

ILLINOIS POLLUTION CONTROL BOARD
September 6, 2012

EVERGREEN FS, INC.,)	
)	
Petitioner,)	
)	
v.)	PCB 11-51
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondents.)	
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EVERGREEN FS, INC.,)	
)	
Petitioner,)	
)	
v.)	PCB 12-61
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	(consol.)
PROTECTION AGENCY,)	
)	
Respondents.)	

OPINION AND ORDER OF THE BOARD (by D. Glosser):

Petitioner Evergreen FS, Inc. (Evergreen) appealed two determinations by the Illinois Environmental Protection Agency (Agency) on two applications by Evergreen for payment from the Underground Storage Tank Fund (UST fund). The Agency reduced the requested reimbursement amounts by 50%, apportioning the costs pursuant to Section 57.8(m) of the Environmental Protection Act (Act) (415 ILCS 5/57.8(m) (2010)). The Agency's determinations concern Evergreen's leaking underground storage tank (UST) site located at 808 North Union Street in Dwight, Livingston County.

On June 21, 2012, the Board found that the Board had jurisdiction to hear Evergreen's petitions for review of Agency determinations made in January and October 2011. Upon review of the record, the Board found that the Agency cannot apportion costs pursuant to Section 57.8(m) of the Act (415 ILCS 5/57.8(m) (2010)). The Board reversed the Agency's denial because the 1991 release that the Agency deemed to be ineligible for reimbursement in 1992 was determined by the Agency not to be an underground storage tank leak. The plain language of the Act allows apportionment only when some, but not all, tanks are eligible for reimbursement under the Act. Thus, the Agency cannot apportion reimbursements between a 1991 spill and the 2007 leak from an underground storage tank under Section 57.8(m) of the Act. 415 ILCS 5/57.8(m) (2010). Furthermore, the Board found that the Agency's decisions were in error because when reviewing a payment application seeking reimbursement for an approved plan or

budget, the Agency's review is limited to "auditing for adherence to the corrective action measures in the proposal". *See* 415 ILCS 5/57.8(a)(1) (2010).

On July 27, 2012, Evergreen filed a motion for authorization of attorney's fees as a cost of corrective action. Evergreen seeks \$13,473.80 in costs and fees. The Agency did not respond to the motion. For the reasons described below the Board grants the request for attorney's fees.

The Board first reviews the procedural history before summarizing Evergreen's motion. The Board will then provide the legal and statutory background and then explain the Board's reasoning.

PROCEDURAL HISTORY

On February 23, 2011, Evergreen timely filed a petition (Pet. 1) for review of a January 20, 2011 Agency determination to deny reimbursement from the UST fund in the requested amount and instead to reduce the payment by 50% because the incident (No. 910580) was ineligible. Pet. 1 at 2. On March 3, 2011, the Board accepted Evergreen's petition for hearing.

On November 16, 2011, Evergreen timely filed a second petition (Pet. 2) for review of an October 12, 2011 Agency determination to deny reimbursement from the same site in the requested amount and instead to reduce the payment by 50% because the incident (No. 910580) was ineligible. Pet. 2 at 2. On December 1, 2011, the Board accepted Evergreen's second petition for hearing.

On December 20, 2011 the Board granted a motion to consolidate both cases (PCB 11-51 and PCB 12-61) for the purposes of a hearing on grounds that the two requests for review and denials of reimbursement are similar. The Board consolidated the cases for decision.

On January 23, 2012, the Agency filed a motion for leave to file a reduced number of copies of the administrative record, asking the Board to allow two hard copies and one disc; the Agency simultaneously submitted copies of the administrative record. On February 15, 2012, a hearing was held before Hearing Officer Carol Webb in Springfield, Sangamon County. Evergreen filed its brief on March 20, 2012 and a reply was filed on April 30, 2012. The Agency filed its brief on April 20, 2012.

