

ILLINOIS POLLUTION CONTROL BOARD

September 2, 2004

|                           |   |              |
|---------------------------|---|--------------|
| JOHNSON OIL COMPANY, LLC, | ) |              |
|                           | ) |              |
| Petitioner,               | ) |              |
|                           | ) |              |
| v.                        | ) | PCB 04-190   |
|                           | ) | (UST Appeal) |
| ILLINOIS ENVIRONMENTAL    | ) |              |
| PROTECTION AGENCY,        | ) |              |
|                           | ) |              |
| Respondent.               | ) |              |

ORDER OF THE BOARD (by A.S. Moore):

Today the Board accepts for hearing the amended petition of Johnson Oil Company, LLC (Johnson Oil), which seeks Board review of an underground storage tank (UST) determination of the Illinois Environmental Protection Agency (Agency). The Board also grants the motion of Johnson Oil's attorney to appear before the Board *pro hac vice* in this appeal.

Under the Environmental Protection Act (415 ILCS 5 (2002)), the Agency decides whether to approve proposed cleanup plans for leaking UST sites, as well as requests for cleanup cost reimbursement from the State's UST Fund, which consists of UST fees and motor fuel taxes. If the Agency disapproves or modifies a submittal, the UST owner or operator may appeal the decision to the Board. *See* 415 ILCS 5/40(a)(1), 57-57.17 (2002); 35 Ill. Adm. Code 105.Subpart D.

The Board issued an order in this case on May 6, 2004. In the order, at the parties' request, the Board extended until July 28, 2004, the time period for Johnson Oil to appeal a March 19, 2004 determination of the Agency. On July 30, 2004, the Board received Johnson Oil's petition, which was timely filed because it was postmarked on or before the July 28, 2004 filing deadline. *See* 415 ILCS 5/40(a)(1) (2002); 35 Ill. Adm. Code 101.300(b), 105.402, 105.406. However, as discussed in an August 5, 2004 order of the Board, the petition was signed by Dick Johnson as "Managing Member" of Johnson Oil, without any indication that he is an attorney. Under Illinois law, anyone other than an individual must be represented by an attorney in a Board adjudicatory proceeding. *See* 35 Ill. Adm. Code 101.400(a)(2). The Board granted Johnson Oil until September 4, 2004, to file an amended petition for review, accompanied by the appearance of an attorney.

On August 26, 2004, Johnson Oil filed an amended petition for review of the Agency's March 19, 2004 determination, accompanied by the appearance of an attorney. In the determination, the Agency modified Johnson Oil's High Priority Site Investigation Corrective Action Plan. The determination concerns a gasoline service station located at 629 West Champaign Road, Rantoul, Champaign County. Johnson Oil appeals on the grounds that the Agency reductions to the budget were unreasonable, arbitrary, and capricious. Johnson Oil also

alleges that the Agency, in making its determination, improperly used rate sheets that were not promulgated under the Administrative Procedure Act. Johnson Oil's petition meets the content requirements of 35 Ill. Adm. Code 105.408.

The Board accepts the petition for hearing. Johnson Oil has the burden of proof. *See* 35 Ill. Adm. Code 105.112(a). Hearings will be based exclusively on the record before the Agency at the time the Agency issued its determination. *See* 35 Ill. Adm. Code 105.412. Accordingly, though the Board hearing affords petitioner the opportunity to challenge the Agency's reasons for its decision, information developed after the Agency's decision typically is not admitted at hearing or considered by the Board. *See Alton Packaging Corp. v. PCB*, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987); *Community Landfill Co. & City of Morris v. IEPA*, PCB 01-170 (Dec. 6, 2001), *aff'd sub nom.* 331 Ill. App. 3d 1056, 772 N.E.2d 231 (3d Dist. 2002).

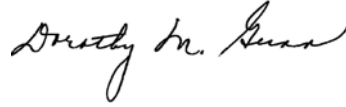
Hearings will be scheduled and completed in a timely manner, consistent with the decision deadline (*see* 415 ILCS 5/40(a)(2) (2002)), which only Johnson Oil may extend by waiver (*see* 35 Ill. Adm. Code 101.308). If the Board fails to take final action by the decision deadline, Johnson Oil may deem its request granted. *See* 415 ILCS 5/40(a)(2) (2002). Currently, the decision deadline is December 24, 2004, which is the 120th day after the Board received the amended petition. *See* 35 Ill. Adm. Code 105.114. The Board meeting immediately before the decision deadline is scheduled for December 16, 2004.

Unless the Board or the hearing officer orders otherwise, the Agency must file the entire record of its determination by September 27, 2004, which is the first business day following the 30th day after the Board received Johnson Oil's amended petition. *See* 35 Ill. Adm. Code 105.410(a). If the Agency wishes to seek additional time to file the record, it must file a request for extension before the date on which the record is due to be filed. *See* 35 Ill. Adm. Code 105.116. The record must comply with the content requirements of 35 Ill. Adm. Code 105.410(b).

Finally, Johnson Oil's petition includes a motion to allow attorney John D. Moriarty to appear *pro hac vice* in this proceeding on behalf of the company. Under the Board's procedural rules, attorneys who are licensed to practice in a state other than Illinois, but who are not licensed and registered to practice in Illinois, "may request to appear *pro hac vice* on a particular matter on a motion filed with the Board." 35 Ill. Adm. Code 101.400(a)(3). The motion to allow Moriarty to appear *pro hac vice* includes his affidavit, which provides that he is a licensed attorney admitted to practice law in Indiana, and is currently in good standing. The Board grants the motion.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on September 2, 2004, by a vote of 5-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn".

Dorothy M. Gunn, Clerk  
Illinois Pollution Control Board