costs as provided in Section 57.6(b)." Section 57.6(b) permits, prior to submission of plans

equally uninforming.[2] An attachment prepared by Bauer invoked for 18 of 19 cuts "Section 57.7(c)(4)(C) of the Act and 35 Ill. Adm. Code 732.606(hh)" (see Exhibit 4, Attach. B, § 2, ¶¶ 1-18). The former citation apparently referred to § 57.7(c)(4)(C) as amended by P.A. 92-574, 92-651 and 92-735, providing:

> In approving any plan submitted pursuant to Part (E) of this paragraph (4), the Agency shall determine, by a procedure promulgated by the Board under item (7) of subsection (b) of Section 57.14, that the costs associated with the plan are reasonable, will be incurred in the performance of corrective action, and will not be used for corrective action activities in excess of those required to meet the minimum requirements of this title.

The latter citation, 35 ILL. ADM. CODE 732.606(hh), merely stated that ineligible costs include "[c]osts proposed as part of a budget plan that are unreasonable".

Chappel and Bauer said the proposal was "not reasonable *as submitted* . . . *additional information and/or supporting documentation may be provided to demonstrate that the costs are reasonable*" (Exhibit 4, Attach. B, § 2, ¶¶ 1-18 (emph. added)). Thus, in January 2005 DaLee submitted an Amended Site Classification Work Plan & Budget pursuant to § 57.8(a)(5) of the Act (Exhibit 5) ("1st ASCWPB"). It proposed $8,320 in personnel costs not approved previously, with both the owner and a professional engineer certifying under oath that the "costs set forth in this budget are necessary activities" and "not for corrective action in excess of the minimum requirements of 415 ILCS 5/57".

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to the Agency, removal of certain "visibly contaminated fill material and any groundwater in the excavation which exhibits a sheen". The 45-day report attached to the SCWPB made clear there were no such costs here; hence no payment request was required.

[2] 35 ILL. ADM. CODE 732.305(c) provides that "[t]he Agency shall have the authority to review and approve, reject or require modification of any plan submitted pursuant to this Section in accordance with the procedures contained in Subpart E of this Part". 35 ILL. ADM. CODE 732.312(j) is substantially the same.

Both owner and engineer further swore that "costs ineligible for payment from the [LUST] Fund pursuant to 35 Illinois Administrative Code Section 732.606 are not included in the budget proposal or amendment".

In April 2005 Chappel and Bauer rejected the amended budget "for the reason(s) listed in Attachment A (Sections 57.71(a)(1) and 57.7(c)(4)(D) of the Act; 35 Ill. Adm. Code 732.505(c) or 732.313(j) and 732.503(b))" (Exhibit 6). 35 ILL. ADM. CODE 732.503(b) – the only new citation – provides:

> The Agency shall have the authority to approve, reject or require modification of any plan or report that has been given a full review. The Agency shall notify the owner or operator in writing of its final action on any such plan or report, except in the case of 20 day, 45 day or free product reports, in which case no notification is necessary. Except as provided in subsections (d) and (e) of this Section, if the Agency fails to notify the owner or operator of its final action on a plan or report within 120 days after the receipt of a plan or report, the owner or operator may deem the plan or report rejected by operation of law. If the Agency rejects a plan or report or requires modifications, the written notification shall contain the following information, as applicable:
>
> 1) An explanation of the specific type of information, if any, that the Agency needs to complete the full review;
>
> 2) An explanation of the Sections of the Act or regulations that may be violated if the plan or report is approved; and
>
> 3) A statement of specific reasons why the cited Sections of the Act or regulations may be violated if the plan or report is approved.

The "explanations" and "specific reasons", stated in an attachment, were:

> The budget includes costs that lack supporting documentation (35 Ill. Adm. Code 732.606(gg)). A physical soil classification and groundwater investigation budget must include, but not be limited to, an accounting of all costs associated with the development, implementation, and completion of the physical soil classification and groundwater investigation plan (Section 57.7(a)(2) of the Act and 35 Ill. Adm. Code 732.305(b)(2)). Since there is no supporting documentation of costs, the Illinois EPA cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act (Section 57.5(a) of the Act and 35 Ill.

Adm. Code 732.606(o)).

