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JUL 08 2004

STATE OF ILLINOIS
Pollution Control Board

**BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS**

| | | |
|-----------------------------|---|----------------|
| ILLINOIS AYERS OIL COMPANY, |) | |
| Petitioner, |) | |
| v. |) | PCB No. 03-214 |
| ILLINOIS ENVIRONMENTAL |) | (LUST Appeal) |
| PROTECTION AGENCY, |) | |
| 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
Mohan, Alewelt, Prillaman & Adami
Suite 325
1 North Old Capitol Plaza
Springfield, IL 62701-1323

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 LEAVE TO FILE AMENDMENT TO RESPONSE and AMENDMENT TO RESPONSE, 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
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)
Dated: July 6, 2004

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STATE OF ILLINOIS
Pollution Control Board

**BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS**

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

MOTION FOR LEAVE TO AMENDMENT TO RESPONSE

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 101.500, hereby submits this motion for leave to file an amendment to the response to the Petitioner's motion for payment of attorneys' fees. In support of this motion for leave to amend, the Illinois EPA states as follows:

1. On or about May 3, 2004, the Petitioner, Illinois Ayers Oil Company, filed a motion for payment of attorneys' fees ("Petitioner's motion"). On May 21, 2004, the Illinois EPA filed a response to the Petitioner's request ("Illinois EPA's response"). Since that time, the Petitioner has filed a motion for leave to file reply and a reply, and the Illinois EPA has filed a motion for leave to file surreply and a surreply (to which the Petitioner has objected).

2. The Illinois EPA acknowledges that the response to the Petitioner's motion has already been filed. However, on June 21 and 22, 2004, testimony was provided in a rulemaking proceeding before the Illinois Pollution Control Board ("Board") that is relevant to the Board's decision on the Petitioner's motion. Had the Illinois EPA been in possession of this testimony at the time of filing its response, reference to the testimony would have been included.

3. Although the testimony post-dates the filing of the response, its content is relevant and thus should be considered by the Board in weighing the merits of the Petitioner's motion. It


would present a material prejudice to the Illinois EPA if this testimony were not considered, as it was provided under oath by a witness that also provided testimony in the present appeal. The testimony, which was given prior to the Board's ruling on the pending Petitioner's motion, bears on whether the Board should grant the motion for payment of attorneys' fees.

4. Specifically, the testimony addresses who actually paid the attorneys' fees in question. Given the nature of the testimony, the Board should have the ability to consider that fact before rendering its decision.

WHEREFORE, for the reasons stated above, the Illinois EPA hereby respectfully requests that this motion for leave to file an amendment to the Illinois EPA's response be allowed.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



John J. Kim
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| PROTECTION AGENCY, |) | |
| Respondent. |) | |

**AMENDMENT TO RESPONSE TO MOTION FOR AUTHORIZATION OF
PAYMENT OF ATTORNEYS' FEES AS COSTS OF CORRECTIVE ACTION**

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 101.500, hereby requests that the Illinois Pollution Control Board ("Board") deny the Petitioner's Motion For Authorization Of Payment Of Attorneys' Fees As Costs Of Corrective Action ("Petitioner's motion"). In support of this amended response, the Illinois EPA states as follows:

1. On May 21, 2004, the Illinois EPA filed a response to the Petitioner's motion ("Illinois EPA's response"). Assuming the Board grants the Illinois EPA's motion for leave to file this amendment, the Illinois EPA hereby incorporates the Illinois EPA's response.

2. Since the filing of the Illinois EPA's response, but before the Board has ruled on the Petitioner's motion, the Board has presided over separate hearings related to two rulemakings. Specifically, in those cases (In the matter of: Proposed Amendments to Regulations of Petroleum Leaking Underground Storage Tanks (35 Ill. Adm. Code 732), R04-22; and In the matter of: Proposed Amendments to Regulation of Petroleum Leaking Underground Storage Tanks (35 Ill. Adm. Code 734), R04-23 (Consolidated)) ("LUST Rulemakings"), the Board held hearings on June 21 and June 22, 2004, to hear testimony from participants.

