

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

J.D.STREETT & COMPANY, INC.,)
 Petitioner,)
 v.)
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
 Respondent.)

PCB 22-27
(UST Appeal)

NOTICE OF FILING AND PROOF OF SERVICE

TO: Carol Webb, Hearing Officer
Illinois Pollution Control Board
1021 N. Grand Avenue East
P.O. Box 19274
Springfield, IL 62794-9274
(carol.webb@illinois.gov)

Melanie Jarvis
Division of Legal Counsel
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276
(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, Petitioner's Motion for Authorization of Payment of Attorney's Fees as Costs of Corrective Action, 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 18th day of December, 2023. The number of pages in the e-mail transmission is 13 pages.

Respectfully submitted,

J.D.STREETT & COMPANY, INC.
Petitioner,

BY: LAW OFFICE OF PATRICK D. SHAW

BY: /s/ Patrick D. Shaw

Patrick D. Shaw
LAW OFFICE OF PATRICK D. SHAW
80 Bellerive Road
Springfield, IL 62704
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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Petitioner,)	
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v.)	PCB 22-27
)	(UST Appeal)
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**PETITIONER’S MOTION FOR AUTHORIZATION OF PAYMENT OF
ATTORNEY’S FEES AS COSTS OF CORRECTIVE ACTION**

NOW COMES Petitioner, J.D.STREETT & COMPANY, 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 authorizing payment of legal costs, and in support thereof states as follows:

1. On November 16, 2023, the Board entered an interim order reversing the Illinois EPA’s decision in part and directing Petitioner to file a statement of eligible legal fees.
2. Attached hereto is the Affidavit of Patrick D. Shaw, documenting the legal costs in this matter, which are \$12,057.00, consisting of \$11,780.00 in attorney-time, and \$277.00 in costs. This affidavit is modeled on previous affidavits utilized by undersigned counsel and found to have been sufficient by the Board. E.g., Prime Location Properties v. IEPA, PCB No. 9-67, at p. 5 (Nov. 5, 2009). It sets forth the legal services provided, the identity of the attorney providing the legal services, and itemization of the time expended for the individual service, and the hourly rate charged. Id.
4. The Board has previously recognized undersigned counsel’s experience in underground storage tank appeals. Prime Location Properties v. IEPA, PCB No. 9-67, at p. 6

(Nov. 5, 2009). His billing rate is \$200 per hour, which has been his hourly rate since 2014 and is believed to be a reasonable rate for environmental attorneys who practice before the Board, and which has been an acceptable billing rate in previous attorney-fee awards. E.g., City of Benton Fire Department, PCB No. 17-1, slip op. at 3 (Feb. 4, 2016)

5. All of the legal costs sought herein were incurred “seeking payment under Title XVI and the plain language of Section 57.8(l) of the Act allows for the awarding of legal fees.” Illinois Ayers Oil Co. v. IEPA, PCB 03-214, at p. 8 (Aug 5, 2004).

6. The award of legal costs are discretionary with the Board. Ted Harrison Oil Co. v. IEPA, PCB 99-127 (Oct. 16, 2003). 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). In Illinois Ayers Co. V. IEPA, PCB 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 has made no express comment on this presumption, the Board has generally awarded litigation costs whenever the petitioner has prevailed on the issues either completely or substantially. See Singh v. IEPA, PCB 23-90, at p. 5 (Nov. 16, 2023) (awarding \$19,759.77); Parker’s Gas & More v. IEPA, PCB 19-79, at p. 5 (July 6, 2023) (awarding \$20,054.00); Reliable Stores v. OSFM, PCB 19-2, at p. 5 (Dec. 15, 2022) (awarding \$33,106.65 following appeal); Dersch Energies v. IEPA, PCB 17-003, at p. 4 (Oct. 20, 2022) (awarding \$32,676.30); KB Sullivan v. IEPA, PCB 21-78, at p. 3 (Oct. 20, 20, 2022) (awarding \$7,860.00); Abel Investments v. IEPA, PCB 16-108, at p. 4 (Mar. 2, 2017) (awarding

