

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ILLINOIS AYERS OIL COMPANY,)	
)	
Petitioner,)	
)	
v.)	Nos. PCB 03-70
)	PCB 03-214
ILLINOIS ENVIRONMENTAL)	PCB 05-048
PROTECTION AGENCY,)	(UST Appeals)
)	
Respondent.)	

NOTICE OF FILING AND PROOF OF SERVICE

TO: Dorothy Gunn, Clerk
Illinois Pollution Control Board
100 West Randolph Street
State of Illinois Building, Suite 11-500
Chicago, IL 60601

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, IL 62794-9274

John Kim
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue East
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PLEASE TAKE NOTICE that on May 31, 2005, I filed the original Notice of Filing and Proof of Service, Motion for Leave to File Reply in Support of Petition for Supplemental Attorneys' Fees Instanter and Reply in Support of Petition for Supplemental Attorneys' Fees with the Office of the Clerk of the Pollution Control Board by electronic filing with the Clerk's Office On-Line (COOL).

The undersigned certifies that he served the Notice of Filing and Proof of Service, Motion for Leave to File Reply in Support of Petition for Supplemental Attorneys' Fees Instanter and Reply in Support of Petition for Supplemental Attorneys' Fees by mailing a copy to the above persons by U.S. Mail on May 31, 2005.

Patrick D. Shaw

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THIS FILING SUBMITTED ON RECYCLED PAPER
BEFORE THE POLLUTION CONTROL BOARD

OF THE STATE OF ILLINOIS

ILLINOIS AYERS OIL COMPANY,)	
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**MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF PETITION FOR
SUPPLEMENTAL ATTORNEYS' FEES INSTANTER**

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

1. On May 26, 2005, Petitioner received a copy of the Motion for Leave to File Instanter Response to Petition for Supplemental Attorneys' Fees.
2. Said Response includes an affidavit of Doug Oakley, which consists of new information unavailable to Petitioner beforehand. Petitioner would be prejudiced if unable to respond to new information that it could not necessarily anticipate in its initial motion.
3. The Board is authorized to grant leave to file a reply if sought within fourteen days after service of the response.
4. Attached hereto is a Reply in Support of Petition for Supplemental Attorneys' Fees, which Petitioner asks leave to file *instanter*.

WHEREFORE, Petitioner prays for an order giving it leave to file the attached reply *instanter*, or for such other relief as the Board deems meet and just.

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Respectfully submitted,

ILLINOIS AYERS OIL COMPANY, Petitioner

By MOHAN, ALEWELT, PRILLAMAN & ADAMI

By _____
Patrick D. Shaw

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REPLY IN SUPPORT OF PETITION FOR SUPPLEMENTAL ATTORNEYS' FEES

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

I. THE ILLINOIS EPA HAS NOT ACTED DILIGENTLY.

To act in a "diligent" manner requires "steady, earnest, and energetic effort."
(Merriam Webster's Collegiate Dictionary (10th ed. 1993))

On August 5, 2004, the Board ordered the IEPA to pay Petitioner's litigation expenses, and the Board denied reconsideration of the same order on October 7, 2004.

The Board's Petroleum Underground Storage Tank rules state:

If the owner or operator has filed an appeal with the Board of the Agency's final decision on an application for payment, the Agency shall have 60 days after the final resolution of the appeal to forward to the Office of the State Comptroller a voucher in the amount ordered as a result of the appeal.

(35 Ill. Admin. Code § 732.603(a))

The IEPA argues that it had until November 16, 2004, to appeal the Board's

decision. This is wholly irrelevant given that the IEPA did not appeal and neither a party's deliberations, nor an appeal itself act to stay a final order. (35 Ill. Admin. Code § 101.906(c); S. Ct. R. 335(g)) Regardless of when "the final resolution of the appeal" is dated, that day has clearly come and gone.

Other than a December 15, 2004 memorandum in which the Division of Legal Counsel directed the LUST Claims Unit to pay the legal fees, no effort appears to have been made to forward the voucher to the Comptroller. Nor does Doug Oakley express any opinion as to when such a payment voucher might be forwarded. (Oakley Aff. at ¶ 8) This is not diligence.

The IEPA implies that the UST Fund has insufficient money to meet its liabilities. What Doug Oakley actually states is:

From November 2004 through May 2005, there have been payments [sic] delays in every month except for March 2005. These delays are attributable to the lack of an adequate balance in the UST Fund to pay all pending claims.

