

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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CLERK'S OFFICE

MAY 27 2005

STATE OF ILLINOIS
Pollution Control Board

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

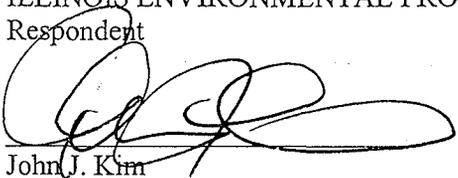
Fred C. Prillaman
Mohan, Alewelt, Prillaman & Adami
Suite 325
1 North Old Capitol Plaza
Springfield, IL 62701-1323

Carol Webb, 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 INSTANTER and RESPONSE TO PETITIONER'S PETITION FOR SUPPLEMENTAL ATTORNEYS' FEES, 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: May 25, 2005

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MOTION FOR LEAVE TO FILE INSTANTER
RESPONSE TO PETITION FOR SUPPLEMENTAL ATTORNEYS' FEES

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") grant the Illinois EPA leave to file instanter its Response to Petitioner's Petition for Supplemental Attorneys' Fees. In support of this motion, the Illinois EPA states as follows:

1. The Petitioner, Illinois Ayers Oil Company, served its Petition for Supplemental Attorneys' Fees upon the Illinois EPA on April 20, 2005. The Illinois EPA filed two subsequent motions for extension of time, seeking additional time to file a response to the Petitioner's petition.
2. Due to the work load of staff within the Illinois EPA, the response and accompanying affidavit were not finalized until the present date.
3. Counsel for the Illinois EPA regrets the delay in filing the response to the Petitioner's petition. The short delay should not prejudice the rights of the Petitioner, especially given that the payment voucher in question has been in the processing stage since well before the filing of the Petitioner's petition.

WHEREFORE, for the reasons stated above, the Illinois EPA hereby respectfully requests that the Board grant the Illinois EPA leave to file instanter its Response to the Petitioner's Petition for Supplemental Attorneys' Fees.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



John J. Kim
Assistant Counsel
Special Assistant Attorney General
Division of Legal Counsel
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STATE OF ILLINOIS
Pollution Control Board

RESPONSE TO PETITION FOR SUPPLEMENTAL ATTORNEYS' FEES

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 Petition for Supplemental Attorneys' Fees ("Petitioner's petition"). In support of this response, the Illinois EPA states as follows:

I. BACKGROUND

On April 1, 2004, the Board issued an order in this matter, resolving the issues raised on appeal by the Petitioner. As part of the order, the Board reversed in part and affirmed in part the Illinois EPA's final decision. On May 3, 2004, the Petitioner filed a motion with the Board, seeking a finding by the Board that the legal fees incurred as part of bringing the appeal be authorized for reimbursement pursuant to Section 57.8(l) of the Illinois Environmental Protection Act ("Act") (415 ILCS 5/57.8(l)).

On August 5, 2004, the Board entered an order, granting the Petitioner's request and ordering the Illinois EPA to reimburse the legal fees incurred by the Petitioner in the amount of \$44,456.49. On September 16, 2004, the Illinois EPA filed a motion for reconsideration, asking that the Board reconsider its decision. On October 7, 2004, the Board issued an order denying the Illinois EPA's motion for reconsideration and affirming the award of reimbursement of legal

fees. Included in the order issued by the Board was the statement that, pursuant to Section 41(a) of the Act (415 ILCS 5/41(a)), the Board's order may be appealed directly to the Illinois Appellate Court within 35 days after service of the order. The Illinois EPA received service of the Board's order on or about October 12, 2004. Thirty-five days from October 12, 2004, is November 16, 2004.

II. THE ILLINOIS EPA HAS ACTED DILIGENTLY

In the Petitioner's petition, the claim is made that the Illinois EPA has never appealed nor complied with the Board's August 5, 2004 final decision. Further, the Petitioner argues that by all appearances, the Illinois EPA is deliberately and systematically disregarding the Board's orders by refusing to reimburse the attorneys' fees. Petitioner's petition, p. 2.

The claims by the Petitioner are simply incorrect. As described above, the Illinois EPA sought the Board's reconsideration of its August 2004 order, as was the Illinois EPA's right, and in October 2004 the Board ruled on that request. The Illinois EPA had until the middle of November 2004 to decide whether or not to further file an appeal of the Board's ruling. It would be prejudicial to the Illinois EPA's rights, and indeed the rights of any party that appears before the Board, to find that taking the time to actively consider whether or not appeal of an order of the Board is a decision that should be held against the party. The Petitioner argues that the Illinois EPA has effectively done nothing since August 5, 2004, in response to the Board's order. Nothing could be further from the truth.

The Illinois EPA first exercised its right to ask the Board to reconsider its decision. When the Board issued a decision on that request, the Illinois EPA then took the time to consider whether an appeal to the Appellate Court should be taken. The time allowed by statute for a party, including the Illinois EPA, to decide whether or not to further appeal a decision is not time

that should be held against a party. At best, when the Illinois EPA decided not to appeal the Board's orders (and that decision did not have to be made until November 16, 2004), then the Petitioner could make a valid claim that action should be taken in response to the Board's ruling to award attorneys' fees.

After November 16, 2004, there was a short period of time that passed before the Illinois EPA's Leaking Underground Storage Tank Claims Unit ("LCU") was informed that steps needed to be taken to process the payment voucher for the fees. On December 15, 2004, a memorandum was sent from the Illinois EPA's Division of Legal Counsel to LCU instructing that such a voucher be processed. Affidavit of Doug Oakley, p. 1 (attached). The actual time between the expiration of the date by which to file an appeal and the memorandum to LCU was 18 business days.

