



OFFICE OF THE ATTORNEY GENERAL  
STATE OF ILLINOIS

**Lisa Madigan**  
ATTORNEY GENERAL

September 29, 2009

RECEIVED  
CLERK'S OFFICE  
OCT 01 2009  
STATE OF ILLINOIS  
Pollution Control Board

John T. Therriault, Assistant Clerk  
Assistant Clerk of the Board  
Illinois Pollution Control Board  
James R. Thompson Center, Ste. 11-500  
100 West Randolph  
Chicago, Illinois 60601

ORIGINAL

Re: ***Prime Location Properties, LLC, v. IEPA***  
**PCB No. 09-67**

Dear Clerk:

Enclosed for filing please find the original and ten copies of a Notice of Filing and Respondent's Objection to Attorney's Fees in regard to the above-captioned matter. Please file the original and return a file-stamped copy to me in the enclosed envelope.

Thank you for your cooperation and consideration.

Very truly yours,

A handwritten signature in black ink, appearing to read "Thomas Davis".

Thomas Davis, Chief  
Assistant Attorney General  
Environmental Bureau  
500 South Second Street  
Springfield, Illinois 62706  
(217) 782-9031

TD/pjk  
Enclosures

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PRIME LOCATION PROPERTIES, LLC, )  
)  
Complainant, )  
)  
vs. )  
)  
ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY, )  
)  
Respondent. )

PCB No. 09-67  
(UST Appeal)

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STATE OF ILLINOIS  
Pollution Control Board

NOTICE OF FILING

ORIGINAL

To: Fred C. Prillaman  
Mohan, Allewelt, Prillaman & Adami  
One North Old State Capital Plaza, Ste. 325  
Springfield, IL 62701


PLEASE TAKE NOTICE that on this date I mailed for filing with the Clerk of the Pollution Control Board of the State of Illinois, RESPONDENT'S OBJECTION TO ATTORNEY'S FEES, a copy of which is attached hereto and herewith served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN,  
Attorney General of the  
State of Illinois

MATTHEW J. DUNN, Chief  
Environmental Enforcement/Asbestos  
Litigation Division

BY:   
THOMAS DAVIS, Chief  
Assistant Attorney General  
Environmental Bureau

500 South Second Street  
Springfield, Illinois 62706  
217/782-9031  
Dated: September 29, 2009

**CERTIFICATE OF SERVICE**

I hereby certify that I did on September 29, 2009, send by First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box a true and correct copy of the foregoing NOTICE OF FILING and RESPONDENT'S OBJECTION TO ATTORNEY'S FEES

To: Fred C. Prillaman  
Mohan, Allewelt, Prillaman & Adami  
One North Old State Capital Plaza, Ste. 325  
Springfield, IL 62701

**RECEIVED**  
**CLERK'S OFFICE**  
OCT 01 2009  
STATE OF ILLINOIS  
Pollution Control Board

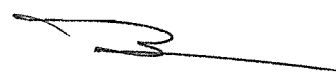
and the original and ten copies by First Class Mail with postage thereon fully prepaid of the same foregoing instrument(s):

To: John T. Therriault, Assistant Clerk  
Illinois Pollution Control Board  
James R. Thompson Center  
Suite 11-500  
100 West Randolph  
Chicago, Illinois 60601

ORIGINAL

A copy was also sent by First Class Mail with postage thereon fully prepaid to:

Carol Webb  
Hearing Officer  
Illinois Pollution Control Board  
1021 North Grand Avenue East  
Springfield, IL 62794



\_\_\_\_\_  
THOMAS DAVIS, Chief  
Assistant Attorney General

This filing is submitted on recycled paper.

