BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ILLINOIS AYERS OIL CO.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 03-214
	)	(UST Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
	)	
Respondent.	)	

NOTICE OF FILING AND PROOF OF SERVICE

TO: Dorothy Gunn, Clerk
Illinois Pollution Control Board
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PLEASE BE ADVISED THAT we are today filing with the Pollution Control Board by Federal Express overnight delivery the original and nine copies of Motion for Motion for Leave to File Reply Instanter, a copy of which is attached hereto.

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 at their business addresses as disclosed by the pleadings of record herein, with postage fully prepaid, and by depositing same in the U.S. Mail in Springfield, Illinois on the 28th day of May, 2004.

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MOTION FOR LEAVE TO FILE REPLY *INSTANTER*

NOW COMES Petitioner, ILLINOIS AYERS OIL CO., by its undersigned attorneys, and pursuant to Section 101.500(e) of the Board's Procedural Rules (35 Ill.Admin.Code §101.500(e)), moves the Illinois Pollution Control Board for leave to file a reply instanter, stating as follows:

1. On April 30, 2004, Petitioner filed its motion for authorization of payment of attorneys' fees as costs of corrective action.

2. On May 19, 2004, the Respondent filed a response.

3. Generally, a movant does not have a right to reply. However, the Board's procedural rules authorize a motion for leave to file a reply, to be filed within fourteen (14) days after service of the response. (35 Ill.Admin.Code §101.500(e))

4. Petitioner would be materially prejudiced if it were not allowed to reply to the novel and complex legal arguments presented by the Agency for the first time in its response.

WHEREFORE, Petitioner prays for leave to file the attached reply instanter.

Respectfully submitted,

ILLINOIS AYERS OIL CO., Petitioner
By MOHAN, ALEWELT, PRILLAMAN & ADAMI

By _____
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BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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

REPLY IN SUPPORT OF MOTION FOR ATTORNEYS' FEES

NOW COMES Petitioner, ILLINOIS AYERS OIL CO., by its undersigned attorneys, and replies in support of its Motion for Attorneys' Fees as follows:

INTRODUCTION

A discretionary fee-shifting provision raises thee questions. First, does the fee-shifting provision apply to this situation? All that Section 57.8(l) of the Act requires is that the owner or operator prevail before the Board. The Agency's response is the primary subject of this reply.

Second, how will the Board exercise its discretion? Petitioner has pointed out that in similar fee-shifting statutes, the presumption has been to award legal fees to a prevailing party unless some injustice would result. While the Agency takes issue with much of Petitioner's larger policy pronouncements, only one argument specifically addresses how the Board's discretion should be exercised under the particular facts of this case. The Agency argues that the Board should not reimburse costs incurred challenging the number of soil borings.

Third, are the fees reasonable? Since the Agency has not rebutted the reasonableness of the fees, this issue has been waived. Shortino v. Illinois Bell Telephone Co., 279 Ill. App. 3d 769, 775 (1st Dist. 1996).

I. SECTION 57.8(l) OF THE ACT AUTHORIZES THE PAYMENT OF "LEGAL FEES," A TERM DISTINCT FROM "LEGAL COSTS."

Section 57.8(l) of the Act authorizes the payment of "legal fees," one of three terms used in Section 57.8(l) of the Act to describe a category of legal expenses:

> **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.**

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

"Generally, when the legislature uses certain words in one instance and different words in another, different results were intended." Emerald Casino, Inc. v. Ill. Gaming Bd., 346 Ill. App. 3d 18, 35 (1st Dist. 2003) Different terms are used in Section 57.8(l) of the Act to accomplish different purposes, to distinguish different procedures and as a result of different histories. Section 57.8(l) serves two purposes: (1) it authorizes the Board to award legal fees to a prevailing owner or operator and (2) it prohibits the Agency from approving legal defense costs as corrective action. These objectives are implemented in different procedural contexts. The "legal defense costs" prohibition governs the Agency's review and approval of plans and budgets under Section 57.7(c)(4)(C). (415 ILCS 5/57.7(c)(4)(C)); see also City of Roodhouse v. IEPA, PCB 92-31 (Sept. 17, 1992) (reversing Agency's refusal to reimburse legal expenses, not deemed "legal defense costs"). In contrast, the Board's authority to grant "legal fees" arises in an appeal

