

ILLINOIS POLLUTION CONTROL BOARD
June 16, 2004

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

ORDER OF THE BOARD (by G.T. Girard):

Illinois Ayers Oil Company (Ayers) filed a “Petition for Supplemental Attorneys’ Fees” (Pet.) on April 19, 2005. The Illinois Environmental Protection Agency (Agency) filed a response on May 27, 2005, along with a motion to file *instanter*, which is granted. On May 31, 2005, Ayers filed a motion for leave to file a reply and a reply. That motion is also granted. For the reasons discussed below, the Board denies the request for supplemental attorney’s fees.

BACKGROUND

On April 1, 2004, the Board reversed in part and affirmed in part a decision by the Agency concerning Ayers high priority corrective action plan (HPCAP) and budget for Ayers’ site in Beardstown, Cass County. Illinois Ayers Oil Company v. IEPA, PCB 03-214 (Apr. 1, 2004). Specifically, the Agency found that 10 of 13 direct push soil borings proposed by Ayers were in excess of the minimum requirements of Title XVI of the Environmental Protection Act (Act) (415 ILCS 5/Title XVI (2002)) because the soils were previously classified. Ayers, slip. op. at 5. The Board reversed the Agency’s modification to the HPCAP with regards to the number of soil borings and corresponding costs for personnel, equipment, handling charges, and investigation. The Board found that the HPCAP’s provision for 13 direct push soil borings was necessary to meet the minimum requirements of the Act and the Board’s regulations. The Board therefore restored to the budget the costs associated with the additional borings. Ayers, PCB 03-214, slip. op. at 17-18.

The Board affirmed the Agency’s modifications for shipping, analytical costs and miscellaneous retail purchases. Ayers, PCB 03-214, slip. op. at 18. The Board therefore affirmed the reductions from the budget for those items. Ayers, PCB 03-214, slip. op. at 18.

On May 3, 2004, Ayers filed a request for authorization of payment of attorney fees with the Board. Ayers sought \$44,456.49 in total legal costs for this proceeding. After considering the arguments in the motion and responses by the Agency, on August 5, 2004, the Board directed the Agency to reimburse Ayers \$44,456.49 in legal fees. The Agency filed a motion asking the Board to reconsider that order and on October 7, 2004, the Board denied that motion. Pursuant

to Section 41(a) of the Act, Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/31(a) (2002)); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706.

PETITION FOR SUPPLEMENTAL ATTORNEY'S FEES

Ayers is asking that the Board order the Agency to submit a voucher for \$44,456.49 within 30 days and if a voucher is not submitted timely, include interest. Pet. at 3. Ayers is also seeking an additional \$14,732.32 in legal expenses from the Agency. Ayers asserts that the "Agency is deliberately and systematically disregarding the Board's orders" by refusing to reimburse attorney's fees. Pet. at 2. Ayers has included an affidavit and billing statements for additional legal costs after April 30, 2004. Those additional legal expenses include legal expenses incurred responding to the Agency's opposition to the request for attorney's fees and seeking compliance with the Board's August 5, 2004 order. Pet. at 2-3.

AGENCY RESPONSE

The Agency maintains that Ayers is incorrect in alleging that the Agency has disregarded the Board's order. Resp. at 2. The Agency points out that the Agency sought reconsideration of the August 5, 2004 order awarding attorney's fees, which the Board denied on October 7, 2004. *Id.* The Agency then had until the middle of November 2004 to appeal the Board's decision if the Agency had decided to do so. *Id.* The Agency then took 18 working days to internally inform the UST claims unit that the reimbursement should be processed. Resp. at 3. The Agency further asserts that payments from the UST Fund have been delayed because of shortfalls in the UST Fund and claims are processed based on the priority assigned the request. *Id.* Based on these facts, the Agency maintains that the Agency has acted with due and normal diligence and the Agency has not disregarded the Board's order. Resp. at 4.

