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.	)	(LUST Appeal)

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 PETITIONER'S BRIEF, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

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Dated: March 8, 2004

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

RESPONSE TO PETITIONER'S BRIEF

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 hereby submits its Response to the Petitioner's Brief to the Illinois Pollution Control Board ("Board").

I. BURDEN OF PROOF

Pursuant to Section 105.112(a) of the Board's procedural rules (35 Ill. Adm. Code 105.112(a)), the burden of proof shall be on the petitioner. In reimbursement appeals, the burden is on the applicant for reimbursement to demonstrate that incurred costs are related to corrective action, properly accounted for, and reasonable. Rezmar Corporation v. Illinois EPA, PCB 02-91 (April 17, 2003), p. 9. Similarly, in the present case the owner or operator of a leaking underground storage tank must prepare and submit a corrective action plan designed to mitigate any threat to human health, human safety or the environment resulting from the underground storage tank release. 415 ILCS 5/57.7(b)(2). Further, the owner or operator must submit a corrective action plan budget which includes, but is not limited to, an accounting of all costs associated with the implementation and completion of the corrective action plan. 415 ILCS 5/57.7(b)(3). The primary focus must remain on the adequacy of the permit application and the information submitted by the applicant to the Illinois EPA. John Sexton Contractors Company v.

Illinois EPA, PCB 88-139 (February 23, 1989), p. 5. Further, the ultimate burden of proof remains on the party initiating an appeal of an Illinois EPA final decision. John Sexton Contractors Company v. Illinois Pollution Control Board, 201 Ill. App. 3d 415, 425-426, 558 N.E.2d 1222, 1229 (1st Dist. 1990).

Thus Illinois Ayers Oil Company ("Ayers") must demonstrate to the Board that it has satisfied its burden before the Board can enter an order reversing or modifying the Illinois EPA's decision under review.

II. STANDARD OF REVIEW

Section 57.8(i) of the Environmental Protection Act ("Act") grants an individual the right to appeal a determination of the Illinois EPA to the Board pursuant to Section 40 of the Act (415 ILCS 5/57.8(i)). Section 40 of the Act (415 ILCS 5/40) is the general appeal section for permits and has been used by the legislature as the basis for this type of appeal to the Board. Therefore, when reviewing an Illinois EPA decision on a submitted corrective action plan and budget, the Board must decide whether or not the proposals, as submitted to the Illinois EPA, demonstrate compliance with the Act and Board regulations. Broderick Teaming Company v. Illinois EPA, PCB 00-187 (December 7, 2000).

The Board will not consider new information not before the Illinois EPA prior to its determination on appeal. The Illinois EPA's final decision frames the issues on appeal. Todd's Service Station v. Illinois EPA, PCB 03-2 (January 22, 2004), p. 4.

In deciding whether the Illinois EPA's decision under appeal here was appropriate, the Board must therefore look to the documents within the Administrative Record ("Record"), along with relevant and appropriate testimony provided at the hearing held on January 7, 2004, in this

matter.[1] Based on the information within the Record and the testimony, along with the relevant law, the Illinois EPA respectfully requests that the Board enter an order affirming the Illinois EPA's decision.

III. INTRODUCTION

Contrary to the assertions of the Petitioner, the Illinois EPA's final decision under appeal is supported in both fact and law, and the Record and testimony elicited at hearing demonstrate that the decision was correct. The Petitioner argues that the Illinois EPA made three errors; namely, that the Illinois EPA's review resulted in deduction of certain personnel and equipment rates based on what an internal guidance document, that the Illinois EPA's review resulted in a modification of the number of soil borings that would be allowed, and that the Illinois EPA's review resulted in the position that each of the direct-push borings in question could be accomplished in a time less than that proposed by the Petitioner.

However, as will be demonstrated by citations to the Record and testimony, the Illinois EPA's review was appropriate. The deduction in unreasonable rates was justified, the number of soil borings requested by the Petitioner was properly modified, and the time allowed for the direct-push borings was reasonable.