> The budget amendment indicated that unforeseen circumstances occurred the [sic] necessitated the increase in the amount needed for personnel time to complete site classification activities however, [sic] no specific circumstances were provided. The amendment also refers to the completion of a Site Classification Completion Report and Corrective Action Completion Report. Costs for a Corrective Action Completion Report should not be included in a budget for Site Classification. In addition, costs associated with work conducted for incident 20010256, a non-LUST is [sic] not eligible for reimbursement.

Exhibit 6, Attach A. Thus, Chappel and Bauer faulted DaLee for failing to include "all costs associated with the development, implementation, and completion of the physical soil classification and groundwater investigation plan", even though the Agency's form ordered that "Amendments must include only the cost over the previous budget". They then wrongly faulted DaLee for including Corrective Action Completion Report ("CACR") costs in the site classification budget.[3] They went on to say there was "no supporting documentation of costs," even though the additional costs were expressly stated to be staff costs and Agency forms were filled out as to tasks, personnel rank, etc.[4] Finally, they suggested – contrary to sworn evidence – that some costs were for clean-up after incident 20010256, involving vandalism to a dispenser for a tank clear on the other side of the complex.

In 2004 the Board had found that the Agency had been using an unlawful

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[3] The cover letter in Exhibit 5 speaks of "completion of the SCCR/CACR", but the assumption that the slash meant "and" rather than "or" was unwarranted. Had the budget been consulted (pp. A-1, G-1, G-2 and Certificate page), Chappel and Bauer would have seen it sought no compensation for corrective action, made no reference to CACR work, and certified that all the time at issue was for site classification.

[4] 35 ILL. ADM. CODE 732.501 requires the use of those forms.

rate sheet in LUST cases. Illinois Ayers Oil Co. v. IEPA, PCB 03-214 (copy, Exhibit 7). That sheet was drafted by Bauer, under Chappel's supervision (*id.* at 6-7). Many reimbursement denials based thereon were found to be unreasonable (*id.* at 16-17). The Agency responded by asking the Board to adopt the rate sheet as an emergency rule. In the Matter of Proposed Amendments to Regulation of Petroleum Leaking Underground Storage Tanks, Nos. R04-22, R04-23,[5] *Motion for Adoption of Emergency Rules* (Apr. 19, 2004) (copy, Exhibit 8). Facing opposition, the Agency withdrew that request and proposed temporary rules under which "[a]ll requests for approval of costs shall be certified by the owner or operator and the Licensed Professional Engineer or Licensed Professional Geologist" which could create "a presumption of reasonableness for all work and costs contained in such submittal". *Amended Motion for Adoption of Emergency Rules* (May 18, 2004) at 6-7 (Exhibit 9). The Board refused to adopt either of the proposals, finding no emergency. *Order of the Board* (June 3, 2004) (Exhibit 10). It noted that a Sangamon County court had ordered the Agency to stop using the rate sheet. *Id.* n.1. Rebuffed on emergency relief, the Agency continued to seek permanent rulemaking, with Chappel and Bauer serving as key proponents.[6]

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[5] In January 2004 the Agency had filed two rulemaking cases, one (docketed No. R04-22) seeking to amend 35 ILL. ADM. CODE Part 732 to, among other things, establish maximum reimbursable amounts for LUST cleanups governed by prior law; the other (docketed No. R04-23) to establish a new 35 ILL. ADM. CODE Part 734 with comparable provisions for cleanups under an amended statute. The cases were consolidated for most purposes, though some filings relate to only one. For brevity, those cases will be referenced herein by their docket numbers, or collectively as the Proposed Amendments Cases.

[6] See *Testimony of Harry A. Chappel, P.E. in Support of the Environmental Protection Agency's Proposal to Adopt 35 Ill. Adm. Code 734*, R04-23 (Mar. 8, 2004) (Exhibit 11);

On June 1, 2005, DaLee again attempted to meet the Agency's objections in this case, submitting another Amended Site Classification Work Plan & Budget, together with a SCCR, which submission is attached as Exhibit 18 ("2nd ASCWPB"). While it was pending, the Board on July 27, 2005 held its final hearing in the Proposed Amendments Cases, focusing on objections by DaLee's consultant, United Science Industries, Inc. ("USI"). In connection therewith, DaLee's principal, Ronald Kruep, appeared prominently in a video presented by USI conveying his opposition to the proposals.

