

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

RELIABLE STORES, INC.,)
)
 Petitioner,)
)
 v.) PCB 19-2
) (UST Appeal)
 OFFICE OF THE STATE FIRE MARSHAL,)
)
 Respondent.)

NOTICE OF ELECTRONIC FILING

To: Patrick D. Shaw Carol Webb
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Don Brown
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PLEASE TAKE NOTICE that on the 22nd day of July, 2021, I caused to be served with the Clerk of the Illinois Pollution Control Board, Respondent's Motion for Leave to File Reply and Reply in Support of Respondent's Motion for Stay of Petitioner's Motion for Authorization of Payment of Attorney's Fees as Costs of Corrective Action *Instantly*, a true and correct copy of which is attached hereto and is hereby served upon you.

OFFICE OF THE STATE FIRE MARSHAL

By: /s/ Daniel Robertson
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CERTIFICATE OF SERVICE

I, DANIEL ROBERTSON, an Assistant Attorney General, do certify that I caused to be served this 22nd day of July, 2021, the attached Notice of Electronic Filing and Respondent's Motion for Leave to File Reply and Reply in Support of Respondent's Motion for Stay of Petitioner's Motion for Authorization of Payment of Attorney's Fees as Costs of Corrective Action *Instante*, upon the persons listed on the Notice of Electronic Filing *via email*.

/s/ Daniel Robertson
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v.)	PCB 19-2
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**RESPONDENT’S MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF
RESPONDENT’S MOTION FOR STAY OF PETITIONER’S MOTION FOR
AUTHORIZATION OF PAYMENT OF ATTORNEY’S FEES AS COSTS OF
CORRECTIVE ACTION INSTANTER**

The Office of the State Fire Marshal (“OSFM”), by Kwame Raoul, the Attorney General of the State of Illinois, moves the Illinois Pollution Control Board (“Board”), pursuant to 35 Ill. Adm. Code 101.500(e), for leave to file its Reply in support of Respondent’s Motion for Stay of Petitioner’s Motion for Authorization of Payment of Attorney’s Fees as Costs of Corrective Action (“Stay Motion”), and to accept Respondent’s Reply *instanter*. In support thereof, the OSFM states as follows:

MOTION FOR LEAVE TO FILE REPLY

1. Section 101.500(e) of the Board’s procedural rules provides that a person may reply “as permitted by the Board or the hearing officer to prevent material prejudice.” 35 Ill. Admin. Code 101.500(e).
2. On May 5, 2021, Reliable Stores, Inc. (“Reliable Stores”) filed its Motion for Authorization of Payment of Attorney’s Fees as Costs of Corrective Action (“Fees Motion”). On June 10, 2021, the OSFM filed an unopposed motion for extension of time to file a responsive

pleading to the Fees Motion. On June 18, 2021, the Board's Hearing Officer granted the unopposed motion for an extension of time to file a responsive pleading.

3. On June 24, 2021, the OSFM filed Respondent's Motion for Stay of Petitioner's Motion for Authorization of Payment of Attorney's Fees as Costs of Corrective Action.

4. On July 8, 2021, Reliable Stores filed Petitioner's Response in Opposition to Respondent's Motion for Stay ("Response").

5. Reliable Stores introduces new arguments in its Response, including an argument opposing the timeliness of the Stay Motion and an argument that the Fees Motion should be granted without any expectation that the OSFM be able to file a response. Response at 3.

6. The OSFM would be materially prejudiced if unable to respond to Reliable Store's heretofore unknown arguments.

WHEREFORE, the OSFM respectfully requests that the Board or Hearing Officer enter an Order granting this Motion for Leave to File Reply, and permit the OSFM to enter the below Reply in support of its Stay Motion *instanter*.

