

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

EVERGREEN FS, INC.,	)	
Petitioner,	)	
	)	
v.	)	PCB No. 11-51; 12-61
	)	(consolidated)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
Respondent.	)	

**NOTICE OF FILING AND PROOF OF SERVICE**

TO: John T. Therriault, Acting Clerk	Carol Webb
Illinois Pollution Control Board	Hearing Officer
100 West Randolph Street	Illinois Pollution Control Board
State of Illinois Building, Suite 11-500	1021 North Grand Avenue East
Chicago, IL 60601	P.O. Box 19274
	Springfield, IL 62794-9274
Melanie Jarvis	
Assistant Council	
Illinois Environmental Protection Agency	
1021 North Grand Avenue East	
P.O. Box 19276	
Springfield, IL 62794-9276	

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board, pursuant to Board Procedural Rule 101.302 (d), a MOTION FOR AUTHORIZATION OF PAYMENT OF ATTORNEY'S FEES AS COSTS OF CORRECTIVE ACTION, a copy of which is herewith served upon the hearing officer and upon the attorneys of record in this cause.

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 and to said hearing officer with postage fully prepaid, and by depositing said envelopes in a U.S. Post Office Mailbox in Springfield, Illinois on the 27<sup>th</sup> day of July, 2012.

BY: /s/ Patrick D. Shaw

MOHAN, ALEWELT, PRILLAMAN & ADAMI

1 N. Old Capitol Plaza, Suite 325

Springfield, IL 62701-1323

Tel: (217) 528-2517

Fax: (217) 528-2553

THIS FILING SUBMITTED ON RECYCLED PAPER

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

EVERGREEN FS, INC.,	)	
Petitioner,	)	
	)	
v.	)	PCB No. 11-51; 12-61
	)	(Consolidated)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
Respondent.	)	

**MOTION FOR AUTHORIZATION OF PAYMENT OF  
ATTORNEY'S FEES AS COSTS OF CORRECTIVE ACTION**

NOW COMES Petitioner, EVERGREEN FS, INC., by its undersigned counsel, and pursuant to Section 57.8(1) of the Illinois Environmental Protection Act (415 ILCS 5/57.8(1)), petitions the Illinois Pollution Control Board (hereinafter "the Board") for an order authorizing payment of legal costs, and in support thereof states as follows:

1. On June 21, 2012, the Board reversed the Illinois Environmental Protection Agency (hereinafter "the Agency") and its denial of the two payment applications at issue in this consolidated appeal. The Board directed the Agency to make payment in the amounts requested consistent with its opinion.

2. Under Section 57.8(1) of the Environmental Protection Act, the legal costs for seeking payment under the Leaking Underground Storage Tank Program are reimbursable from the underground storage tank fund if the owner or operator prevails before the Board. (415 ILCS 5/57.8(1)).

3. Unquestionably, Petitioner has prevailed before the Board. "A prevailing party, for purposes of awarding attorney fees, is one that is successful on a significant issue and achieves some benefit in bringing suit." J.B. Esker & Sons, Inc. v. Cle-Pa's Partnership, 325 Ill. App. 3d

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276, 280 (5<sup>th</sup> Dist. 2001). The party need not necessarily succeed as to all issues. See Becovic v. City of Chicago, 296 Ill. App. 3d 236, 240 (5<sup>th</sup> Dist. 1998) (citing numerous cases in holding that party prevailed in obtaining \$2,750 judgment in suit seeking \$35,300).

