

BEFORE THE POLLUTION CONTROL BOARD  
OF THE STATE OF ILLINOIS

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JUN 04 2004

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

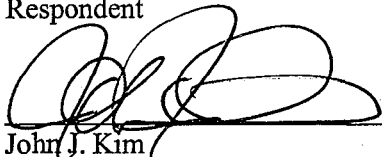
Fred C. Prillaman  
Mohan, Alewelt, Prillaman & Adami  
Suite 325  
1 North Old Capitol Plaza  
Springfield, IL 62701-1323

Carol 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 SURREPLY and SURREPLY, 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: June 2, 2004

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ILLINOIS ENVIRONMENTAL	)	(LUST Appeal)
PROTECTION AGENCY,	)	
Respondent.	)	

**MOTION FOR LEAVE TO FILE SURREPLY**

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(e), hereby submits this motion for leave to file a surreply to the reply filed by the Petitioner. In support of this motion for leave to file a surreply, the Illinois EPA states as follows:

1. On or about June 1, 2004, the Petitioner, Illinois Ayers Oil Company, filed its motion for leave to file reply ("motion for leave") and the accompanying reply ("reply") to the Illinois EPA's response to the Petitioner's request for payment of attorneys' fees. The Illinois EPA received notice of the motion for leave and the reply on June 1, 2004.

2. The Petitioner's reply contains three specific contentions or misstatements that are material errors raised for the first time. Those errors addressed in this surreply are: 1) The allegation that the Illinois EPA misinterpreted or misapplied the language of Section 57.8(1) of the Environmental Protection Act ("Act") (415 ILCS 5/57.8(1)) (Petitioner's reply, p. 3); 2) The allegation that the case of Ted Harrison Oil Company v. Illinois EPA, PCB 99-127, provides no guidance in the present appeal (Petitioner's reply, p. 8, footnote 2); and 3) The allegation that the only means for the Illinois EPA to reject excessive soil borings is in conjunction with a request for payment from the Underground Storage Tank Fund ("UST Fund") (Petitioner's reply, p. 9).

3. The Illinois EPA recognizes that the Board's procedural rules do not allow for the filing of a reply or surreply as a matter of right. Rather, pursuant to Section 101.500(e) of the Board's rules (35 Ill. Adm. Code 101.500(e)), a party seeking to file such a pleading must seek and be granted leave from the Board to do so to prevent material prejudice.

4. In the case of CDT Landfill Corporation v. City of Joliet, PCB 98-60 (March 5, 1998), the Board articulated guidelines for acceptance of a surreply. The Board stated that the motion for leave to file the surreply asserted that the surreply was necessary to correct material errors and misstatements in the reply. The Board granted the surreply to a limited extent, and noted that the denied portions of the surreply were not limited to correcting misstatements and material errors. Instead, the denied portions made additional arguments not necessitated by information or legal theories raised for the first time in the reply brief. CDT, p. 3.

5. Thus, the Board held that a surreply should correct material errors and misstatements raised for the first time in a reply. As identified in paragraph 2 above, the three errors identified in the Petitioner's reply meet that criteria.

WHEREFORE, for the reasons stated above, the Illinois EPA hereby respectfully requests that this motion for leave to file a surreply be allowed.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,  
Respondent

  
\_\_\_\_\_  
John J. Kim

Assistant Counsel  
Special Assistant Attorney General  
Division of Legal Counsel  
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Dated: June 2, 2004

This filing submitted on recycled paper.

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PROTECTION AGENCY,	)	
Respondent.	)	

**SURREPLY**

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(e), hereby submits this surreply to the reply filed by the Petitioner. In support of this surreply, the Illinois EPA states as follows:

**I. INTRODUCTION**

On or about June 1, 2004, the Petitioner, Illinois Ayers Oil Company, filed its motion for leave to file reply ("motion for leave") and the accompanying reply ("reply") to the Illinois EPA's response to the Petitioner's request for payment of attorneys' fees. The Illinois EPA received notice of the motion for leave and the reply on June 1, 2004.

The Petitioner's reply contains three specific contentions or misstatements that are material errors raised for the first time. Those errors addressed in this surreply are: 1) The allegation that the Illinois EPA misinterpreted or misapplied the language of Section 57.8(l) of the Environmental Protection Act ("Act") (415 ILCS 5/57.8(l)) (Petitioner's reply, p. 3); 2) The allegation that the case of Ted Harrison Oil Company v. Illinois EPA, PCB 99-127, provides no guidance in the present appeal (Petitioner's reply, p. 8, footnote 2); and 3) The allegation that the only means for the Illinois EPA to reject excessive soil borings is in conjunction with a request for payment from the Underground Storage Tank Fund ("UST Fund") (Petitioner's reply, p. 9).

