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DEC 17 2003

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

STATE OF ILLINOIS
Pollution Control Board

ILLINOIS AYERS OIL COMPANY,)
 Petitioner,)
 v.)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
 Respondent.)

PCB No. 03-214
(LUST Appeal)

NOTICE

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
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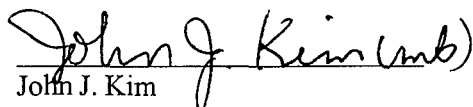
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Carol Sudman, Hearing Officer
Illinois Pollution Control Board
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Springfield, IL 62794-9274

PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board a RESPONSE TO MOTION FOR INTERLOCUTORY APPEAL, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



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Dated: December 15, 2003

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**BEFORE THE POLLUTION CONTROL BOARD
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ILLINOIS AYERS OIL COMPANY,)
Petitioner,)
v.) PCB No. 03-214
ILLINOIS ENVIRONMENTAL) (LUST Appeal)
PROTECTION AGENCY,)
Respondent.)

RESPONSE TO MOTION FOR INTERLOCUTORY APPEAL

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, John J. Kim, Assistant Counsel and Special Assistant Attorney General, and, pursuant to 35 Ill. Adm. Code 101.500, 101.504, and 101.518, hereby requests that the Illinois Pollution Control Board ("Board") affirm the order entered by the Hearing Officer on December 2, 2003. In support of this response, the Illinois EPA states as follows:

I. BACKGROUND

1. On December 2, 2003, the Hearing Officer assigned by the Board to oversee the present appeal issued an order in response to a motion to compel discovery filed by the Petitioner, Illinois Ayers Oil Company ("Ayers Oil"). Specifically, the Petitioner argued that it was entitled to receive the following information through discovery requests: 1) Rate sheets and related database used by the Illinois EPA; 2) job classification requirements for all Illinois EPA who reviewed the subject high priority site investigation corrective action plan ("HCAP") and associated budget; 3) the Leaking Underground Storage Tank ("LUST") Section's Project Manager Handbook ("handbook"); and 4) a document entitled "IRT 500.003." The Illinois EPA filed a response to the motion to compel, and the Illinois EPA asks that the arguments and statements therein be considered in conjunction with this response.

2. The Hearing Officer's order ruled on the Petitioner's motion to compel as follows: 1) The rate sheets were not ordered to be produced, as the Hearing Officer took note of the fact that the Illinois EPA had provided the relevant portions of the rate sheets in redacted form to Ayers Oil, and that the database request was overly broad; 2) the job qualifications of the employees of the Illinois EPA that reviewed the subject HCAP and budget could be addressed by Ayers Oil at the hearing; 3) the handbook was not deemed relevant given that Ayers Oil provided no evidence that the handbook was relied upon; and 4) the IRT document was found to contain general information that could be elicited through testimony, along with more specific information that did not relate to the review of HCAPs and budgets.

3. The Petitioner is now seeking review by the Board on the same issues raised before the Hearing Officer, along with several arguments not previously raised. A careful review of the content of the motion for interlocutory appeal makes clear that the Petitioner is seeking to justify its overly broad "fishing expedition" of discovery based on a number of misleading and/or erroneous factual and legal arguments.

4. The Petitioner filed its motion for interlocutory appeal on or about December 5, 2003. The Illinois EPA received a hand-delivered copy of the motion for interlocutory appeal on December 5, 2003, at 4:55 p.m. Pursuant to Section 101.500(d) of the Board's procedural rules (35 Ill. Adm. Code 101.500(d)), the Illinois EPA would have fourteen (14) days to file a response, or in this case, until December 19, 2003. However, on December 10, 2003, the Illinois EPA was informed that it must file its response to the motion for interlocutory appeal by no later than December 15, 2003. The Illinois EPA objects to this expedited schedule, primarily since it is a situation created entirely of the Petitioner's own doing. The Petitioner's decision to force the Board and the Illinois EPA into reviewing and acting upon the motion for interlocutory appeal in

an extremely truncated fashion is objectionable, yet the Illinois EPA has little choice but to comply.

