

MAY 21 2004

STATE OF ILLINOIS
Pollution Control Board

**BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS**

ILLINOIS AYERS OIL COMPANY,)	
Petitioner,)	
v.)	PCB No. 03-214
ILLINOIS ENVIRONMENTAL)	(LUST Appeal)
PROTECTION AGENCY,)	
Respondent.)	

NOTICE

Dorothy M. Gunn, Clerk
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PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board a RESPONSE TO MOTION FOR AUTHORIZATION OF PAYMENT OF ATTORNEYS' FEES AS COSTS OF CORRECTIVE ACTION, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent


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Dated: May 19, 2004

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**RESPONSE TO MOTION FOR AUTHORIZATION OF PAYMENT
OF ATTORNEYS' FEES AS COSTS OF CORRECTIVE ACTION**

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, hereby requests that the Illinois Pollution Control Board ("Board") deny the Petitioner's Motion For Authorization Of Payment Of Attorneys' Fees As Costs Of Corrective Action ("Petitioner's motion"). In support of this response, the Illinois EPA states as follows:

1. On April 1, 2004, the Board issued an opinion and order in this matter. The Board's opinion included an order that the Illinois EPA restore certain modifications to the Petitioner's high priority corrective action plan ("HCAP") and budget by approving the HCAP's proposed use of 13 direct push soil borings and by restoring all corresponding budget reductions.

2. The opinion also included an affirmation of certain budget reductions imposed by the Illinois EPA in the final decision under appeal.

3. Following the issuance of the Board's opinion, the Petitioner, Illinois Ayers Oil Company, filed the Petitioner's motion seeking the Board's authorization of payment from the Underground Storage Tank Fund ("UST Fund") in the amount of \$44,456.49 in legal fees. The Illinois EPA received service of the Petitioner's motion on May 3, 2004. The Illinois EPA subsequently filed a motion for an extension of time by which to file this response.

4. The Petitioner cites to Section 57.8(l) of the Illinois Environmental Protection Act ("Act") (415 ILCS 5/57.8(l)) as the authority for the Board to allow payment of legal fees to an owner/operator who has prevailed in an appeal. Specifically, that subsection provides as follows:

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

Thus, there is a clear statutory provision allowing for the possible—not mandatory—approval of legal costs when such costs are related to a successful action to seek payment under Title XVI of the Act (415 ILCS 5/1, et seq.).

5. The Petitioner argues that this language, as a fee-shifting provision, should ordinarily allow for the recovery of legal costs unless special circumstances otherwise warrant. Further, the Petitioner notes that fee-shifting statutes are intended to encourage litigation, and that the Board has recognized that adjudication of contested cases is an essential element of the formation of policies which make up the underground storage tank reimbursement program. Petitioner's motion, pp. 2-3.

6. The Petitioner goes on to claim that fee awards pursuant to Section 57.8(l) of the Act help protect the interests of third-parties. This is explained by arguing that to not award legal costs, an owner or operator might yield to a reduced corrective action plan. In the event that the plan is subsequently found to be insufficient, the owner or operator can point to the Illinois EPA's approval as a defense to a possible third-party claim. Awarding legal costs encourages an appeal to the Board where complacency would be less costly than litigation. Thus, by the Petitioner's rationale, seeking the restoration of costs deemed necessary to determine the extent of contamination provides both the Petitioner and a third-party such as an

adjoining landowner benefits since those parties are spared the risk of the Illinois EPA's cost-cutting. Petitioner's motion, p. 3.

7. Finally, the Petitioner argues that the Board's ruling on the "rate sheet" previously utilized by the Illinois EPA was similar in nature to the type of action that, pursuant to the Administrative Procedure Act ("APA"), would be eligible for recovery of legal costs. Petitioner's motion, pp. 3-4.

8. Included with the Petitioner's motion is an affidavit provided by Petitioner's counsel and documentation regarding the amounts of fees and costs that make up the Petitioner's total request for payment.

