BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

L. KELLER OIL PROPERTIES/FARINA)		
Petitioner,	**)**	
v.	**)**	**PCB No. 06-189** **PCB No. 06-190 (consolidated)** **(UST Appeal)**
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	**)**	
Respondent.	**)**	

BRIEF IN SUPPORT OF MOTION FOR AUTHORIZATION OF SETTLEMENT

NOW COMES, Petitioner, L. KELLER OIL/FARINA, by its undersigned attorneys, and files this Brief in Support of Motion for Authorization of Settlement, stating as follows:

FACTUAL BACKGROUND

1. These consolidated appeals arise from leaking underground storage tank incidents at a former service station in Farina, Fayette County, Illinois. (Mot. Consolidate, at ¶ 1 (Jun. 23, 2006))

2. On November 15, 2005, a site investigation disclosed leaks from the gasoline underground storage tanks at the site, which were reported and assigned Incident Number 20051539. (Pet. Rev. ¶ 2 & Ex. 1 (PCB No. 06-190))

3. On February 10, 2006, a site investigation disclosed that the diesel fuel and heating oil tanks at the site had leaked as well and Incident Number 20060153 was assigned. (Pet. Rev. ¶ 2 & Ex. 1 (PCB No. 06-189))

4. Thereafter, early action work was performed with respect to both incidents and the tanks were removed. In December of 2005, the Petitioner submitted its 45-Day Report, detailing

activities performed with respect to the earlier incident. (Pet. Rev. Ex. 1 (PCB No. 06-190)) Then, on March of 2005, the 45-Day Report for the later incident was submitted. (Pet. Rev. Ex. 1 (PCB No. 06-189))

5. On May 22, 2006, the Illinois EPA mailed "non-LUST determination" letters, rejecting the 45-Day Reports. Both letters stated, the following:

> **Based on the information currently in the Illinois EPA's possession, this incident is not subject to Title XVI of the Act or 35 Ill. Adm. Code 731. Therefore, the Illinois EPA Leaking Underground Storage Tank Section has no reporting requirements regarding this incident.**

(Pet. Rev. Ex. 2 (PCB No. 06-190); Pet. Rev. Ex. 2 (PCB No. 06-189))

6. On June 23, 2006, Petitioner timely appealed the letters to the Illinois Pollution Control Board, concurrently with a motion to consolidate the appeals.

7. On July 6, 2006, the Board entered an order, accepting the appeals and granting the motion to consolidate.

8. By August 8, 2006, the Illinois EPA and the Petitioner reported to the Hearing Officer that a settlement had been reached, and that an open waiver of decision deadline would be filed.

9. On September 11, 2006, the Illinois EPA filed a Motion for Authorization of Settlement, the terms of which can be succinctly excerpted in their entirety:

> **1. The Illinois EPA sent two letters to Petitioners on May 22, 2006 that were incorrect. As part of the settlement in this case, two new letters were issued to replace those issued on May 22, 2006.**
>
> **2. During settlement negotiations, Petitioner requested reimbursement for attorney fees. As a part of settlement and not as an admission by the Illinois EPA that payment of attorney fees would be applicable if a hearing were held in this matter, the Illinois EPA and the Petitioner agreed to a**

compromise amount of $2,500.00.

3. In order to effectuate payment of the agreed settlement amount from the Leaking Underground Storage Tank Fund, the parties must have Illinois Pollution Control Board ("Board") authorization. Pursuant to Section 732.606(g) payments of attorney fees must be authorized by the Board. Without this authorization, the case cannot be settled.

(Mot. Authorization of Settlement, ¶1-¶3)

10. On September 21, 2006, the Board entered an order, expressing doubt that it had statutory authority to approve payment of legal fees under these circumstances and directed the parties to submit a filing detailing such authority. (Order of Sept. 21, 2006)

11. The parties then, as evidenced by multiple Hearing Officer orders from status hearings, continued the matter repeatedly in order to consider the best manner in which to respond. (E.g., Hrg Officer Order of Oct. 11, 2006)

12. Following the revocation of the non-LUST determination, additional corrective action work was performed in response to the incidents, and on June 27, 2007, another LUST appeal was filed regarding a site investigation plan and budget. See L. Keller Oil Properties v. IEPA, PCB 07-147 (Dec. 6, 2007), reconsideration denied (March 20, 2008).