On June 21, 2012, the Board entered an opinion and order finding that Evergreen was entitled to reimbursement from the leaking UST fund. On July 27, 2012, Evergreen filed a motion for authorization of attorney's fees as a cost of corrective action (Mot.). Evergreen seeks \$13,473.80 in costs and fees. The Agency did not respond to the motion.

EVERGREEN'S MOTION

Evergreen argues that under Section 57.8(l) of the Act (415 ILCS 5/57.8(l) (2010)) legal costs for seeking payment from the UST fund are eligible for reimbursement if the tank owner prevails before the Board. Mot. at 3. Evergreen opines that it "unquestionably" prevailed before the Board and contributed to the case law on the issue of UST reimbursements. Mot. at 3, 5.

Evergreen notes that the awarding of legal costs is discretionary with the Board. Evergreen further opines that the Board seems to favor awarding attorney's fees in UST fund reimbursement cases where petitioner has prevailed. Mot. at 4. In support of this proposition, Evergreen cites to several Board cases where attorney's fees were awarded to the tank owner when prevailing before the Board. *Id.*

Evergreen attached an affidavit from its attorney, Patrick D. Shaw, documenting the legal costs in this proceeding. Mot. at 5, Exh. A. Mr. Shaw relates that he is a duly licensed attorney in Illinois, and that he attempted to negotiate a settlement in the matter before proceeding to hearing. *Id.* Mr. Shaw indicates that "to prepare for hearing, I reviewed the substantial administrative record filed by the Agency . . . and began drafting a summary of facts that 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." *Id.* Mr. Shaw also prepared a reply brief. *Id.* Evergreen seeks a total \$13,473.80 in fees and costs; \$13,307 in attorney's fees and \$166.80 in costs. The affidavit reflects an hourly rate of \$175 per hour raised to \$185 in March of 2012. The breakdown of costs includes preparing a petition for review and reviewing materials from Evergreen. Mot. Exh. A, Exh. 1.

Evergreen maintains that while the facts are complicated in this appeal, the Board made significant legal ruling regarding the UST fund, including the proper application of apportionment and scope of Agency review of payment applications. Mot. at 5. Thus, Evergreen opines it has contributed to the "body of law" in which UST reimbursement decisions are made. *Id.*

STATUTORY BACKGROUND

Title XVI of the Act sets forth the provisions for the administration and oversight of the Leaking Underground Storage Tank Program, which includes the UST fund. 415 ILCS 5/57 (2010). Title XVI also establishes requirements for eligible owners to seek reimbursement from the UST fund. 415 ILCS 5/57 (2010). If an owner or operator plans to seek reimbursement, the owner or operator must comply with the provisions of Title XVI. 415 ILCS 5/57.5(a) (2010). Section 57.7 sets forth requirements for remediation of a site where a leaking underground storage tank is removed, including the submission of a corrective action plan. 415 ILCS 5/57.7 (2010).

Section 57.8 of the Act sets forth when an owner or operator may seek reimbursement "after completion of the requirements of Sections 57.6 and 57.7, or after completion of any other required activities at the UST site." 415 ILCS 57.8 (2010). Section 57.8 of the Act also includes the timeframes for Agency determinations and the right to appeal a decision to the Board. 415 ILCS 5/57.8(a)(1) (2010). Section 57.8 of the Act addresses indemnification and what steps an owner or operator may take if the UST fund lacks sufficient funds to reimburse for the activities. 415 ILCS 57.8(a)(5) (2010).

Section 57.8(l) of the Act provides:

Corrective action does not include legal defense costs. Legal defense costs include legal costs for seeking payment under this Title unless the owner or operator prevails before the Board in which case the Board may authorize payment of legal fees. 415 ILCS 5/57.8(l) (2010).

DISCUSSION

Evergreen seeks reimbursement of \$13,473.80 in attorney's fees and costs from the UST fund. Mot. at 5. Initially, the Board observes that because the Agency filed no response to Wheeling's motion, the Agency is deemed to have waived any objection to the Board granting the motion. *See* 35 Ill. Adm. Code 101.500(d). The Agency's waiver, however, does not bind the Board in its disposition of the motion. *Id.* The Board will begin by addressing whether Evergreen "prevailed" before the Board. Then the Board will discuss whether the Board should exercise its discretion and award attorney's fees and costs.