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

**PRIME LOCATION PROPERTIES, LLC,**            )  
  )  
  )  
  )  
**Petitioner,**    )  
  )  
**v.**    )  
  )  
**ILLINOIS ENVIRONMENTAL**                        )  
**PROTECTION AGENCY,**                            )  
  )  
  )  
  )  
**Respondent.**                                        )

**RECEIVED**  
**CLERK'S OFFICE**  
  
OCT 01 2009  
  
PCB No. 09-67   **STATE OF ILLINOIS**  
(UST Appeal)   **Pollution Control Board**

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**RESPONDENT'S OBJECTION TO ATTORNEY'S FEES**

Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, by its attorney, LISA MADIGAN, Attorney General of the State of Illinois, hereby responds to the Motion for Authorization of Payment of Attorney's Fees as Costs of Corrective Action, and states as follows:

1.       Petitioner has prevailed in its action before the Board and seeks reimbursement of legal costs. The Board granted leave to Petitioner to file "a statement of its legal fees that may be eligible for reimbursement and its arguments why the Board should exercise its discretion to direct the Agency to reimburse those fees from the UST Fund." August 20, 2009 Opinion at page 34.
2.       Section 57.8(1) of the Act provides: "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."
3.       Petitioner relies upon four previous Board decisions in which the Board has

required the reimbursement of legal fees from the UST Fund: *Ted Harrison Oil Co. v. IEPA*, PCB 99-127 (October 16, 2003); *Illinois Ayers Oil Co. v. IEPA*, PCB 03-214 (August 5, 2004); *Swif-T Food Mart v. IEPA*, PCB 03-185 (August 19, 2004); and *Webb & Sons, Inc. v. IEPA*, PCB 07-24 (May 3, 2007). In each of these orders, the Board based its discretionary decision to award fees on the “facts” of the particular case but did not (except for *Ayers*) identify what it considered to be the salient facts justifying the award. The Board’s decision in *Ted Harrison Oil Co.* seems to have served as “precedent” for its ruling in *Ayers* although it did not explain why an award was “warranted” in the earlier case.

4. In *Ayers* there were independent grounds for the award of attorney’s fees under Section 10-55 of the Administrative Procedure Act, 5 ILCS 100/10-55. The Agency’s rate sheet was found to be an invalid rule of general applicability. Even though the petitioner in *Ayers* (represented by the same counsel as the present case) conceded that Section 10-55 of the Administrative Procedure Act did not apply to the Board, the Board found the invalidity of the rate sheet under the APA to be a “compelling reason for allowing reimbursement of legal fees.” PCB 03-214; August 5, 2004 order at page 9. The petitioner in *Ayers* also argued that the Board’s decision in *Ted Harrison Oil Co.* was inapplicable to the situation in *Ayers*. PCB 03-214; June 1, 2004 reply at page 8, footnote 2. Noting that the Agency did not challenge the reasonableness of the requested fees, the Board concluded: “Therefore, the Board does not find the legal fees are unreasonable.” PCB 03-214; August 5, 2004 order at page 9. In other words, an award of fees must be reasonable. Unfortunately, no rationale is provided for the substantial amount of the legal fees awarded in *Ayers*. The “standard” of reasonableness thus established without the necessary factual context to lend any insight to future award considerations.

5. The Board's decision in *Ayers* is noteworthy for at least two other reasons. First, the Board seized upon that petitioner's suggestion that Section 57.8(1) of the Act is a "fee-shifting" statute. The company cited *Chicago v. Illinois Commerce Commission*, 187 Ill. App. 3d 468, 470 (1st Dist. 1989), in support of its argument. The Board did not discuss this particular case but (in the "discussion" of the issue) nonetheless adopted the theory and found that the statutory provision:

provides for an award to compensate counsel for prevailing before the Board and as such is a "fee-shifting" statute. See *Brundidge et al. v. Glendale Federal Bank*, F.S.B. 168 Ill. 2d 235, 245; 659 N.E.2d 909, 914 (1995). The plain language of Section 57.8(1) of the Act (415 ILCS 5/57.8(1) (2002)) guides the Board in our analysis of when to allow the prevailing party to receive legal defense costs. The first question the Board must address is whether or not the proceeding falls within the parameters of the statutory provision. Second, the Board must also determine whether or not to exercise our discretion.