OFFICE OF THE STATE
FIRE MARSHAL

By KWAME RAOUL
Attorney General of the, State of Illinois

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RESPONDENT’S REPLY IN SUPPORT OF RESPONDENT’S MOTION FOR STAY OF PETITIONER’S MOTION FOR AUTHORIZATION OF PAYMENT OF ATTORNEY’S FEES AS COSTS OF CORRECTIVE ACTION

The OSFM seeks to stay the Board’s ruling on Reliable Stores’ May 5, 2021 Motion for Authorization of Payment of Attorney’s Fees as Costs of Corrective Action (“Fees Motion”), because ruling on the Fees Motion is premature in light of a pending appeal of the April 1, 2021 Opinion and Order of the Board, and because jurisdiction has shifted to the First District Appellate Court. Alternatively, should the Board deny the request for a stay, the OSFM requests an opportunity to respond to the Fees Motion. Reliable Stores now opposes the timeliness of the OSFM’s motion for stay, opposes the stay request pending the Appellate Court’s determination, and opposes the Board affording the OSFM an opportunity to respond to the fees sought in the Fees Motion, including fees relating to matters on which Reliable Stores did not prevail.

The Board should grant the motion for stay because, ultimately, authorizing legal fees as costs of corrective action pending the Appellate Court’s review may lead to an absurd result unintended by the General Assembly, and because the Board does not have jurisdiction to rule on the Fees Motion at this time.

I. THE MOTION FOR STAY IS TIMELY.

On May 5, 2021, Reliable Stores filed its Fees Motion and attempted to serve the OSFM through e-mail. The OSFM's counsel, however, did not receive notice of the Fees Motion until June 7, 2021. By June 10, 2021, counsel for the OSFM had relayed the notice discrepancy to counsel for Reliable Stores, conferred with Reliable Stores' counsel on an unopposed motion for an extension of time, and filed said extension request with the Board. Notably, the motion for extension of time sought only the 14 days authorized by the Board's procedural rules, and specifically requested the opportunity to file a "responsive filing." On June 18, 2021, the Board's Hearing Officer granted the request, and on June 24, 2021, the OSFM timely filed its motion for stay.

Reliable Stores objects to the timeliness of the motion for stay but provides no alternative for when such motion would have been timely other than the obvious timeframe within which to file an initial response. Motions for stay are provided for within both the Board's procedural rules (35 Ill. Adm. Code 101.514) and the Rules of the Supreme Court of Illinois (Ill. S. Ct. Rule 335). Attempting to paint provided-for motions as either unjust or "a second major litigation" detracts from rights reasonably afforded to the OSFM. The Board should therefore find the motion for stay was timely filed.

II. THE BOARD SHOULD STAY A DETERMINATION ON THE FEES MOTION BECAUSE THE *STACKE* FACTORS FAVOR A STAY, INCLUDING THE THREAT OF IRREPARABLE HARM SHOULD THE APPELLATE COURT REVERSE THE BOARD'S APRIL 1, 2021 DECISION.

As discussed in the OSFM's motion for stay, the Board considers several factors when considering a stay, including: (1) whether a stay is necessary to secure the fruits of the appeal if the movant is successful, (2) whether the status quo should be preserved, (3) the respective rights

of the litigants, (4) whether hardship on other parties would be imposed, and (5) whether there is a “substantial case on the merits.” People v. AET Envtl., Inc., PCB 07-95 (June 20, 2013), slip op. at 4 (citing Stacke v. Bates, 138 Ill. 2d 295, 304-06 (1990)); People v. Toyal, Inc., PCB 00-211 (Sep. 16, 2010), slip op. at 4-6. Reliable Stores mischaracterizes or otherwise wholly ignores the arguments addressed in the OSFM’s application of these factors.

First, Reliable Stores mischaracterizes the Supreme Court’s ruling in Stacke v Bates, 138 Ill.2d 295 (1990), by alleging that a likelihood of success on the merits is “a very important consideration under the Stacke analysis.” Response at 5. In fact, the Supreme Court in Stacke emphasized that a movant for stay is “not required to show a probability of success on the merits” and that a finding of a likelihood of success is only necessary when “the balance of the equitable factors does not strongly favor the movant.” Stacke v. Bates, 138 Ill.2d 295, 309 (1990). Even under Reliable Stores’ misapplication of the Stacke analysis, it essentially only presents two arguments negating whether the OSFM has presented a substantial case on the merits. First, Reliable Stores attempts to portray the OSFM’s substantive claim as a violation of the Administrative Procedures Act (an allegation only supported by citing to a general definition). Response at 5. Second, Reliable Stores raises the lack of a dissenting Board opinion or motion for reconsideration of the Board’s underlying decision to conclude that the OSFM lacks a substantial claim on the merits (a conclusion which would nullify almost all motions for stay). *Id.* at 6. Neither of these are factors addressed by the Illinois Supreme Court in Stacke, and an analysis of the likelihood of success is unnecessary given the weight of the Stacke factors in favor of staying a determination on the Fees Motion.

