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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

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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 EMERGENCY MOTION TO COMPEL DISCOVERY, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



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Dated: December 1, 2003

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RESPONSE TO EMERGENCY MOTION TO COMPEL DISCOVERY

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 and 101.502, hereby requests that the Hearing Officer assigned by the Illinois Pollution Control Board ("Board") to oversee the conduct of this appeal deny the Petitioner's emergency motion to compel discovery. In support of this response, the Illinois EPA states as follows:

I. BACKGROUND

1. On March 28, 2003, the Illinois EPA issued a final decision to the Petitioner, Illinois Ayers Oil Company ("Ayers Oil"). The decision modified a high priority site investigation corrective action plan ("HPCAP") and associated budget submitted by Ayers Oil. On May 3, 2003, Ayers Oil sent a petition for review of the Illinois EPA's decision to the Board. The present appeal followed.

2. On or about October 30, 2003, the Petitioner propounded interrogatories and requests for production of documents upon the Illinois EPA. On or about November 20, 2003, the Illinois EPA sent responses to those discovery requests to the Petitioner. On November 24, 2003, counsel for the Petitioner sent a letter ("demand letter") asking that certain specific

documents be provided on November 25, 2003, when depositions of three Illinois EPA employees would be held.

3. The Petitioner's demand letter sought the following documents (in the descriptive terms used by the Petitioner in the demand letter):

- 1) Rate sheets for each of the personnel and work items in the subject budget and used by the Illinois EPA to determine reasonableness, including rate sheets for a professional engineer, a project engineer, a staff geologist, a field manager, a geoprobe and mobilization/de-mobilization;
- 2) The internal guidance document used by the Illinois EPA to assist in the determination of the reasonableness of costs included in proposed budgets;
- 3) The Illinois EPA's "fee" database used to compile any type of ranges, averages, etc., as to what fees and other charges are incurred by owners and operators conducting Leaking Underground Storage Tank ("LUST") projects in Illinois;
- 4) All databases developed by the Illinois EPA over time and in use in the year 2003 for determining ranges of reasonableness as applied to fees of contractors, etc., in connection with LUST projects;
- 5) All databases developed by the Illinois EPA over time and in use in the year 2003 for determining ranges of reasonableness as applied to fees of contractors, etc., in connection with remediation activities undertaken and paid for by the Illinois EPA;
- 6) Memorandum attached to the rate sheet used in this situation, and informing the users of the rate sheet that the sheet is to be used as a guidance document;

- 7) Draft final decision, prepared by the project manager on the subject project for review and signature by the unit manager;
- 8) Job classification requirements for employees within the LUST Section who, in the subject budget review case, reviewed and judged whether the fees and time requested in the budget are, in fact, reasonable;
- 9) As of the date of the final decision under appeal, the Illinois EPA's established per-hour rates that were acceptable for the following personnel identified in the subject budget: Professional Engineer, Project Engineer, Staff Geologist, and Field Manager;
- 10) The LUST Program Project Manager Handbook, used by the Illinois EPA to review the budget which is the subject of this appeal; and
- 11) A document described as "IRT 500.003," which appears by reference on the only document produced by the Illinois EPA in response to Petitioner's request to produce documents, being a single page from the LUST Program Project Manager Handbook (as described therein, IRT 500.003 was developed for the purpose of assisting Illinois EPA reviewers in reviewing budgets.

4. On November 25, 2003, the Illinois EPA provided some of the information requested in the Petitioner's demand letter. Specifically, the Illinois EPA provided the rate sheet information for a professional engineer, engineer, geologist/hydrogeologist, geoprobe and mobilization/de-mobilization (items 1, 2 and 9 in par. 3 above) and the memorandum attached to the rate sheet (item 6 in par. 3 above).

5. As to the remainder of the documents that would arguably be included within the scope of the Petitioner's discovery request and/or the demand letter, however, the Illinois EPA

relied upon the objections and responses contained within its responses to the Petitioner's discovery requests. Also, as was explained during the deposition taken on November 25, 2003, of Carol Hawbaker, the project manager assigned to the review of the plan and budget in question, the "draft final decision" that is described in item 7 of paragraph 3 above is the final decision itself, as the "draft" of that decision that was prepared by Ms. Hawbaker was later signed without change by her unit manager.

6. On or about November 26, 2003, the Petitioner filed an emergency motion to compel discovery ("motion to compel") with the Board.