3. Included in the witnesses providing sworn testimony on June 21, 2004, was Cindy Davis, a principal and the name member in the consulting company of CSD Environmental. Under questioning from Claire Manning, counsel for Professionals of Illinois for the Protection of the Environment ("PIPE"), Ms. Davis testified she provided testimony in the present case of Illinois Ayers Oil Company v. Illinois EPA, PCB 03-214. Ms. Davis testified that Illinois Ayers Oil Company was and still is a client of "CEC" (which is apparently a transcription error, and should have been referenced as "CSD"). LUST Rulemakings, June 21, 2004 transcript, p. 95.

4. Ms. Davis further testified that her opinion in the Illinois Ayers case was that the Illinois EPA's use of the "rate sheet" was unfair for a variety of reasons. She further testified:

Hence the reason we decided to appeal Ayers. I paid for the appeal on Ayers, and not the owner/operator. The reason I did is, I guess it was just something that stuck in me that I didn't feel was right, and it was affecting my business, driving the cost of cleanups up because all we were doing was spending time trying to justify why we were needing more money than the Agency was willing to give to us.

LUSt Rulemakings, June 21, 2004 transcript, p. 96.

5. Ms. Davis clearly testified that it was the consultant, CSD Environmental, and not the owner/operator, Illinois Ayers Oil Company, which initiated and paid for the appeal. This testimony was reiterated by Ms. Manning on a second day of testimony in the LUST Rulemakings proceedings. Ms. Manning stated:

Just to clarify this too, for purposes of the record, Cindy Davis testified on behalf of her company, that when she, you know, that it was her company that incurred the legal costs, you know, in terms of going forward to the Board as opposed to the owner/operator.

LUSt Rulemakings, June 22, 2004 transcript, p. 74.

6. Therefore, both Ms. Davis and Ms. Manning stated that it was CSD Environmental, not Illinois Ayers Oil Company, that incurred the legal costs of bringing the appeal in Illinois Ayers Oil. Further, they made clear that the owner/operator, Illinois Ayers Oil

Company, was not the party that paid any of those costs. Ms. Davis testified that the reason her company initiated the appeal was her company's concerns regarding the cost of doing business.

7. If the Board were to approve the payment of costs as sought by the Petitioner here, then it would be approving a payment of money to a party (the owner/operator, Illinois Ayers Oil Company) that did not incur any of the costs at issue. In effect, it would be subsidizing the legal activity of CSD Environmental, an entity that has no legal obligation, responsibility, or rights under the Illinois Environmental Protection Act ("Act") (415 ILCS 5/1, et seq.).

8. Only an owner/operator may receive payment of costs from the Underground Storage Tank Fund ("UST Fund"). If the Board approves the payment sought here, it would require that the Board find that the attorneys' fees are a corrective action that would be payable from the UST Fund pursuant to Section 57.8(l) of the Act (415 ILCS 5/57.8(l)).

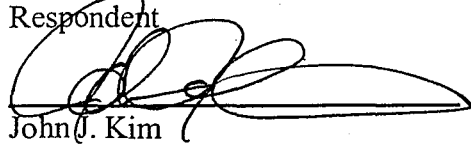
9. It is a fundamental concept to the Act that costs deemed eligible for reimbursement from the UST Fund are payable only to the owner/operator, under the basis that it is the owner/operator that incurs those costs. Here, the consultant to the owner/operator has testified under oath that the owner/operator did not incur those costs, and in fact did not make the decision to bring this appeal in its own name. Rather, it was the owner/operator's consultant that had a business concern, paid for the appeal, and now seeks to reap the benefits by way of payment of legal fees. To allow such a payment would open the door to other situations in which an owner/operator, in name only, seeks costs for reimbursement or payment from the UST Fund that were never actually incurred by the owner/operator. This is a bad precedent, and one that should be stopped now to prevent future erosion of the purposes of the Act.

WHEREFORE, for the reasons stated above, the Illinois EPA hereby respectfully requests that the Board enter an order denying the Petitioner's motion.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent



John J. Kim

Assistant Counsel

Special Assistant Attorney General

Division of Legal Counsel

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Springfield, Illinois 62794-9276

217/782-5544

217/782-9143 (TDD)

Dated: July 6, 2004

This filing submitted on recycled paper.

CERTIFICATE OF SERVICE


I, the undersigned attorney at law, hereby certify that on July 6, 2004, I served true and correct copies of a MOTION FOR LEAVE TO FILE AMENDMENT TO RESPONSE and AMENDMENT TO RESPONSE, 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
Mohan, Alewelt, Prillaman & Adami
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