

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

PAK-AGS, INC.,)	
Petitioner,)	
)	
v.)	PCB No. 15-14
)	(UST Appeal)
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 N. Grand Avenue East
Chicago, IL 60601	P.O. Box 19274
	Springfield, IL 62794-9274

Melanie Jarvis
Illinois Environmental Protection Agency
1021 N. 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 MODIFICATION OF INTERIM ORDER AND 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 5th day of January, 2015

BY: /s/ Patrick D. Shaw

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

THIS FILING SUBMITTED ON RECYCLED PAPER

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

PAK-AGS, INC.,)	
Petitioner,)	
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v.)	PCB No. 15-14
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
Respondent.)	

**MOTION FOR MODIFICATION OF INTERIM ORDER AND AUTHORIZATION OF
PAYMENT OF ATTORNEY'S FEES AS COSTS OF CORRECTIVE ACTION**

NOW COMES Petitioner, PAK-AGS, 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 modifying its interim order and authorizing payment of legal costs, and in support thereof states as follows:

1. On December 4, 2014, the Board reversed the Illinois Environmental Protection Agency (hereinafter "the Agency"), and its June 23, 2014, determination, directed the Agency to reimburse Pak-Ags in the amount of \$16,595.90, and ordered Petitioner to file statements on legal costs.

2. Prior to addressing legal costs, however, Petitioner asks that the Board reconsider and review the amount approved, as Petitioner believes the amount should be \$17,562.48. Since the Board's order was an interim order, undersigned hopes this is an appropriate means of addressing this issue as it gives the Illinois EPA an opportunity to respond.

HANDLING CHARGES SHOULD BE INCLUDED IN THE FINAL ORDER.

3. The discrepancy of nearly \$1,000 is the result of the way in which the LUST

Program treats handling charges, an issue which was not addressed in the underlying briefs.

Petitioner requested reimbursement of \$17,562.48 (R.at 2), and at all times the Agency argued that there should be no reimbursement at all, for the reasons given in the denial letter unrelated to any specific concerns over proper handling charges. (R. at 4)

4. On January 29, 2014, the Agency approved Stage 1 Actual Costs, in the amount of \$16,595.90, with the following caveat:

Handling charges will be determined at the time a billing package is reviewed by the Illinois EPA. The amount of allowable handling charges will be determined in accordance with Section 57.1(a) of the Environmental Protection Act (Act) and 35 Illinois Administrative Code (35 Ill. Adm. Code) 734.635.

(R. at 40)

5. Handling charges are treated differently than other reimbursable expenses, as they are reimbursable as a percentage of actual subcontractor costs. (35 Ill. Adm. Code § 734.635) This ministerial task is not evaluated at the budget stage. (35 Ill. Adm. Code § 734.310(b) (“The budget must include . . . an estimate of all costs associated with the development, implementation, and completion of the site investigation plan, excluding handling charges . . .”)) Instead, the appropriate amount of handling charges is determined at the payment stage upon “proof of payment of subcontract costs for which handling charges are requested.” (35 Ill. Adm. Code § 734.605(b)(10))

6. Herein, there were \$8,286.75 in subcontractor costs identified in the application for payment (R. at 27), which were supported by proof of payment from the subcontractors (R. at 30-35) Pursuant to the handling charge formula in the regulations, \$928.68 was properly requested for handling charges at the application for payment stage.

7. The Board's order recognized that the initial budget approval expressly reserved the issue of handling charges at the reimbursement stage (Interim Opinion, at p. 19), so this issue may be a simple oversight. The Agency's denial letter did not identify any specific objections to the payment of handling charges or the proof of payment of subcontractors, and it is the denial statements which "frame the issue of fact or law in controversy." EPA v. PCB, 86 Ill.2d 390, 405 (1981). Therefore, Petitioners, ask that the final order include the \$928.68 in handling charges omitted in the interim order.

LEGAL DEFENSE COSTS AS PART OF CORRECTIVE ACTION

8. In the interim order, the Board recognized that Pak-Ags had prevailed and asked it to file a statement of its legal costs that may be eligible for reimbursement if the Board determines to exercise its discretion to reimburse legal fees. (Interim Order, at p. 21)

9. 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)).