IV. STATEMENT OF FACTS

Rather than provide a complete recitation of the facts, the Illinois EPA will refer to relevant portions of the Record and hearing testimony in its arguments.

V. REGULATORY BACKGROUND

[1] Citations to the Administrative Record will hereinafter be made as, "AR, p. ___." References to the transcript of the hearing will be made as, "TR, p. ___." Also, the Illinois EPA notes that it has filed a separate Objection and Motion to Strike. The arguments and objections made therein are incorporated here, and the Illinois EPA specifically objects to (and maintains an objection to) any portions of the Petitioner's Brief or Reply Brief that contain references to, or arguments based upon, the deposition transcripts admitted as evidence over the Illinois EPA's objection.

The Petitioner provides a sufficient overview of the regulatory background applicable here, with some exceptions. First, the Petitioner glosses over the purpose and scope of a "completeness review" as contemplated by Section 732.502 of the Board's regulations (35 Ill. Adm.Code 732.502). Section 732.502(a) provides that the Illinois EPA will review plans submitted pursuant to Part 732 for completeness, with completeness being defined as the submission of all documentation and information required by Illinois EPA forms for the particular plan. That subsection further states that a completeness review is not used to determine the technical sufficiency of a particular plan or of the information or documentation submitted along with the plan.

The Petitioner is arguing that either the Illinois EPA could have or should have asked for more information to answer any questions raised by the submitted information, or that the failure to do so somehow means the Illinois EPA is forbidden from questioning the sufficiency of the information or documentation. Clearly, Section 732.502(a) requires only that the appropriate Illinois EPA form be completely filled out; whether the information contained in the form is sufficient to justify the proposal or request embodied in the form is a separate matter, as that is based upon the result of the technical (not completeness) review. As the Board stated in West Suburban Recycling and Energy Center, L.P. v. Illinois EPA, PCB 95-119 and 95-125 (October 17, 1996), p. 11, to affirmative require that the Illinois EPA seek from the applicant any and all information necessary to make an initial application successful would be tantamount to shifting the applicant's burden to the Illinois EPA, which the Board would not do.

Also, the Petitioner mischaracterizes the "roles" of the Illinois EPA and an owner/operator of a leaking underground storage tank when it attempts to compare procedures between a permit appeal and an appeal brought pursuant to the Leaking Underground Storage

Tank ("LUST") program. The Petitioner claims that in a permit appeal the Illinois EPA's role is to advocate those controls or restrictions which best protect the environment from pollution and its threats. The Petitioner argues that it is the role of the permit applicant to complain about the cost of those controls or restrictions. Then, the Petitioner argues that in LUST appeals, the Illinois EPA "seeks to protect the LUST Fund, while the petitioner seeks more environmental protection." Petitioner's brief, p. 8. This is a completely unsupported statement, and obviously is intended to portray the Illinois EPA's decisions issued pursuant to the LUST program as being totally based on financial concerns. Conversely, a petitioner is apparently obligated to ensure that the environment is protected. Though it goes without saying that the Petitioner's statement is incorrect, the Illinois EPA instead directs the Board's attention to Section 57 of the Act (415 ILCS 5/57), which provides that the purpose of Title XVI of the Act is to, in accordance with certain federal requirements and the State's interest in the protection of Illinois' land and water resources, adopt procedures for the remediation of underground storage tank ("UST") sites that have suffered releases, establish and provide procedures for a LUST program which will oversee any remediation required for LUSTs, administer the UST Fund (established to allow persons who qualify for access to the UST Fund to satisfy financial responsibility requirements under state and federal law), establish requirements for eligible owner/operators to seek payment from the UST Fund for corrective action costs, and audit and approve corrective action efforts performed by licensed professional engineers.