II. THE MOTION TO COMPEL SHOULD BE DENIED

7. The gist of the motion to compel filed by the Petitioner is the Petitioner's objection to what it characterizes as the Illinois EPA's assertion that the documents sought but not provided would not lead to information that is admissible at hearing, and therefore is not subject to discovery. Motion to compel, p. 2.

8. However, that is not the objection that has been raised by the Illinois EPA. First, it is necessary to ascertain exactly what documents are being sought by the Petitioner in its motion to compel. In terms of documents, the Petitioner's interrogatories and requests to produce documents (reproduced verbatim in the Illinois EPA's answers and responses that are found as Exhibits 1 and 2 to the motion to compel) seek a much broader range of information than are listed in the demand letter and referred to in the motion to compel. For example, the interrogatories and requests to produce make repeated references to seeking information and documentation regarding the Illinois EPA's practices when reviewing requests for reimbursement. The Illinois EPA correctly and consistently objected to the requests for this information and documentation, since the final decision under appeal does not involve any

request by the Petitioner for reimbursement of costs. The specific objections made by the Illinois EPA are found in Exhibits 1 and 2 to the motion to compel, and the Illinois EPA stands by them.

9. In the demand letter and motion to compel, the Petitioner does not make any reference to information or documentation regarding the Illinois EPA's handling of reimbursement requests, and rightly so. Therefore, it is a reasonable assumption that the only information and documentation being sought by the Petitioner is that which is specifically referenced in the demand letter and/or motion to compel. Practically speaking, the items in the demand letter (listed in paragraph 3 above) encompass all the information and documentation referenced in the motion to compel. The Illinois EPA thus asserts that only that information and documentation should be considered as sought by the Petitioner. Defining the scope of the information and documentation at issue is obviously necessary in order for the Illinois EPA to respond to the motion to compel.

10. The Petitioner also argues that, in support of its motion, the question presented by the appeal is whether the Illinois EPA's modification of the HPCAP and budget is reasonable and, as part of the reasonableness inquiry, whether the bases of the Illinois EPA's decision (including the generation of a "rate sheet") are valid. Motion to compel, p. 2.

11. The Petitioner's statement is wrong, and not surprisingly seeks to switch the burden of proof onto the Illinois EPA. The Board's authority to review an Illinois EPA budget determination arises from Section 57.7(c)(4)(D) of the Illinois Environmental Protection Act ("Act") (415 ILCS 5/57.7(c)(4)(D)). Section 57.7(c)(4)(D) grants owners and operators the right to appeal an Illinois EPA determination on a proposed plan to the Board in accordance with the procedures of Section 40 of the Act (415 ILCS 5/40). The owner or operator must prove that the costs associated with the budget are reasonable, will be incurred in performing corrective action,

and will be used to satisfy only the minimum requirements of the Act. Rantoul Township High School District No. 193 v. Illinois EPA, PCB 03-42 (April 17, 2003).

12. The burden in this appeal is upon the Petitioner to demonstrate that the costs included within the HCAP budget were reasonable, will be incurred in performing corrective action, and will be used to satisfy only the minimum requirements of the Act. The Petitioner is making clear its intention to put the Illinois EPA's review process on trial, hoping to move the Board's focus and attention away from the statutory standard and burden of proof.

13. Also, the Petitioner argues in the motion to compel that the Illinois EPA has "consistently reported to the USEPA" that it has issued a LUST Managers' Handbook to its LUST managers. Motion to compel, p. 3. That statement is wholly unsupported by any evidence, other than a passing reference in a transcript in a completely unrelated hearing held in 1997 to some letters between the Illinois EPA and the United States Environmental Protection Agency ("USEPA") as found in Exhibit 5 to the motion to compel. Those letters have not been provided as part of the motion to compel, so it is impossible to determine whether they have any relevance at all to the present appeal. There is no information as to the dates of the letter, or whether they relate to the Illinois EPA's review of corrective action plans and budgets, which is the only type of decision that is the Board's focus in this appeal. The case from which the transcript is taken is one that involved the review of a reimbursement decision, and again, that is not the type of decision (and accordingly, the type of review process) that is before the Board for review in the present matter.