PCB 03-214; August 5, 2004 order at page 7. A careful reading shows that what legitimately began in *Ted Harrison Oil Co.* as the reimbursement of the owner or operator for legal costs has evolved, according to the "plain language" of the statute, as a scheme to "compensate counsel" premised upon the *argument* that Section 57.8(1) is *intended* to shift fees. The Board accepted the "fee-shifting" argument at face value even though the court in *Chicago v. Illinois Commerce Commission* was concerned with the APA provision, the purposes of which "are to discourage enforcement of invalid rules and to provide incentive to those subject to regulations to oppose doubtful rules where compliance would otherwise be less costly than litigation." 187 Ill. App. 3d at 470. The court was also concerned with assessing reasonable attorney's fees and discussed the issue in the context of the specific statutory language. The First District also considered whether legal costs were paid by the client or the legal clinic representing that party. The actual holding of this case is that (under the APA provision) attorney's fees must be "calculated at market rates

commensurate with experience and expertise” in order to be reasonable. *Ibid.* In any event, *Chicago v. Illinois Commerce Commission* provides no basis for the Board to find that this provision of the Environmental Protection Act is a “fee-shifting” statute and the Board relied instead upon *Brundidge et al. v. Glendale Federal Bank, F.S.B.* The Supreme Court held in this common fund class action litigation that in determining the amount of attorney fees to be granted to the plaintiffs’ counsel, the circuit court is vested with discretionary authority to choose either the percentage-of-the-award method or the “lodestar” method, based on facts and circumstances of each case. 168 Ill. 2d at 246. The Board did not discuss this case either, but according to the Court’s own rationale, *Brundidge* makes a “critical distinction” between fee-shifting cases defined as “where a statute clearly provides for an award to compensate counsel for the prevailing class” and common funds cases: “We believe that fee-shifting cases are materially different from common fund cases, such as the case at bar, most notably because fee-shifting cases do not involve a common fund from which attorney fees may be awarded.” *Id.* at 245. In summary, the Board has based (and expanded) its non-critical finding that our statute is a fee-shifting statute upon case law that is clearly inapplicable.

6. The second reason the *Ayers* decision is noteworthy pertains to the Board’s refusal to allow the late filing of the Agency’s July 8, 2004 amended response, which that petitioner had argued was not relevant:

The Agency is seeking to amend a response to a request for the authorization of payment of legal fees. The Act allows the Board to authorize the payment of legal fees if the owner or operator prevails before the Board. *See* 415 ILCS 5/57.8(1) (2002). There is no language in the Act which specifies who must initially pay the attorney fees. Therefore, the Board agrees with *Ayers* that the information presented in testimony at the rulemaking hearing is not relevant to the Board’s decision on the request for legal costs. The Board denies the motion to amend the response.

PCB 03-214; August 5, 2004 order at page 2. The Board apparently rejected the merits of the Agency's argument as not relevant but then determined the statute "provides for an award to compensate counsel." This information is worth due consideration before it may be relegated to the dustbin, especially since the Agency intends to appeal the present matter. Therefore, this pleading will incorporate and reprise those prior arguments as follows: On June 21 and 22, 2004, the Board conducted hearings in PCB R04-22 and R04-23 on the proposed amendments to Parts 732 and 734. Cindy Davis testified in the rulemakings regarding her participation in the *Ayers* proceeding; her company, CSD Environmental, was the consultant for the Illinois Ayers Oil Company and she provided testimony in PCB 03-214. Ms. Davis opined that the Agency's rate sheet was unfair: "Hence the reason we decided to appeal Ayers. I paid for the appeal on Ayers, and not the owner/operator. The reason I did is, I guess it was just something that stuck in me that I didn't feel was right, and it was affecting my business, driving the cost of cleanups up because all we were doing was spending time trying to justify why we were needing more money than the Agency was willing to give to us." PCB R04-22 and R04-23; June 21, 2004 transcript at page 96. It was the consulting company and not the oil company that incurred the costs of bringing the appeal in PCB 03-214. If the Board were to approve the payment of costs sought in PCB 03-214, the Board would require a payment from the Fund to a party that had not incurred any of the costs. In effect, it would be subsidizing the legal activity of CSD Environmental, an entity that has no legal obligation, responsibility, or rights under the Act. Only an owner or operator may receive payment of costs from the Fund. The Board's approval would require a finding that the attorney's fees are a corrective action that would be payable from the Fund pursuant to Section 57.8(l). It is a fundamental concept that costs deemed eligible for



reimbursement from the Fund are payable only to the owner or operator. Here (PCB 03-214), it was the owner/operator's consultant that had a business concern, paid for the appeal, and now seeks to reap the benefits by way of payment of legal fees. To allow such a payment would open the door to other situations in which an owner or operator, in name only, seeks costs for reimbursement or payment from the Fund that were never actually incurred by the owner or operator. This is a bad precedent, and one that should be stopped now to prevent future erosion of the purposes of the Act. See PCB 03-214; July 8, 2004 amended response at pages 1-3.