Reliable Stores next states that a determination that its legal fees are corrective action costs would go to the Illinois Environmental Protection Agency (“Illinois EPA”) and that payment would be made from the Leaking Underground Storage Tank Fund. Response at 5, 6. Reliable Stores does not address the OSFM’s concern that there exists no obvious mechanism to recover any legal costs paid out of the Underground Storage Tank Fund should the Appellate Court overturn the Board’s decision. In fact, such an outcome may result in the very scenario Reliable Stores emphasizes the Board should avoid: the request for attorney fees resulting in a “second major litigation” as a separate State entity attempts to recover fees that should never have been paid.

Reliable Stores then mischaracterizes the review of whether hardship on other parties would be imposed by incorrectly alleging that it is the OSFM’s burden to demonstrate that Reliable Stores will not be prejudiced should the Board grant a stay. Response at 7. However, the only hardship Reliable Stores appears to contend a stay may cause is the general assumption that owners, operators and the consultants and lawyers they hire may not be provided assurance that they will ultimately be paid for the work performed. *Id.* at 8, 9. This mischaracterizes the OSFM’s motion for stay, which only seeks to stay a determination on the Fees Motion pending the Appellate Court’s ruling. Reliable Stores’ alleged hardship further mischaracterizes Section 57.8(1) of the Environmental Protection Act (“Act”), which provides no assurance that consultants and lawyers will ultimately be paid for work performed, but instead only provides for the Board’s exercise of discretion to authorize payment of legal fees in situations where an owner or operator prevails before the Board. 415 ILCS 5/57.8(1) (2020). The Board’s grant of a stay of a determination on the Fees Motion pending the Appellate Court’s review would not ultimately impact whether Reliable

Stores, its consultants or lawyers will be paid for their work, and Reliable Stores provides no support for this allegation.

Finally, Reliable Stores contends that the Board has expressly refused to issue stays from financial assurance requirements, but also acknowledges that the OSFM does not seek to stay any financial assurance requirement. Response at 9. Rather, Reliable Stores attempts to portray the OSFM's appeal of the Board's April 1, 2021 decision as somehow "blocking performance of remediation" even though all necessary cleanup activities and repairs were completed as of May 9, 2018. Opinion and Order of the Board, PCB 19-2, slip op. at 3 (April 1, 2021).

Section 57 of the Act clearly states that the Underground Storage Tank Fund is "intended to be a State fund by which **persons who qualify** for access to the Underground Storage Tank Fund may satisfy the financial responsibility requirements under applicable State law and regulations." 415 ILCS 5/57 (2020) (emphasis added). The Board's authorization of attorney fees as costs of corrective action pending the Appellate Court's review may lead to the absurd result where, if the Appellate Court overturns the underlying decision, Reliable Stores seeks reimbursement from the Underground Storage Tank Fund for attorney fees that were accrued litigating a release that itself is ineligible for reimbursement. The General Assembly could not have intended such a result in drafting the language of Section 57.8(l) of the Act. 415 ILCS 5/57.8(l) (2020); *see also In re B.L.S.*, 202 Ill. 2d 510, 514–15 (2002) ("primary purpose of statutory construction is to determine and give effect to the legislature's intent, while presuming the legislature did not intend to create absurd, inconvenient, or unjust results.").