REPLY

In the reply, Ayers takes issue with the Agency's assertions that the Agency has acted with due and normal diligence. Ayers asserts that other claims dated after August 4, 2004 have in fact been sent to the comptroller's office for payment. Reply at 3. Ayers also claims that the affidavit of Mr. Doug Oakley does not assert that there were insufficient monies in the UST Fund, rather that the priority list was established and payments delayed. Reply at 2. Finally Ayers asserts that the Agency responded only to the issue of delay, while Ayers request is also premised on the same reasons that were initially established in the August 5, 2004 order. Reply at 4. Ayers maintains that "it is not uncommon for litigation concerning the appropriateness of attorney fee awards to give rise to litigation above and beyond that of the underlying case." *Id.*

DISCUSSION

Before reaching the merits of this filing, the Board must decide how to procedurally approach the filing. The filing by Ayers is captioned to include PCB 03-70 Illinois Ayers Oil Co. v. IEPA and PCB 05-48 Illinois Ayers Oil Co. v. IEPA. PCB 03-70 is still pending before the Board and no decision has been made concerning the contested costs, let alone determining

that attorney's fees are eligible for reimbursement. The Board dismissed PCB 05-48 because the case was not timely filed (*see Illinois Ayers Oil Co. v. IEPA PCB 05-48* (Jan. 6, 2005)). The only case where attorney's fees have been awarded is in PCB 03-214. Therefore the relief requested in Ayers' petition for supplemental attorney's fees is not relief that can be granted in PCB 03-70 and 05-48.

However, even with PCB 03-214, there are procedural problems. The time for requests to reconsider the Board's decision, as well as the time to file an appeal, have long past. *See* 415 ILCS 5/41(a) (2002); 35 Ill. Adm. Code 101.520. The docket is therefore closed in PCB 03-214. The Board's procedural rules do allow for relief from final orders if the motion is filed within one year of the Board's final decision. 35 Ill. Adm. Code 101.904(c). Section 101.904(b) provides:

On written motion, the Board may relieve a party from a final order entered in a contested proceeding for the following:

- 1) Newly discovered evidence that existed at the time of hearing and that by due diligence could not have been timely discovered;
- 2) Fraud (whether intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; or
- 3) Void order, such as an order based upon jurisdictional defects. 35 Ill. Adm. Code 101.904(b).

Ayers has not cited the Board's procedural rules, nor has Ayers specifically alleged that there is newly discovered evidence, fraud, misrepresentation or other misconduct, or that the order is void. Further, even if the Board were to interpret Ayers filing as seeking relief due to alleged misconduct of an adverse party, the alleged misconduct is actions and activities taken by the Agency since the Board entered the final order in PCB 03-214. Thus, Ayers is not actually seeking a modification of the order in PCB 03-214, but rather Ayers is seeking additional relief due to the Agency's lack of due diligence in complying with the Board's August 5, 2004 order. Further, the additional attorney's fees sought by Ayers are fees not originally requested before the Board entered the final order on August 5, 2004 or sought during the appropriate period for reconsideration.

The Board and the Agency were both created by the Environmental Protection Act. *See* 415 ILCS 5/4 and 5/5 (2002). As such, both the Board and the Agency only have the authority granted to them by the Act. *Granite City Division of National Steel v. PCB*, 155 Ill.2d 149, 613 N.E.2d 719, 729 (1993). Under the Act, the Board does not have the authority to "challenge the Agency's performance of its duties." *Landfill, Inc. v. PCB*, 74 Ill.2d 541, 387 N.E.2d 258, 265 (1978).

A review of the filings by Ayers establishes that the relief Ayers is seeking is relief that the Board cannot grant, even in PCB 03-214. Ayers is seeking additional attorney's fees for legal expenses incurred responding to the Agency's opposition to attorney's fees being awarded

and for fees “expended in attempting to seek Agency compliance with the Board’s August 5, 2004 order.” Pet. at 3. The Board finds that the request for these supplemental fees is not appropriate under 35 Ill. Adm. Code 101.904 as the request does not meet any of the criteria in Section 101.904(b).

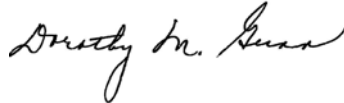
Next Ayers is seeking an order directing the Agency to submit a voucher for Ayers. The Board finds that such an order would also be inappropriate. The Board’s August 5, 2004 order directed the Agency to reimburse Ayers for the legal fees associated with the appeal in PCB 03-214. The Board cannot review the Agency performance of the Agency’s duties pursuant to that final order. See Landfill, Inc. 387 N.E.2d at 265. Therefore, the Board finds that the relief sought by Ayers is relief the Board cannot grant and the request is denied.

CONCLUSION

The Board finds that the requested relief is relief the Board cannot grant in this proceeding. Therefore, the Board denies Ayers request for supplemental attorney’s fees and an order directing the Agency to submit a voucher for Ayers.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on June 16, 2005, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board