14. Further, the Illinois EPA takes the position that the Petitioner has misrepresented the testimony of Brian Bauer at his deposition. (Neither party has the transcript to the deposition, given the short time period from which the deposition was taken.) The Petitioner

states that Mr. Bauer testified that newer LUST Section project managers who are less familiar with the terms (presumably used in the LUST Section) do review the handbook in question. That is not the recollection of counsel for the Illinois EPA. More clear testimony on this issue was given in a deposition taken of Carol Hawbaker, who testified that the handbook was intended for the use of project managers that had just gained employment. At the very least, there was no testimony by any management of the LUST Section that the handbook was a necessary and required piece of reading and consultation in the course of reviewing budgets.

15. Despite there being no testimony on the issue, the Petitioner make the jump and state that "it is clear that LUST project managers have been instructed to use manuals containing guidance and policies in connection with their administration of LUST programs, including the program which is the subject of this appeal." There is simply no deposition testimony of any kind, nor any other evidence other than the Petitioner's own unfounded supposition, that the handbook in question is required reading. Nothing in any of the Illinois EPA's responses to the interrogatories or requests to produce documents indicates that the handbook is required reading, or that any employees that reviewed the budget in question were instructed to read the handbook.

16. The Petitioner then argues that even though the Illinois EPA may assert that the handbook and IRT (Issues Resolution Team) document were not used by the person who reviewed the file in question, the documents may disclose that they should have been used, or that if they had been used, the result would have been different. The Petitioner argues that there is no way to tell until it receives and reviews the documents.

17. The Illinois EPA takes the position (as it did in responses to discovery requests) that the handbook and IRT document do not relate to the review of a high priority corrective action plan or budget, which is the review that led to the final decision under appeal. There is

one page in the handbook that generically refers to the review of budgets, and that page was provided to the Petitioner since it arguably related to the review of an HCAP budget. However, there is nothing else in the handbook, and nothing in the IRT document, that speaks to the method of review of a high priority corrective action plan and/or budget. The Illinois EPA's concern is that to provide these documents to the Petitioner would be to reward a "fishing expedition" in which the Petitioner uses the pending appeal as an excuse to seek documents that in no way relate to the decision under appeal.

18. The Petitioner then states that the Board has previously overruled the Illinois EPA's objections to these or similar categories of requested documents in more than one past instance. Motion to compel, pp. 4, 5, 6. Despite that statement, the Petitioner has provided no documentation or evidence other than, at best, references to transcripts from hearings (without any actual orders or related pleadings). The facts and law surrounding those cases (Brunetto, Southern Food Park and Owens) is distinguishable, and the Petitioner has made no effort to establish any analogous facts or legal circumstances upon which the Hearing Officer or Board could rely when comparing those cases. Simply put, those are different cases with different facts and different law that are not applicable or analogous.

19. The Petitioner also argues that the validity of the statistical methods employed by the Illinois EPA in generating its rate sheet information are at the heart of the case and must be brought into the open and tested for accuracy. Motion to compel, p. 6. However, as was testified to in a deposition and as will almost certainly be raised in testimony at hearing, the Illinois EPA has already explained its method for calculating the relevant information found within the rate sheet. The Petitioner, in seeking to obtain the data from which the rate sheet information was arrived at, is again hoping for a windfall of information that is totally unrelated

to the present appeal. The information has no relevance and would play no role in the Board's decision in this appeal. The Illinois EPA has explained its calculations; if the Petitioner wants to take issue with that, it does not need any further information to do so. But if the Petitioner does receive the information sought in the database, it would be able to gain information about rates that are not at issue or were even proposed in the budget that led to the final decision under appeal.

20. As provided in Section 101.614 of the Board's procedural rules (35 Ill. Adm. Code 101.614), all relevant information and information calculated to lead to relevant information is discoverable. Further, the question of whether discovery is unreasonable, oppressive or irrelevant depends on the issues that the Board may consider on a given appeal. ESG Watts, Inc. v. Sangamon County Board, PCB 98-2 (December 3, 1998).

21. In the present case, the Board may look only to the issues raised within the final decision issued by the Illinois EPA that is under appeal. That final decision relates to the Illinois EPA's review of a high priority corrective action plan and budget. Accordingly, only those issues related to the submission and review of a high priority corrective action plan and budget are before the Board, and that scope defines the extent of what information is discoverable and what information is irrelevant.