III. JURISDICTION OF THIS MATTER IS VESTED WITH THE APPELLATE COURT.

Reliable Stores contends that the OSFM must explain how the Fees Motion is not “collateral or incidental” to the judgment on appeal (Response at 9), but such requirement is unnecessary for purposes of the stay request. In Skokie Valley Asphalt Co., the Board directed a prevailing party to file a petition for attorney fees, and received said petition, prior to the Board’s underlying decision being appealed. People v. Skokie Valley Asphalt Co., PCB 96-98, slip op. at 1, 2 (Oct. 21, 2004). The Board made no “collateral or incidental” determination on the requested fees in that case. Rather, the Board’s holding is straightforward and clear: “appellate court jurisdiction attaches when an appeal of a Board decision is properly made,” and the Board “cannot rule on the petition seeking attorney fees and the accompanying issues unless it regains jurisdiction.” *Id.* at 2.

Further, a Board determination on the Fees Motion is directly tied to the Appellate Court’s decision on appeal. Section 57.8(l) of the Act specifically states:

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) (2020).

Pursuant to the plain language of the Act, the Board **may** authorize payment of legal fees **only** if the owner or operator prevails before the Board. Whether Reliable Stores prevailed is directly impacted by the issue on appeal. If the Appellate Court reverses the Board’s April 1, 2021 decision, then Reliable Stores will not have ultimately prevailed, meaning the Board would not have had the necessary statutory authority to make a determination on payment of legal fees.

IV. ALTERNATIVELY, THE BOARD SHOULD ALLOW THE OSFM TO RESPOND DIRECTLY TO SPECIFIC FEES REQUESTED BY RELIABLE STORES.

As noted above, Section 57.8(1) of the Act states that the Board “**may** authorize payment of legal fees” only where an owner or operator prevails in seeking payment under Title XVI of the Act. 415 ILCS 5/57.8(1) (2020) (emphasis added). Such authorization is discretionary, and the Board routinely allows non-movants to respond to statements of legal costs that may be eligible for reimbursement. *See, e.g., Dickerson Petroleum, Inc. v. Illinois EPA*, PCB 09-87, slip op. at 9 (Sep. 2, 2010) (“The Agency may respond to this [statement of legal costs] by filing its response with the Board on or before October 7, 2020.”). Should the Board determine that a ruling on the Fees Motion is appropriate, allowing the OSFM to respond to the specific fees requested within a reasonable amount of time as determined by this Board would not unduly delay this proceeding or prejudice Reliable Stores. Ultimately, Reliable Stores should not be submitting legal fees as corrective action costs to the Illinois EPA for reimbursement from the Underground Storage Tank Fund until such time as the Appellate Court concludes its review.

Further, the OSFM does not seek to unduly delay this proceeding in requesting an opportunity to respond, but seeks the request in good faith to address line items in the Fees Motion that raise significant concern to the OSFM. The Board, in implementing its discretion to authorize payment of attorney fees, considers multiple factors including “whether there is a reasonable connection between the fees charged and the litigation.” *Prime Location Properties v. Illinois EPA*, PCB 09-67, slip op. at 4 (Nov. 5, 2009).

As a brief example of areas of concern in the Fees Motion, among the fees requested by Reliable Stores are multiple hours drafting proposed stipulated facts that were never filed and relate to video evidence that the Board ultimately denied including in the record. *See* Opinion and

Order of the Board, PCB 19-2, slip op. at 3 (April 1, 2021). Reliable Stores also seeks authorization for multiple hours of attorney fees relating to its opposition to the OSFM's March 16, 2020 motion to supplement the record, a motion the Board ultimately granted. *See* Opinion and Order of the Board, PCB 19-2, slip op. at 5 (June 18, 2020). These and other requests of concern make up a substantive portion of the attorney fees sought in the Fees Motion, and the Board should grant the OSFM an opportunity to address these concerns to aid the Board, if it exercises its discretion to consider the award of the sought legal fees.

V. CONCLUSION

For the reasons stated above and in the motion for stay, the OSFM respectfully requests that the Board stay Reliable Stores' Fees Motion pending the Appellate Court's review of the April 1, 2021 Opinion and Order of the Board. Alternatively, the OSFM respectfully requests an opportunity to respond to the legal fees sought in the Fees Motion within a reasonable amount of time as determined by the Board.

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