II. THE ILLINOIS EPA IS NOT ENFORCING AN INVALID RULE

5. The first argument offered by the Petitioner in support of its motion for interlocutory appeal is it is fundamentally unfair to allow the Illinois EPA to enforce an invalid rule against the Petitioner. Petitioner's motion, p. 2. However, that argument is both misplaced and mistimed. Before the Board is a motion for interlocutory appeal seeking a reversal of the Hearing Officer's order; whether or not the Illinois EPA is enforcing an invalid rule (which the Illinois EPA categorically denies) is not a ground for the relief sought in the motion. Rather, that argument is one that goes to the merits of the case and should not be considered or ruled upon at this time.

6. Other than discovery depositions taken by the Petitioner, in which testimony is one-sided by design, no testimony of any kind has been elicited in this appeal. The Board has yet to conduct a hearing on the merits of the case, and neither party has presented any evidence for the Board's consideration (or been given a formal opportunity to challenge or refute the opposing party's evidence). If, as the Petitioner apparently desires, the Board were to decide based solely on the motion for interlocutory appeal that the Illinois EPA's use of the rate sheets in question was an improper rulemaking, the Illinois EPA would have been dealt a serious blow to its case without ever having been allowed to present a single witness or cross-examine any witness of the Petitioner's.

7. Since neither party has yet to participate in a hearing before the Board in this matter, and thus no evidence has yet been elicited as part of the record before the Board, it is untimely for the Board to consider or act upon the Petitioner's argument regarding the Illinois

EPA's use of the rate sheets. The Petitioner seeks a finding by the Board that would be based on no evidentiary testimony, or evidence of any other kind, and yet could be quite serious in its ramifications. Put another way, the Petitioner is trying to bait the Board into making dispositive decisions based on a pre-hearing motion that includes no testimonial evidence that has been elicited during a hearing. It is simply misplaced to advance that type of argument here, and it is certainly not timely.

8. Also, the Petitioner claims that the factual basis for the Illinois EPA's formulation of the rate sheets remains a secret. Again, this is an unsupported and incorrect statement. Throughout the motion for interlocutory appeal, the Petitioner cites to portions of transcripts taken in discovery—not evidentiary—depositions of several Illinois EPA employees. These depositions fail to present a complete picture of testimony that could be provided at a hearing. That said, based on the depositions taken and the responses the Illinois EPA has already provided through written discovery, the Petitioner now has more than sufficient information before it to show just how the Illinois EPA calculated the rate sheets.

9. This information, though, is not what is at the heart of the Petitioner's request. The Petitioner has already gained access to the information necessary for it to understand and respond to the Illinois EPA's decision-making process. Through the overly broad and irrelevant nature of the Petitioner's discovery request that is now raised in the motion for interlocutory appeal, it is clear that the Petitioner is on an extended "fishing expedition," hoping to acquire information and documentation that has nothing to do with the present case but which may be useful to the Petitioner in some future, unrelated context. The Board should not facilitate this type of activity, and instead should follow the clear and reasoned decision of the Hearing Officer as contained in her order.

10. There is little doubt that the Petitioner will continue to advance the argument that the Illinois EPA's rate sheets are an improper rule, and that the Board will likely address the argument in some fashion as part of its final opinion and order. But to do so at that time will have allowed the Illinois EPA to present any testimony, evidence or arguments that it feels are contrary to the position of the Petitioner. Only after a hearing and post-hearing briefing would both parties be able to adequately and fully make their arguments. The Board would then have the arguments of both parties on the issue, and thus would be best-situated to speak on the topic.

11. The Petitioner then argues that even if the Board will not find that the rate sheets are invalid, the Petitioner should nonetheless have the right to test the validity of the rate sheets, database and statistical methods used. Petitioner's motion for interlocutory appeal, p. 4. As stated above, the Illinois EPA has already provided all the information needed for the Petitioner to make the type of challenge described. In response to Interrogatories 7 and 14(a) as posed by the Petitioner, the Illinois EPA described how the rate sheets are calculated and used. Further, testimony was provided during the discovery depositions that further described the methods of calculation and use.

12. Despite the fact that the testimony cited to by the Petitioner in its motion was taken in depositions, and that neither party has presented any evidence or witnesses in a hearing setting, the Petitioner still fashions an argument (to which the Illinois EPA takes exception) that the method of calculation and use was "haphazard" and based on an "unscientific sampling and analysis protocol." Petitioner's motion for interlocutory appeal, p. 8. So clearly the Petitioner is in possession of sufficient information by which it can raise whatever arguments it deems appropriate. Whether those arguments have merit is a matter for debate, but what is not in

question is the fact that the Petitioner has all the information it needs to present its case to the Board.