7. *Ayers* was the precedent for the Board's August 19, 2004 decision in *Swif-T Food Mart v. IEPA*, PCB 03-185:

In Illinois Ayers, the Board stated that under a fee-shifting statute, the amount of fees to be awarded lies within the "broad discretionary powers" of the Board. Globalcom, Inc. v. Illinois Commerce Commission, 347 Ill. App. 3d 592; 806 N.E.2d 1194, 1214 (1st Dist. 2004). This includes a determination of reasonableness of the requested fees. United States Fidelity and Guaranty Company v. Old Orchard Plaza Limited Partnership, 333 Ill. App. 3d 727, 740; 776 N.E.2d 812, 824 (1st Dist. 2002); In re Pine Top Insurance Company, 292 Ill. App. 3d 596 [sic]; 686 N.E.2d 657 (1997).

PCB 03-185; August 19, 2004 order at page 3. The Board's prior analysis or lack thereof in *Ayers* necessarily leads to close scrutiny of the particular cases it has cited. The First District Appellate Court ruled in *Globalcom, Inc. v. Illinois Commerce Commission* that the ICC has "broad discretionary powers." 347 Ill. App. 3d at 626. This first opinion cited *United States Fidelity and Guaranty Company v. Old Orchard Plaza Limited Partnership* for the "well-established" proposition that fee-shifting statutes must be strictly construed. This second earlier opinion reiterated another well-established proposition, to wit: the trial court has "broad discretionary powers" in awarding attorney's fees. 333 Ill. App. 3d at 740. The last cited case, *In re Pine Top Insurance Company*, 292 Ill. App. 3d 597, held that the trial court failed to

conduct a reasonableness analysis in ascertaining whether to approve or disapprove the contingency fee agreement, and may be considered (if at all) as merely filler. No court has held that the Pollution Control Board enjoys “broad discretionary powers” regarding attorney’s fees or any other issue; in fact, numerous appellate decisions have considered issues relating to the scope of authority granted to the Board and its exercise of such authority, and none has characterized the Board’s powers (*i.e.*, authority) or exercise thereof (*i.e.*, discretion) as being “broad.”

8. The most recent case cited in support of this Petitioner’s request for legal costs is *Webb & Sons, Inc. v. IEPA*, PCB 07-24 (May 3, 2007). This case is noteworthy for the limitations placed by the Board on the award of costs, including the rejection of engineering expenditures as legal costs. PCB 07-24; May 3, 2007 order at page 5.

9. The primary purpose of this review of Board decisions is to respond to this Petitioner’s motion in which the Board is urged to “continue to liberally award legal costs to prevailing parties in LUST appeals.” Motion at ¶ 6. The award of legal cost reimbursements from the Fund has indeed been liberal as demonstrated by the Board precedents discussed above. The process to date seems to be one of “ask and ye shall receive.” Counsel for this Petitioner has submitted an affidavit in support of the award request and states that the hourly rates “charged are commensurate with the prevailing rates for environmental legal services in Springfield, Illinois for 2009. . . .” The assessment of a “reasonable” monetary amount is an issue separate and apart from the legal justification of any given award. None of the decisions addressed the details of such an assessment. For instance, the hourly rates approved in the past have not been identified in the Board’s decision nor discussed in the context of whether such rates are representative or prevailing. Here, Attorney Shaw has two different billable rates: \$160 per hour

and \$220 per hour. Respondent accepts as true the verified statements as to the nature and amounts of work performed, but these rates are employed somewhat inconsistently. The rates charged for teleconferences with the client were \$220 per hour in April 2009 and \$165 per hour in May 2009; some pleadings were drafted at the higher rate and some at the lower rate. The billings for May 4, 2009 regarding e-mails *received* from the hearing officer use both rates. There is little indication in the previous decisions that the rates or the itemized work have been reviewed during the Board's determinations of "reasonable" awards.