in which an owner or operator prevails. E.g., Ted Harrison Oil Co. v. IEPA, PCB No. 99-127 (Oct. 16, 2003). Perhaps most significantly, however, the term "legal defense costs" originated in 1989 amendments to the Act, while the term "legal fees" originated in 1993 amendments. See Appendix A hereto. Therefore, the "legal fees" provision is best viewed as an amendatory act, written to serve a new and different objective than that heretofore provided by the "legal defense costs" exclusion. "Every amendment to a statute is presumed to have a purpose, and a court must consider the language of an amended statute in light of the need for amendment and the purpose it serves." People v. Woodard, 175 Ill.2d 435, 444 (1997).

The fundamental flaw in the Agency's argument is that it is premised on the assumption that the legislature intended for the different terms to be used interchangeably. The Agency does not explain why the legislature would adopt different terminology or explain why other substitutes were not used.[1] Given the Agency's failure to even address this crucial point, its argument is incomplete and unpersuasive.

II. THE PLAIN LANGUAGE OF THE STATUTE AUTHORIZES THE BOARD TO AWARD THE PAYMENT OF LEGAL FEES.

The primary objective in construing the meaning of a statute is to ascertain and give effect to the intention of the legislature. Carver v. Sheriff of La Salle County, 203 Ill. 2d 497, 507 (Ill. 2003). The most reliable means of doing so is by careful examination of the language of the statute. Id. Statutory language must be given its plain, ordinary and popularly understood

[1] It would have been far easier to draft the 1993 amendments using the pre-existing terminology or shortened forms thereof. For example, the Board could have been authorized to make a "payment of legal costs for seeking payment under this Title," to make a "payment of such legal costs," or even make a "payment of legal costs."

meaning, while "afford[ing] the statutory language the fullest, rather than the narrowest, possible meaning to which it is susceptible." Id.

The Board's authority in this matter originates from the final clause in Section 57.8(l):

> **. . . 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))

The Board's authority is unambiguous: In the event an owner or operator prevails before the Board, the Board may authorize the payment of legal fees. The only condition imposed upon the Board's authority is that an owner or operator prevail before it. The word "unless" does not address or limit the Board's authority, it is a reservation or condition imposed upon the immediately preceding proposition concerning "legal defense costs." The sentence can be diagramed as follows:

A include B, unless C, in which case D.

Where A = Legal defense costs

B = Legal costs for seeking payment under this Title

C = The owner or operator prevails before the Board

D = The Board may authorize payment of legal fees

The Agency's erroneously argues that the Board's authority is limited or confined by whether the owner or operator is seeking reimbursement for legal costs for seeking payment under this Title. This limitation is not expressed in the language of the statute. At most, the statute states that if the owner or operator prevails before the Board, legal costs for seeking payment under this Title are no longer legal defense costs. In other words, the Board's authority

is unrestricted by any expressed or implied limitation arising from the definition of legal defense costs. The Board should reject the Agency's invitation to read into the plain language of the statute any unexpressed "exceptions, limitations or conditions." Carver, 203 Ill. 2d at 507.

III. THE AGENCY'S INTERPRETATION WOULD SUBSTANTIALLY DIMINISH THE TYPES OF LEGAL EXPENSES BARRED FROM REIMBURSEMENT AS "LEGAL DEFENSE COSTS."