13. On December 29, 2008, counsel for Petitioner withdrew and undersigned counsel subsequently entered an appearance. After familiarizing himself with the file, undersigned counsel determined that the best way forward is to file this brief, seeking to address the Board's request for information, and ask for the Board's approval of the settlement.

II. Terms of Settlement Agreement

The underlying disputes arose from Agency "No-LUST" determination decisions that removed these incidents from coverage under the LUST Program. Upon appeal before the

Board, the Illinois EPA agreed that these decisions were erroneous and agreed to issue new letters. Since the error cost the Petitioner a significant amount in legal fees to gain a correction, the Petitioner insisted that the settlement reimburse all, or a portion, of those fees. In other words, the Petitioner was contemplating the advantage of simply going to hearing with what it perceived to be an easily proven case and then petition the Board for reimbursement of its fees under 415 ILCS 5/57.8(l). This, of course, would have required additional expenditures of attorney's fees and the risk that the Board, might not exercise its discretion to award them. Consequently, Petitioner agreed to a "compromise amount of $2,500.00."

The Agency's filing indicates that it is only admitting the error in this issuance of the non-LUST determination letters, but does not concede the appropriateness of the attorney fee award sought by Petitioners, except within the context of a compromise. It is customary for a consent decree to decline to determine all of the parties' competing claims or admit fault or responsibility. See Maher v. Gagne, 448 U.S. 122, 135 FN8 (1980). Usually settlement agreements are easiest to reach if the parties focus on their interests, and not their positions.[1] Here, the parties appeared to have agreed to focus on their monetary interests and reach a compromise amount.

The Agency's statement that this settlement is not "an admission by the Illinois EPA that payment of attorney fees would be applicable if a hearing were held in this matter" does not mean that the Illinois EPA believes the Board is without authority to grant the motion it filed; that would be tantamount to filing a frivolous motion. It simply means that if the Board rejects

[1] The proposition that principled settlements can be achieved by a "focus on interests, not positions" is adopted from the Harvard Negotiation Project in books such as Getting to YES: Negotiating Agreement Without Giving In, by Roger Fisher and William L. Ury. (1981).

the settlement agreement and a hearing is held, it reserves the right to argue that no award is appropriate under these circumstances or that the award sought by Petitioners is unreasonable. The specific question of the Board's authority to grant the motion is the subject of the remainder of this brief.

III. THE ACT'S ATTORNEY FEE PROVISION AND BOARD PRECEDENT.

The relevant statutory authority is Section 57.8(l) of the Act, which provides:

> **Corrective action does not include legal defense costs. Legal defense costs include legal costs for seeking payment under this Title [XVI] unless the owner or operator prevails before the Board in which case the Board may authorize payment of legal fees.**

(415 ILCS 5/57.8(l)(emphasis added))

Petitioner submits that the question presented by the Board is whether the Petitioner has prevailed before the Board. If the Petitioner has, then the Board is authorized to award legal fees.

This case is similar to Dickerson Petroleum v. IEPA, PCB No. 09-87; 10-5 (Sept. 2, 2010), which also involved an Agency issuance of non-LUST determination letters in response to 45-day reports.[2] That case appears to have involved substantial legal briefing and discovery as to both procedural and substantive issues. The Board did not resolve most of those issues, but concluded that the denial letters were insufficient as a matter of law and remanded the decisions

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[2] The denial letter used substantially the same language as herein:

Based on the information currently in the Illinois EPA's possession, this incident is not subject to 35 Ill. Adm. Code 734, 732 or 731. Therefore, the Illinois EPA Leaking Underground Storage Tank Program has no reporting requirements regarding this incident.

(Dickerson Petroleum, Inc. v. IEPA, PCB No. 09-87, Petition for Review, Ex. 1)

to the Agency to issue new denial letters within 30 days. In doing so, the Board denied to exercise its discretion to award attorneys fees.

