BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PRIME LOCATION PROPERTIES, LLC,	)	
	)	
Complainant,	)	
	)	
vs.	)	**PCB No. 09-67**
	)	**(UST Appeal)**
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
	)	
Respondent.	)	

NOTICE OF ELECTRONIC FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on May 18, 2012, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, c/o John T. Therriault, Assistant Clerk, James R. Thompson Center, 100 W. Randolph St., Ste. 11-500, Chicago, IL 60601, a RESPONSE TO MOTION FOR SUPPLEMENTAL AWARD OF LEGAL COSTS, 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: May 18, 2012

CERTIFICATE OF SERVICE

I hereby certify that I did on May 18, 2012, cause to be served by First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box in Springfield, Illinois, a true and correct copy of the following instruments entitled NOTICE OF ELECTRONIC FILING and RESPONSE TO MOTION FOR SUPPLEMENTAL AWARD OF LEGAL COSTS upon the persons listed on the Service List.

Thomas Davis, Chief
Assistant Attorney General

SERVICE LIST

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

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

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PRIME LOCATION PROPERTIES, LLC,	)	
	)	
Petitioner,	)	
	)	
v.	)	**PCB NO. 09-67**
	)	**(UST Appeal)**
	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

RESPONSE TO MOTION FOR SUPPLEMENTAL AWARD OF LEGAL COSTS

NOW COMES the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, and respectfully objects to the Motion for Supplemental Award of Legal Costs filed by the Petitioner, PRIME LOCATION PROPERTIES, LLC, and states as follows:

1. The Board issued its final order in this permit appeal on November 5, 2009. The Petitioner had prevailed in this proceeding and, upon the motion of the Petitioner, the Board awarded $10,088.18 in legal fees and costs pursuant to Section 57.8(l) of the Act. The Board order was affirmed upon appeal through a Rule 23 order on March 2, 2012 in *Illinois EPA v. Illinois Pollution Control Board and Prime Location Properties, LLC*, 2012 IL App (5th) 100072-U (copy attached). The recent motion seeks an additional award to reimburse Prime Location for its expenditures of $12,501.15 during the appeal.

2. Prime Location does not cite to any legal authority regarding the Board's ability to consider this supplemental request. However, the Petitioner does affirmatively represent [at ¶ 6] that on April 11, 2012 "the mandate was issued and the appeal remanded to the Illinois Pollution Control Board." Neither the March 2nd appellate order nor the April 2nd mandate is submitted

with the motion to support this representation. The Board clearly concluded and terminated the permit appeal through its November 5, 2009 final order. The Board has no legal ability to exercise any jurisdiction over a proceeding after appeal unless specifically ordered pursuant to a proper remand. The Act does not allow for *any* rehearing or reopening of a case after the Board has issued a final administrative decision. The Illinois Supreme Court has consistently held that "an administrative agency may allow a rehearing, or modify and alter its decisions, only where authorized to do so by statute."[1] There is no provision in the law for the Board to consider this request for a supplemental award regarding costs incurred on appeal to the appellate court.

3. The Fifth District Appellate Court affirmed the Board's rulings. *See* 2012 IL App (5th) 100072-U at ¶s 28 & 29. The award of attorney fees was upheld. There is no discussion in the appellate order as to the potential recovery of additional expenses because this was not an issue on appeal. Lastly, there is absolutely nothing set forth in the decision that pertains to any remand. The Board is not directed to take any action. The mandate is simply necessary for payment of the $10,088.18 by the Illinois EPA.

4. The Board is implicitly asked to reopen this proceeding in order to award additional reimbursement for expenditures made after the Board's final order was issued. It is well settled that an administrative agency obtains its power to act from the legislation creating it and its power is strictly confined to that granted in its enabling statute; the legal ability of an administrative body to hear proceedings cannot be conferred on it by the election of the parties,

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[1] *Pearce Hospital Foundation v. Illinois Public Aid Commission* (1958), 15 Ill.2d 301, 307; see also *Department of Transportation v. Illinois Commerce Commission*, 266 Ill. App. 3d 659, 576-77 (1st Dist. 1994) ("regulatory agencies do not have any 'inherent power' and can only modify their decisions if authorized to do so by statute.").