Prevailing Before the Board

"The first question the Board must address is whether or not the proceeding falls within the parameters of the statutory provision." Illinois Ayers Oil Co. v. IEPA, PCB 03-214, slip op. at 7 (Aug. 5, 2004). The Board has required the reimbursement of legal fees and costs where the petitioner prevailed in appealing the Agency's rejection of a plan and budget under Section 57.7 of the Act. *See* Illinois Ayers, PCB 03-214, slip op. at 7-8. The Board found in Illinois Ayers that obtaining plan and budget approval is a prerequisite to UST fund reimbursement. *Id.* The Board therefore held that the petitioner was "seeking payment" within the meaning of Section 57.8(l) of the Act (415 ILCS 5/57.8(l) (2010)). *Id.* at 8. In this case, Evergreen's request for reimbursement is also "seeking payment" within the meaning of Section 57.8(l) of the Act (415 ILCS 5/57.8(l) (2010)).

The Board determined that it had jurisdiction to hear Evergreen's appeal of the Agency's denial of reimbursement for certain activities at Evergreen's site. The Board further found that the Agency cannot apportion costs under the Act except in cases where there are eligible and ineligible tanks. The Board reversed the Agency's determination. Thus, Evergreen prevailed before the Board. *See* Evergreen FS, Inc. v. IEPA, PCB 11-51, 12-61 (consld.) (June 21, 2012). Therefore, the Board finds that Evergreen is eligible for reimbursement of attorney's fees and costs under Section 57.8(l) of the Act (415 ILCS 5/37.8(l) (2010)).

Board's Discretion to Reimburse

"Second, the Board must also determine whether or not to exercise [its] discretion" to award legal fees and costs in this case. Illinois Ayers, PCB 03-214, slip op. at 7. In deciding whether to exercise its discretion, the Board considers the reasonableness of requested legal fees and costs before authorizing payment. *See* Prime Location Properties, LLC v. IEPA, PCB 09-67, slip op. at 4 (Nov. 5, 2009), *affirmed* IEPA v. PCB and Prime Location Properties, LLC, 2012 IL App(5th) 100072-U; Illinois Ayers, PCB 03-214, slip op. at 8-9; Swif-T-Food Mart v. IEPA, PCB 03-185, slip op. at 3 (Aug. 19, 2004). The party requesting legal fees and costs bears the burden of presenting sufficient evidence from which the Board can render a decision as to their

reasonableness. See Prime Location, PCB 09-67, slip op. at 4, citing J.B. Esker & Sons, Inc. v. Cle-Pa's Partnership, 325 Ill. App. 3d 276, 283 (5th Dist. 2001); Sampson v. Miglin, 279 Ill. App. 3d 270, 281 (1st Dist. 1996). The petitioner “‘must set forth with specificity the legal services provided, the identity of the attorney providing the legal services, an itemization of the time expended for the individual service, and the hourly rate charged.’” Prime Location, PCB 09-67, slip op. at 4, quoting J.B. Esker, 325 Ill. App. 3d at 283 (affirming award where attorney “‘submitted a detailed bill itemizing the time spent in fractions of an hour’”).

Although the petitioner must present a sufficient basis for determining whether the requested charges are reasonable, the Board may also consider the entire record and its experience and knowledge of the case in assessing whether the charges are reasonable. See Prime Location, PCB 09-67, slip op. at 4, citing Cretton v. Protestant Memorial Medical Center, Inc., 371 Ill. App. 3d 841, 868 (5th Dist. 2007); Sampson, 279 Ill. App. 3d at 281. In determining the reasonableness of Evergreen’s request, the Board may take into account a number of factors, including “‘the skill and standing of the attorneys employed, the nature of the case, the novelty and difficulty of the issues involved, the degree of responsibility required, the usual and customary charge for the same or similar services in the community, and whether there is a reasonable connection between the fees charged and the litigation.’” Prime Location, PCB 09-67, slip op. at 4, quoting Cretton, 371 Ill. App. 3d at 867-68 (setting forth factors trial court should consider to assess fee reasonableness); see also Sampson, 279 Ill. App. 3d at 281 (same).

