

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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

NOTICE OF FILING AND PROOF OF SERVICE

TO: Carol Webb, Hearing Officer Melanie Jarvis
 Illinois Pollution Control Board Division of Legal Counsel
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 Springfield, IL 62794-9274 Springfield, IL 62794-9276
 (Carol.Webb@illinois.gov) (Melanie.Jarvis@illinois.gov)

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board, MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF MOTION FOR ATTORNEY'S FEES INSTANTER, copies of which are herewith served upon the above persons.

The undersigned hereby certifies that I have served this document by e-mail upon the above persons at the specified e-mail address before 5:00 p.m. on the 11th of June, 2020. The number of pages in the e-mail transmission is 8 pages.

PIASA MOTOR FUELS, INC.

BY: LAW OFFICE OF PATRICK D. SHAW

BY: /s/ Patrick D. Shaw

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BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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

MOTION FOR LEAVE TO FILE
REPLY IN SUPPORT OF MOTION FOR ATTORNEY'S FEES INSTANTER

NOW COMES Petitioner, PIASA MOTOR FUELS, INC., by its undersigned counsel, pursuant to Section 101.500(e) of the Procedural Rules of the Illinois Pollution Control Board (35 Ill. Adm. Code § 101.500(e)), and move for leave to file reply in support of its Motion for Authorization of Payment of Attorney's Fees as Costs of Corrective Action, stating as follows:

1. On May 28, 2020, Respondent filed its Response to Petitioner's Motion for Authorization of Attorney's Fees as Costs of Corrective Action, claiming that the Board is precluded by failing to issue an interim order from granting the relief requested, and alternatively that any recovery should be limited to \$817.42.

2. Petitioner would be materially prejudiced if it were unable to reply to these new, novel arguments made in the Response.

3. Illinois Pollution Control Board rules authorize the filing of a motion seeking permission to file a reply within 14 days after service of the response. (35 Ill. Adm. Code 101.516(e))

4. This motion is filed 14 days after service of the response and seeks leave to file the reply instanter.

WHEREFORE, Petitioner, PIASA MOTOR FUELS, INC., requests that the Board authorize permission to file the attached reply instanter, and such other and further relief as the Board deems meet and just.

Respectfully submitted,

PIASA MOTOR FUELS, INC.
Petitioner,

BY: LAW OFFICE OF PATRICK D. SHAW
Its attorneys

BY: /s/ Patrick D. Shaw

Patrick D. Shaw
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REPLY IN SUPPORT OF MOTION FOR ATTORNEY’S FEES

NOW COMES Petitioner, PIASA MOTOR FUELS, INC., by its undersigned counsel, pursuant to Section 101.500(e) of the Procedural Rules of the Illinois Pollution Control Board (35 Ill. Adm. Code § 101.500(e)), reply in support of its Motion for Authorization of Payment of Attorney's Fees as Costs of Corrective Action, stating as follows:

1. The Illinois Environmental Protection Agency (hereinafter “the Agency”) argues that Petitioner’s Motion is not warranted because the Illinois Pollution Control Board (hereinafter “the Board”) did not issue an interim order reserving ruling on the issue of legal fees. There is no legal authority presented in support of this contention, just a claim to “past practice.” (Response, at p. 2) The Board has previously awarded legal fees without an “interim order,” and without any reference to legal fees. See Chatham BP v. IEPA, PCB 14-1 (Feb. 5, 2015); Evergreen FS v. IEPA, PCB 11-51 (Sept. 6, 2012); 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); Ted Harrison Oil Co. v. IEPA, PCB 99-127 (Oct. 16, 2003). Since the issue of whether a party prevailed in a proceeding cannot be assessed until a judgment is reached, a post-judgment motion is the proper procedure to seek an attorney-fee award. Touchdown Sportswear, Inc. v. Hickory Point Mall Co., 165 Ill.App.3d 72,

74 (4th Dist. 1987).

2. The Agency's citation to Miller v. Pollution Control Board, 267 Ill. App. 3d 160, 171 (4th Dist. 1994) is inapposite. That case addressed the question of whether the Board's authority to award "hearing costs" included attorney's fees. Here, there is no question that the statutory language authorizes the award of attorney's fees, nor any question raised as to the terms of Section 57.8(l) of the Act.

3. The General Assembly gave the Board discretion to award legal costs as corrective action, so long as the movant is deemed a prevailing party. Contrary to the Agency's argument, the legislative choice to provide an attorney-fee shifting provision in a statute is generally understood as intending to encourage parties to pursue legal remedies. See Melton v. Frigidaire, 346 Ill.App.3d 331, 339 (1st. Dist. 2004). Indeed, to the best of undersigned counsel's knowledge, the Board has always awarded a prevailing party legal defense costs.