4. The award of legal costs are discretionary with the Board. Ted Harrison Oil Co. v. IEPA, PCB 99-127 (Oct. 16, 2003). In Illinois Ayers Co. V. IEPA, PCB No. 03-214 (Aug. 5, 2004), petitioner urged the Board to follow federal precedents arising under public interest statutes, which assume that a prevailing party “should ordinarily recover an attorney’s fee unless special circumstances would render such an award unjust.” Hensley v. Eckerhart, 461 U.S. 424, 429 (1983). While the Board made no express comment on this presumption, Board precedent appears to favor the exercise of discretion in favor of an award since an award appears to have authorized by the Board in every case in which the petitioner has prevailed. See Ted Harrison v. IEPA, PCB No. 99-127 (Oct. 16, 2003) (awarding \$19,421.75 in legal fees); Illinois Ayers Co. v. IEPA, PCB No. 03-214 (Aug 5, 2004) (awarding \$44,456.49 in legal fees); Swif-T Food Mart v. IEPA, PCB No. 03-185 (Aug. 19, 2004) (awarding \$11,291.37 in legal fees); Webb & Sons, Inc. v. IEPA, PCB No. 07-24 (May 3, 2007) (finding award appropriate, but reducing claimed legal fees by 45 percent in light of petitioner’s failure to obtain reimbursement for 55% of the reductions sought to be reversed); Prime Location Properties v. IEPA, PCB No. 09-67 (Nov. 5, 2009) (awarding \$ 10,088.18 in legal fees and costs, which was substantially what was requested); Dickerson Petroleum v. IEPA, PCB Nos. 09-87; 10-5 (Dec. 2, 2010) (awarding \$53,019.29 in legal fees and costs); Zervos Three. v.IEPA, PCB No. 10-54 (June 2, 2011) (awarding \$73,347.88 in legal fees and costs); Wheeling/GWA Auto Shop, v. IEPA, PCB No. 10-70 (Sept. 22, 2011) (awarding \$17,030.46 in legal fees and costs, which was substantially

what was requested).

5. While the facts in this consolidated appeal are somewhat complicated and perhaps (and hopefully) unlikely to arise again, the Board made significant legal rulings regarding the nature of the LUST Program, such as the proper subjects of apportionment and the proper scope of Agency review of payment applications. The Board has previously recognized that the adjudication of contested cases is an essential element in the formation of the policies that govern the UST reimbursement program. Platolene 500 v. IEPA, PCB 92-9, at 12-14 (May 7, 1992). In challenging the Agency's decision, Petitioner has contributed to the body of law in which UST reimbursement decisions are based and controversies settled or adjudicated. None of which is to deny that the primary motivation behind this appeal is to receive payment for the approximately \$20,000 that was rejected by the Agency. The most immediate and direct purpose of statutory fee awards is to encourage such claims for reimbursement, particularly where not insisting on proper reimbursement may be less costly than litigation. See Chicago v. Illinois Commerce Com., 187 Ill. App. 3d 468, 470 (1st Dist. 1989).

6. Attached hereto as Exhibit A is an affidavit of Patrick D. Shaw, documenting the legal costs in this matter, which are \$13,473.80. This figure is the sum of the attorney fee billable time of Patrick D. Shaw (\$13,307.00) and costs (\$166.80). This affidavit is modeled on the one that undersigned counsel used in Prime Locations, and which was found sufficient to meet petitioner's prima facie burden of evidencing litigation costs.

7. As detailed in the attached affidavit, there are no legal costs being sought for the related pending appeal of the OSFM determination. Evergreen FS v. OSFM, PCB No. 12-127.

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WHEREFORE, Petitioner, EVERGREEN FS, INC. requests that this Board authorize the payment from the leaking underground storage tank fund the amount of \$13,473.80 in attorney's fees and litigation costs to EVERGREEN FS, INC., pursuant to 415 ILCS 5/57.8(1).

Respectfully submitted,

EVERGREEN FS, INC., Petitioner,

BY: MOHAN, ALEWELT, PRILLAMAN & ADAMI,  
Its attorneys

BY: /s/ Patrick D. Shaw

MOHAN, ALEWELT, PRILLAMAN & ADAMI  
1 N. Old Capitol Plaza, Suite 325  
Springfield, IL 62701-1323  
Tel: (217) 528-2517  
Fax: (217) 528-2553

STATE OF ILLINOIS        )  
  ) ss.  
COUNTY OF SANGAMON )

**AFFIDAVIT OF PATRICK D. SHAW**  
**VERIFYING ATTORNEY FEES**

Affiant, Patrick D. Shaw, being first duly sworn, states as follows:

1.       The statements made herein are based upon my personal knowledge, and I am competent to testify hereto.
  
2.       I am an attorney duly licensed to practice law in the State of Illinois; and I am the attorney of record for Petitioner, Evergreen FS, Inc. in the case entitled Evergreen FS, Inc. v. IEPA, PCB 11-51; 12-61.
  
3.       During the pendency of this appeal, my hourly billing rate was \$175.00 per hour, and was raised to \$185.00 per hour effective March of 2012.
  