but is dependent on statute. While the term "jurisdiction" may not be strictly applicable to an administrative body, the term may be used to designate the authority of the administrative body to act, and the terms "jurisdiction" and "authority" have been used interchangeably in certain administrative law contexts. *Business & Professional People for the Public Interest v. Illinois Commerce Commission* (1989), 136 Ill.2d 192, 243-44. In *Blount v. Stroud* (2009), 323 Ill.2d 302, 327, the Illinois Supreme Court reiterated the inherently limited scope of authority of administrative agencies by citing the following precedents: *Vuagniaux v. Department of Professional Regulation* (2003), 208 Ill.2d 173, 186 (administrative agency possesses only those powers granted by the legislature; any action must be authorized by the statute under which the agency was created); *Villegas v. Board of Fire & Police Commissioners* (1995), 167 Ill.2d 108, 126 ("an administrative body lacks inherent or common law authority to exercise jurisdiction not conferred upon it by legislative enactment"); *Homefinders v. City of Evanston* (1976), 65 Ill.2d 115, 129 ("administrative bodies have only such powers as are conferred upon them by statute or ordinance"). Specific grants of authority are legislative in nature and strictly construed to preclude any implied powers or purposes. *Village of Lombard v. Pollution Control Board* (1977), 66 Ill. 2d 503, 506; *Alvarado v. Industrial Commission* (2005), 216 Ill 2d 547, 553. An action or decision by an administrative agency taken in excess of, or contrary to, its statutory authority is void. *Alvarado v. Industrial Commission* (2005), 216 Ill.2d 547, 554.

5. The authority provided by Section 57.8(l) of the Act is limited by the plain meaning of the language: "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." There is no provision for

additional reimbursement for prevailing on appeal. This subsection allows a discretionary award of "legal costs for seeking payment under this Title" and this was accomplished when the Petitioner prevailed before the Board. Appellate expenditures are beyond the scope of the statute. The Board, therefore, lacks authority under the Act to grant the supplemental award requested by the Petitioner.

6. The policy arguments presented by the Petitioner [¶s 9, 10 & 11] are self-serving and, without any statutory basis for the relief sought, merely an invitation to error.

WHEREFORE, the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, respectfully requests that the Motion for Supplemental Award of Legal Costs filed by the Petitioner for want of jurisdiction and authority.

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
Environmental Bureau
Assistant Attorney General

500 South Second Street
Springfield, Illinois 62706
217/782-9031
Dated: May 18, 2012

2012 IL App (5th) 100072-U

NO. 5-10-0072

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Petitioner, v. ILLINOIS POLLUTION CONTROL BOARD and PRIME LOCATION PROPERTIES, LLC, Respondents.	)	Petition for Review of the Order of the Illinois Pollution Control Board. PCB No. 09-67

JUSTICE CHAPMAN delivered the judgment of the court.
Presiding Justice Donovan and Justice Welch concurred in the judgment.

ORDER

¶ 1 *Held*: Nullity rule did not apply to petition for review filed with administrative agency by a nonattorney on behalf of a corporation where agency's regulationsdid not define filing the petition as the practice of law. Comment in an earlier decision letter did not preclude agency from later determining that underground storage tank leaks sprang from a single incident. Administrative agency did not abuse its discretion in awarding attorney fees to the prevailing party.

¶ 2 Respondent Prime Location Properties, LLC, applied for and received reimbursement from the Leaking Underground Storage Tank Fund (LUST fund) to clean up contamination resulting from leaking underground storage tanks found on an abandoned gas station it purchased. The LUST fund is administered by the Illinois Environmental Protection Agency (IEPA). The process of locating and confirming leaks from all seven of the tanks took several years. At one point, the IEPA issued a decision in which it rejected Prime's proposed plan to remove all seven tanks

because, at that point, leakage had been confirmed from only two of the tanks. The decision also noted that leaks from any of the other storage tanks on the property would be treated as a separate incident. Subsequently, Prime removed all seven tanks, confirmed that all seven were leaking, and sought reimbursement for the costs it incurred. The IEPA denied Prime's request for reimbursement from the LUST fund based on its failure to follow procedures in place for reporting the leaks as a separate incident. Prime petitioned for review with the Illinois Pollution Control Board (IPCB), which reversed the IEPA's decision. In this appeal, the IEPA argues that (1) the IPCB lacked jurisdiction to consider Prime's petition because the initial petition for review was filed on its behalf by a corporate officer who was not an attorney, (2) the IPCB erred in failing to give preclusive effect to the IEPA's earlier decision that any additional leaks would be treated as a separate incident, and (3) the IPCB abused its discretion in awarding Prime attorney fees without proof of payment. We affirm.