While Petitioner believes that the Board's authority to award "legal fees" is premised solely upon an owner or operator prevailing before the Board, Petitioner does not agree that its legal costs incurred pursuing this appeal are not the type that would normally be categorized as legal costs incurred "seeking payment under this Title." (415 ILCS 5/57.8(l)) This conclusion is reached based upon the plain language of the "legal defense costs" exclusion and the legal precedents and legislative amendments which have helped define it.

Essentially, the "legal defense costs" exclusion bars some, but not all, legal expenses from reimbursement as corrective action. The Board's decision in City of Roodhouse v. IEPA , PCB No. 92-31 (Sept. 17, 1992), illustrates the limits of the exclusion. There, the City of Roodhouse incurred legal fees running a water supply line to the remediation site. In reversing the Agency's refusal to reimburse those legal fees, the Board recognized that the term "legal defense costs" did not necessarily preclude reimbursement of all legal costs. Id. at pp. 39-40. Specifically, the legal expenses of negotiating contracts with the municipal water authority, obtaining easements from property owners and meeting with clients were deemed to be corrective action costs and thus reimbursable.

Under the City of Roodhouse holding, there are two categories of legal expenses: (1) legal defense costs, which are never reimbursable and (2) all other legal costs, which are reimbursable if they are associated with corrective action. In Clarendon Hills Bridal Center v. IEPA, PCB No. 93-55 (Feb. 16, 1995), a case which arose under the pre-1993 LUST provisions, the Agency refused to reimburse the legal costs of appealing an OSFM tank registration decision. The Board affirmed the Agency's decision that these costs were legal defense costs incurred seeking payment from the LUST Fund. Id. at 38-39.

The Agency's current argument is entirely contrary to the holding affirmed in Clarendon Hills Bridal Center. There, the legal costs of "seeking payment" were broadly defined to include the costs of appealing a tank registration decision made by OSFM. In the present case, the Agency recognizes that planning and budgeting were "necessary precursors" to payment under the LUST Fund, but concludes that a line must be drawn somewhere. (Response, at p. 11) The problem is that the line has already been drawn at the tank registration stage. The phrase "legal costs for seeking payment" cannot be interpreted in an outcome-driven manner so that it means one thing when fees are sought before the Agency and another when fees are sought before the Board.

If the Agency's narrow interpretation of the "legal costs for seeking payment" is accepted, it would expose the LUST Fund to a wide variety of new claims for reimbursement for legal expenses that would no longer be excluded as "legal defense costs." For example, if a corrective action plan is approved by the Board over the Agency's objection, then the cost of performing corrective action necessarily includes the legal costs of surmounting the obstacles presented by the Agency. The legal costs of seeking the Agency's approval (or reversal) are no different than

the legal costs of seeking the third-party approvals in City of Roodhouse, so long as the legal costs before the Agency are not considered "legal defense costs." Petitioner does not believe that this is the outcome intended by the legislature. Instead, the costs of "seeking payment" was intended to be interpreted broadly so that the costs of litigating with the Agency would not be reimbursable unless the dispute was resolved favorably by the Board. See Carver, 203 Ill. 2d at 506 (statutory language should be afforded its "fullest, rather than the narrowest, possible meaning to which it is susceptible.")

The 1993 amendments further support a broad interpretation. While the 1993 amendments did not alter the basic language of the "legal defense costs" exclusion, one slight, but significant, change was made:

> **Legal defense costs include legal costs for seeking payment under Section 22.18b.**

Ill. Rev. Stat.1991, ch. 111½, par. 1022.18 (emphasis added)

> **Legal defense costs include legal costs for seeking payment under this Title....**

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

Had the legislature intended for a narrow interpretation of the legal costs of seeking payment, the reference to Section 22.18b would have been replaced by a citation to Section 57.8 of the Act. For the purpose of this provision, however, the legal costs for seeking payment arise under the entire Title, not merely a single section in which payment is actually requested.