13. Focusing on the information and documents that are the subject of the motion for interlocutory appeal, the Illinois EPA argued in its response to the motion to compel originally submitted to the Hearing Officer that no information within those contested documents relates in any way to the arguments raised by the Petitioner. Though the Petitioner is now expanding the arguments in support of its request for the documents, the fact remains that a simple review of the documents in question will reveal that the Hearing Officer's descriptions and findings were correct. There is no information contained within any of the documents in question that relate in any way to the question of whether the rate sheets are an improper rulemaking, and none of the information therein will lead to any relevant evidence that could be used.

14. The documents that are the subject of the Petitioner's request do not contain any information regarding the use of the guidance documents or rate sheet by the LUST Section. The handbook, other than the page already provided to the Petitioner as part of the response to the Petitioner's request to produce, has no information on budget reviews, much less rate sheets. The IRT document has no information on rate sheets for HPCAP budgets – it relates to site classification budget review, not HPCAP budget review. The database is simply spreadsheet information with no information regarding how to use the rate sheets.

15. The Petitioner makes the unfounded argument that if the rate sheets had been the subject of a formal rulemaking, the Petitioner would have had an opportunity to participate in the development and implementation process. Further, the Petitioner argues that the Illinois EPA must now allow the Petitioner to review the database to see whether any portion therein supports

the Petitioner's claim that the rate sheets are invalid. Petitioner's motion for interlocutory appeal, p. 9.

16. Those arguments are again based on the supposition that the rate sheets are an improper rulemaking. The Illinois EPA has argued, and will argue, that the rate sheets do not rise to that level and therefore the notice other formal requirements attendant to a formal rulemaking are not applicable. As such, there is no requirement that the Illinois EPA produce the information to the Petitioner. For the Board to rule against the Illinois EPA on this point would again severely prejudice the Illinois EPA's defense in this case, as a potentially dispositive ruling would be made without the Illinois EPA ever having had the opportunity to participate in a hearing. Also, the Illinois EPA reminds the Board that it is the Petitioner that has the burden of demonstrating that the information contained within the HCAP and budget was such that approval of the HCAP and budget would not result in a violation of the Illinois Environmental Protection Act ("Act") or underlying regulations.

17. The Petitioner also argues that the database used by the Illinois EPA to create the rate sheets consists in part of rates taken from applications for reimbursement from the Underground Storage Tank ("UST") Fund. The Petitioner believes the database information is relevant to the rates imposed by the Illinois EPA in the present case. Petitioner's motion for interlocutory appeal, p. 10.

18. The Petitioner then states that in Paragraph 19 of its response, that the Illinois EPA conceded that information used to prepare the rate sheets was generated from both budget reviews and requests for reimbursements. It is unclear what paragraph the Petitioner is citing to, as Paragraph 19 of the Illinois EPA response to the Petitioner's motion to compel contains no such statement. In general, the Illinois EPA has objected and continues to object to the

production of any information or documentation that relates to any type of final decision other than one related to a high priority corrective action plan or budget. Any information related to reimbursement requests or review of plans or budgets for activities other than high priority corrective action is not relevant to the present appeal, and therefore should not be considered. Accordingly, the Illinois EPA should not be required to produce that information. The reason for the Illinois EPA's justified concerns regarding the Petitioner's overly broad requests is that to allow those requests would be to provide the Petitioner with a windfall of information, all stemming from the fishing expedition being conducted.

19. As the Illinois EPA has steadfastly stated, both in responses to discovery requests and in the response to the motion to compel, information that is not related in any way to the present appeal should not be produced. The Petitioner has twisted this argument, and characterize the Illinois EPA's objection as the Illinois EPA seeking to on the one hand rely exclusively on the rate sheets and on the other hand refuse to disclose the basis upon which it was generated on the basis that some of the underlying data was and is unrelated to this case. Petitioner's motion for interlocutory appeal, p. 10.

20. As the Petitioner's motion to compel followed its interrogatories and requests to produce documents, those requests form the extent of the information sought by the Petitioner. The Illinois EPA objected to interrogatory numbers 5, 6, 8 and 18 on the grounds that, inter alia, the requests sought information related to the review of both budgets and reimbursement requests. Those interrogatories, which are attached to the motion for interlocutory appeal along with the Illinois EPA's answers, clearly seek information that goes well beyond the scope of the Board's review here. Further, the Illinois EPA has objected to the production of the database

information for several reasons, not the least of which is that the information is irrelevant and overly broad.