Shortly thereafter, the Agency issued the Decision. Although Chappel conceded the activities covered were appropriate (Exhibit 1, p. 1) and, in a separate letter (Exhibit 19), approved the SCCR, he again "modified" the budget "pursuant to Section 57.7(a)(1) of the Act and 35 Ill. Adm. Code 732.305(c) or 732.312(j)" (Exhibit 1, p. 1). Although he knew the work was completed and an NFR letter issued, he disingenuously went on to state:

> Please note that the costs must be incurred in accordance with the approved plan. Be aware that the amount of reimbursement may be limited by Sections 57.8(e), 57.8(g), and 57.8(d) of the Act, as well as 35 Ill. Adm. Code 732.604, 732.606(s), and 732.611.
>
> NOTE: Amended plans and/or budgets must be submitted and approved prior to the issuance of a No Further Remediation (NFR) Letter. Costs associated with a plan or budget that have not been approved prior to the issuance of an

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Testimony of Harry A. Chappel, P.E. in Support of the Environmental Protection Agency's Proposal to Amend 35 Ill. Adm. Code 732, R04-22 (Mar. 8, 2004) (Exhibit 12); *Testimony of Brian Bauer in Support of the Environmental Protection Agency's Proposal to Adopt 35 Ill. Adm. Code 734,* R04-23 (Mar. 8, 2004) (Exhibit 13); *Testimony of Brian Bauer in Support of the Environmental Protection Agency's Proposal to Amend 35 Ill. Adm. Code 732*, R04-22 (Mar. 8, 2004) (Exhibit 14); *Hearing Transcript*, R04-22, R04-23 (Mar. 15, 2004) (excerpts, Exhibit 15); *Hearing Transcript*, R04-22, R04-23 (May 25, 2004) (excerpts, Exhibit 16); *Hearing Transcript*, R04-22, R04-23 (May 26, 2004) (excerpts, Exhibit 17).

NFR letter will not be reimbursable.[7]

Bauer's attachment offered as the full statement of "explanation" and "specific reasons" for the disallowance:

> $11,100.00 deduction for costs that lack supporting documentation (35 Ill. Adm. Code 732.606(gg)). A physical soil classification and groundwater budget must include, but not be limited to, an accounting of all costs associated with the development, implementation, and completion of the physical soil classification and groundwater investigation plan (Section 57.7(a)(2) of the Act and 35 Ill. Adm. Code 732.305(b)(2)). Since there is no supporting documentation of costs, the Illinois EPA cannot determine that costs will not be used for activities in excess of those necessary to meet the minimum requirements of Title XVI of the Act (Section 57.5(a) of the Act and 35 Ill. Adm. Code 732.606(o)).
>
> The budget amendment previously submitted indicated that unforeseen circumstances occurred the [sic] necessitated the increase in the amount needed for personnel time to complete site classification activities however, [sic] no specific circumstances were provided.

Exhibit 1, Attach. A, § 2. So little attention was given to the 2nd ASCWPB that even the typographical errors in the prior response were repeated.

On December 1, 2005, the Board moved to Second Notice on the proposed amendments (excerpts, Exhibit 20). While it approved many of the proposals, it ***rejected*** the limitations on consultant costs at issue here.

B. *The Decision's Stated Grounds Are Not Supported by the Record.*

The Agency's denial letter generally frames the issues on appeal. See Illinois Ayers Oil Co. v. IEPA, PCB 03-214 (Apr. 1, 2004). Thus, the threshold issue is whether the record supports the conclusion that there was "no

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[7] Chappel issued an NFR letter (Exhibit 19) simultaneous with the Decision. Upon receipt, USI contacted the Agency to see if it had overlooked that DaLee requested no NFR be issued if the amended budget was not approved. It said there was no oversight and nothing DaLee could submit would result in approval of the disallowed costs.

supporting documentation" for the denied requests. Far from supporting that conclusion, the record here disproves it. The 2nd ASCWPB went on and on:

> . . . this justification outlines the additional costs necessary to close out incident 972197. Additional costs are associated with the 1st ASCWPB, 2nd ASCWPB, SCCR, and other tasks to complete the Site Classification (i.e., monitoring well abandonment).
>
> The ASCWPB includes a total of 70 hours of Project Manager (PM) time. The PM acts as the sole manager responsible for every aspect of a project, including analyzing data, client and IEPA correspondences, report preparation, budget breakdowns, assessment and approval of all costs associated with project, overseeing map preparation, monitoring of invoices and reimbursements, and general project management. The amended budget submitted with this justification includes 40 hours of additional PM time for professional oversight, data review, work & safety plans associated with site classification activities, client/IEPA correspondence, OSFM correspondence, and time associated with drafting the first ASCWPB, this ASCWPB and justification. The amended budget submitted with this justification also includes 30 hours of PM time for project management, drafting the SCCR, and drafting work & safety plans for the monitoring well abandonment activities.
>
> The ASCWPB includes a total of 30 hours of Environmental Specialist (ES) time. The ES is responsible for any task assigned to them from the PM. These tasks may include: Technical writing, ISGS and ISWS data reduction, well mapping, JULIE utility clearance, offsite access work, report forms (well completion, well purging & boring logs), well tables, analytical reduction and tables, and report submittal. The amended budget included with this justification includes additional ES time for the compilation of the work & safety plans associated with site classification activities, ISGS/ISWS information, analytical tables for the SCCR, Appendices for the SCCR, and the compilation of the SCCR.
>
> The ASCWPB includes a total of 10 hours of Project Coordinator (PC) time. The PC's responsibility includes preparation of LUST paperwork, breakdowns of all cost incurred for work phase including preparing and gathering receipts and supporting documents for preparation of submittal, preparing line item breakdown of actual costs on EPA forms, revisions after Professional Engineer's review, copying paperwork and logging of information for tracking, final review and submission of costs to PM for budget information. The amended budget included with this justification includes additional PC time for historical cost breakdowns and reimbursement package preparation.

> The ASCWPB includes a total of 10 hours of Professional Engineer (PE) time. The PE is responsible for final review of the Corrective Action Report, CA Budget, and certifying required documents for submittal to the Agency, as well as, reimbursement review and certifications. The PE is also responsible for final review and certifications of any amended budget submitted to the Agency. Therefore, the amended budget submitted with this justification includes PE time for professional supervision, 1st ASCWPB certification, 2nd ASCWPB certification, SCCR review and certification, and reimbursement package certification.
>
> The ASCWPB includes a total of 5 hours of Clerical (CL) time. The CL is responsible for copying, binding, filing, and mailing all reports. Therefore, the amended budget submitted with this justification includes additional CL time for copying, binding, filing and mailing reports. (1st ASCWPB, 2nd ASCWPB, and the SCCR)
>
> The ASCWPB includes a total of 10 hours of Draftsman (DR) time. The DR is responsible for drafting maps and figures for reports submitted to the Agency, inputting GPS data, and inputting groundwater survey data. The DR is also responsible for drafting geological cross-sections in order provide a detailed representation of the vertical extent of contamination. The amended budget submitted with this justification includes additional DR time for drafting maps and figures for the work plans as wells as drafting site maps, figures, diagrams, and geological cross-sections for the SCCR.

Exhibit 18, App. H, Addendum M. Indisputably, the record does not support the Decision on its stated ground. Accordingly, it should be reversed.

C. ***The Agency Was Not Unable to Determine Whether Costs Were for Unpermitted Purposes.***

The Decision speculates that the denied costs may have been used for unpermitted purposes. It says the costs were denied because the Agency could not determine that this was not so. However, multiple provisions, unutilized by Chappel and Bauer, refute the claim that they had no way of determining whether the requested costs were for improper purposes:

► At § 57.15, the Act grants the Agency "the authority to audit all data, reports, plans, documents and budgets submitted pursuant to" the LUST

statute. However, it conducted no audit here.

► In § 57.7,[8] the Act permits the Agency to conditionally deny a proposal by stating "the specific type of information . . . the applicant did not provide" – but the Agency provided no such specifics here.

► At § 30, the Act permits the Agency to commence such "investigations as it shall be deem advisable" – but it commenced no such investigation here.

► In 35 ILL. ADM. CODE 732.500(b)(1), 732.502(b) and 732.502(d), the Board has granted the Agency the authority to declare budget submissions incomplete. The Agency did not declare DaLee's submission incomplete.