## **II. THE ILLINOIS EPA CORRECTLY APPLIED TERMS IN SECTION 57.8(l)**

The Petitioner argues in its reply that the Illinois EPA misapplied terms in Section 57.8(l) of the Act, by making reference to the Petitioner's claim as one for "legal costs" instead of "legal fees." Petitioner's reply, pp. 2-3. The Illinois EPA's references and arguments in its response conform exactly to the Petitioner's initial request for payment of legal fees, as well as the language employed in Section 57.8(l) of the Act. While the Petitioner is correct that specific words used in a statute should be noted and given full effect, here the Illinois EPA has employed the terminology exactly as used in the statute.

Section 57.8(l) of the Act provides in part that legal defense costs include legal costs for seeking payment under this title. The Illinois EPA's reference to "legal costs" is consistent with the statutory language that states that the expenses in question relate to legal costs for seeking payment under Title XVI. Approval by the Board of "legal fees" would thus allow for payment of the "legal costs" referenced earlier. The Illinois EPA's use of the terminology, to the extent it has any relevance at all, is not inconsistent with Section 57.8(l). If the Board were to accept the Petitioner's unfounded allegations, it would create undue prejudice by stripping away key substantive parts of the Illinois EPA's arguments.

## **III. THE TED HARRISON CASE IS APPLICABLE**

Another misstatement made for the first time by the Petitioner is that the Ted Harrison case does not provide any guidance as to what constitutes the legal costs of seeking payment. Petitioner's reply, p. 8, fn. 2. This is interesting, since earlier the Petitioner cites favorably to the Ted Harrison case. Petitioner's reply, pp. 2-3.

In the Board's July 24, 2003 opinion in Ted Harrison, it was noted that the case was governed by (now repealed) Section 22.18b of the Act (415 ILCS 5/22.18b). Ted Harrison (July

24, 2003), pp. 4-6. However, on October 16, 2003, the Board issued another order in that case granting attorneys' fees. There, the Board cited only to Section 57.8(l) of the Act (and no other statutory provision) as the authority to grant payment of such fees. While the Board does not address why it applied Section 57.8(l), the fact remains that the Ted Harrison case is the only case issued by the Board thus far relying on Section 57.8(l) to award attorneys' fees. The case is therefore relevant and to ignore the holding would be prejudicial to the Illinois EPA.

Also, it should be noted that throughout the Board's October 16, 2003 order in Ted Harrison, the Board made repeated references to "legal defense costs" and specifically in its order stated that \$19,421.75 in attorney fees were to be paid for legal defense costs. This reference by the Board reinforces the propriety of the Illinois EPA's use of the term "legal costs" in its response, or at the very least nullifies the Petitioner's argument that only "legal fees" are at issue. The Illinois EPA's citation to the Ted Harrison case is clearly proper.

#### **IV. TECHNICAL DECISIONS TO PLANS ARE NOT RELIANT ON COST ISSUES**

Finally, the Petitioner for the first time makes the unfounded and patently false assertion that had it submitted a corrective action plan with an admittedly excessive number of proposed borings, but not sought payment from the UST Fund, the Illinois EPA would not have rejected the number of borings as excessive, nor could it have, since it is only the costs that those borings represent that would be objectionable under Section 57.7(c)(4)(C) of the Act (415 ILCS 5/57.7(c)(4)(C)). The Petitioner admits that a proper number of borings is a technical issue, but claims that the issue can only arise when the owner or operator is seeking payment from the UST Fund for the borings. Petitioner's reply, p. 9.

This is an unsupported and extremely misleading statement, as it attempts to portray the Illinois EPA's decision here to reduce the number of soil borings as one purely driven by

reimbursement concerns. Rather, as the Illinois EPA's final decision clearly stated, Section 57.7(c)(1) of the Act (415 ILCS 5/57.7(c)(1)) and Section 732.404 of the Board's regulations (35 Ill. Adm. Code 732.404) provide the technical requirements needed for an acceptable corrective action plan. There is no requirement upon any owner or operator to seek reimbursement of costs from the UST Fund, and therefore there is no requirement that an owner or operator submit a budget in tandem with a corrective action plan. If the owner or operator does wish to seek reimbursement, then a budget must be submitted and approved. But even if only a corrective action plan is submitted, the Illinois EPA has the ability pursuant to Section 57.7(c)(1) and Section 732.404 to issue a decision that modifies or rejects part or all of a proposed plan if they do not meet all requirements or guidelines imposed by the Act and Board regulations.

WHEREFORE, for the reasons stated above, if the Board grants the Petitioner leave to file a reply, the Illinois EPA hereby respectfully requests that this surreply also be allowed and accordingly that the Board deny the Petitioner's motion seeking approval of payment of attorneys' fees and/or costs.

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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Dated: June 2, 2004

This filing submitted on recycled paper.

## CERTIFICATE OF SERVICE


I, the undersigned attorney at law, hereby certify that on June 2, 2004, I served true and correct copies of a MOTION FOR LEAVE TO FILE SURREPLY and SURREPLY, 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  
Suite 325  
1 North Old Capitol Plaza  
Springfield, IL 62701-1323

Carol Sudman, Hearing Officer  
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