III. THE ILLINOIS EPA'S USE OF ITS INTERNAL GUIDANCE WAS PROPER

In its Brief, the Petitioner argues that the Illinois EPA's internal guidance[2] (referred to by the Petitioner as a rate sheet) was either an invalid de facto rule or inadmissible, and therefore the

[2] As testified to by Carol Hawbaker and Brian Bauer, the internal guidance is a document containing certain commonly-encountered personnel titles or equipment with a corresponding rate or cost that represents the amount up

internal guidance and all testimony based on the internal guidance should be stricken. The Illinois EPA instead argues that the use of the internal guidance was and is appropriate, and the Illinois EPA's utilization of the guidance comported with any applicable legal guidelines.

A. The Internal Guidance Is Not A De Facto Rule

The primary contention by the Petitioner in support of its claim that the internal guidance is a de facto rule is that it is a statement of general applicability. Petitioner's Brief, p. 10. In making this claim, the Petitioner relies in large part on a holding found in Senn Park Nursing Center v. Miller, 104 Ill.2d 169, 470 N.E.2d 1029 (1984). However, the Senn Park case, aside from some general language, is distinguishable and not applicable to the case at hand.

In Senn Park, a state agency amended its procedure for calculating an inflation factor used when determining rates of reimbursement for nursing home facilities. Id., at 176-177, at 1033. There, the Illinois Supreme Court determined that based on the definition of a "rule" as found in Illinois Administrative Procedure Act ("IAPA") (5 ILCS 100/1-70), the amended procedure was violative of the IAPA's requirement regarding rulemaking. Further, the court noted that what was at issue was not the State plan, but rather a rule that changed the State plan. Id., at 179, at 1034.

Here, the internal guidance in question is not an amendment of any existing plan, but rather the Illinois EPA's means of implementing the existing requirement within Section 732.505(c) of the Board's regulations (35 Ill. Adm. Code 732.505(c)), namely, to determine whether costs are reasonable.

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to which would be deemed reasonable without further documentation (i.e., the documentation provided in the accompanying form would suffice). If the amount requested in a budget or reimbursement request exceeded the amount, further documentation may be needed to approve the amount. The purpose of the use of the internal guidance is to help facilitate timely and consistent reviews of budgets and reimbursement requests. Hearing Transcript, pp. 185, 215, 217, 221; Petitioner's Exhibit 2 (Attachment 2).

There are other cases that are more on point with the present situation. In Donnelly v. Edgar, 117 Ill.2d 59, 509 N.E.2d 1015 (1987), the Illinois Supreme Court again considered the question of whether an internal policy procedure was an improper rulemaking (i.e., a "rule" as defined by the IAPA that had not undergone the otherwise required steps of public notice and comment). In Donnelly, the court considered whether a policy that established a formal hearing review panel to review hearing officer proposed decisions was a rule. The court decided the policy was not a rule, as it met one of the stated exceptions to the general definition. Specifically, statements concerning only the internal management of an agency and not affecting private rights or procedures available to persons or entities outside the agency are not a "rule." 5 ILCS 100/1-70. Id., at 65, at 1018.

Further, the court noted that the purpose of the internal procedure was to prescribe a method for maintaining consistency among the different decisions on restricted driving permits. As the court observed, the IAPA was not intended to apply to every agency explanation of existing policy to its employees. Id.

Another case that is persuasive is that of Kaufman Grain Company v. Director, Department of Agriculture, 179 Ill. App. 3d 1040, 534 N.E.2d 1259 (4th Dist. 1988). In Kaufman, the appellate court repeated the sentiment of the Donnelly court, stating that not all statements of agency policy must be announced by means of published rules. When an administrative agency interprets statutory language as it applies to a particular set of facts, adjudicated cases are a proper alternative method of announcing agency policies. Id., at 1047, at 1264. Contrast this statement with the Petitioner's claim that adjudication of matters such as the present appeal is a problem. Petitioner's Brief, p. 13.