4.       I began working on the appeal of the January 20, 2011 denial letter in February of 2011. As is my custom, I held off on immediately taking action on the appeal to see if settlement was possible. During this time, a second denial letter on the same issues, resulting in a second appeal in November of 2011.
  
5.       In January of 2012, it was decided to proceed to hearing, which was held February 15, 2012. To prepare for the haring, I reviewed the substantial administrative record filed by the Agency in late January and began drafting a summary of facts which could be used to determine the extent of testimony that would be needed at hearing, whether there are any additional documents needed to supplement the record, as well as to serve as the initial draft for the post-hearing brief.



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6. In March of 2012, I prepared the post-hearing brief and towards the end of April into early May, I prepared the post-hearing reply brief.

7. During this appeal, the consultant, Mike Keebler, had initiated administrative process with the Office of the State Fire Marshal ("OSFM"), concerning the subject matter of this dispute. I was not involved in any of these efforts until after I filed the post-hearing reply brief on May 1, 2012. On May 3, 2012, I filed an appeal of the OSFM's final determination (PCB No. 12-127) as a precautionary measure in the event the Board ruled it did not have jurisdiction over this appeal and the OSFM's final determination was deemed the appropriate forum. Since the Board ultimately ruled that it did have jurisdiction and granted the relief sought, it is our intention to dismiss the OSFM appeal. No legal costs pertaining to the OSFM appeal are sought herein.

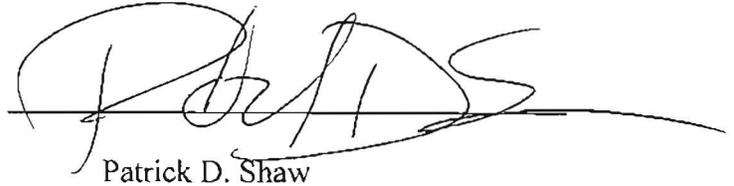
8. Attached hereto as Exhibit 1 is an accurate summary of the legal work done and the legal fees incurred with respect to this matter. This summary has been taken from the actual invoices and thus reflects actual work performed and fees incurred. The summary reveals the date the work was performed, the description of the work performed, the amount of time spent, and the total fees incurred. The hourly rates charged are commensurate with the prevailing rates for environmental legal services in Springfield, Illinois for 2012 and represent the rates charged to all clients.

9. My attorney fee billable time for this consolidated appeal was \$13,307.00, plus an additional \$166.80 in legal costs, primarily in the form of filing fees. The bookkeeping software was apparently unable to eliminate the legal costs of the OSFM appeal since they were not originally entered as a separate matter from the IEPA appeal. Thus, of the \$252.90 in legal costs

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evidenced in the attach print-out, \$86.10 incurred in May of 2012 are not being sought, leaving \$166.80 in costs sought herein.

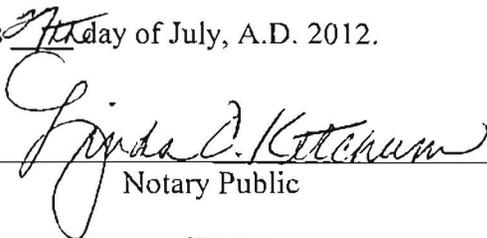
FURTHER AFFIANT SAYETH NOT.

  
Patrick D. Shaw

STATE OF ILLINOIS            )  
  ) SS.  
COUNTY OF SANGAMON )

The undersigned, a Notary Public in and for said County, in the State aforesaid, does hereby certify that Patrick D. Shaw, personally known to me to be the same person whose name is subscribed to the above instrument, appeared before me today in person and acknowledged that he signed and delivered that instrument as his free and voluntary act, for the uses and purposes set forth.

Given under my hand and official seal, this 27<sup>th</sup> day of July, A.D. 2012.