Prior to 1993, Section 22.18b of the Act essentially contained the entire LUST Fund program, under which the owner or operator applied for reimbursement and the Agency decided

which costs were eligible and reasonable. (Ill.Rev.Stat. 1989, ch. 111½, par. 1022.18)[2] In 1993, planning and budgeting provisions were added, such that many of the issues previously made at the reimbursement stage were now made at various points on a procedural continuum. For example, an owner or operator intending to "seek payment from the Fund" must submit budgets before performing physical soil classification and groundwater activities (415 ILCS 5/57.7(a)(2)) and before performing corrective action (415 ILCS 5/57.7(c)(1)(B)). In reviewing the plan and budget, the Agency decides whether "costs . . . will not be used for corrective action activities in excess of those required to meet the minimum requirements of this title." (415 ILCS 5/57.7(c)(4)(C)) The Agency's approval of the plan and budget constitutes "final approval for purposes of seeking and obtaining payment from the Underground Storage Tank Fund if the costs associated with the completion of any such plan are less than or equal to the amounts approved in such budget." (415 ILCS 5/57.7(c)(4)(A)(emphasis added)) These provisions show that planning and budgeting are part of the process of seeking payment from the Fund, not merely obtaining payment from the Fund through a request for payment.

In summary, Section 57.8(l) of the Act must be construed in light of its dual role as "legal defense costs" exclusion and "legal fees" authority. The Agency seeks to defeat Petitioner's claim to legal fees by ignoring the established meaning of the "legal defense costs" exclusion.

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[2] The reimbursement appeal in Ted Harrison Oil Co. v. IEPA, PCB No. 99-127 (Jan. 24, 2003) arose under Section 22.18b of the Act, id. at pp. 11-12, and therefore does not provide any guidance as to what constitute "the legal costs of seeking payment under this Title."

IV. PETITIONER'S PLAN AND BUDGET WERE REJECTED SOLELY FOR FINANCIAL REASONS.

The Agency argues that the primary issue in this case was the Agency's "technical decision" that the number of borings proposed in the corrective action plan was "excessive." (Response, at ¶ 18) Section 57.7(c)(4)(C) of the Act directs the Agency to ensure that "costs associated with the plan . . . will not be used for corrective action activities in excess of those required to meet the minimum requirements of this Title." (415 ILCS 5/57.7(c)(4)(C)) Under the Board's procedural rules, the financial review of a plan should include identification of "excessive" costs. (35 Ill. Admin. Code § 732.505(c))

Had Petitioner submitted a corrective action plan, proposing one-thousand borings, but not sought payment from the LUST Fund, the Agency would not have rejected the number of borings as excessive, nor could it have, since it is only the costs that those borings represent that would be objectionable under Section 57.7(c)(4)(C) of the Act. While it is true that a proper number of borings is a technical issue, it is an issue that can only arise when the owner or operator is seeking payment from the Fund for the borings. Consequently, all issues in the underlying appeal arose because Petitioner was seeking payment from the Fund.

In any case, Petitioner questions the wisdom of inventing the distinction sought by the Agency. This distinction would discourage technical challenges to Agency decisions, to the detriment of the environmental objectives of the Act. Many less responsible owners and operators would have been tempted to accept the Agency's reduction in the number of soil borings, safe in the knowledge that the Agency would issue a letter releasing them of any future liability. Instead of invented distinctions, the Board should exercise its discretion in light of the

degree of Petitioner's success, the importance of the Board's rulings to the administration of the LUST Fund and the potential benefits to the environment.

V. AWARDING ATTORNEY FEES TO A PREVAILING PARTY DOES NOT ENCOURAGE FRIVOLOUS LITIGATION.

The Agency mischaracterizes Petitioner's explanation of the policy reasons behind fee-shifting statutes as a rejection of compromise and settlement. (Response, at ¶22) In discussing the purposes served by fee-shifting statutes, courts invariably find that they encourage specific types of litigation. Chicago v Illinois Commerce Com., 187 Ill. App. 3d 468, 470 (1st Dist. 1989). The Agency may not agree with that policy, but that is entirely irrelevant when analyzing the legislature's intent.