The conclusion is obvious: Bauer and Chappel had no *bona fide* basis for suggesting that the denied costs were invalid, and simply made up that suggestion as a make-weight for the denial based on other grounds.

D. ***The Decision Applies Unpromulgated Rules in Violation of the Illinois Ayers Decision.***

Those other grounds were unlawful. In making their denials, Chappel and Bauer improperly applied the standards which they had proposed, but for which they had not received approval (and which ultimately were ***denied***), in the Proposed Amendment Cases. The following demonstrates this fact.

In January 2004, the Agency commenced R04-23 by asking the Board to adopt a rule stating in part:

> Payment for costs associated with professional consulting services shall not exceed the amounts set forth in this Section. Such costs shall include, but not be limited to, those associated with project planning and oversight; field work,

[8] See § 57.7(c)(4)(C) as amended by P.A. 92-554 and § 57.7(c)(4)(D)(iii) as amended by P.A. 92-574, P.A. 92-651 and P.A. 92-735.

field oversight; travel; per diem; mileage; transportation; and the preparation, review, certification, and submission of all plans, budgets, reports, applications for payment, and other documentation. . . .

b) Site Investigation. Payment of costs for professional consulting services associated with site investigation activities conducted pursuant to Subpart C of this Part shall not exceed the following amounts:

1) Payment for costs associated with Stage 1 site investigation preparation, field work, and field oversight shall not exceed a total of $3,200.00.

2) Payment for costs associated with the preparation and submission of Stage 2 site investigation plans shall not exceed a total of $3,200.00.

3) Payment for costs associated with Stage 2 field work and field oversight shall not exceed $500.00 per half-day. The number of half-days shall not exceed the following:

. . . B) One half-day for each monitoring well installed as part of the Stage 2 site investigation. . . .

6) Payment for costs associated with the preparation and submission of site investigation completion reports shall not exceed a total of $1,600.00.

Proposed 734.845, as stated at pp. 93-95 of the attachment to *Statement of Reasons, Synopsis of Testimony, etc.* (Jan. 13, 2004) (excerpts, Exhibit 21). Shortly thereafter it filed two "Errata Sheets." In pertinent part, one amended proposed § 735.845(b)(1) by changing $3,200 to $1,600 and by providing that the cap on monitoring well installation (one half-day of work, reimbursed at $500, per well) be applied at Stage 1 as well as Stage 2. The other applied the same principles to cases under Part 732.[9] As amended, the proposal provided:

Payment for costs associated with professional consulting services shall not exceed the amounts set forth in this Section. Such costs shall include, but not be limited to, those associated with project planning and oversight; field work,

[9] See n. 5 above. For simplicity, we quote only the Part 734 proposals in the text.

field oversight; travel; per diem; mileage; transportation; and the preparation, review, certification, and submission of all plans, budgets, reports, applications for payment, and other documentation. . . .

b) Site Investigation. Payment of costs for professional consulting services associated with site investigation activities conducted pursuant to Subpart C of this Part shall not exceed the following amounts:

1) Payment for costs associated with Stage 1 site investigation preparation, field work, and field oversight shall not exceed a total of $1,600.00.

2) Payment for costs associated with Stage 1 field work and field oversight shall not exceed $500.00 per half-day. The number of half-days shall not exceed the following:

. . . B) One half-day for each monitoring well installed as part of the Stage 1 site investigation. . . .

3) Payment for costs associated with the preparation and submission of Stage 2 site investigation plans shall not exceed a total of $3,200.00.

4) Payment for costs associated with Stage 2 field work and field oversight shall not exceed $500.00 per half-day. The number of half-days shall not exceed the following:

. . . B) One half-day for each monitoring well installed as part of the Stage 2 site investigation. . . .

6) Payment for costs associated with the preparation and submission of site investigation completion reports shall not exceed a total of $1,600.00.

First Errata Sheet to Proposal for Addition of 35 Ill. Adm. Code 734, R04-23 (Mar. 8, 2004), at 8-9 (Exhibit 22).

