

ILLINOIS POLLUTION CONTROL BOARD
August 22, 2024

1441 KINGSHIGHWAY, LLC,)	
)	
Petitioner,)	
)	
v.)	PCB 24-32
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

OPINION AND ORDER OF THE BOARD (by M. Gibson):

1441 Kingshighway, LLC (1441 Kingshighway or Petitioner) is the owner of a former self-service fueling station in St. Clair County at which underground storage tanks (UST) leaked petroleum. The Illinois Environmental Protection Agency (IEPA) denied a request for reimbursement of \$11,023.60 for early action activities involving the removal of tanks, associated piping, and contaminated backfill. Petitioner requested that the Board reverse IEPA’s denial and approve the reimbursement request as submitted. In an interim opinion and order on June 20, 2024, the Board found that the record supported Petitioner’s request for reimbursement. The Board reversed IEPA’s determination and directed IEPA to approve Petitioner’s reimbursement request for \$11,023.60.

Petitioner now requests that the Board authorize payment of its legal fees. Below, the Board finds that Petitioner’s appeal sought payment from the UST Fund and that it prevailed before the Board under Section 57.8(l) of the Environmental Protection Act (Act) (415 ILCS 5/57.8(l) (2022)); *see* 35 Ill. Adm. Code 734.630(g). The Board exercises its discretion to award legal fees and directs IEPA to reimburse Petitioner \$19,729 from the UST Fund.

The Board’s order begins below with an abbreviated procedural history. After providing the statutory and regulatory authorities, the Board discusses the issues, reaches its conclusion, and issues its order.

PROCEDURAL HISTORY

On November 3, 2023, 1441 Kingshighway filed a petition asking the Board to review an October 18, 2023 determination of IEPA. On November 13, 2023, 1441 Kingshighway waived the decision deadline to June 30, 2024. On November 16, 2023, a Board order accepted 1441 Kingshighway’s petition for hearing. On January 31, 2024, IEPA filed its administrative record.

On April 10, 2024, the Board held a hearing. The Board received the transcript on April 18, 2024. On May 1, 2024, Petitioner filed its post-hearing brief. On May 15, 2024, IEPA filed its post-hearing brief. On May 20, 2024, Petitioner filed its reply brief.

On June 20, 2024, the Board concluded that Petitioner's reimbursement request would not violate either of the Board rules cited in IEPA's denial letter. The Board therefore reversed IEPA's decision and ordered IEPA to approve the reimbursement request as submitted. The Board set a deadline for Petitioner to file a statement of legal fees that may be reimbursable and also set a deadline for IEPA to respond.

On June 28, 2024, Petitioner filed its request (Req.), attached to which was the affidavit of Patrick D. Shaw (Aff.). IEPA has not filed a response to Petitioner's motion or request.

STATUTORY AND REGULATORY AUTHORITIES

Costs associated with "corrective action" may be reimbursed from the UST Fund. 415 ILCS 5/57.9(a)(7) (2022). "'Corrective action' means activities associated with compliance with the provisions of Sections 57.6 [early action] and 57.7 [site investigation and corrective action] of this Title [XVI Petroleum Underground Storage Tanks]." 415 ILCS 5/57.2 (2022).

Section 57.8 of the Act addresses reimbursement from the UST Fund. Subsection (l) provides in its entirety that "[c]orrective 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) (2022); *see also* 35 Ill. Adm. Code 734.630(g).

BOARD DISCUSSION

Below, the Board first addresses whether this appeal falls within the scope of Section 57.8(l) of the Act. If it does, the Board next addresses whether it will exercise its discretion to award Petitioner's requested legal fees and costs.

Whether Section 57.8(l) Applies

"The first question the Board must address is whether or not the proceeding falls within the parameters of the statutory provision." Knapp Oil Co. v. IEPA, PCB 16-103, slip op. at 2 (Nov. 17, 2016), citing Ill. Ayers Oil Co. v IEPA, PCB 03-214, slip op. at 7 (Aug. 5, 2004) (Ill. Ayers).

Petitioner argues that "[a]ll 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 the awarding of legal fees.'" Req. at 2, *citing* Ill. Ayers, slip op. at 8. Petitioner asserts that it "prevailed in full in obtaining from the Board a reversal of the IEPA's decision and an order for IEPA to approve the budget amendment as submitted." Req. at 3-4.