(Oakley Aff. at ¶ 10 (emphasis added))

Oakley does not actually testify that there was ever insufficient money to pay Petitioner. Instead, he describes a scenario in which the IEPA may be intentionally delaying payments in order to avoid an actual condition of insufficient funds that would trigger provisions to defer site investigation and corrective action. (415 ILCS 5/57.8(b)) In any event, there were adequate funds in March of 2005, so the assumption must be that as of March of 2005, the IEPA had failed to place Illinois Ayers on the priority list.¹

¹ The IEPA "shall form a priority list for payment and shall notify persons in such priority list monthly of the availability of funds and when payment shall be made." (415 ILCS 5/57.8(a)(3)) Oakley does not indicate that such notice was given, nor when payment can be expected. (Oakley Aff. at ¶ 8)

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Doug Oakley further states that “[t]he queue date associated with the payment voucher will be set as August 5, 2004.” (Oakley Aff. at ¶ 7 (emphasis added)) The assumption also must be that the queue date for Petitioner is not currently set as August 5, 2004. On April 12, 2005, the IEPA forwarded vouchers to the Comptroller for numerous sites with queue dates later than any of the Board’s previous orders, including a voucher for \$113,417.10 for the Des Plaines Oasis with an application acceptance date of December 10, 2004. (Pet. Supp. Atty Fees, Ex. E)² As of April 12, 2005, the Illinois Ayers site was clearly being treated as a site with less “priority” than one with a December 10, 2004, application acceptance date.

With respect to the issue of priority, the Board’s rules prioritize payments due as a result of an appeal to the Board:

Within 60 days after notification to an owner or operator that the application for payment or a portion thereof has been approved by the Agency or by operation of law, the Agency shall forward to the Office of the State Comptroller in accordance with subsection (d) or (e) of this Section a voucher in the amount approved. If the owner or operator has filed an appeal with the Board of the Agency's final decision on an application for payment, the Agency shall have 60 days after the final resolution of the appeal to forward to the Office of the State Comptroller a voucher in the amount ordered as a result of the appeal.

² Other vouchers were forwarded for Belvidere Oasis North (11/29/2004), Clark #5596 (11/16/2004), Dave’s Garage (11/19/2004), George Vitovec (11/16/2004), Lee’s Food Mart (11/19/2004), Leonard Henson (11/29/2004), Linker Oil Co. (11/18/2004), Munsterman Shell Station (11/30/2004), Simpson’s Auto Service (12/1/2004), and Vandalia Bus Garage (11/19/2004 and 11/22/2004).

(35 Ill. Admin. Code § 732.603(a) (emphasis added))

With respect to conventional applications for payment, payment must be “in accordance with subsection (d) or (e),” which contains the priority list provisions. With respect to payments authorized by the Board on appeal, no such condition attaches, meaning that such payments are not subject to the priority of earlier conventional payment applications. Such a superpriority is justified by the fact that Board appeals arise from much earlier events.

Whether or not payments arising from Board appeals should give rise to “superpriority,” there is no justification for treating Illinois Ayers worse than other sites. Unfortunately, it appears that “but for” the filing of this supplemental petition on April 18, 2005, the IEPA was not prepared to take any action for the foreseeable future.

II. THE SUPPLEMENTAL PETITION IS NOT BASED SOLELY ON THE ISSUE OF DELAY.

The IEPA responds solely to the complaint of delay, but Petitioners’ request was also premised on the same reasons that gave rise to the initial award (Pet. Supp. Atty Fees at ¶ 8) It is not uncommon for litigation concerning the appropriateness of an attorney fee award to give rise to litigation above and beyond that of the underlying case. In such cases it is appropriate to give a supplemental award of those additional legal expenses incurred after the initial petition was filed. See Citizens Organizing Project v. IDNR, 189 Ill.2d 593, 599 (2000) (ordering trial court to award legal fees, including costs of appealing trial court’s decision to deny legal fee award). The IEPA has failed to respond to this argument.

CONCLUSION

For the foregoing reasons, Petitioner renews its request for the relief sought in the Petition for Supplemental Attorneys' Fees.

Respectfully submitted,

ILLINOIS AYERS OIL COMPANY, Petitioner

By MOHAN, ALEWELT, PRILLAMAN & ADAMI

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