In "modifying" DaLee's budgets, Chappel and Bauer hid their reliance on that unapproved proposal, but their use thereof cannot be doubted now. The SCWPB proposed personnel costs of $13,967 (Exhibit 3 at G-2); Chappel and Bauer cut $4,567 as "not reasonable as submitted", implying that deficiencies

could be cured by a fuller submission (Exhibit 4, Attach. B, § 2, ¶¶ 1-18). However, when such a submission was made in the 1st ASCWPB, they allowed not a penny. When an even fuller submission was made in the 2nd ASCWPB, they allowed only $424 in environmental technician time for closing monitoring wells. Exhibit 1, Attach. A, § 1. Contrary to the implication in Exhibit 4, Bauer and Chappel formed a stone wall around the $9,400 originally approved. Except for the $424 well abandonment allowance, they refused to reconsider their original decision no matter how much additional information was provided.

The significance of their stone wall becomes apparent in light of the work at issue. Excluding the well abandonment costs, at issue in all three budgets were consultants' services for (1) a Stage 1 site investigation, (2) a Stage 2 site investigation, (3) installation of six monitoring wells, and (4) the site investigation completion report. Under the proposed rule quoted at pp. 12-13 above, reimbursements for these services would be capped at:

Stage 1 site investigation	$1,600
Stage 2 site investigation	$3,200
Monitoring well installation – 6 x $500	$3,000
Site Investigation Completion Report	$1,600
Total	$9,400

Excluding the well abandonment costs, the record here shows:

SCWPB sought:	$13,967
Amount allowed:	$9,400
1st ASCWPB sought:	$9,400 + $8,320
Amount allowed:	$9,400 (no change)
2nd ASCWPB sought:	$9,400 + $11,100
Amount allowed:	$9,400 (no change)

Allowing $424 for well abandonment in the final ruling was no breach of the stone wall, because under the draft rule well abandonment was not included in the lump-sum caps stated above.[10] For activities covered by the $9,400, Chappel and Bauer allowed no variation, no matter what the showing.

Use of a figure which equals the unapproved proposal *to the penny* might be a coincidence if it occurred once, but here it occurred *three times.* Perhaps one should not be surprised. In R04-23, Chappel stated:

> The limits specified include all costs incurred by a consultant for completing the specified activity, including, but not limited to, project planning and oversight, travel, per diem, mileage, transportation, lodging, all miscellaneous equipment, as well as the preparation of plans, reports, applications for payment and other documentation. ***There will be no additional monies provided if multiple submittals are required to provide the required information.***

Exhibit 11 at 6-7 (emph. added). Chappel apparently thinks that if he says so, it must be so. The law, however, is otherwise.

E. *The Agency May Not Rely On "Discretion" In Making "Reasonability" Decisions.*

As noted above, Chappel and Bauer cited for support of their actions § 57.7(c)(4)(C) as amended by P.A. 92-574, 92-651 and 92-735, providing:

> In approving any plan submitted pursuant to Part (E) of this paragraph (4), the Agency shall determine, by a procedure promulgated by the Board under item (7) of subsection (b) of Section 57.14, that the costs associated with the plan are reasonable, will be incurred in the performance of corrective action, and will not be used for corrective action activities in excess of those required to meet the minimum requirements of this title.

[10] Nor, realistically, could well abandonment be included in those sums, because monitoring wells often must remain in place for Stage 3 activity or for monitoring the effect of corrective action.

They also cited 35 ILL. ADM. CODE 732.606(hh), declaring that ineligible costs include "[c]osts proposed as part of a budget plan that are unreasonable". Chappel and Bauer apparently contend that whatever they deem "unreasonable" may be disallowed, but that is incorrect. Merely adopting a rule that unreasonable costs are prohibited is not compliance with a legislative command to submit and have approved a *procedure* for making unreasonability decisions. Using an unpromulgated rule is not complying with that statute either.

Moreover, the Administrative Procedure Act, 5 ILCS 100 ("APA"), provides:

> Each rule that implements a discretionary power to be exercised by an agency shall include the standards by which the agency shall exercise the power. The standards shall be stated as precisely and clearly as practicable under the conditions to inform fully those persons affected.

5 ILCS 100/5-20. A rule which merely prohibits "[c]osts . . . that are unreasonable" (35 ILL. ADM. CODE 732.606(hh)) simply parrots the statutory grant; it does not state "standards by which the agency shall exercise the power" (5 ILCS 100/5-20), and it certainly does not state the standards "as precisely and clearly as practicable under the conditions to inform fully those persons affected". Section 732.606(hh) is invalid and Bauer and Chappel may not rely upon it.