¶ 3 Prime became the owner of the subject property in April 2006. In July 2001, Prime's predecessor, Metropolis Oil and Gas Company, discovered a leak of gasoline and/or heating oil from the underground storage tanks on the property. Metropolis Oil and Gas reported the contamination the following day.

¶ 4 The IEPA determined that early corrective action costs were reimbursable from the LUST fund. The first step was to map the site and determine the location of the underground tanks and the source or sources of the contamination. Metropolis Oil and Gas hired the CW3M Company to do this. At this stage, Metropolis Oil and Gas and CW3M were aware that there were a total of seven underground storage tanks on the property, but CW3M could determine the location of only four of the tanks. The IEPA approved removal of all four of these tanks. However, CW3M found that removal of the four tanks would undermine the structural integrity of the structures

on the property. One tank was located near the foundation of a building on the property. A second tank was underneath the foundation. The foundation was unsound. The remaining two tanks were located under the gasoline pump island near the footings of the canopy. After CW3M informed the IEPA of the difficulties involved in removing the tanks, the IEPA requested further investigation to determine which of the tanks were leaking.

¶ 5 Metropolis Oil and Gas and CW3M submitted a series of proposed corrective action plans and associated budgets to the IEPA. Twice, they proposed removing the structures on the property to allow for the removal of all seven tanks. Both times, the IEPA refused to approve the plans for removal of the tanks and structures, and instead sought further investigation to determine which of the tanks were leaking.

¶ 6 Further investigation allowed CW3M to confirm leaks from two of the storage tanks. However, it was still not possible to gain access to the other two tanks sufficient to determine whether they were leaking, and the locations of the three remaining tanks were still not determined. A corrective action plan submitted in August 2005 reflected this.

¶ 7 In November 2005, the IEPA amended the corrective action plan submitted in August and rejected the associated budget. In relevant part, the IEPA refused to approve any action associated with the five tanks that CW3M had not yet been able to access to confirm whether they were leaking. The IEPA noted, without explanation, that any additional leaks confirmed "must be reported as a new release."

¶ 8 In December 2005, CW3M submitted an amended budget in response to the November decision letter. It noted that it did not agree with the IEPA's statement that only two tanks showed evidence of a possible release, but that it was modifying the budget in accordance with the IEPA's request "in order to move the site forward."

¶ 9 In April 2006, Prime purchased the property. Eventually, Environmental Management, Inc. (EMI), a company hired by Prime, demolished the structures on the property, removed all seven storage tanks, and confirmed that all of the tanks had been leaking. Prime then sought reimbursement from the LUST fund.

¶ 10 On January 27, 2009, the IEPA rejected the plan and budget associated with this work. The basis for its rejection was Prime and EMI's failure to treat the leaks from the five additional tanks as a new release and follow procedures for reporting it as such. Prime received this decision letter on February 9, 2009, and timely petitioned for review with the IPCB on March 9. The petition for review was signed by an officer of Prime who was not a licensed attorney. In accordance with long-standing practice and policy, the IPCB required Prime to submit an amended petition for review through an attorney before proceeding in the matter. Prime did so in April 2009.

¶ 11 After a hearing, the IPCB issued a detailed written decision addressing all three of the issues raised in this appeal. With respect to its jurisdiction over the petition for review, the IPCB noted that under circumstances similar to those present here, it had "consistently interpreted" relevant regulations "as requiring that counsel file an appearance and amended petition, not as requiring that the case be dismissed."

¶ 12 In addressing the merits, the IPCB explained that all seven tanks were last used in 1987, and that when the contamination was discovered and reported in 2001, it was reported as a leak from all seven tanks. The IPCB also emphasized that the IEPA had never specifically determined that the five tanks were not leaking when the release was reported in 2001. The IPCB concluded that the evidence submitted showed that all seven tanks were leaking when the release was first discovered and reported. Thus, it remanded the matter to the IEPA to consider the merits of the plan and budget

Prime submitted addressing the removal of the five tanks and cleanup of the associated contamination.

¶ 13 In addition, the IPCB awarded attorney fees to Prime for its costs in appealing the IEPA's decision. The IEPA appealed the IPCB's decision directly to this court pursuant to section 41 of the Illinois Environmental Protection Act (415 ILCS 5/41(a) (West 2008)) and Supreme Court Rule 335 (eff. Feb. 1, 1994).