Upon remand, the Agency reconsidered its response to the 45-day report and issued a No-Further Remediation letter as originally requested, and issued a letter approving reimbursement for most of the corrective action costs sought ($62,780.63). Based upon this new information, Dickerson Petroleum moved for reconsideration of the Board's previous denial of attorney's fees, arguing that it had prevailed before the Board even without an explicit reversal of the Agency's decisions. The Agency objected, denying that its actions following remand constituted an admission that the Agency's decisions had been wrong, but that the Illinois EPA had elected to change strategies. Order, at p. 6 (The Agency explained: "There are a multitude of reasons for changes in strategy, such as particular evidence not having a predicted impact or the re-allocation of litigation resources.") The Board found that the absence of a final ruling on the competing claims did not matter. "Even in the absence of an explicit reversal, the Board's February 4, 2010 order resulted in relief including reimbursement substantially as sought by Dickerson." (Order, at p. 8) Attorney fees in the amount of $53,019.29 were ultimately approved. (Order of Dec. 2, 2010)

Similar to Dickerson, the Petitioner herein obtained a reversal of non-LUST determination letters by bringing an action before the Board. Unlike in Dickerson, the Illinois EPA admitted that its decisions were erroneous upon appeal to the Board. The main difference with Dickerson, however, is that there was no hearing herein. This distinction is reduced, however, in considering that the hearing in Dickerson only resulted in a non-final ruling in the form of a remand, and this appears to have been very significant in the Board's initial refusal to

exercise its discretion in awarding any legal fees. (Order of Feb. 4, 2010, at p. 29)

A final hearing adjudicating the competing claims of the parties is not required under Dickerson to vest the Board with authority to award legal fees, and this follows from the terms of the statute. The statute merely states that the owner/operator must "prevail[] before the Board." This matter is before the Board, and the Board has entered an order approving the Petitions for Review and accepting them for hearing. (Order of July 6, 2006) The Board herein is being asked to approve a settlement agreement, by which Petitioner will receive substantially all that was requested in the petitions for hearing.

III. COURT PRECEDENT FOR AWARDING ATTORNEY FEES BY JUDICIAL APPROVAL OF SETTLEMENT AGREEMENT.

In a similar statute awarding attorney's fees to the prevailing party, the U.S. Supreme Court has ruled that "[t]he fact that respondent prevailed through a settlement rather than through litigation does not weaken her claim to fees." Maher v. Gagne, 448 U.S. 122, 129 (1980). "Nothing in the language of [42 U.S.C.] § 1988 conditions the District Court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated." Id. Instead, Section 1988 states in relevant part that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b). Since this language mirrors the operative language in the Illinois Environmental Protection Act, the Supreme Court's construction should be highly persuasive. There is similarly nothing in the Illinois Environmental Protection Act that conditions an award of fees on full litigation of the issues.

In Maher, the plaintiff had filed suit because the State had improperly calculated her

public assistance benefits. The State agreed to an increase in her benefits without admission of fault or responsibility, and the parties agreed to let the trial court decide whether attorney fees were appropriate. The trial court found that the plaintiff was a prevailing party: "while not prevailing 'in every particular,' she had won "substantially all of the relief originally sought in her complaint." Maher v. Gagne, 448 U.S. 122, 127 (1980); compare with Dickerson Petroleum v. IEPA, PCB No. 09-87; 10-5, at p. 8 (Sept. 2, 2010) ("Dickerson received substantially the relief it had sought."). The U.S. Supreme Court affirmed the award.

Since Petitioner has identified U.S. federal caselaw, which supplies an authoritative interpretation of the prevailing party language, Petitioner necessarily must distinguish its arguments herein from the "catalyst" theory subsequently rejected by the U.S. Supreme Court in Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res., 532 U.S. 598 (2001). A "catalyst" theory means that even a losing party should be considered to have prevailed, if by brining the action, he or she is a catalyst for the policy changes. In Buckhannon, the plaintiff's civil right's action against state law was dismissed as moot after the state legislature amended the state law. According to the five-justice majority of the Supreme Court, this was "a nonjudicial alteration of actual circumstances" for which it did not believe the concept of prevailing party could be used to "authorize[] federal courts to award attorney's fees to a plaintiff who, by simply filing a nonfrivolous but nonetheless potentially meritless lawsuit (it will never be determined), has reached the sought-after destination without obtaining any judicial relief." Id. at 606.