\$13,519.37); City of Benton Fire Department, PCB No. 17-1, slip op. at 3 (Feb. 4, 2016) (awarding \$20,357.80); Knapp Oil Co. v. IEPA, PCB 16-103, at p. 3 (Nov. 17, 2016) (awarding \$9,990.38); Burgess v. IEPA, PCB 15-186, at p. 11 (Nov. 5, 2015) (awarding \$11,304.16); Estate of Gerald D. Slightom v. IEPA, PCB 2011-025 (Nov. 5, 2015) (awarding \$79,455.26 following appeal); Chatham BP v. IEPA, PCB 15-173 (Sept. 3, 2015) (awarding \$11,485.08); McAfee v. IEPA, PCB 15-84 (May 21, 2015) (awarding \$10,315.00); PAK-AGS v. IEPA, PCB 15-14 (March 5, 2015) (awarding \$10,355.00); Chatham BP v. IEPA, PCB 14-1 (Feb. 5, 2015)(awarding \$21,314.70); Evergreen FS v. IEPA, PCB 11-51 (Sept. 6, 2012) (awarding \$13,473.80); Wheeling/GWA Auto Shop v. IEPA, PCB 10-70 (Sept. 22, 2011) (awarding \$78,915.86); Zervos Three, v. IEPA, PCB 10-54 (June 2, 2011) (awarding \$73,347.88); Dickerson Petroleum v. IEPA, PCB 09-87 (Dec. 2, 2010) (awarding \$53,019.29); Prime Location Properties v. IEPA, PCB 9-67 (Nov. 5, 2009)(awarding \$10,088.18); Swif-T Food Mart v. IEPA, PCB No. (Aug. 19, 2004) (awarding \$11,291.37); Illinois Ayers Co. v. IEPA, PCB No. 03-214 (Aug 5, 2004) (awarding \$44,456.49); Ted Harrison Oil Co. v. IEPA, PCB 99-127 (Oct. 16, 2003) (awarding \$19,421.75).

8. Since the reasonableness of the legal defense costs are the Board's starting point, the \$12,057.00 claimed here are clearly within the lower range of claims awarded by the Board, roughly between \$10,000 and \$12,000.¹

9. "Where a petitioner has partially prevailed, the Board has used its discretion both to

¹ The lowest attorney fee award (\$7,860.00) involved a relatively simple issue of law pertaining to whether the Illinois EPA could reject a \$2,125.96 request for partial payment of corrective action costs for failure to submit a corrective action completion report. KB Sullivan v. IEPA, PCB 21-78, at pp. 4-5 (Aug. 11, 2022).

award the entire amount of requested legal fees and to award only a portion of the requested legal fees.” Piasa Motor Fuels v. IEPA, PCB 18-54, at p. 7 (Nov. 5, 2020). Petitioner believes the Board should exercise its discretion to award the entire amount of requested legal fees given that the amount requested is within the range of legal costs which reasonably could have been expected if only partial relief had been sought.

10. However, a partial award is inappropriate where the litigation involves “a common core of facts” or “related legal theories” that preclude severance of the claims. Cannon v. William Chevrolet/GEO, 341 Ill. App. 3d 674, 687 (1st Dist. 2004) Consequently, 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’s fees for hours reasonably expended on the unsuccessful claims as well.” Piasa Motor Fuels v. IEPA, PCB 18-54, at p. 8 (quoting Cannon).

11. In administrative appeals such as these in particular, there are significant limitations concerning the factual, procedural and legal issues in any case. This appeal in particular involved a reimbursement application for the limited work allowed in the early action stage. The factual issues arose from the same administrative record involving removal of leaking tanks and backfilling the resulting excavation. The legal issues arose from the same Agency decision claiming the submittal was incomplete under the same regulation, 35 Ill. Adm. Code § 734.630(cc) (“Costs that lack supporting documentation”). The Board recognized that the issues were similar although the ruling differed. Interim Opinion, at p. 10 (“While the [backfill] issue is similar to the issue of tank removal . . .”)