22. The Illinois EPA objects to the production of any information or documentation other than what has been provided to date. The information/documentation is either completely beyond the scope of the present appeal or is irrelevant (and will not lead to any information that is relevant). A review of each item included in the demand letter (as found in paragraph 3 above), along with the Illinois EPA's specific objections, follows:

1) Rate sheets. Those rates for the job titles that were modified to the figure found on the rate sheet (i.e., professional engineer, engineer, geologist/hydrogeologist, geoprobe and mobilization/de-mobilization) have been provided to the Petitioner. The Illinois EPA did not provide the rate sheet information for a field manager, since the final decision deducted all the costs associated with that job title; the rate presented in the budget was not modified to a figure on a rate sheet, but rather that entire line item was deducted as being related to unnecessary work. There is no need for the Petitioner to be provided with a rate that was not used by the Illinois EPA in the final decision.

2) Internal guidance document. The document being referred to is the rate sheet.

3) The fee database for LUST projects. As argued above, there is no need for this information to be provided to the Petitioner. The rates themselves that were utilized have been provided, the method of calculation has been provided, and that is more than sufficient for the Petitioner to raise any arguments it wishes. The database contains a great deal of information unrelated to the present appeal that would serve no purpose in this appeal, but would reward the Petitioner in its fishing trip for any other irrelevant information that it could gain.

4) All databases developed over time for LUST projects. The only rates that were used in the final decision under appeal were calculated from the most recent database, and that is the only database that should even be the subject of discussion. And, as argued above, that database is irrelevant to the present case.

5) All databases developed over time for Illinois EPA-initiated remediation activities. Any information related to this request goes completely beyond the

scope of the present case, as the Illinois EPA did not initiate the cleanup in this case. This is a clear example of the Petitioner seeking to gain information that is totally irrelevant to the decision under appeal. The Petitioner is using the present appeal as the means to seek information that has nothing to do with the pending appeal, but which would likely be used in the context of other unrelated matters. The Petitioner should not be rewarded with such information.

6) The memorandum attached to the rate sheet. That document has been provided to the Petitioner.

7) Draft final decision. The final decision under appeal was the draft decision before Harry Chappel signed the letter. There is no other document other than the final decision.

8) Job classification requirements. This is a class of information that again indicates that the Petitioner seeks to attack the Illinois EPA's method of review (and personnel assigned to such review), rather than focusing on the documents which were submitted for review to the Illinois EPA. There is no reason for these type of employment-related documents to be provided to the Petitioner. The qualifications and educational background of any person that conducted any review of the HPCAP and budget can readily be ascertained through testimony at hearing. Further, any final decision issued by the Illinois EPA is a decision from the agency as a whole; each person associated with the decision met their respective job requirements, otherwise they would not be so employed. There is simply no reason for this irrelevant information to be provided.

9) Per-hour rates. See the discussion regarding item 1 above.

10) The LUST Program Project Manager Handbook. This document contains a great deal of totally irrelevant information that would serve no purpose in the present appeal, but would no doubt be used henceforth by the Petitioner in this and other projects. The only portion of the handbook that is even remotely relevant to the present case has been provided.

11) IRT 500.003. This document does not relate to the review of high priority corrective action plan budgets, and therefore is irrelevant to the Board's review of the final decision under appeal. The document speaks to the review of other types of budgets (site classification and low priority), but does not address the method of review of high priority budgets.

23. Having made the preceding arguments and objections, the Illinois EPA is hereby providing the database (in hard copy spreadsheet form), handbook (with the page already provided tabbed) and IRT 500.003 to the Hearing Officer for an in camera review. The Illinois EPA stresses that it is doing so only because it will be readily apparent to the Hearing Officer that the arguments and objections made herein are meritorious and should be upheld.

24. However, if the Hearing Officer should for some reason order that the documents in part or in full should be produced and provided to the Petitioner, the Illinois EPA fully intends to exercise its rights to appeal such an order to the Board as a whole. That being the case, the Illinois EPA asks that the Hearing Officer not require the production of any such information to the Petitioner unless and until the Board has had an opportunity to hear the Illinois EPA's appeal of the order. If the Hearing Officer were to require the production of any of the subject documents in part or in whole prior to the Board considering the Illinois EPA's appeal, it could result in the Petitioner being provided with documents that the Board later determines should not

have been provided. Obviously, the very abuse and negative consequence that the Illinois EPA seeks to avoid would then have been allowed.

WHEREFORE, for the reasons stated above, the Illinois EPA hereby respectfully requests that the Board enter an order denying the Petitioner's motion to compel and not require the production of any further information and/or documentation beyond that which has already been provided.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



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Dated: December 1, 2003

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on December 1, 2003, I served true and correct copies of a RESPONSE TO EMERGENCY MOTION TO COMPEL DISCOVERY, 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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