10. 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), the 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, the Board appears

to have authorized payment of reasonable legal defense costs in all cases where petitioners have prevailed. Wheeling/GWA Auto Shop, v. IEPA, PCB No. 10-70 (Sept. 22, 2011); Evergreen FS v. IEPA, PCB No. 11-51 (Sept. 6, 2012); Zervos Three, v. IEPA, PCB No. 10-54 (June 2, 2011); Dickerson Petroleum v. IEPA, PCB Nos. 09-87; 10-5 (Dec. 2, 2010); Prime Location Properties v. IEPA, PCB No. 9-67 (Nov. 5, 2009); Swif-T Food Mart v. IEPA, PCB No. 03-185 (Aug. 19, 2004); Illinois Ayers Co. v. IEPA, PCB No. 03-214 (Aug 5, 2004). In exceptional circumstances, the Board has reduced the amount of recover, but still awarded substantial legal fees to the prevailing party. E.g., Webb & Sons. v. IEPA, PCB No. 07-24 (May 3, 2007) (award in proportion to degree of success); Prime Location Properties, PCB 09-67 (Nov. 15, 2012) (post-mandate attorneys fees disallowed).

11. Historically, the Board has initially and fully considered the reasonableness of the claimed legal defense costs before exercising its discretion to authorize their payment. Evergreen FS, v. IEPA, PCB No. 11-51 (Sept. 6, 2012).

12. Attached hereto is the Affidavit of Patrick D. Shaw, documenting the legal costs in this matter, which are \$10,355. This affidavit is modeled on previous affidavits utilized by undersigned counsel under similar circumstances and which have been found sufficient by the Board. E.g., Prime Location Properties v. IEPA, PCB No. 9-67, at p. 5 (Nov. 5, 2009), aff'd IEPA v. PCB, 2012 IL App (5th) 100072-U.

13. The Board has previously recognized undersigned counsel's experience in underground storage tank appeals, and substantially approved the legal defense costs requested in previous decisions. Evergreen FS v. IEPA, PCB No. 11-51, at p. 5 (Sept. 6, 2012) (awarding \$13,473.80); Prime Location Properties v. IEPA, PCB No. 9-67 (Nov. 5, 2009) (awarding

\$10,088.18). Shaw's hourly rate was \$185 per hour in 2012, and has been raised to \$200 per hour subsequently, which is still comparable to, if not less than, the rate of environmental legal services in Springfield, Illinois.

14. 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. Moreover, the benefits of this contribution are mostly to be appreciated by future Fund claimants that can look to Board precedent in shaping future decisions. 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).

15. With respect to the specifics of this appeal, the Board decision affirmed a crucial expectation that the LUST Program requires the Agency to raise objections to the approach taken in the plan and budget at the time the plan and budget are approved. The Board had previously reached a similar ruling in Evergreen FS, concerning the specific issue of apportionment. The ruling herein has potentially broader, more general applicability. The Board authorized reimbursement of legal costs in Evergreen FS, which had many similarities to this case, not only because of the Board's reliance on Evergreen FS herein (Interim Order at pp. 19-20), but both also involved several issues being raised, of which the Board exercised its prerogative to rule only on those issues necessary for resolution. Similarly, the Board should also exercise its discretion to authorize the award of the requested legal defense costs as corrective action.

WHEREFORE, Petitioner, PAK-AGS, INC., requests that this Board authorize the payment from the leaking underground storage tank fund the amount of \$10,355 in attorney's fees and litigation costs pursuant to 415 ILCS 5/57.8(1).

Respectfully submitted,

PAK-AGS, INC.,
Petitioner,

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

BY: /s/ Patrick D. Shaw

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

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, PAK-AGS, INC. in the case entitled PAK-AGS, INC. v. IEPA, PCB 15-14.

3. During the pendency of this appeal, my hourly billing rate was \$200 per hour, and I am generally familiar with the hourly rates of environmental attorneys practicing in Springfield, Illinois, and believe this rate to be comparable, if not less, than other such attorneys.

4. I began working on the appeal in July of 2014, when I received queries about the recent denial letter. I gathered information and filed a petition for review in late July.

5. By early September of 2014, I had the administrative record, which I began to summarize in preparation for hearing and briefing, which was conducted on September 17, 2014.

6. Most of the legal work was performed after the hearing in the form of drafting the briefs and responding to other post-trial issues.

8. Attached hereto as Exhibit 1 is an accurate summary of the legal work done and the attorney's fees incurred with respect to this matter. This summary has been taken from the law firm's billing program and 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 \$10,280. In addition, legal costs include the \$75.00 filing fee with the Board, bringing the total legal costs to \$10,355.

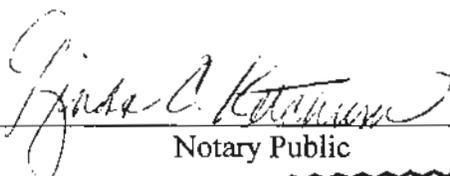
FURTHER AFFIANT SAYETH NOT.