10. The ruling was significant in interpreting the concept of “supporting

documentation,” which is not defined by the Board’s regulations. Interim Opinion, at p. 8. The implication of the regulatory context is that the legal requirements are ascertained through adjudication by the Board of different circumstances forming precedent to guide future actions. The Board decisions are the only guidance to such undefined concepts.

11. Accordingly, Petitioner asks the Board to exercise its discretion to award the legal defense costs incurred seeking payment for corrective action under Title XVI.

Respectfully submitted,
J.D.STREETT & COMPANY, INC.,
Petitioner

By its attorneys,
LAW OFFICE OF PATRICK D. SHAW

By: /s/ Patrick D. Shaw

Patrick D. Shaw
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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 the case entitled J.D.Streett & Company, Inc. v. IEPA, PCB 22-27.
3. Attached hereto as Exhibit A is a printout from my bookkeeping software detailing legal defense costs incurred in this matter. At all times relevant hereto my hourly rate has been \$200 per hour, which is the regular and ordinary billing rate charged all of my clients. I am generally familiar with the hourly rates of environmental attorneys practicing in Springfield, Illinois and before the Board, and believe this rate to be comparable, if not less, than other such attorneys.
4. I began working on the appeal in December of 2021, filing the Petition for Review that month. The Agency filed the record in October of 2022. I worked on a motion for summary judgment in January of 2023, at which time I discovered missing documents from the record,

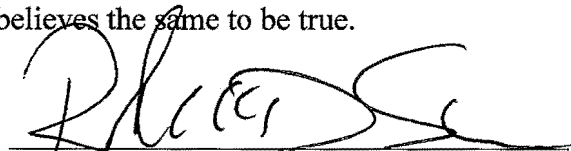
some e-mails and a page from the subcontract agreement. I notified counsel for the IEPA and filed a motion to supplement the record. Once the motion was granted I filed the motion for summary judgment in February of 2023 and after receiving IEPA's cross-motion for summary judgment, filed a response in March of 2023. On November 16, 2023, the Board issued its opinion herein.

7. Exhibit A identifies the legal work performed and the attorney's fees incurred in this matter. It reveals the date the work was performed, the description of the work performed, the amount of time spent, and the total fees incurred. Charges for computer-based legal research are made in proportion to the amount of time used in a matter. Filing fees, postage and photocopying charges are also identified when applicable.

7. The legal defense costs incurred in seeking payment for corrective action herein total \$12,057.00, consisting of \$11,780.00 in attorney-time, and \$277.00 in costs (which consist of the filing fee and computer research).

FURTHER AFFIANT SAYETH NOT.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.


Patrick D. Shaw

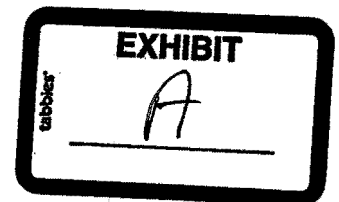
Law Office of Patrick D. Shaw
80 Bellerive Road
Springfield, IL 62704

Invoice submitted to:
J.D. Streett & Company, Inc.
144 Weldon Parkway
Maryland Heights MO 63043

December 18, 2023

Professional Services

	<u>Hrs/Rate</u>	<u>Amount</u>
12/3/2021 Review e-mail from consultant; review precedent; e-mail to consultant	2.00 200.00/hr	NO CHARGE
12/6/2021 Research legal issues and e-mail questions/ opinions to consultant	2.50 200.00/hr	500.00
12/9/2021 Draft petition for review	1.50 200.00/hr	300.00
12/10/2021 Revise and file petition for review; e-mail draft for review	1.70 200.00/hr	340.00
12/13/2021 E-mail petition to client w/comments	0.10 200.00/hr	20.00
12/16/2021 Receive & review Board order accepting petition for review	0.10 200.00/hr	20.00
9/27/2022 Tel Conf. re status of record; receive Hrg Officer order	0.10 200.00/hr	20.00