¶ 14 The IEPA first argues that the IPCB erred in considering Prime's petition for review at all because it lacked jurisdiction over the petition. This argument is based on the "nullity rule." Under that rule, any action taken in a legal proceeding on behalf of another party by a person who is not authorized to practice law is considered null and void. *Applebaum v. Rush University Medical Center*, 231 Ill. 2d 429, 435, 899 N.E.2d 262, 266 (2008). In this case, the petition for review was filed by an officer of the company who was not an attorney. That petition was timely filed within 35 days after Prime received the IEPA's decision letter. See 415 ILCS 5/40(a)(1) (West 2008). However, the amended petition, filed by an attorney, was filed more than 35 days after Prime received the letter. The IEPA argues that the original petition was null and void because it was filed by a nonattorney. As such, the IEPA contends, the amended petition could not relate back to the date on which the original petition for review was filed, and it could not confer jurisdiction on the IPCB.

¶ 15 The IPCB and Prime argue that (1) under the Environmental Protection Act and the IPCB's regulations, petitioning for review with the IPCB does not constitute the practice of law and (2) the nullity rule has been relaxed recently,and this is not a case where application of the nullity rule is necessary to protect the public and the integrity of the courts from the unauthorized practice of law. See *Applebaum*, 231 Ill. 2d at 435, 899 N.E.2d at 266; *Downtown Disposal Services, Inc. v. City of Chicago*,

407 Ill. App. 3d 822, 834-35, 943 N.E.2d 185, 197 (2011), *appeal allowed*, ____ Ill. 2d ___, 949 N.E.2d 1097 (2011). We agree with the first of these arguments and need not consider the second.

¶ 16 As previously noted, under the nullity rule, any action taken by a nonattorney on behalf of a party in a legal proceeding is null and void. This includes pleadings filed with a court. *Janiczek v. Dover Management Co.*, 134 Ill. App. 3d 543, 545-46, 481 N.E.2d 25, 26 (1985). The rule is meant to protect the integrity of the court system from the unauthorized practice of law by unqualified individuals and to protect litigants from the consequences of mistakes made by someone who lacks the requisite skills to practice law. *Janiczek*, 134 Ill. App. 3d at 546, 481 N.E.2d at 27. Due to the potentially harsh consequences of applying the nullity rule, courts have developed numerous exceptions over the years. See, *e.g.*, *Applebaum*, 231 Ill. 2d at 446, 899 N.E.2d at 272; *Pratt-Holdampf v. Trinity Medical Center*, 338 Ill. App. 3d 1079, 1085, 789 N.E.2d 882, 887 (2003); *Janiczek*, 134 Ill. App. 3d at 546-47, 481 N.E.2d at 26-27.

¶ 17 This case, however, does not involve a pleading filed in a court. Instead, it involves a petition for review filed with an administrative agency. We emphasize that this fact does not make the nullity rule inherently inapplicable. Indeed, the prohibitions against the unauthorized practice of law the nullity rule is meant to enforce are applicable to nearly all administrative proceedings. 705 ILCS 205/1 (West 2008); 705 ILCS 220/1 (West 2008). (We note parenthetically that there are statutory exceptions. See 705 ILCS 205/1 (West 2008) (providing that nonattorneys may represent others in proceedings before specified administrative bodies).) However, the IPCB has argued that filing the petition for review does not constitute the practice of law under the Illinois Environmental Protection Act and relevant

regulations. Thus, it contends, the nullity rule is inapplicable. For the following reasons, we agree.

¶ 18 The Environmental Protection Act itself provides that an "applicant" may petition for rehearing before the IEPA or for review of the IEPA's decision by the IPCB. 415 ILCS 5/40(a)(1) (West 2008). Regulations promulgated under the Act expressly differentiate between petitioning for review and appearing at hearings before the IEPA or IPCB. While the regulations state that the applicant may petition for review (35 Ill. Adm. Code 105.204(a) (2011)), they provide that parties must be represented by a licensed attorney "when appearing before" the IPCB (35 Ill. Adm. Code 101.400(a)(2) (2011)). The IPCB also noted in its decision in this case that it has never dismissed a petition for review under the circumstances presented here. Instead, it has required applicants to obtain representation and submit an amended petition for review prior to proceeding, as happened in this case. An administrative agency's interpretation of the statutes and regulations it enforces is entitled to "substantial weight and deference." *Strube v. Pollution Control Board*, 242 Ill. App. 3d 822, 826-27, 610 N.E.2d 717, 720 (1993).