Even more on point and worthy of consideration is the case of Highland Park Convalescent Center v. Illinois Health Facilities Planning Board, 217 Ill. App. 3d 1088, 578 N.E.2d 92 (1st Dist. 1991). There, the appellate court reviewed a methodology employed by a state agency to determine whether a proposed facility would result in a maldistribution of facilities or services. The agency followed a prescribed calculation to arrive at a decision based on the "quadrant theory." Id., at 1092-93, at 94-95. A witness for the agency testified that the agency's rules do not contain standards for defining maldistribution, and that it is the applicant's duty to show why a proposed location is appropriate. Id., at 1093, 95.

The court found that the methodology employed by the agency to assist it in its maldistribution findings was not a rule as contemplated by the IAPA, based on the fact that the methodology was not a rule. Rather, the court found that it was simply the reasoning by which an agency determined that maldistribution existed. Id., at 1096, at 97. The court also cited with favor the decision reached in Kaufman.

Here, the internal guidance expressly is used to assist in the promotion of consistency in decisions. Obviously, the Illinois EPA has a large workload for each of its reviewers (Carol Hawbaker testified, for example, that she currently has 201 sites assigned to her, Hearing Transcript, p. 171). Any internal guidance that helps to ensure consistency (as noted in the Donnelly case) while not running afoul of the definition of a rule is appropriate.

The internal guidance document utilized by the Illinois EPA either is not a rule by exception or by outright inapplicability. The document is internal to the Illinois EPA, and does not affect any private rights. While the document may assist the Illinois EPA staff in determining whether a cost is reasonable, it does not affect any private rights since there is a clearly defined right of appeal to any Illinois EPA LUST program decision. Thus, the means by

which the Illinois EPA renders its decisions is subject to appeal, and numerous cases have stated that adjudication is an appropriate means to establish an agency's policy.

Just as compelling is the argument that the internal guidance is not a rule of any kind, just as the court in Highland Park found. There as here, the methodology in question was the embodiment of the reasoning by which an agency reached a determination (in Highland Park the determination was whether a maldistribution existed, here it is whether a cost is unreasonable). Also, similar to the Highland Park case, the particular methodology has not been presented as being the "end all—be all" means of reasoning, but clearly is one which allows the agency in question to help reach its final decisions.

In the case of the internal guidance, the cover memorandum clearly states that the attached rate sheet is meant as a guidance document, and that any requests for reimbursement above the rates in the sheet should be discussed with the project manager's unit manager. Petitioner's Exhibit 2, Attachment 2. The Illinois EPA has clearly expressed its intent and goal that the internal guidance be used as just that—guidance—and that there are clearly contemplated exceptions and fact-specific deviations from the content of the rate sheet. The internal guidance is not a statement of general applicability, but rather is a tool to assist project managers' in their review of numerous budget submittals from different consultants.

B. The Illinois EPA Treated The Internal Guidance Per The Board's Orders

The Petitioner goes on to argue that the Illinois EPA's refusal to disclose information related to the internal guidance somehow prohibits the internal guidance's use as evidence. The Illinois EPA simply handled the information referenced by the Petitioner in the manner provided for by the Hearing Officer and Board in this instance, as evidenced by the respective pre-hearing orders issued. To then state that the Illinois EPA's following of those orders is somehow an act

that can now be used against the Illinois EPA's interests goes against the requirement that a party comply with orders of the Board. That the Petitioner is disappointed it did not receive orders in its favors is apparent; that the Illinois EPA should accordingly be penalized for following orders issued by the Hearing Officer and the Board is nonsensical.

IV. THE ILLINOIS EPA'S TECHNICAL REVIEW WAS CORRECT

The Petitioner argues that the Illinois EPA's technical review of the corrective action plan was in error, since the requirements of the Act and regulations will be met if the remedial investigation includes 13 direct push borings and not merely three. Petitioner's Brief, p. 18.