10. Petitioner's argument is likewise rather presumptive: "With respect to the specifics of this appeal, the Board should award reimbursement for the same reason that legal fees were awarded in Swif-T Food Mart, which the Board found to be applicable precedent herein." Motion at ¶ 7. The Board's decision in the prior case did serve as precedent for the determination of the *technical* issue, but the factual rationale for the award of legal costs in *Swif-T Food Mart* was much different than the record here. More importantly, Petitioner does not represent that it has actually paid for the legal work performed. Similarly, Attorney Shaw does not state that the fees *incurred* have been billed and paid. Reimbursement is a simple concept. The owner or operator must prove more than mere eligibility in order to receive any payment from the Fund.

11. The owner or operator has a legal right to reimbursement from the Fund, but that right is not unlimited. *FedEx Ground Package System, Inc. v. Pollution Control Board*, 382 Ill. App. 3d 1013 (1<sup>st</sup> Dist. 2008). The First District cites to its earlier decision for the proposition that "the Fund does not have a broad remedial purpose, presumably due to its limited resources." 382 Ill. App. 3d at 1015-16. This earlier case is *Strube v. Pollution Control Board*, 242 Ill. App.

3d 822, 826 (1<sup>st</sup> Dist. 1993), where the court summarized and adopted the Board's arguments:

The Board disputes the Strubes' contention that the Fund has a broad remedial purpose. The Board states that the Fund's purposes are narrow and that the statutory definition of corrective action is specific. Accordingly, the Board asserts that restoration expenses such as repaving fall outside the statutory definition of corrective action. We agree.

The Board argues that a two-pronged analysis should be used to determine if an activity meets the definition of corrective action: (1) whether the costs are incurred as a result of action to stop, minimize, eliminate or clean up a petroleum release; and (2) whether the costs are the result of activities such as those listed in the statute.

If "the Fund does not have a broad remedial purpose, presumably due to its limited resources," then the Board cannot "continue to liberally award legal costs to prevailing parties in LUST appeals." If the owner or operator does not have an unlimited legal right to reimbursement from the Fund, then it is unlikely such a *limited* legal right may be exercised by a third party, *e.g.* the consultant in *Ayers* or the attorney in the present case.

12. Petitioner is not legally *entitled* to reimbursement but rather merely qualifies for a potential award of legal costs. Respondent respectfully argues that the Board precedents discussed above must be evaluated in light of the appellate court's declarations in the *FedEx* case. The award in the present case must be determined with more stringency than the Board has done in the past. The legal bills must first be paid in order to be *eligible* for reimbursement. The legal work performed must fall within the statutory definition of corrective action; after all, Section 57.8(1) *explicitly excludes* legal defense costs except in the limited situation set forth in that provision. Any award is discretionary and the Board's reasonableness approach is only as good as its attention to the details such as the hourly rates being charged for legal services and the relation of that work to the outcome achieved. A finding that a particular award is based

upon the facts of a given case has no meaning as precedent unless the assessment of that particular award is articulated. The Agency suggests that a reasonable award with an appropriate rationale may be made in this case but not without clarification of the inconsistently applied hourly rates issue. The focus must be on limiting awards from the Fund in accordance with the statutory and case law requirements and not on how "broad" the Board's discretionary powers might be.

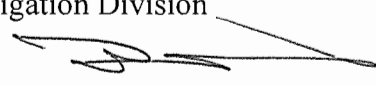
WHEREFORE, the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, objects to the award of attorney's fees as requested.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY,  
*ex rel.* LISA MADIGAN,  
Attorney General  
of the State of Illinois

MATTHEW J. DUNN, Chief  
Environmental Enforcement/Asbestos  
Litigation Division

BY: \_\_\_\_\_

  
THOMAS DAVIS, Chief  
Environmental Bureau  
Assistant Attorney General

Attorney Reg. No. 3124200  
500 South Second Street  
Springfield, Illinois 62706  
217/782-9031  
Dated: 9/29/09