21. There is no relevance or materiality to any information regarding reimbursement documents since this appeal involves a technical decision. The Illinois EPA has consistently raised this concern, and the Board should carefully review the interrogatories and answers when considering this issue. The Petitioner's attempt to use this appeal as the means by which irrelevant and immaterial information can be gained should not be allowed.

III. THE HANDBOOK, DATABASE, RATE SHEETS AND IRT ARE NOT RELEVANT

22. None of the four categories of documents and information sought by the Petitioner are relevant to the present proceeding. The Illinois EPA notes that some information from the rate sheets, i.e., the cover memorandum and specific rates employed in this particular instance, have already been provided to the Petitioner. Similarly, the one page of the handbook that has any arguable relevance has also been provided. But no information contained within the database is relevant, and in fact is much broader than the rates at issue in this appeal. And though the Petitioner seeks to gain this information, the rates themselves and the methodology for calculating the rates has already been made known to the Petitioner.

23. The attempt to seek the database as a whole, and other information in the rate sheets outside of the rates already provided, is nothing more than an attempt to find out all information for all rates calculated by the Illinois EPA. For example, there is no relevance to information contained within the rate sheets or database regarding backhoes, since that type of equipment was not at issue here. But that type of irrelevant (yet potentially valuable in other unrelated contexts) information is exactly what the Petitioner seeks.

24. There is no information in any of the documents, other than what has been provided already to the Petitioner, that has any relevance or will lead to any relevant evidence for this proceeding. The Hearing Officer reviewed the documents in question and reached that conclusion, and the Board should do the same.

25. As part of its argument on this issue, the Petitioner totally twists a statement made by the Illinois EPA. The Petitioner claims that the Illinois EPA stated that the manner in which it went about making its decision in this case is itself the focus of this appeal. Petitioner's motion for interlocutory appeal, p. 12. In fact, a reading of the paragraphs cited from the Illinois EPA's response to the motion to compel makes very clear that the Illinois EPA was arguing that the Petitioner was wrongly seeking to shift the burden of proof from the Petitioner (who carries the burden of proof here) to the Illinois EPA by trying to place the Illinois EPA's procedures on trial. The Illinois EPA unequivocally believes that the manner about which it made its decision is not and should not be the Board's focus; rather, the question to be reviewed is whether the Petitioner has met its burden of proof and whether the Petitioner submitted sufficient documents in its HCAP and budget. This attempt to shift the burden of proof will certainly be addressed in a more comprehensive manner, but at the appropriate time and place in the hearing (if necessary) and in post-hearing briefs.

26. Given that the burden of proof is on the Petitioner, and that no hearing has taken place such that the Petitioner has placed into evidence any of the facts to support its claims, the Illinois EPA continues to argue that the burden of proof remains on the Petitioner. The attempts by the Petitioner to project theories onto the Illinois EPA (e.g., "if the Agency didn't look at it, then the Board can't see it, either, nor can anybody else") are obviously pure conjecture on the part of the Petitioner. Petitioner's motion for interlocutory appeal, p. 13. The Illinois EPA is not

arguing that if the Illinois EPA didn't look at it then no one else can either. Rather, the Illinois EPA is arguing that as to the handbook (which was the subject of that particular passage in the motion for interlocutory appeal), there is no information in the handbook except for the one page already provided that has anything at all to do with the review of a high priority corrective action plan budget.

27. The Hearing Officer correctly noted in her order that there was no evidence presented by the Petitioner that the handbook was relied upon. The Illinois EPA's argument is consistent with that observation, but also takes it one step further, in that there is nothing in the handbook (except what has been provided) that even remotely addresses budget reviews. This is not a matter of "we didn't look at it so no one else can," but rather "there's nothing in the book other than what's been given that has anything at all to do with the appeal."

28. As stated earlier, the Illinois EPA will address the question of whether the burden in this case should shift to the Illinois EPA, but for now the Illinois EPA states that it does not believe there is a burden shift of the type described by the Petitioner. That, however, is a legal question and not a factual one, and therefore is distinct from the discovery request.

IV. THE PETITIONER KNOWS HOW THE FINAL DECISION WAS MADE

29. The Petitioner argues that it is fundamentally unfair to deprive it of its right to know how the Illinois EPA made its decision in this case, and what the Illinois EPA's own guidance requires in making such decisions. Petitioner's motion for interlocutory appeal, p. 13.