Because Petitioner prevailed when it sought payment from the UST Fund, the Board finds that this appeal falls within the scope of Section 57.8(l) of the Act. Accordingly, the Board below exercises its discretion to determine whether to award Petitioner its requested legal fees and costs.

Whether to Exercise the Board's Discretion to Award Fees

Petitioner states that, in earlier cases, the Board considered the “reasonableness” of the claimed legal defense costs before exercising its discretion to authorize paying them. Req. at 2; *see* Evergreen FS v. IEPA, PCB 11-51, 12-61 (cons.), slip op. at 4 (Sept. 6, 2012). The Board agrees. *See* City of Benton Fire Dept. v. IEPA, PCB 17-1, slip op. at 3 (May 24, 2018) (Benton); Prime Location Properties v. IEPA, PCB 09-67, slip op. at 4 (Nov. 5, 2009) (Prime Location), citing Swif-T Food Mart v. IEPA, PCB 03-185, slip op. at 3 (Aug. 19, 2004); Ill. Ayers, slip op. at 8-9.

As the party seeking reimbursement, Petitioner has the burden of presenting sufficient evidence with which the Board can determine the reasonableness of the fees. Abel Investments v. IEPA, PCB 16-108, slip op. at 2 (Mar. 2, 2017); Prime Location, slip op. at 4, *citing* J.B. Esker & Sons v. Cle-Pa's P'ship., 325 Ill. App. 3d 276, 283, 757 N.E.2d 1271, 1277 (5th Dist. 2001); Sampson v. Miglin, 279 Ill. App. 3d 270, 281 (1st Dist. 1996). Petitioner “must set forth with specificity the legal services provided, the identity of the attorney providing the legal services, an itemization of the time expended for the individual service, and the hourly rate charged.” Prime Location, slip op. at 4, *citing* J.B. Esker & Sons, 325 Ill. App. 3d at 283. While Petitioner must present a “sufficient basis” for determining whether the requested charges are reasonable, the Board may also consider “the entire record and its experience and knowledge of the case” in assessing whether the charges are reasonable. Prime Location, slip op. at 4, *citing* Cretton v. Protestant Mem'l. Med. Cent., 371 Ill. App. 3d 841, 868, 864 N.E.2d 288,315; Sampson, 279 Ill. App. 3d at 281, 664 N.E.2d at 289.

In determining whether Petitioner's request is reasonable, the Board may consider factors including “the skill and standing of the attorneys employed, the nature of the case, the novelty and difficulty of the issues involved, the degree of responsibility required, the usual and customary charge for the same or similar services in the community, and whether there is a reasonable connection between the fees charged and the litigation.” Prime Location, slip op. at 4, *citing* Cretton, 371 Ill. App. 3d at 867-68, 864 N.E.2d at 315; Sampson, 279 Ill. App. 3d at 281, 664 N.E.2d at 289. The Board may apply its own expertise to “assess the time required to complete particular activities.” Cretton, 371 Ill. App. 3d at 868.

Petitioner argues that its appeal “involved a significant first-time issue pertaining to the proper interpretation and application of several Board regulations as applied to compartment tanks, which is a type of tank that is relatively recent and will be increasingly encountered in the field.” Req. at 4. Petitioner asserts that its “legal costs were reasonable given the complexity of issues of first impression.” *Id.* at 4. Petitioner adds that “the Board has generally awarded litigation costs whenever the petitioner has prevailed on the issues either completely or substantially.” *Id.* at 2-3 (citations omitted).

Petitioner further argues that the Board has recognized Mr. Shaw's experience in UST appeals. Req. at 2, *citing* Prime Location, slip op. at 6. Petitioner adds that his billing rate of \$260 per hour as of January 1, 2024 (up from \$200 an hour in 2023) is a “reasonable rate for environmental attorneys who practice before the Board, and which has been an acceptable billing

rate in previous attorney-fee awards.” Req. at 2, *citing Dickerson Petroleum v. IEPA*, PCB 09-87, slip op. at 4 (Dec. 2, 2010) (\$295 per hour); *Chatham BP v. IEPA*, PCB 14-1 (Feb. 5, 2015) (\$275 per hour).