The problem with the Petitioner's argument is that, based on the information and documentation with the corrective action plan and budget, there is no support that would allow the Board to conclude that the Petitioner has met its burden. The claim of the Petitioner is that the 10 direct push borings not approved by the Illinois EPA were necessary to assist in the investigation of natural migration pathways. Hearing Transcript, p. 103. Supposedly, the documentation that links the need for the 10 direct push borings to the need to further investigate natural migration pathways is found in the corrective action plan on pages six and eight. Id., pp. 103-104.

Looking to pages six and eight of the corrective action plan, it is plain that there is simply no statement of any kind that the 10 direct push borings in question would be tied to investigation of natural migration pathways. There is a broad statement that the borings would be used to better define and evaluate the extent and relative distribution of petroleum contaminants in the subsurface, but that statement does not make any reference specifically to the investigation of natural migration pathways. Record, p. 6.

It was the testimony of the Petitioner that the information on page six, combined with that on page eight (Record, p. 8), effectively made reference to natural migration pathways. However, a review of the cited information on those pages of the corrective action plan reveals no such statement is made. It would have been very easy for the Petitioner to state what they now would have the Board believe, but in fact that kind of explanation for the need for the 10 borings in question is not found.

However, there is a direct reference to the purpose for the 10 borings found later in the corrective action plan budget. On page 68 of the Record, the Petitioner noted that the 13 locations (including the 10 borings not approved and the three borings that were approved) will be probed and sampled "in accordance with 35 IAC 732.308(a)." The Petitioner puts its best foot forward, trying to argue that the phrase "in accordance with" is not at all similar in meaning to "pursuant to," such that the reference to Section 732.308(a) in the budget as the specific reason for using the borings does not mean what it clearly does mean. Section 732.308(a) references soil borings and soil boring logs that are to be included in a site classification completion report. Thus, the Illinois EPA's conclusion that these borings related to site classification activities (therefore not approvable in a corrective action plan and budget) was entirely reasonable and appropriate.

V. THE ILLINOIS EPA'S FINANCIAL REVIEW WAS CORRECT

Finally, the Petitioner takes issue with the Illinois EPA's review and decision on the budget portion of the corrective action plan. There were essentially four components to the Illinois EPA's sum decision on the budget: 1) the reduction of 13 borings to 10 borings; 2) the reduction of five days' time for investigation to two days' time; 3) the reduction of allowed hours; and 4) the reduction of allowed rates/costs. On each point, the Petitioner has failed to

meet its burden and the corresponding decision reached by the Illinois EPA was reasonable and appropriate.

A. The Number Of Soil Borings Was Properly Reduced

As has been argued above, the Illinois EPA properly reduced the number of soil borings proposed in the corrective action plan and budget from 13 to three, thus reducing by 10 the total number of approved borings. That decision was accordingly carried out in the assessment of related costs found in the budget.

B. The Time For Certain Investigation Activities Was Properly Reduced

Given the correct reduction in the number of soil borings to be approved, there was a corresponding reduction in the amount of time needed to perform those borings. As found in the budget submitted by the Petitioner, there is no information that describes how the Petitioner reached its conclusions as to the time needed to perform investigation activities in question. The Petitioner's consultant testified that he provided some information prior to the submission of the corrective action plan and budget, and that he had experience in calculating the time needed to perform soil borings of this nature. Hearing Transcript pp. 37, 40. None of that information is found in the corrective action plan or budget.

Given that there was no supporting documentation for the days and hours found in the budget at page 68 of the Record, the Illinois EPA's project manager spoke with her supervisor and obtained an estimate of a reasonable period of time to allow for. Hearing Transcript, pp. 178-179.[3] Her reliance on that experienced estimate was reasonable and appropriate given the lack of any supporting documentation from the Petitioner on this issue.