4. The Agency does not dispute that Petitioner was a prevailing party, but that Petitioner only prevailed in part. The Board recently discussed such issues in Abel Investments, LLC v. IEPA, PCB 16-108 (March 2, 2017). The Agency conspicuously ignores this Board precedent.

5. In Abel Investments, the Board awarded all of the legal costs of a partially successful appeal. In doing so, it recognized the discretion to exclude "the hours spent on unsuccessful claims." Id. slip op. at 3. In Abel as here, the attorney's time was "devoted generally to the litigation as a whole." Id. Given that much of the analysis herein was performed by the consultant in extended correspondence with the Agency, the legal work herein largely consisted of reproducing that analysis with a common statement of facts, as well as a response to

a motion to dismiss on jurisdictional grounds that treated the issues as having a single common core. The Board's ruling rejecting the motion to dismiss similarly treated the appeal as involving a single common core.

6. Notably, the litigation costs sought here are on the low-side of Board awards for the legal costs of the entire proceeding before the Board: City of Benton Fire Department v. IEPA, PCB 2017-001 (May 24, 2018) (\$20,357.80); Abel Investments, LLC v IEPA, PCB 2016-108 (March 2, 2017) (\$13,519.37); Knapp Oil Co. v. IEPA, PCB 2016-103 (Nov. 17, 2016) (\$9,990.38); Burgess v. IEPA, PCB 15-186, at p. 11 (Nov. 5, 2015) (\$11,304.16); Chatham BP v. IEPA, PCB 15-173 (Sept. 3, 2015) (\$11,485.08); McAfee v. IEPA, PCB 15-84 (May 21, 2015) (\$10,315.00); PAK-AGS v. IEPA, PCB 15-14 (March 5, 2015) (\$16,595.90); Chatham BP v. IEPA, PCB 14-1 (Feb. 5, 2015) (\$21,314.70); Wheeling/GWA Auto Shop v. IEPA, PCB 10-70 (Sept. 22, 2011) (\$17,030.46); Evergreen FS v. IEPA, PCB 11-51 (Sept. 6, 2012) (\$13,473.80); Zervos Three, v.IEPA, PCB 10-54 (June 2, 2011) (\$73,347.88); Dickerson Petroleum v. IEPA, PCB 09-87 (Dec. 2, 2010) (\$53,019.29); Prime Location Properties v. IEPA, PCB 09-67 (Nov. 5, 2009) (\$10,088.18); Swif-T Food Mart v. IEPA, PCB No. 03-185 (Aug. 19, 2004) (\$11,291.37); Illinois Ayers Co. v. IEPA, PCB No. 03-214 (Aug 5, 2004) (\$44,456.49); Ted Harrison Oil Co. v. IEPA, PCB 99-127 (Oct. 16, 2003) (\$19,421.75)¹ In other words, if Petitioner had sought a more limited review, the litigation costs would likely be little different because the attorney hours were "devoted generally to the litigation as a whole." Abel Investments, slip op. at 3.

7. In Abel Investments, the Board also followed Illinois law in "focus[ing] on the

¹ This list does not include Board awards of partial litigation costs, or those which include costs of administrative review in the Appellate Court.

significance of the overall relief obtained by the plaintiff.” Cannon v. William Chevrolet/Geo, Inc., 341 Ill. App. 3d 674, 687 (1st Dist. 2003) (cited in Abel Investments, slip op. 3-4). The Agency does not address the issue and it appears that the Board’s finding in Abel of “significant issues regarding IEPA’s review and determination under the UST program” is the primary distinction with Webb & Sons v. IEPA, PCB 07-24 (May 3, 2007). Moreover, the Agency’s assertion that legal fees should be reduced in proportion to the amount of any recovery is not supported by the Board’s ruling that attorney fees need not “be proportionate to an award of money damages.”) Abel Investments, slip op. at 4 (citing Cannon, 341 Ill. 3d at 686). The purpose of a fee award is to make adjudicatory review of Agency determinations economically feasible, a purpose that is defeated by an award of \$817.42 in attorney fees when any such review will range from \$10,000 to almost \$80,000.

WHEREFORE, Petitioner, PIASA MOTOR FUELS, INC., requests that the Board authorize payment from the Leaking Underground Storage Tank Fund the amount of \$11,677.40 in attorney’s fees and litigation costs pursuant to 415 ILCS 5/57.8(l), and such other and further relief as the Board deems meet and just.

Respectfully submitted,

PIASA MOTOR FUELS, INC.
Petitioner,

BY: LAW OFFICE OF PATRICK D. SHAW
Its attorneys

BY: /s/ Patrick D. Shaw

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