9. The Board should issue a decision denying the Petitioner's motion for any one of several reasons. The most obvious and well-reasoned basis for denying the claim is that the present action is not the type addressed by Section 57.8(l) of the Act. That subsection clearly provides that legal costs may possibly be recovered only following a successful action *to seek payment from the UST Fund* pursuant to the Act. That type of action, one seeking payment under Title XVI of the Act, is the only type that is provided for in Section 57.8(l).

10. The present action was not one related to the Petitioner seeking payment from the UST Fund. The decisions under appeal were Illinois EPA modifications to a HCAP and budget submitted by the Petitioner. In neither the HCAP nor the budget does the Petitioner seek payment from the UST Fund. Only a request for payment of reimbursement seeks payment from the UST Fund, and that clearly was not the type of submission made by the Petitioner that led to this appeal.

11. The Petitioner may argue that approval of the HCAP and budget were necessary precursors for later submitting an actual request seeking payment from the UST Fund. That fact

notwithstanding, the Petitioner cannot perform an end-run around the requirement of a specific type of legal action set forth in Section 57.8(l). Indeed, if any condition precedent to an actual request for payment from the UST Fund is considered to be tantamount to a request itself, then contrary to the statutory language of Section 57.8(l), the Board will be broadening the scope of the provision's plain language to mean that any type of final decision (whether for a technical plan or budget) is the same as a request for payment.

12. It is impossible to argue that a technical plan is akin to a request for payment, since a technical plan does not include any request for payment. Further, the Board's own regulations unequivocally show that technical plans (including HCAPs and budgets) and requests for payment are two different types of submissions.

13. Subpart E of Section 732 of the Board's regulations (35 Ill. Adm. Code 732.500-505) addresses the selection and review procedures for plans and reports. Section 732.500(b, c) set forth the different types of documents that are defined as plans and reports. Among those documents are high priority corrective action plans and associated budgets. Section 732.505 describes the standards for review of plans and reports, including HCAPs and budgets.

14. Subpart F of Section 732 of the Board's regulations (35 Ill. Adm. Code 732.600-612) addresses payment or reimbursement from the UST Fund. That subpart has separately defined review procedures.

15. **There is no doubt** that a request for payment from the UST Fund is not the same document as a **plan or report** (including a budget). The Act and the Board's regulations are straightforward in their separate definitions and procedures related to those two different types of submissions. It is equally without doubt that the Petitioner's submissions that led to the Illinois EPA's final decision that was reviewed by the Board in the present appeal were not requests for

payment, but rather were a corrective action plan and associated budget. If the language of Section 57.8(l) of the Act included actions involving plans or reports, the Petitioner's claim for legal costs may have some merit. But the specific description of a request for payment, to the exclusion of referencing appeals of plans and reports, must be taken into consideration by the Board that the General Assembly's language is not intended to be all-inclusive. The action brought by the Petitioner here is simply not of the type that falls within the scope of Section 57.8(l) of the Act.

16. In the only other case that the Board has relied upon Section 57.8(l) of the Act to award legal costs, the final decision under review was one issued by the Illinois EPA in response to a request for payment from the UST Fund. See, Ted Harrison Oil Company v. Illinois EPA, PCB 99-127. In Ted Harrison, the Illinois EPA denied reimbursement sought by Ted Harrison Oil Company. Following the Board's ruling that the Illinois EPA's decision should be overturned, the Board went on to award legal costs. Ted Harrison, PCB 99-127 (October 16, 2003). The Ted Harrison case did involve an action of the type specified in Section 57.8(l), and the Board's reliance on Section 57.8(l) was thus warranted. Here, since the final decision was not one denying reimbursement from the UST Fund, the Petitioner cannot avail itself of the provisions in Section 57.8(l).