¶ 19 The IEPA next contends that the IPCB erred in failing to give preclusive effect to a November 2005 decision letter, which stated that any additional leaks would be considered a separate release and must be treated as such. The IEPA argues–and the IPCB agrees–that the November 2005 letter was a final and appealable decision. Thus, the IEPA contends, unless the decision letter is appealed within 35 days, its effect is preclusive. The IPCB, however, argues that the November 2005 letter did not decide the relevant question of whether the additional five tanks were leaking at the same time the original leak was reported. We agree with the IPCB.

¶ 20 As previously noted, the November 2005 decision letter noted that at that point,

leaks from only two of the tanks had been confirmed. Thus, the IEPA approved only the costs associated with the excavation of those two tanks and cleanup of the surrounding soil. It also stated, "Furthermore, any additional [tanks] that are found on-site and contamination that may be associated with those [tanks] must be reported as a new release and handled accordingly." The IEPA relies on this language in arguing that the decision letter included a determination that the leaks from the five additional storage tanks were not part of the release initially reported in 2001. Under the facts of this case, we find this position untenable.

¶ 21 It is important to note that the November 2005 letter does not address the factual question of whether all seven tanks were leaking when the contamination was first discovered in 2001. Indeed, in November 2005, it was impossible for the IEPA to make such a determination. As previously discussed, three of the tanks had not even been located, and while it appeared that two additional tanks were leaking, this could not be confirmed due to their inaccessible locations. Because the November 2005 decision letter did not–and could not–address the question involved, we cannot find that it had a preclusive effect on determinations made later.

¶ 22 The IPCB argues that the November 2005 decision letter constituted preapproval of certain corrective action to be performed, but that it did not limit the scope of any corrective action that could be taken in the matter as site investigation progressed. It points to section 57.7(e) of the Illinois Environmental Protection Act, which expressly provides that an applicant may proceed with additional investigation and cleanup beyond what the IEPA approves in advance. 415 ILCS 5/57.7(e) (West 2008). The applicant may then seek reimbursement from the LUST fund for such work, subject to IEPA approval. See 35 Ill. Adm. Code 734.310(e), 734.335(d) (2011).

¶23 The IPCB's contentions are consistent with what actually occurred in this case. The companies hired by Prime and its predecessor submitted corrective action plans addressing issues that were known and issues that still needed to be investigated. As they were able to pinpoint the sources of the leaks, the IEPA approved work to address those leaks. Only after Prime was able to access all seven tanks and confirm that all of them were leaking could a factual determination be made as to whether they were leaking in 2001 when the contamination was first discovered and, therefore, part of the same release. Consistent with this, we find that the IPCB correctly determined that the November 2005 decision letter did not preclude a later determination that all seven tanks were a part of the same release.

¶24 We note that the IEPA does not argue that the IPCB's findings are against the manifest weight of the evidence. We may therefore presume it is adequately supported by the record.

¶25 The IEPA's final contention is that the IPCB abused its discretion in awarding attorney fees to Prime without requiring proof that the fees were actually incurred. We disagree.

¶26 As the IEPA correctly notes, the LUST fund does not have a broad remedial purpose due to the fact that it has limited resources. *Township of Harlem v. Environmental Protection Agency*, 265 Ill. App. 3d 41, 44, 637 N.E.2d 1252, 1254-55 (1994). Thus, statutes allowing for recovery of any costs are to be construed narrowly. *Township of Harlem*, 265 Ill. App. 3d at 44, 637 N.E.2d at 1254. The Environmental Protection Act explicitly provides that the attorney fees of the prevailing party in a petition for review are among the costs that can be reimbursed from the fund, although other legal costs are not. 415 ILCS 5/57.8(l) (West 2008).

¶ 27 The IEPA notes that Prime did not submit evidence that it had actually paid its attorney. However, Prime's attorney did submit an affidavit outlining the fees he charged for the various services he provided in this matter. This is generally sufficient where attorney fees are permitted by statute. See *Brubakken v. Morrison*, 240 Ill. App. 3d 680, 685-86, 608 N.E.2d 471, 475 (1992) (discussing whether an attorney's statement of fees provided sufficient detail to support an award of attorney fees). It is also consistent with regulations requiring applicants to submit invoices, not proof of payment, for corrective action costs they seek to have reimbursed. 35 Ill. Adm. Code 734.605(b)(9) (2011). The IEPA does not argue here–and did not argue before the IPCB–that the fees charged were not reasonable. We find no abuse of discretion.

¶ 28 We find no error. We therefore affirm the IPCB's ruling.

¶ 29 Affirmed.