Petitioner points out that Mr. Shaw’s affidavit is modeled on previous affidavits submitted to the Board and found to be sufficient. Req. at 1, *citing Prime Location*, slip op. at 5. His affidavit is accompanied by a six-page invoice summarizing fees and costs. Aff., Exh. A. From the affidavit and summary, the Board can determine the date of services; a description of services; the hours and hourly rate billed; and the fee charged. *Id.* Mr. Shaw’s services began on October 23, 2023, a short time after IEPA issued its contested determination on October 18, 2023. His services continued to June 28, 2024.

Mr. Shaw’s summary totals 79.80 hours for total fees of \$19,654.¹ Exh. A at 4; *see* Aff. at 1-2. The summary describes work performed and the time allocated to that work in tenths of an hour. Exh. A. The summary also includes the cost of \$75 for the Board’s filing fee. *Id.* at 4.

The Board finds that the listings are itemized specifically enough to assess the reasonableness of the charges. *See Prime Location*, slip op. at 5, *citing Sampson*, 279 Ill. App. 3d at 281-82, 664 N.E.2d at 289. The summary submitted by Petitioner is generally similar to information provided in other UST cases in which the Board has directed IEPA to reimburse legal fees. *See, e.g., Dersch Energies, v. IEPA*, PCB 17-3, slip op. at 4 (Oct. 20, 2022); *Burgess v. IEPA*, PCB 15-186, slip op. at 5-6 (Feb. 4, 2016) (*Burgess*). As noted above, IEPA has not filed a response or disputed the reasonableness of the requested fees and costs.

The Board concludes that this appeal presented significant issues regarding IEPA’s review and determinations under the UST program. *Dersch*, slip op. at 4; *Burgess*, slip op. at 6, *citing Pak-Ags*, slip op. at 7; *Chatham BP v. IEPA*, PCB 14-1, slip op. at 6 (Feb. 5, 2015). Based on its review of the record and authorities including prior Board decisions, as well as the absence of an IEPA response to the motion, the Board finds Petitioner’s requested legal fees and costs to be reasonable. Accordingly, the Board will exercise its discretion under Section 57.8(l) of the Act to grant Petitioner’s unopposed request and direct IEPA to reimburse the requested \$19,729 in legal fees and costs.

CONCLUSION

The Board finds that Petitioner’s appeal sought payment from the UST Fund and that it prevailed before the Board under Section 57.8(l) of the Act (415 ILCS 5/57.8(l) (2022)). The Board exercises its discretion to award legal fees and directs IEPA to reimburse Petitioner \$19,729 from the UST Fund.

The Board incorporates by reference its findings of fact and conclusions of law from its June 20, 2024 interim opinion and order. This final opinion constitutes the Board’s findings of fact and conclusions of law.

¹ The invoice includes 0.1 hours showing “NO CHARGE.” Exh. A at 3.

ORDER

The Board grants Petitioner's request to authorize payment of attorney's fees and directs IEPA to reimburse Petitioner \$19,729 in legal fees from the UST Fund under Section 57.8(l) of the Act. 415 ILCS 5/57.8(l) (2022).

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2022); see also 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; see also 35 Ill. Adm. Code 101.902, 102.700, 102.702. Filing a motion asking that the Board reconsider this final order is not a prerequisite to appealing the order. 35 Ill. Adm. Code 101.902.

Names and Addresses for Receiving Service of Any Petition for Review Filed with the Appellate Court	
Parties	Board
Patrick D. Shaw Law Office of Patrick D. Shaw 80 Bellerive Road Springfield, Illinois 62704 pdshaw1law@gmail.com	Illinois Pollution Control Board Attn: Don A. Brown, Clerk 60 East Van Buren Street, Suite 630 Chicago, Illinois 60605 don.brown@illinois.gov
Illinois Environmental Protection Agency Attn.: Richard Kim, Assistant Counsel 1021 North Grand Avenue East PO Box 19276 Springfield, Illinois 62794-9276 richard.kim@illinois.gov	

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on August 22, 2024, by a vote of 4-0.



Don A. Brown, Clerk
Illinois Pollution Control Board