[3] The Illinois EPA has previously expressed its firm position that the admission into evidence of discovery deposition transcripts in their entirety was inappropriate and should be stricken, along with any testimony based upon those transcripts. However, if the Board should decide to affirm the Hearing Officer's decision, the Illinois EPA notes that on page 28 of his deposition transcript, Harry Chappel expressed his opinion as to the reasonable

C. The Hours Associated With Certain Activities Was Properly Reduced

Similar to the reduction in the number of hours/days allowed for the direct push borings, there were other reductions in the number of hours compared to what was proposed in the corrective action plan budget. Record, pp. 72-73.

In reviewing the information contained in the budget, there is no documentation or information that provides any background as to why the hours sought for the tasks identified (sometimes multiple tasks per line item) are reasonable. Given this lack of any supporting documentation, the Illinois EPA's decision to modify the budget with hours believed to be reasonable based on past experience of the Illinois EPA staff was correct.

D. The Costs/Rates Associated With Certain Activities/Personnel Were Properly Reduced

Finally, there were a number of personnel rates or per unit costs that were reduced by the Illinois EPA, either due to the excessive nature of the cost, the undocumented nature of the cost, or the inconsistency of the cost with the corrective action plan (i.e., samples proposed with no locations identified, a concept not described or approved in the corrective action plan). In each instance, the Petitioner failed to provide any explanation or information in support of the costs that were listed in the budget. The testimony by the Petitioner's consultant at hearing was indeed interesting, but none of that information is found anywhere in the budget or corrective action plan. Therefore, the Illinois EPA did not have the benefit of the information when reaching its decision. As noted above, the use of the internal guidance as a tool to assist in consistent decision-making is appropriate here, and therefore use of that document to assist in the reduction of certain rates or costs was also acceptable.

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amount of time to perform direct push borings. That opinion was based on his background in consulting engineering and his years spent at the Illinois EPA, all of which are extensive. Chappel Deposition Transcript, pp. 68-75. It should be noted that Mr. Chappel is also a licensed Professional Engineer. Record, p. 88.

In Todd's Service Station v. Illinois EPA, PCB 03-2 (January 22, 2004), the Board noted that the Petitioner failed to include any explanation in either the budget submitted or hearing testimony as to how personnel rates were calculated or why they were reasonable. That lack of explanation led the Board to conclude the Illinois EPA's reduction of certain costs and hours in question in the budget was correct. Todd's, p. 7. Here, there was hearing testimony provided, but the Petitioner did not include any of that information within the budget. Therefore, the information was never before the Illinois EPA during their decision-making process. The Board should follow the precedent established in Todd's and affirm the reductions made here.

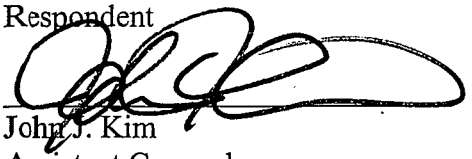
Also, the Petitioner's claim that some of the costs or rates in question have been approved in the past is not persuasive, since the past actions of the Illinois EPA are not in question here. As was discussed, the intent behind using the internal guidance is to help promote consistency in decisions; obviously, there are going to be exceptions to that guidance, and those exceptions should not be held against the Illinois EPA here.

VI. CONCLUSION

For all the reasons and arguments included herein, the Illinois EPA respectfully requests that the Board affirm the Illinois EPA's March 28, 2003 decision. The Petitioner has not met even its *prima facie* burden of proof, and certainly has not met its ultimate burden of proof. The information contained within the corrective action plan and budget is consistent with the Illinois EPA's final decision, and the lack of information now being offered by the Petitioner in an untimely manner should not be considered since it was never presented to the Illinois EPA. For these reasons, the Illinois EPA respectfully requests that the Board affirm the Illinois EPA's final decision.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



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Dated: March 8, 2004

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on March 8, 2004, I served true and correct copies of a RESPONSE TO PETITIONER'S BRIEF, 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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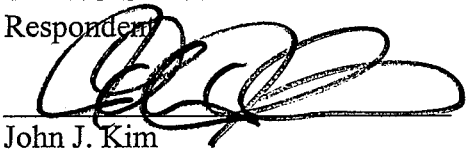

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