IV. THE AGENCY SHOULD PAY DALEE'S LEGAL COSTS

415 ILCS 5/57.8(l) provides that legal costs incurred in seeking payment under the LUST statute are barred by the general rule prohibiting recovery of "legal defense costs" "unless the owner or operator prevails before the Board in which case the Board may authorize payment of legal fees." The purpose of this provision is two-fold. First, it was enacted in recognition that one *seeking*

payment is a claimant and thus costs of doing so are not literally legal *defense* costs; hence, absent such a stipulation, rules stated elsewhere prohibiting recovery of "legal defense costs" would not apply. Second, § 57.8(l) recognizes that in some cases the claimant *should* be recompensed for having to come to the Board to receive justice. Hence, the "except" clause was inserted, and was common-sensically limited to situations where a claimant prevails.

Except that the claimant must prevail, § 57.8(l) provides no guidelines on how the Board should exercise its power under the "except" clause. However, principles which govern when an action is appealed to a Circuit Court provide reliable guidance by analogy. This is so because in LUST appeals the Board sits in a position analogous to the Circuit Court in contexts that have the Circuit Court, rather than another administrative agency, as the reviewing body between the acting agency and the Appellate Court. Under the APA:

> In any case in which a party has any administrative rule invalidated by a court for any reason, ***including but not limited to the agency's exceeding its statutory authority or the agency's failure to follow statutory procedures in the adoption of the rule,*** the court ***shall*** award the party bringing the action the reasonable expenses of the litigation, including reasonable attorney's fees.

5 ILCS 100/10-55(c) (emph. added).

Here there has been a repeated pattern of unlawful activity by the Agency and by the particular persons whose conduct is at issue. As long-time Agency employees, Chappel and Bauer must have known that their preparation and use of a secret rate sheet violated the APA, long before Illinois Ayers came down. As employees working full-time applying the LUST statute, they *certainly* knew that that sheet was not a "procedure promulgated by the Board under

item (7) of subsection (b) of Section 57.14" (415 ILCS 5/57.7(c)(4)(C) as amended by P.A. 92-574, 92-651 and 92-735). If there was any doubt, it was resolved by the Illinois Ayers opinion and by the order of the Sangamon County court in CW3M Co. v. IEPA, 03-MR-0032 (see generally Exhibit 10 n.1). If there was any further doubt, there was the Order denying emergency rulemaking (Exhibit 10), and those individuals' continued participation in the *proposed* rulemaking. To fail to award attorneys' fees here would be to rule that citizens are without remedy when bureaucrats cause those citizens injury by deliberately and repeatedly engaging in indisputably unlawful action.

It does not follow, however, that the award of fees should be made against the LUST fund. To send a message to Agency management which has allowed the lawlessness to continue in the LUST section, and to assure that limited LUST funds are not further diverted from real needs to covering bureaucrats' errors, the decision should specify that the award not be paid from the fund.[11]

V. CONCLUSION.

For all the foregoing reasons, petitioner DaLee Oil Co. respectfully submits that the Decision should be reversed and the Agency ordered (1) to pay from the LUST fund the disallowed costs and (2) to pay DaLee's attorneys' fees for

[11] The fund will pay significantly for Chappel and Bauer's errors in any event. This case stems directly from their decision that removal of the tanks not be handled as a continuation of the over-fill incident. Because of the treatment of the over-fill under Method II, finding signs of contaminant in the soil upon removal of the tanks was predictable. If harm to humans from the over-fill could be excluded under Method II analysis, the same logic and geological factors should have sufficed for contaminants found on removal of the USTs (and which might be nothing more than the remnants from the over-fill). Bauer and Chappel rejected that logic and required treatment as if a release from the USTs had occurred, with resultant compounding of required work. Yet when all the tests were done, all soil and groundwater results were below Tier 1 Class I Residential clean-up standards. Not one iota of benefit to the environment resulted from Chappel and Bauer's "judgment".

this appeal from non-LUST funds.

December 23, 2005 DALEE OIL CO.

By:_____
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