30. The Illinois EPA does not disagree with those statements. But, the Illinois EPA does disagree with the contention that the Petitioner does not now know how the final decision in this case was reached. The motion for interlocutory appeal challenges the Hearing Officer's decision to not require disclosure of the four groups of information and documents described

earlier. In this case, the information and documents described relate to those parts of the Illinois EPA's decision that modify rates sought for approval by the Petitioner in the HCAP budget.

31. Through answers to interrogatories and deposition testimony, the Petitioner has learned that the Illinois EPA used an internal guidance (thus far referred to as "rate sheets" or "rate sheet rule") to assist in the determination of whether the rates in question were reasonable as is required pursuant to the Act and regulations. Use of that internal guidance resulted in a modification of the rates to rates found on the guidance. Those rates have been disclosed to the Petitioner, as has the method of their calculation (i.e., collection of submitted budgets, discarding redundant copies from common consultants, taking an average and then one standard deviation).

32. That is the sum and substance of the Illinois EPA's decision here, and there simply is nothing more. There is no secret passage in the handbook that discusses the internal guidance, there is no mysterious directive in the IRT document regarding HCAP budget review, and there is nothing relevant in the database that speaks to the issues raised in this case. It is possible that the Petitioner thinks there is some policy or requirement found in one of the documents in question that has been avoided or overlooked. If that were the case, then certainly the Petitioner would have every right to know of that omission and to make any arguments thereto. However, that is not the situation here.

33. Simply put, the Illinois EPA seeks to avoid the production of irrelevant information and documents (that also would not lead to any relevant information or documents) since the disclosure is uncalled for, and is beyond the scope of the present appeal, and would reward the Petitioner with information that has no application here but could in other cases. The final decision, responses to discovery and testimony taken in depositions thus far makes clear how and why the Illinois EPA made its decision. If the Petitioner disagrees with that, it can try

to address it at hearing and in briefing. But the documents in question do not add anything to the decision making process employed here.

V. CONCLUSION

34. The documents and information sought by the Petitioner that were the subject of the Hearing Officer's order were correctly reviewed, analyzed and acted upon by the Hearing Officer. Her decision took all arguments into consideration and reflected a careful reading of the content of the documents.

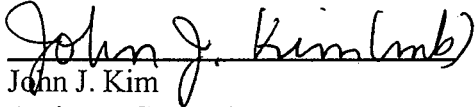
35. The Petitioner has since raised additional arguments in support of obtaining the documents, but none of those arguments is persuasive. The arguments do not claim any mistake on the part of the Hearing Officer in reaching her decision, and fail to make any claim of merit that warrants overturning the Hearing Officer's order. If anything, the arguments are untimely and do not relate to justification for requiring that the documents in question be turned over to the Petitioner.

36. The Illinois EPA strongly believes that that Hearing Officer's order should be affirmed. However, in the event that the Board decides to overturn any part of the order, the Illinois EPA hereby requests that any information contained within the IRT or database that relates to any budget review other than a HCAP budget or any rates that are not at issue in the final decision be redacted. For all the reasons raised herein, as well as in the Illinois EPA's response to the motion to compel, that sort of consideration should not be reached since the Hearing Officer's order should be affirmed with no qualifications or conditions.

WHEREFORE, for the reasons stated above, the Illinois EPA hereby respectfully requests that the Board enter an order denying the Petitioner's motion for interlocutory appeal and affirm the Hearing Officer's order dated December 2, 2003.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

Handwritten signature of John J. Kim in cursive script.

John J. Kim

Assistant Counsel

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Dated: December 15, 2003

This filing submitted on recycled paper.

CERTIFICATE OF SERVICE

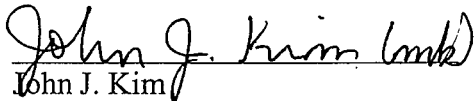
I, the undersigned attorney at law, hereby certify that on December 15, 2003, I served true and correct copies of a RESPONSE TO MOTION FOR INTERLOCUTORY APPEAL, by placing true and correct copies in properly sealed and addressed envelopes and by depositing said sealed envelopes in a U.S. mail drop box located within Springfield, Illinois, with sufficient First Class Mail postage affixed thereto, upon the following named persons:

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