While the Petitioner may argue that even 18 days is a long period of time, in practical terms it could not and should be interpreted as any intention decision to delay payment by the Illinois EPA of the legal fees. The truth of the matter is that at no time has there been any disregard or deliberate disobedience of the Board's order. All that has transpired since the final date by which the Illinois EPA could appeal the Board's decisions has been the systematic and normal handling of a payment voucher.

Further, since November 2004 to the present, there have been delays in payments from the Underground Storage Tank Fund ("UST Fund") with the exception of one month. The delays are attributable to the consistent lack of adequate balances in the UST Fund to allow for the payment of all pending vouchers. Oakley Affidavit, p. 2. When such shortages in the UST Fund balance occur, a priority list for payment is generated and payments are handled pursuant to the date on which a complete application for payment was received pursuant to Section

57.8(a)(3) of the Act (415 ILCS 5/57.8(a)(3)). The payment for the fees here is being handled no differently than all other payment vouchers for costs to be paid from the UST Fund, in that prioritization is utilized and some payments must wait until their priority has moved sufficiently high on the list.

The payment voucher for the fees awarded in the Board's August 2004 order is being processed, is on the priority list, and will be approved and paid when it moves high enough on the priority list. Oakley Affidavit, p. 1. This scenario is the same for each and every payment voucher on the list at this time. There has been no conspiratorial or disobedient act by the Illinois EPA to fail to pay the costs at issue; rather, the payment voucher is simply experiencing the same delays (due to the low balance of the UST Fund) that all other payment vouchers are experiencing.

III. CONCLUSION

The Illinois EPA has acted with all due and normal diligence in the handling of this matter, and has not disregarded any order of the Board in the process. The payment voucher for the attorneys' fees in the amount of \$44,456.49 is presently in the processing stage, and when it is due for payment a check will be issued. To treat this payment voucher differently than all other pending payment vouchers would be inconsistent with the statutory system of prioritization during times of low balance in the UST Fund. There is no malfeasance or nonfeasance on the part of the Illinois EPA that would warrant the imposition of any further fees in this matter. For these reasons, the Illinois EPA respectfully requests that the Board deny the Petitioner's petition.

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

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

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Dated: May 25, 2005

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STATE OF ILLINOIS)
) SS
SANGAMON COUNTY)

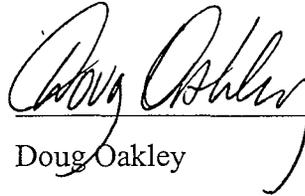
AFFIDAVIT

I, Doug Oakley, upon my oath, do hereby state as follows:

1. I am employed as the Manager of the Leaking Underground Storage Tank Claims Unit ("LCU") for the Illinois Environmental Protection Agency ("Illinois EPA").
2. As Manager of the LCU, I have reviewed the status of the pending payment voucher to pay certain corrective action costs (so deemed by the Illinois Pollution Control Board ("Board") in an order dated August 5, 2004, in the case of Illinois Ayers Oil Company v. Illinois EPA, PCB 03-214).
3. The requirement to pay the legal defense fees, found to be corrective action costs by the Board in its August 2004 order, totals \$44,456.49.
4. The voucher to pay Illinois Ayers Oil Company ("Ayers") is currently in the processing stage within Illinois EPA. The voucher is on a priority list, listed by queue date and amount, as prescribed by Section 57.8(a)(3) of the Illinois Environmental Protection Act ("Act") (415 ILCS 5/57.8(a)(3)). When the voucher moves sufficiently high on the priority list, it will be approved for payment and forwarded to the Office of the Comptroller in the same manner as all other vouchers currently on the priority list.
5. On December 15, 2004, a memorandum was sent to LCU from the Division of Legal Counsel requesting that steps be taken to process a payment voucher for the fees. Following receipt of the memorandum, LCU began processing the payment voucher in the same manner as all other requests for payment from the Underground Storage Tank Fund ("UST Fund").
6. There has been no intentional or deliberate attempt of any kind to delay or prevent the payment of the fees/costs that were the subject of the Board's August 2004 order.
7. The queue date associated with the payment voucher will be set as August 5, 2004, the date of the Board's order finding that the legal defense fees were corrective action costs.
8. It is difficult to estimate exactly when the payment voucher will be forwarded to the Office of the Comptroller, given the ever-changing status of the UST Fund balance and prioritization of payment vouchers.

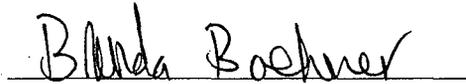
9. The present expectation is that new claims for payment from the UST Fund will take anywhere from six to nine months from the date of submission to payment by the Comptroller.
10. From November 2004 through May 2005, there have been payments delays in every month except for March 2005. These delays are attributable to the lack of an adequate balance in the UST Fund to pay all pending claims.
11. To the best of my knowledge, the information herein is true and accurate.

FURTHER AFFIANT SAYETH NOT.

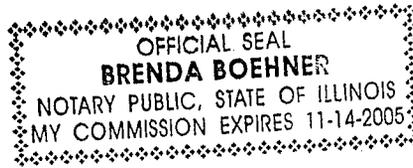


Doug Oakley

Subscribed and sworn to before me
this 25th day of May, 2005.



Notary Public



CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on May 25, 2005, I served true and correct copies of a MOTION FOR LEAVE TO FILE INSTANTER and RESPONSE TO PETITIONER'S PETITION FOR SUPPLEMENTAL ATTORNEYS' FEES, 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
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