BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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

NOTICE

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

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

PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board a MOTION FOR RECONSIDERATION, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

John J. Kim
Assistant Counsel
Special Assistant Attorney General
Division of Legal Counsel
1021 North Grand Avenue, East
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Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)
Dated: September 14, 2004

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MOTION FOR RECONSIDERATION

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 101.520 and 101.902, and by motion filed no later than 35 days following the receipt of an order entered by the Illinois Pollution Control Board ("Board") on August 5, 2004, hereby respectfully moves the Board to reconsider that order in that the Board erred in its decision. The Illinois EPA received service of the Board's order on August 10, 2004. In support of this motion, the Illinois EPA states as follows:

I. STANDARD FOR REVIEW

The purpose of a motion for reconsideration is to bring to the court's or Board's attention newly-discovered evidence which was not available at the time of the hearing, changes in the law, or errors in the court's or Board's previous application of the existing law. Vogue Tyre & Rubber Company v. Office of the State Fire Marshal, PCB 95-78 (January 23, 2003), citing to, Citizens Against Regional Landfill v. County Board of Whiteside County, PCB 93-156 (March 11, 1993), and Korogluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 572 N.E.2d 1154 (1st Dist. 1992).

Here, the Illinois EPA argues that the Board incorrectly applied certain provisions of Title XVI of the Illinois Environmental Protection Act ("Act" (415 ILCS 5/57, et seq.) in

reaching its decision dated August 5, 2004 ("August 5th order" or "Order"). Specifically, the Board has misconstrued the provisions of Section 57.8(l) of the Act (415 ILCS 5/57.8(l)), and in doing so has reached a conclusion contrary to the clear and plain wording of the legislation passed by the General Assembly.

II. THE BOARD MISAPPLIED SECTION 57.8(l) OF THE ACT

As the Board noted in its August 5th order, the first question that needed to be addressed was whether the current proceeding fell within the parameters of Section 57.8(l) of the Act. The next question was whether the discretion conferred in that provision should be exercised. Order, p. 7. It is the position of the Illinois EPA that the Board's answer to the first question was incorrect, and thus there was no need to move to the second question.

The main concern of the Illinois EPA is that the Board failed to explain or justify its decision to deviate from the plain wording of Section 57.8(l) of the Act. That provision states:

> 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. (Emphasis added.)

The Board noted the Illinois EPA's argument that the emphasized language above should act to prevent the consideration of the Petitioner's request for payment of legal fees, since the appeal centered on submissions from the Petitioner (i.e., a corrective action plan and associated budget) that did not seek payment from the Underground Storage Tank Fund ("Fund").

The Board disagreed with the Illinois EPA's position, and instead decided that the corrective action plan and budget were within the scope of Section 57.8(l). To reach that conclusion, the Board observed that there were numerous steps in Title XVI that must be followed in order for an owner or operator to seek and receive reimbursement for costs related to a leaking underground storage tank ("LUST"). Order, p. 8. Further, the Board stated that the

only way an owner or operator ("O/O") could seek reimbursement for the remediation of a LUST was to follow the provisions of Title XVI. The Illinois EPA could approve or disapprove the O/O's actions at several points in the remediation of the site; if an appeal with the Board were not filed at any specific step, the O/O would have acquiesced to the Illinois EPA's final decision such that no further appeal could be taken. Id.

The Board thus found that, here, the Petitioner could not have sought reimbursement for the 10 additional borings at issue unless the corrective action plan and budget were appealed. Therefore, the only way for the Petitioner to seek and receive reimbursement for the corrective action plan was to file an appeal.

The Illinois EPA respectfully argues that although the Board's recitation of the overall statutory scheme involving remediation of LUST sites is accurate, the conclusions drawn therefrom are not reasonable. The issue here was not whether appeal rights should or should not have been exercised, or whether the Petitioner was put into a better position to seek reimbursement based upon its filing of an appeal. Rather, the issue was whether submitting a proposed corrective action plan and budget are considered seeking payment from the Fund pursuant to Section 57.8(l) of the Act. By the Board's rationale, it would have been impossible for the Petitioner to receive reimbursement for the 10 additional borings if the corrective action plan and budget were not appealed.

Following that reasoning, it would have been impossible for the Petitioner to receive reimbursement for any borings, much less the 10 additional borings, unless the site were classified as a high priority site. Therefore, the site classification work plan and budget should also be considered to be part of "seeking payment" under the August 5th order's guidelines. Indeed, review of proper site classification of a site is not possible unless the O/O has first

submitted a 20-day and 45-day report as to the background information and conditions at the LUST site. In short, each and every required step set forth in Title XVI or the Board's regulations regarding remediation are sufficiently linked to seeking payment such that, in the end, the use of the term "seeking payment" is useless and adds nothing to Section 57.8(l) of the Act. That being the case, the Board is interpreting the words "seeking payment" to be directly equivalent to "compliance" in the context of Section 57.8(l). The specific terminology employed by the General Assembly, limiting the scope of Section 57.8(l) to a certain activity (i.e., seeking reimbursement from the Fund), has thus been expanded to mean any step taken in compliance with Title XVI. As the Board itself declared, "The only way an owner or operator can seek reimbursement for remediation of a leaking underground storage tank site is by following the provisions of Title XVI." Order, p. 8.

The Board is clearly then interpreting Section 57.8(l) to mean that any step taken pursuant to Title XVI that is a prerequisite to seeking reimbursement is considered to be a step taken to seek payment from the Fund, even if no actual request to seek payment has been made. If an owner or operator only filed an appeal of a corrective action plan decision, with no mention of any related budget, then by the Board's rationale any successful appeal of that decision would qualify the owner or operator to seek payment of legal fees. However, at that point, just as in this case, there was no actual proof or evidence that the owner or operator would actually submit a request for payment from the Fund.

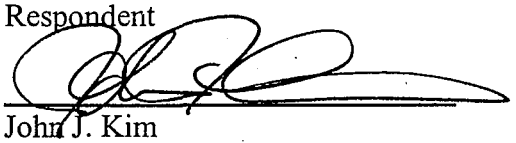
III. CONCLUSION

The Board's decision set forth in the August 5th order is incorrect in that it misconstrues the plain and clear wording found in Section 57.8(l) of the Act. The Illinois EPA respectfully

asks that the Board reconsider its decision of August 5, 2004, and deny the Petitioner's request for payment of legal fees.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



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Dated: September 14, 2004

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on September 14, 2004, I served true and correct copies of a MOTION FOR RECONSIDERATION, 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:

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

Fred C. Prillaman
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