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	<u>Hrs/Rate</u>	<u>Amount</u>
10/11/2022 Receive & quick review of Agency Record	0.10 200.00/hr	20.00
11/15/2022 Conference with Hrg Officer/ IEPA atty	0.10 200.00/hr	20.00
1/13/2023 Review record; draft factual background for motion for summary judgment	4.00 200.00/hr	800.00
1/16/2023 Draft background and flow chart	3.20 200.00/hr	640.00
1/17/2023 Draft motion for summary judgment; e-mail IEPA atty re missing document in record	4.00 200.00/hr	800.00
1/18/2023 Telephone IEPA attorney; tel conf. w/ Hrg Officer via e-mails; receive & review Hrg Officer order	0.40 200.00/hr	80.00
1/24/2023 Draft motion for summary judgment	2.60 200.00/hr	520.00
1/25/2023 Draft motion for summary judgment	3.50 200.00/hr	700.00
1/26/2023 Revise draft motion; e-mail to client and consultant; receive e-mail w/comments including add'l pages missing; assemble missing pages and e-mail consultant; receive replies from client and consultant	2.60 200.00/hr	520.00
1/27/2023 Review file; e-mail IEPA atty with additional documents missing from record; e-mail to client re changes to be made to motion	1.90 200.00/hr	380.00
1/30/2023 Receive & review e-mail from IEPA atty; draft and file motion to supplement record	0.60 200.00/hr	120.00

	<u>Hrs/Rate</u>	<u>Amount</u>
1/30/2023 Receive & review Hrg Officer order grant motion to supplement record	0.10 200.00/hr	20.00
2/6/2023 Research additional issue for motion	1.00 200.00/hr	200.00
2/7/2023 Revise and file motion for summary judgment	2.30 200.00/hr	460.00
2/8/2023 e-mails re filing w/ consultant & client	0.20 200.00/hr	40.00
2/10/2023 E-mail Hrg Officer/IEPA atty re extension of time to respond to motion	0.10 200.00/hr	20.00
2/15/2023 E-mail w/ Hrg Officer & IEPA re scheduling	0.10 200.00/hr	20.00
2/16/2023 Receive & review Hrg Officer order	0.10 200.00/hr	NO CHARGE
3/2/2023 Receive & review Illinois EPA Response / Cross- Motion for Summary Judgment; e-mail to client w/ comments; e-mail copy of case to Thorpe	1.80 200.00/hr	360.00
3/3/2023 Receive & review e-mail from Thorpe; review cases cited in Cross Motion; e-mail response	2.50 200.00/hr	500.00
3/6/2023 Research and draft response to Cross Motion	1.80 200.00/hr	360.00
3/9/2023 Research and draft response to IEPA Cross-Motion	3.40 200.00/hr	680.00
3/10/2023 Draft Response to IEPA Cross-Motion	5.10 200.00/hr	1,020.00

J.D. Streett & Company, Inc.

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	<u>Hrs/Rate</u>	<u>Amount</u>
3/13/2023 Draft Response to Cross-Motion; e-mail draft to client and consultant w/comments	5.40 200.00/hr	1,080.00
3/14/2023 Revise and file Cross-Response; e-mail to client	0.50 200.00/hr	100.00
3/20/2023 Telephone status conference; filings complete; Hrg Officer will contact parties in 90 days if Board order has not been issued	0.10 200.00/hr	20.00
11/16/2023 Receive & review Interim Opinion	0.30 200.00/hr	60.00
12/12/2023 Review interim opinion and draft comments to client and consultant; receive response; e-mail reply	1.00 200.00/hr	200.00
12/15/2023 Receive & review e-mails from consultant; replies to e-mails; begin drafting motion for atty fees	1.90 200.00/hr	380.00
12/18/2023 Draft and file motion for attorney's fees	2.30 200.00/hr	460.00
For professional services rendered	<u>61.00</u>	<u>\$11,780.00</u>
Additional Charges :		
12/10/2021 Pollution Control Board filing fee Filing Fee		75.00
1/31/2023 Lexis research charges for January of 2023 LEXIS		94.00
2/1/2023 Lexis research for February 2023 LEXIS		53.00

J.D. Streett & Company, Inc.

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	<u>Amount</u>
3/31/2023 Lexis research for March 2023 LEXIS	55.00
Total additional charges	<u>\$277.00</u>