Compromise and settlement must be distinguished from what the Agency desires, which is capitulation through the failure to appeal the Agency's final decision. (Response, at ¶ 21) A party that appeals an Agency decision still has incentive to negotiate a resolution since litigation is always doubtful and expensive. Any abuses in legal expenditures are within the Board's discretion to remedy. To the extent that the Agency's decisions are motivated in part, or too much, by the desire to protect the assets of the Fund (instead of the environment), this fee provision gives the Agency an economic incentive to compromise that would not otherwise exist. In sum, the fee-shifting provision in Section 57.8(l) of the Act may encourage litigation, but it in no way discourages settlement.

CONCLUSION

For the foregoing reasons, Petitioner renews its request for the relief sought in the Motion for Authorization of Payment of Attorneys' Fees as Costs of Corrective Action.

Respectfully submitted,

ILLINOIS AYERS OIL COMPANY, Petitioner

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LEGISLATIVE HISTORY OF "LEGAL DEFENSE COSTS" (APPENDIX A)

I. OLD LUST PROGRAM (PRE-1993)

The term "legal defense costs" was initially used solely as a limitation on the amounts reimbursable as indemnification costs from the LUST Fund:

> **(D) "Indemnification" means indemnification of an owner or operator for the amount of any judgment entered against such owner or operator in a court of law, for the amount of any final order or determination made against such owner or operator by an agency of State government or any subdivision thereof, or for the amount of any settlement entered into by such owner or operator, if such judgment, order, determination or settlement arises out of an injury suffered to person or property as a result of a release of petroleum from an underground storage tank owned or operated by such owner or operator. Indemnification shall not include legal defense costs.**

P.A. 86-125, §1, eff. July 28, 1989 (codified at Ill.Rev.Stat. 1989, ch. 111½ , par. 1022.18) (emphasis added).

Later, the limitation was expanded to apply to "corrective action" and to costs for seeking payment:

> **(C) "Corrective action" means an action to stop, minimize, eliminate, or clean up a release of petroleum or its effects as may be necessary or appropriate to protect human health and the environment. This includes, but is not limited to, release investigation, mitigation of fire and safety hazards, tank removal, soil remediation, hydrogeological assessments, and the provision of alternate water supplies. Corrective action does not include removal of an underground storage tank if the tank was removed or permitted for removal by the Office of the State Fire Marshall prior to the owner or operator providing notice of a release of petroleum in accordance with applicable notice requirements. Corrective action does not include legal defense costs. Legal defense costs include legal costs for seeking payment under Section 22.18b.[8]**
>
> **(D) "Indemnification" means indemnification of an owner or operator for the amount of any judgment entered against the owner or operator in a court of law, for the amount of any final order or determination made against the owner or operator by an agency of State**

[8] Paragraph 22.18b of this chapter. [from original]

government or any subdivision thereof, or for the amount of any settlement entered into by the owner or operator, if the judgment, order, determination, or settlement arises out of bodily injury or property damage suffered as a result of a release of petroleum from an underground storage tank owned or operated by that owner or operator. Indemnification shall not include legal defense costs. Legal defense costs include legal costs for seeking payment under Section 22.18b.

P.A. 87-323, §1, eff. Sept. 16, 1991 (codified at Ill.Rev.Stat. 1991, ch. 111½, par. 1022.18) (emphasis added).

Section 22.18b of the Act essentially constituted all of the LUST Fund provisions at that time. (Ill.Rev.Stat. 1989, ch. 111½, par. 1022.18b).

II. NEW PROGRAM (1993-2002)

Title XVI of the Act separated the legal defense cost provisions and authorized the Board to pay legal fees:

(l) 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.

P.A. 88-495, §15, eff. Sept. 13, 1993 (codified at 415 ILCS 5/57.8(l)) (emphasis added).

In addition, the citation to Section 22.18b was replaced with a reference to the entire Title.