

**JUL 21 2004**

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

**STATE OF ILLINOIS**  
**Pollution Control Board**

ILLINOIS AYERS OIL CO., )  
 )  
Petitioner, )  
 )  
v. ) PCB 03-214  
 ) (UST Appeal)  
ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY, )  
 )  
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

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Illinois Environmental Protection Agency  
1021 North Grand Avenue East  
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PLEASE BE ADVISED THAT we are today filing with the Pollution Control Board by U.S. mail the original and nine copies of Response in Opposition to Motion For Leave to Amendment to Response, a copy of which is attached hereto.

The undersigned hereby certifies that a true and correct copy of this Notice of Filing, together with a copy of the document described above, were today served upon the hearing officer and counsel of record of all parties to this cause by enclosing same in envelopes addressed to such attorneys at their business addresses as disclosed by the pleadings of record herein, with postage fully prepaid, and by depositing same in the U.S. Mail in Springfield, Illinois on the 16<sup>th</sup> day of July, 2004.

  
Patrick D. Shaw

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THIS FILING SUBMITTED ON RECYCLED PAPER

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**RESPONSE IN OPPOSITION TO MOTION**  
**FOR LEAVE TO AMENDMENT TO RESPONSE**

NOW COMES the Petitioner, Illinois Ayers Oil Co. ("Illinois Ayers"), by one of its undersigned attorneys, pursuant to Section 101.500(d) of the Pollution Control Board Procedural Rules (35 Ill.Adm.Code §101.500(d)), in opposition to the Motion for Leave to Amendment to Response filed by the Illinois Environmental Protection Agency ("Illinois EPA"), stating as follows:

1. The Illinois EPA is seeking permission to belatedly amend a late response to Illinois Ayers' Motion for Authorization of Payment of Attorneys Fees as Cost of Corrective Action.
2. As of this date, the Board has not accepted the Agency's initial untimely response.
3. Section 101.522 of the Pollution Control Board's Procedural Rules authorizes an extension of time for filing any document "for good cause shown." (35 Ill.Adm.Code §101.522)
4. The Illinois EPA claims that it has come into possession of new information about who actually paid the attorney fees in question.

5. The Agency knew, or at the very least had strong reason to know, that CSD Environmental was incurring the legal charges because Exhibit 1 to Petitioner's Motion was clearly identified as the summary of the CSD Environmental Services bill. Therefore, Respondent has not shown good cause to belatedly amend a late filing.

6. Petitioner would be prejudiced by the late filing because it raises numerous evidentiary and legal questions about the arrangements made to pay the legal costs in this case.

7. The identity of the person or persons who actually paid the attorney fees is completely irrelevant. In any given case, the legal costs of representing a party may actually be paid by a third party, such as an insurance company, a family member, a legal services organization, or any number of people under an infinite variety of contractual agreements, indemnities or settlements.

8. Here, the fee-shifting provision provides that "the Board may authorize payment of legal fees" in any case in which the owner or operator prevails before the Board. (415 ILCS 5/57.7(1)) The statutory language does not even require the legal fees to be incurred, let alone be paid or paid by anyone in particular. See In re: Marriage of Brent, 263 Ill.App.3d 916, 927 (4<sup>th</sup> Dist. 1994) (explaining that statutory award of fees "necessarily incurred" implied, albeit inconclusively, that the legal fees must be incurred to be awarded). In any event, the Agency does not claim that legal expenses detailed by affidavit and exhibit were not incurred in the present lawsuit.

9. Nor does the Act require that the legal cost be paid, let alone be paid solely by the owner/operator. (415 ILCS 5/57.7(1)) As a general rule, attorney fees need not have been paid at all in order to justify an attorney fee award. See Brosam v. Employers' Mutual Casualty Co., 61 Ill.App.2d 183, 198 (4<sup>th</sup> Dist. 1965). It is completely irrelevant whether or not the party

entitled to attorneys' fees actually paid attorney fees. Brubakken v. Morrison, 240 Ill.App.3d 680, 686 (1<sup>st</sup> Dist. 1992); see also Pitts v. Holt, 304 Ill.App.3d 871, 874 (1<sup>st</sup> Dist. 1999) (holding that whether or not the client agreed to pay a fee or whether the attorney agreed to accept any awarded attorney fees are not valid bases on which to deny or limit an attorney fee award). It is also irrelevant whether or not the attorney fees are paid by a third party. See, e.g., Pickering v. Holman, 459 F.2d 403, 408 (9<sup>th</sup> Circ. 1972) (holding that manufacturer's willingness to pay customer's legal costs is common and should not preclude fee award where customer prevails); Hernas v. Vickery Hills, 517 F.Supp. 592, 593 n.1 (N.D.Ill. 1981) (plaintiffs' fees paid by insurance company irrelevant in determining whether an award of fees is appropriate); American Council of Blind v. Romer, 962 F.2d 1501, 1503-04 (10<sup>th</sup> Circ. 1992) (refusing to bar an award of legal fees where the attorney was compensated by a third party; holding that "the type of financing arrangement involved in the case should not be used an independent basis on which to deny the plaintiffs their deserved fees."); ABC, Inc. v. Primetime 24, 67 F.Supp.2d 558, 562 (M.D.N.C. 1999) (holding that the fact that a third party has paid some or all of the prevailing party's legal fees does not bar recovery of statutory attorney fees, citing various statutes). The totality of the case law holds that the identity of the person paying the legal fees is of no consequence.

10. The award sought in the subject attorney fee petition is one to be granted to the owner/operator. Any interest any third-party may have in such an award is not relevant. Where the Respondent has failed to cite any authority for the legal relevance of this late allegation, the motion to amend should be denied.

11. The award of attorney fees in this case is proper because Petitioner's successful challenge of the Agency's decision reversed an environmentally unsound decision by the Agency

to the benefit of the Petitioner and the public. In addition, Petitioner's success in the litigation corrected a long-standing and erroneous practice by the Agency of secret rate-making, which also advanced the lawful and fair implementation of the LUST program. None of these benefits are reduced or minimized by virtue of the allegation that someone else may have paid legal costs.

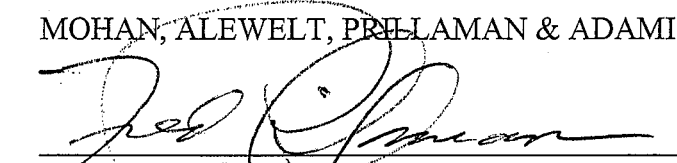

WHEREFORE, Petitioner prays for an Order denying Respondent leave to file amendment to response and in the alternative, if said motion is granted, that Petitioner be given leave to file such clarifying information as the Board deems relevant, and for such other relief as the Board deems meet and just.

Respectfully submitted,

ILLINOIS AYERS OIL CO., Petitioner

By MOHAN, ALEWELT, PRILLAMAN & ADAMI

By

  
Fred C. Prillaman  
  
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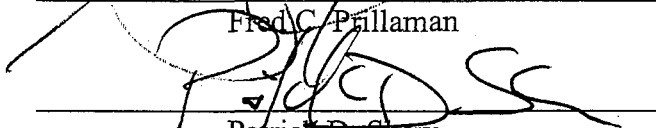
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