  
\_\_\_\_\_  
Notary Public

Patrick D. Shaw  
MOHAN, ALEWELT, PRILLAMAN & ADAMI  
1 N. Old Capitol Plaza, Suite 325  
Springfield, IL 62701  
Tel: (217) 528-2517  
Fax: (217) 528-2553



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

Invoice submitted to:  
Environmental Management Inc.  
1154 No. Bradforton Road  
Springfield IL 62707

June 30, 2012

In Reference To: General

## Professional Services

	<u>Hrs/Rate</u>	<u>Amount</u>
<u>February 2011</u>		
2/22/2011 Receive & review email from client w/ memo and attachments	0.30 175.00/hr	52.50
2/23/2011 Review fax from client and on-line information; tel Mike Keeber; draft and file petition for review	2.50 175.00/hr	437.50
SUBTOTAL:	[ 2.80	490.00]
<u>March 2011</u>		
3/1/2011 Review materials to prepare petition; email to client	0.50 175.00/hr	87.50
3/7/2011 Receive & review Board order accepting appeal	0.10 175.00/hr	17.50
3/21/2011 Receive & review Hrg Officer Order	0.10 175.00/hr	17.50
3/28/2011 Draft waiver of decision deadline	0.10 175.00/hr	17.50
3/31/2011 Draft email to Agency to query when case will be assigned	0.10 175.00/hr	17.50



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	<u>Hrs/Rate</u>	<u>Amount</u>
SUBTOTAL:	[ 0.90	157.50]
<u>May 2011</u>		
5/17/2011 Hearing Status Conference	0.10 175.00/hr	17.50
5/18/2011 Receive & review Hrg Officer order	0.10 175.00/hr	17.50
SUBTOTAL:	[ 0.20	35.00]
<u>June 2011</u>		
6/2/2011 Draft waiver of decision deadline	0.20 175.00/hr	35.00
SUBTOTAL:	[ 0.20	35.00]
<u>July 2011</u>		
7/19/2011 Telephone conference w/ Agency; tel conference w/ Hrg Officer and Agency	0.10 175.00/hr	17.50
7/22/2011 Receive & review Hrg Officer Order	0.10 175.00/hr	17.50
SUBTOTAL:	[ 0.20	35.00]
<u>August 2011</u>		
8/23/2011 Status Conf. w/ Board and Hearing Officer; follow-up e-mail re scheduling	0.10 175.00/hr	17.50
8/26/2011 Receive & review Hearing Officer Order	0.10 175.00/hr	17.50
8/29/2011 Draft and file limited waiver of decision deadline	0.10 175.00/hr	17.50
SUBTOTAL:	[ 0.30	52.50]

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	<u>Hrs/Rate</u>	<u>Amount</u>
<u>September 2011</u>		
9/14/2011 Review file; draft settlement position to Agency; send draft settlement to client for review	1.00 175.00/hr	175.00
SUBTOTAL:	[ 1.00	175.00]
<u>October 2011</u>		
10/18/2011 Telephone conference w/ Hrg Officer and Agency attorney	0.10 175.00/hr	17.50
10/24/2011 Receive & review Hrg Officer Order	0.10 175.00/hr	17.50
SUBTOTAL:	[ 0.20	35.00]
<u>November 2011</u>		
11/2/2011 Receive & review second decision to appeal for Evergreen	0.30 175.00/hr	52.50
11/7/2011 Telephone conference w/ Mike Keebler	0.30 175.00/hr	52.50
11/16/2011 Draft and file Petition for Review (Evergreen II)	3.50 175.00/hr	612.50
11/21/2011 Research and e-mail response to status of wells as part of UST or UST systems	4.10 175.00/hr	717.50
11/22/2011 Research add'l issue involving ust versus ust systems; e-mail update to client; tel conf. w/ client	1.30 175.00/hr	227.50
SUBTOTAL:	[ 9.50	1,662.50]
<u>December 2011</u>		
12/5/2011 Receive & review Board order accepting Petition for Hearing	0.20 175.00/hr	35.00
12/13/2011 Telephone conf. w/ Hrg Officer	0.10 175.00/hr	17.50