A "catalyst" theory was useful in civil rights lawsuits, many of which do not seek any

compensatory relief, but instead seek to change public policy through declaratory relief.[3] In contrast, LUST appeals all seek some form of coercive relief from the Board originating from a denial of a request submitted to the Illinois EPA. Here, specifically, Petitioner sought recognization as the owner/operator of a LUST incident eligible for reimbursement from the LUST Fund and the pending motion seeks the Board approval of an agreement to provide that relief to Petitioner.

Cases subsequent to Buckhannon have approved awards of legal fees to parties prevailing as a result of a court-approved settlement agreement, at least so long as the agreement results in real benefits are changes to the prevailing party. E.g., Am. Disability Ass'n v. Chmielarz, 289 F.3d 1315, 1320 (11th Cir. 2002)("even absent the entry of a formal consent decree, if the district court either incorporates the terms of a settlement into its final order of dismissal or expressly retains jurisdiction to enforce a settlement") These principles also apply to administrative bodies, which either have authority to enforce the settlements themselves, or the final orders are enforceable in the courts by such means as writ of mandamus. A.R. v. N.Y. City Dep't of Educ., 407 F.3d 65, 84 FN 13 (2d Cir. 2005)("Under our analysis, the fact that the IHOs [Independent Hearing Officers], as is common in administrative procedures, have no enforcement mechanism of their own is irrelevant, at least so long as judicial enforcement is available.").[4]

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[3] A change in policy or statute would not render moot damage claims that had arisen prior to the change; such damage claims would still exist to be adjudicated or resolved by stipulation. Buckhannon, at 609.

[4] Since the Illinois EPA has long since complied with the settlement agreement by recognizing the legal status of Petitioner as an owner/operator of a LUST incident, the enforcement of the settlement agreement may appear to be foregone conclusion at this point. Settlement agreements are almost always complied with. The question posed by this line of cases is whether this settlement, if approved by the Board, would be enforceable by the Board in either

In summary, the U.S. Supreme Court, construing a fee-shifting statute similar to that presented here, has found no requirement that a formal adjudication be conducted in order for a party to prevail, and no reason that a settlement would preclude one from being a prevailing party. Subsequent federal caselaw addressing the concerns of "catalyst theory" arguments are not directly implicated here, where Petitioner has sought and obtained coercive relief specific to it, but in any event, if those concerns were applicable here, they are resolved by the Board approving the settlement agreement either directly or by incorporating its terms in its final order dismissing the case.

CONCLUSION

PETITIONER requests that based upon the authority cited herein, that the Board approve the settlement agreement, including $2,500 in attorney's fees. Alternatively, PETITIONER asks for such guidance as to the Board's requirements for approval of the settlement that it deems appropriate.

Respectfully submitted,
L. KELLER OIL PROPERTIES/FARINA, Petitioner

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a subsequent LUST appeal over which the Board has statutory jurisdiction or by writ of mandamus in a court of original jurisdiction. Petitioner believes the answer to this hypothetical is yes.

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NOTICE OF FILING AND PROOF OF SERVICE

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PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board, pursuant to Board Procedural Rule 101.302 (d), a Brief In Support of Motion for Authorization of Settlement, a copy of which is herewith served upon the hearing officer and upon the attorneys of record in this cause.

The undersigned hereby certifies that a true and correct copy of this Notice of Filing, together with a copy of the document described above, were today served upon the hearing officer and counsel of record of all parties to this cause by enclosing same in envelopes addressed to such attorneys and to said hearing officer with postage fully prepaid, and by depositing said envelopes in a U.S. Post Office mailbox in Springfield, Illinois on the 29th day of May, 2013.

Respectfully submitted,
L. KELLER OIL PROPERTIES/FARINA, Petitioner

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