

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

PIASA MOTOR FUELS, INC.,                    )  
Petitioner,                                        )  
  )  
v.    )     PCB 2018-054  
  )     (UST Appeal - Land)  
ILLINOIS ENVIRONMENTAL                    )  
PROTECTION AGENCY,                        )  
Respondent.                                    )

**NOTICE**

Don Brown, Clerk  
Illinois Pollution Control Board  
James R. Thompson Center  
100 West Randolph Street  
Suite 11-500  
Chicago, IL 60601

Carol Webb, Hearing Officer  
Illinois Pollution Control Board  
1021 North Grand Avenue East  
P. O. Box 19274  
Springfield, IL 62794-9274

Patrick D. Shaw  
Law Office of Patrick D. Shaw  
80 Bellerive Road  
Springfield, IL 62704

**PLEASE TAKE NOTICE** that I have today filed with the office of the Clerk of the Pollution Control Board

**RESPONSE TO PETITIONER'S MOTION FOR AUTHORIZATION OF PAYMENT OF ATTORNEY'S FEES AS**

**COSTS OF CORRECTIVE ACTION**, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,  
Respondent



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Melanie A. Jarvis  
Assistant Counsel  
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: May 28, 2020

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

PIASA MOTOR FUELS, INC.,	)	
Petitioner,	)	
	)	
v.	)	PCB 2018-054
	)	(UST Appeal - Land)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
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**RESPONSE TO PETITIONER'S MOTION FOR AUTHORIZATION OF PAYMENT OF ATTORNEY'S  
FEES AS COSTS OF CORRECTIVE ACTION**

**NOW COMES** the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, Melanie A. Jarvis, and hereby submits to the Illinois Pollution Control Board ("Board") its Response to Petitioner's Motion for Authorization of Payment of Attorney's Fees as Costs of Corrective Action. It is the Illinois EPA's position that Piasa Motor Fuels Inc. should not be awarded the legal fees it seeks.

**I. BACKGROUND**

On April 16, 2020, a Final Opinion and Order of the Board was entered in this matter. The Board granted, in part, the Agency's motion for summary judgment and found that the Agency properly denied Piasa's request to be reimbursed \$11,787.53 in costs incurred excavating backfill from its property. The Board granted, in part, Piasa's motion for summary judgment and ordered the Agency to approve reimbursement for an additional \$1,003.12 for excavation, transportation, and disposal of approximately 15 cubic yards of contaminated soil and to calculate and approve reimbursement for the handling charges related to the \$1,003.12 amount. The Board then denied the remainder of the Agency's and Piasa's motions for summary judgment.

## II. ARGUMENT

Section 57.8(l) of the Illinois Environmental Protection Act (“Act”), 415 ILCS 5/57.8(1), states that the Board “**may authorize** payment of legal fees” to an owner or operator that prevails before the Board in seeking payment under Title XVI of the Act. The Board, on April 16, 2020, issued a Final and Appealable Order. Having issued a final order, the Board did not authorize the parties file for payment of attorney fees. When the Board uses its discretion in awarding attorney fees, its past practice is to issue an interim order reserving ruling on the issue of legal fees. That was not done in this case; therefore, Petitioner’s Motion is not warranted since the Board has already issued a final order. Petitioner’s motion should be denied.

Even if the Board had entertained the issue of legal fees, at most, the Petitioner should receive only a portion of the legal fees requested as it only prevailed on a portion of the costs requested. As noted in Illinois Ayers Oil Company v. Illinois EPA, PCB 03-214 (August 5, 2004), this provision is a “fee-shifting” statute. Such statutes must be strictly construed since they are in derogation of common law. Miller v. Pollution Control Board, 267 Ill. App. 3d 160, 171; 642 N.E.2d 475, 485 (4<sup>th</sup> Dist. 1994); Globalcom, Inc. v. Illinois Commerce Commission, 347 Ill. App. 3d 592, 618; 806 N.E.2d 1194, 1214 (1<sup>st</sup> Dist. 2004) The Board has broad discretionary powers concerning the amount of fees to be awarded. Swif-T-Food Mart v. Illinois EPA, PCB 03-185, slip op. at 3 (August 19, 2004)

Illinois courts have recognized the general principle that a party is not entitled to fees on unsuccessful claims. Globalcom, 347 Ill. App. 3d 592, 618; 806 N.E.2d 1194, 1214. They have also acknowledged the difficulty in making such a determination in situations where discrete claims cannot be perceived, with one suggesting that a “court must evaluate whether the claims (1) involved a common core of facts or related legal theories and (2) whether the plaintiff achieved a level of success making it appropriate to award attorney fees for hours reasonably expended on the

unsuccessful claims as well.” Cannon v. William Chevrolet/GEO, Inc., 341 Ill. App. 3d 674, 687; 794 N.E.2d 843, 854 (1<sup>st</sup> Dist. 2004). But when courts can identify and separate claims, fees are awarded on only the successful claims for which fees are allowed. Franz v. Calaco Development Corp., 352 Ill. App. 3d 1129, 1151-1152; 818 N.E.2d 357, 377-378 (2<sup>nd</sup> Dist.2004)

Fee shifting statutes are not creatures of common law and they should neither be construed nor applied liberally. This is demonstrated by the fact that the general rule in Illinois law is that a party is not entitled to fees on unsuccessful claims.

Petitioner requested \$12790.65 in reimbursement and prevailed on 1,003.12. Therefore, Piasa prevailed on 7% of the case and would be able to recover only 7% of the attorney fees attributable to it. Piasa is asking for \$11,677.40 in attorney fees. Seven percent of that amount is \$817.42 in attorney fees attributable to the winning claim. This approach has been upheld by the Board in Webb and Sons v. IEPA, (May 3, 2007) PCB 2007-024. So at most, the Petitioner should be awarded \$817.42 if the Board had decided to authorize an award of attorneys fees, which as stated above, it did not.

### III. CONCLUSION

For all of the foregoing reasons and arguments presented herein, Piasa should not be awarded attorney fees.

Respectfully submitted,

**ILLINOIS ENVIRONMENTAL PROTECTION AGENCY**

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Melanie A. Jarvis  
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217/782-5544  
217/782-9143 (TDD)  
Dated: May 28, 2020

**CERTIFICATE OF SERVICE**

I, the undersigned attorney at law, hereby certify that on **May 28, 2020**, I served true and correct copies of **RESPONSE TO PETITIONER'S MOTION FOR AUTHORIZATION OF PAYMENT OF ATTORNEY'S FEES AS COSTS OF CORRECTIVE ACTION** via the Board's COOL system and email, upon the following named persons:

Don Brown, Clerk  
Illinois Pollution Control Board  
James R. Thompson Center  
100 West Randolph Street  
Suite 11-500  
Chicago, IL 60601

Carol Webb, Hearing Officer  
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