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	<u>Hrs/Rate</u>	<u>Amount</u>
12/13/2011 Telephone conference Jarvis re dispute and hearing; e-mail to client regarding discussions and directions for preparing for hearing	0.40 175.00/hr	70.00
12/15/2011 Receive & review Hrg Officer order; file waiver of decision deadline; file motion to consolidate	0.80 175.00/hr	140.00
SUBTOTAL:	[ 1.50	262.50]
<u>January 2012</u>		
1/11/2012 E-mail to Jarvis regarding tomorrow's status conf. and intent to request hearing date; e-mails to and from Jarvis re same	0.50 175.00/hr	87.50
1/17/2012 Telephone conference w/ Hrg Officer and IEPA; e-mail to Hrg Officer	0.10 175.00/hr	17.50
1/23/2012 Receive & review motion from Agency and briefly review copy of record	0.30 175.00/hr	52.50
SUBTOTAL:	[ 0.90	157.50]
<u>February 2012</u>		
2/1/2012 Receive & review e-mail from consultant regarding evidence of release; e-mail response	0.50 175.00/hr	87.50
2/2/2012 Receive & review e-mail regarding prep for upcoming hearing from consultant, receive response; e-mail time and directions	0.70 175.00/hr	122.50
2/9/2012 Review record; begin drafting fact summary and index	5.60 175.00/hr	980.00
2/10/2012 Continue review record and draft index and fact summary; e-mail query to consultant	6.20 175.00/hr	1,085.00
2/13/2012 Review cleanup record; supplement factual summary	5.80 175.00/hr	1,015.00
2/14/2012 Revise and finalize factual summary; revise and finalize index of record; e-mail questions for tomorrow's testimony to consultant	2.70 175.00/hr	472.50
2/15/2012 Prepare for hearing; tel conf. w/ consultant; hearing	2.60 175.00/hr	455.00

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	<u>Hrs/Rate</u>	<u>Amount</u>
2/20/2012 Receive & review Hrg Officer Order	0.20 175.00/hr	35.00
SUBTOTAL:	[ 24.30	4,252.50]
<u>March 2012</u>		
3/2/2012 E-mail to Keebler re status of OSFM decision	0.20 185.00/hr	37.00
3/13/2012 Revise factual statement for brief	2.90 185.00/hr	536.50
3/16/2012 Revise fact section of brief; draft first argument; incorporate transcript testimony into brief	4.90 185.00/hr	906.50
3/19/2012 Draft de minimis portion of brief; revise/shorten brief; modify index for appendix	4.50 185.00/hr	832.50
3/20/2012 Revise and file brief	3.00 185.00/hr	555.00
3/23/2012 E-mail to client copy of brief w/ explanation	0.30 185.00/hr	55.50
SUBTOTAL:	[ 15.80	2,923.00]
<u>April 2012</u>		
4/20/2012 Receive & review response to post-hearing motion and motion to dismiss	0.50 185.00/hr	92.50
4/27/2012 E-mail to client transmitting response brief; begin drafting reply	4.40 185.00/hr	814.00
4/30/2012 Research and draft reply brief	5.70 185.00/hr	1,054.50
SUBTOTAL:	[ 10.60	1,961.00]
<u>May 2012</u>		
5/1/2012 Revise and file reply brief	4.90 185.00/hr	906.50

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	<u>Hrs/Rate</u>	<u>Amount</u>
SUBTOTAL:	[ 4.90	906.50]
<u>June 2012</u>		
6/25/2012 Telephone conference w/ Hrg Officer and IEPA	0.10 185.00/hr	18.50
Receive & review Opinion and Order of Board finding Agency's decisions in error; e-mail copy to client	0.70 185.00/hr	129.50
6/27/2012 Receive & review status conf. report from Hrg Officer	0.10 185.00/hr	18.50
SUBTOTAL:	[ 0.90	166.50]
For professional services rendered Additional Charges :	74.20	\$13,307.00
<u>March 2011</u>		
3/28/2011 Check #26656 to Capital One for IPCB re Evergreen FS		75.00
SUBTOTAL:		[ 75.00]
<u>December 2011</u>		
12/29/2011 Check #27062 to Capital One, re IEPA, IL IPCB files fees		75.00
SUBTOTAL:		[ 75.00]
<u>March 2012</u>		
3/31/2012 Photocopying for March 2012.		16.80
SUBTOTAL:		[ 16.80]
<u>May 2012</u>		
5/30/2012 Check #27264 to Capital One re: IEPA/IPCB-File Petition for Review of OSFM Determination.		75.00
5/31/2012 Postage for May 2012.		1.30

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Environmental Management Inc.

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	<u>Amount</u>
5/31/2012 Photocopying for May 2012.	9.80
	<hr/>
SUBTOTAL:	[ 86.10]
	<hr/>
Total additional charges	\$252.90
Accounts receivable transactions	