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 5th day of January, A.D. 2015.


Notary Public



1/5/2015
11:40 AMMohan, Alewelt, Prillaman & Adami
Slip Listing

Page 1

Selection Criteria

Slip Classification Open
 Refe. Selection Include: Pack-AGs
 Slip Date Earliest - 12/10/2014

Rate Info - identifies rate source and level

Slip ID	Dates and Time	Attorney Activity	Units DNB Time	Rate Rate Info	Slip Value
Posting Status	Description	Client Reference	Variance	Bill Status	
6043	TIME	PDS	0.30	200.00	60.00
7/7/2014		T	0.00	T@1	
WIP	Telephone conf. w/ client; receive and tentatively review denial	Env'tl Mgt. Inc			
	Exported	Pack-AGs	0.00		
6057	TIME	PDS	1.00	200.00	200.00
7/21/2014		R	0.00	T@1	
WIP	Research regulations and site history; draft notes to file; e-mail query to client	Env'tl Mgt. Inc			
	Exported	Pack-AGs	0.00		
6058	TIME	PDS	0.20	200.00	40.00
7/22/2014		RR	0.00	T@1	
WIP	Receive & review response e-mail from client	Env'tl Mgt. Inc			
	Exported	Pack-AGs	0.00		
6064	TIME	PDS	4.40	200.00	880.00
7/25/2014		DR	0.00	T@1	
WIP	Draft and file petition for review; e-mail query to client; receive response	Env'tl Mgt. Inc			
	Exported	Pack-AGs	0.00		
6068	TIME	PDS	0.10	200.00	20.00
7/28/2014		RR	0.00	T@1	
WIP	Receive & review e-mail from client; respond w/ filed copy of appeal	Env'tl Mgt. Inc			
	Exported	Pack-AGs	0.00		
6096	TIME	PDS	0.50	200.00	100.00
8/13/2014		Email	0.00	T@1	
WIP	E-mail to client re strategy for appeal, background	Env'tl Mgt. Inc			
		Pack-AGs	0.00		



1/5/2015
11:40 AMMohan, Alewelt, Prillaman & Adami
Slip Listing

Page 2

Slip ID		Attorney	Units	Rate	Slip Value
Dates and Time		Activity	DNB Time	Rate Info	
Posting Status		Client		Bill Status	
Description		Reference	Variance		
Board decisions, etc.; receive reply Exported					
6098	TIME	PDS	0.20	200.00	40.00
8/15/2014		Email	0.00	T@1	
WIP		Env'tl Mgt. Inc			
E-mail to client re strategy		Pack-AGs	0.00		
Exported					
6104	TIME	PDS	0.40	200.00	80.00
8/19/2014		Email	0.00	T@1	
WIP		Env'tl Mgt. Inc			
E-mail to/from Hrg Officer; tel conf. w/ Hrg Officer and Jarvis re hrg, etc.		Pack-AGs	0.00		
Exported					
6139	TIME	PDS	3.00	200.00	600.00
9/3/2014		RR	0.00	T@1	
WIP		Env'tl Mgt. Inc			
Receive & review quick-claim deed from client; review administrative record from IEPA; prepare table of contents to record		Pack-AGs	0.00		
Exported					
6140	TIME	PDS	1.60	200.00	320.00
9/3/2014		Email	0.00	T@1	
WIP		Env'tl Mgt. Inc			
E-mail to client summarizing info in administrative record, opinions and strategy; receive e-mail from client re same		Pack-AGs	0.00		
Exported					
6143	TIME	PDS	0.10	200.00	20.00
9/6/2014		Email	0.00	T@1	
WIP		Env'tl Mgt. Inc			
E-mail to Jarvis re intent not to have witnesses and submit deed		Pack-AGs	0.00		
Exported					
6145	TIME	PDS	0.40	200.00	80.00
9/16/2014		RR	0.00	T@1	
WIP		Env'tl Mgt. Inc			
Receive & review e-mail from Jarvis re deed; e-mail to client re same; receive and review replies		Pack-AGs	0.00		
Exported					