Evergreen provided a detailed accounting of the attorney’s fees and costs being requested for reimbursement. See Mot. Exh. A and Exh. 1. Mr. Shaw is a licensed attorney and has appeared before the Board in other UST fund cases (see Prime Location, PCB 09-67, slip op. at 1). The total hours spent by Mr. Shaw on this appeal is 74.20 hours. The fees include filing fees and copying charges. The Board has awarded such costs in the past. See e.g. Wheeling /GWA Auto Shop v. IEPA, PCB 10-70, slip op. at 4 (Sept. 22, 2011), citing Prime Location, PCB 09-67, slip op at 5-6; see also Zervos Three, Inc. v. IEPA, PCB 10-54, slip op. at 6 (June 2, 2011).

The affidavit details the actions taken during the hours charged. Mot. Exh. A and Exh. 1. The actions include preparation of the petition for review, review of hearing officer orders and status calls, and preparation for hearing and the post-hearing brief. Further, the affidavit and itemization of costs is similar to that filed in Prime Location. The Board finds that the listings and itemization of fees and costs are sufficient to establish the work performed, who performed the work, and whether the work was reasonable. Thus, Evergreen has met its burden of presenting sufficient evidence from which the Board can render a decision as to the reasonableness of attorney’s fees and costs.

Based on the evidence in the affidavit and on the Board’s experience and knowledge of this case, the Board finds that the request for attorney’s fees and costs is reasonable. Furthermore, the Board finds that exercising its discretion under Section 57.8(l) of the Act (415 ILCS 5/57.8(l) (2010)) to award attorney’s fees and costs is appropriate. The issues in this appeal were significant issues and led to a decision with implications for future requests for reimbursement from the UST fund. Therefore, the Board awards \$13,307 in attorney’s fees and \$166.80 in costs for a total of \$13,473.80 in fees and costs.

CONCLUSION

On June 21, 2012, the Board found that the Board had jurisdiction to hear Evergreen's petitions for review of Agency determinations made in January and October 2011. Upon review of the record, the Board found that the Agency cannot apportion costs pursuant to Section 57.8(m) of the Act (415 ILCS 5/57.8(m) (2010)). The Board reversed the Agency's denial because the 1991 release that the Agency deemed to be ineligible for reimbursement in 1992 was determined by the Agency not to be an underground storage tank leak. The plain language of the Act allows apportionment only when some, but not all, tanks are eligible for reimbursement under the Act. Thus, the Agency cannot apportion reimbursement between a 1991 spill and the 2007 leak from an underground storage tank under Section 57.8(m) of the Act. 415 ILCS 5/57.8(m) (2010). Furthermore, the Board found that the Agency's decisions were in error because when reviewing a payment application seeking reimbursement for an approved plan or budget, the Agency's review is limited to "auditing for adherence to the corrective action measures in the proposal". *See* 415 ILCS 5/57.8(a)(1) (2010).

The Board today finds that Evergreen prevailed before the Board. The Board further finds it is appropriate to exercise the Board's discretion and award attorney's fees and costs to Evergreen. Therefore, the Board directs that \$13,473.80 be awarded to Evergreen from the UST fund as corrective action costs.

ORDER

1. The Board grants the request of Evergreen FS, Inc. (Evergreen) for authorization of payment of attorney's fees and costs.
2. The Board directs the Illinois Environmental Protection Agency to provide Evergreen with reimbursement from the UST fund for legal fees and costs in the amount of \$13,473.80

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2010); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on September 6, 2012, by a vote of 4-0.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal flourish at the end.

John T. Therriault, Assistant Clerk
Illinois Pollution Control Board