17. If the Board were to somehow find that the clear restrictive language of Section 57.8(l) of the Act **should** be interpreted beyond its plain meaning (as the Petitioner would have the Board do), **the Board** should nonetheless deny the Petitioner's motion. Assuming *arguendo* that a budget could somehow be likened to a request for reimbursement, there is no doubt that a technical plan such as a HCAP is not a request for reimbursement. Indeed, submission of a

HCAP does not bind or require the owner/operator to subsequently submit a request for payment.

18. Thus, if an owner/operator were to prevail on an appeal involving a proposed corrective action plan, that decision should in no way be considered to be sufficient to invoke the provisions of Section 57.8(1) of the Act. In the present case, much of the costs reduced by the Illinois EPA in its budget decision stemmed from the technical decision in the HCAP that the number of borings proposed by the Petitioner was excessive. That decision was made in the modification of the HCAP, and the budget was modified accordingly. However, without the change in the HCAP, there would have been no corresponding modification of the budget. Therefore, none of the legal costs associated with contesting the Illinois EPA's decision to reduce the number of borings, and the other related activities, should be considered to be subject to approval by the Board.

19. Although the Petitioner argues that the Board should not "claim chop" in awarding legal costs, the Illinois EPA argues to the contrary. First, the Board should not approve any legal costs here since the action was not of the nature described in Section 57.8(1) of the Act. However, if for some reason the Board does extend itself and find that legal costs should be awarded, then at the very least the amount of legal costs should be reduced.

20. The Petitioner claims it cannot separate its costs between the different issues in the case. **Based on the manner** in which the legal costs have been documented by the Petitioner, it is impossible for the Illinois EPA to provide the Board with a specific breakdown of legal costs on an issue-by-issue basis. However, a review of the testimony and costs in the final decision indicate that the costs associate with the reduction in the number of borings (i.e., the

technical issue) accounted for most of the reduction in costs in the budget. The costs associated with the Illinois EPA's reliance upon the rate sheet are minimal in comparison.

21. If the Board should decide that legal costs are appropriate for payment, and the Illinois EPA strongly believes it should not, then the Board should at the very least apportion the Petitioner's presented legal costs by at no less than three-fourths of the total amount. Even that ratio would be generous, considering that any costs associated with the Illinois EPA's use of the rate sheet (the only remotely arguable issue that was not technical in nature) make up but a fraction of the total costs ordered restored by the Board.

22. Another of the Petitioner's arguments is that for the Board to exercise its discretion and allow for payment of legal costs in this or any other matter is that it would somehow help to benefit both the owner/operator and third-parties. In the same vein as the Petitioner's arguments that litigation of matters should be encouraged before the Board, the failure of an owner/operator to file an appeal of a final decision is a wrong that should be righted by virtually guaranteeing that the costs associated with such an appeal will be paid for. The Illinois EPA does not believe that litigation of matters is in any one party's best interests, but that sometimes litigation is the only means available for parties to resolve differences. However, such an act should not be encouraged, but rather, as has been noted by the Board, resolution through negotiations allowed by 90-day extensions is the more preferred route. The Petitioner's arguments pay no heed to such an option. Also, it is questionable at best for the Board to consider deciding the question of whether to award legal costs by taking into consideration the dubious claim that third-parties will benefit in an indirect manner.

23. The last argument advanced by the Petitioner is that the Board's decision to find that the rate sheet was an improper rulemaking allows for recovery of all related legal costs,

since pursuant to the APA, such a prevailing decision would allow for the possible awarding of legal costs. However, the obvious flaw in that argument is that the Board's authority here to approve legal costs for payment is not the same as that that is conferred via the APA. Here, the Board's authority and scope is defined in Section 57.8(1), and as stated above, if the decision at hand is not one in response to a request to seek payment from the UST Fund, then the legal costs affiliated with the appealing the decision are not subject for approval. That a different statute allows for the recovery of legal costs for different circumstances by different judicial authorities does not mean that the Board can avail itself of that different provision.

WHEREFORE, for the reasons stated above, the Illinois EPA hereby respectfully requests that the Board enter an order denying the Petitioner's motion.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent



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Dated: May 19, 2004

This filing submitted on recycled paper.