1/5/2015
11:40 AMMohan, Alewelt, Prillaman & Adami
Slip Listing

Page 3

Slip ID	Dates and Time	Posting Status	Description	Attorney Activity Client Reference	Units DNB Time Variance	Rate Rate Info Bill Status	Slip Value
6147	9/17/2014	TIME	WIP Prepare and attend hrg before Hrg Officer; e-mail to client about hrg; review reply Exported	PDS P Env'l Mgt. Inc toPack-AGs	2.50 0.00 0.00	200.00 T@1	500.00
6158	9/17/2014	TIME	WIP Receive & review Hrg Report Exported	PDS RR Env'l Mgt. Inc Pack-AGs	0.10 0.00 0.00	200.00 T@1	20.00
6176	10/1/2014	TIME	WIP File waiver of decision deadline Exported	PDS FIL Env'l Mgt. Inc Pack-AGs	0.10 0.00 0.00	200.00 T@1	20.00
6185	10/2/2014	TIME	WIP Research and draft legal arguments for brief Exported	PDS R Env'l Mgt. Inc Pack-AGs	4.50 0.00 0.00	200.00 T@1	900.00
6186	10/3/2014	TIME	WIP Research and draft legal arguments Exported	PDS R Env'l Mgt. Inc Pack-AGs	2.90 0.00 0.00	200.00 T@1	580.00
6187	10/6/2014	TIME	WIP Research and draft legal arguments; draft fact summary Exported	PDS R Env'l Mgt. Inc Pack-AGs	3.80 0.00 0.00	200.00 T@1	760.00
6188	10/7/2014	TIME	WIP Revise brief Exported	PDS RV Env'l Mgt. Inc Pack-AGs	4.00 0.00 0.00	200.00 T@1	800.00
6189	10/8/2014	TIME	WIP Revise brief, exhibit/chrono summary, and fil	PDS RV Env'l Mgt. Inc Pack-AGs	3.50 0.00 0.00	200.00 T@1	700.00

1/5/2015
11:40 AMMohan, Alewelt, Prillaman & Adami
Slip Listing

Page 4

Slip ID	Dates and Time	Posting Status	Description	Attorney Activity Client Reference	Units DNB Time Variance	Rate Rate Info Bill Status	Slip Value
			Exported				
6181		TIME		PDS	0.10	200.00	20.00
	10/9/2014			Email	0.00	T@1	
	WIP			Env'tl Mgt. Inc			
			E-mail to Client transmitting recent brief	Pack-AGs	0.00		
			Exported				
6212		TIME		PDS	0.40	200.00	80.00
	10/28/2014			RR	0.00	T@1	
	WIP			Env'tl Mgt. Inc			
			Receive & briefly review Agency response; e-mail to client w/ preliminary comments; receive comments from client	Pack-AGs	0.00		
			Exported				
6215		TIME		PDS	5.00	200.00	1000.00
	10/31/2014			DR	0.00	T@1	
	WIP			Env'tl Mgt. Inc			
			Draft reply brief, obtain Fire Code from State Library	Pack-AGs	0.00		
			Exported				
6221		TIME		PDS	5.10	200.00	1020.00
	11/3/2014			RV	0.00	T@1	
	WIP			Env'tl Mgt. Inc			
			Revise and file reply brief	Pack-AGs	0.00		
			Exported				
6222		TIME		PDS	0.10	200.00	20.00
	11/6/2014			RR	0.00	T@1	
	WIP			Env'tl Mgt. Inc			
			Receive & review e-mail from IEPA re objection, and reply from Hrg Officer	Pack-AGs	0.00		
			Exported				
6224		TIME		PDS	0.60	200.00	120.00
	11/6/2014			Email	0.00	T@1	
	WIP			Env'tl Mgt. Inc			
			E-mail to client transmitting our reply brief and explaining issues	Pack-AGs	0.00		
			Exported				
6240		TIME		PDS	2.30	200.00	460.00
	11/13/2014			RR	0.00	T@1	
	WIP			Env'tl Mgt. Inc			
			Receive & review IEPA moton to file reply/strike; draft outline of issues for response; tel client	Pack-AGs	0.00		
			Exported				

1/5/2015
11:40 AM

Mohan, Alewelt, Prillaman & Adami
Slip Listing

Page 5

Slip ID	Dates and Time	Posting Status	Description	Attorney Activity Client Reference	Units DNB Time Variance	Rate Rate Info Bill Status	Slip Value
6241		TIME		PDS	3.00	200.00	600.00
	11/17/2014			DR	0.00	T@1	
		WIP		Env'tl Mgt. Inc			
			Draft and file response to motion to strike/file reply brief	Pack-AGs	0.00		
			Exported				
6295		TIME		PDS	1.20	200.00	240.00
	12/5/2014			RR	0.00	T@1	
		WIP		Env'tl Mgt. Inc			
			Receive & review Board order, forward to client w/ comments; receive question about amount; reply	Pack-AGs	0.00		
Grand Total				Billable	51.40		10280.00
				Unbillable	0.00		0.00
				Total	51.40		10280.00