BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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

NOTICE OF FILING AND PROOF OF SERVICE

TO: John T. Therriault, Acting Clerk
Illinois Pollution Control Board
100 West Randolph Street
State of Illinois Building, Suite 11-500
Chicago, IL 60601

Carol Webb
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 West Randolph Street
Chicago, IL 60601

Thomas Davis
Assistant Attorney General
500 S. Second Street
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PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board, pursuant to Board Procedural Rule 101.302 (d), a MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUPPLEMENTAL AWARD OF LEGAL COSTS, a copy of which is herewith served upon the hearing officer and upon the attorneys of record in this cause.

The undersigned hereby certifies that a true and correct copy of this Notice of Filing, together with a copy of the document described above, were today served upon the hearing officer and counsel of record of all parties to this cause by enclosing same in envelopes addressed to such attorneys and to said hearing officer with postage fully prepaid, and by depositing said envelopes in a U.S. Post Office Mailbox in Springfield, Illinois on the 17th day of August, 2012.

BY: /s/ Patrick D. Shaw

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THIS FILING SUBMITTED ON RECYCLED PAPER

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

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUPPLEMENTAL AWARD OF LEGAL COSTS

NOW COMES Petitioner, PRIME LOCATION PROPERTIES, INC. (hereinafter "Prime"), by its undersigned counsel, and pursuant to the Order of the Board entered July 12, 2012, states as follows:

I. THE BOARD'S JURISDICTION ORIGINATES FROM STATUTE, SUBJECT TO THE LAW OF THE CASE DECIDED BY THE APPELLATE COURT.

Petitioner submits that the primary guidance in this discussion should be that of statutory application. The Illinois Environmental Protection Agency and the Illinois Pollution Control Board are established by the Illinois Environmental Protection Act and derive their powers and mandate therefrom. (415 ILCS 5/4 & 5/5) Under the Illinois Constitution, the Appellate Court's powers of review also derive from statute. (Ill. Const. Art. VI, § 6 ("The Appellate Court shall have such powers of direct review of administrative action as provide by law.")) The Illinois Supreme Court has explained that when "a court is in the exercise of special statutory jurisdiction, that jurisdiction is limited to the language of the act conferring it and the court has no powers from any other source." Fredman Bros. Furniture Co. v. Department of Revenue, 109 Ill. 2d 202, 210 (1985).

However, even in the case of special statutory jurisdiction, the doctrine of separation of powers prevents the Illinois General Assembly from infringing upon the inherent judicial power, including rulemaking authority to regulate the trial of case, as well as to adjudge, determine and render a judgment. Strukoff v. Strukoff, 76 Ill. 2d 53, 58 (1979). The Illinois Supreme Court has the Constitutional authority "to provide by rule for expeditious and inexpensive appeals." (Ill. Const. Art. VI, § 16) The statutory basis of administrative review and the Supreme Court's rulemaking authority are in tension, and the Illinois Supreme Court has found that in this area, the legislature and the courts exercise concurrent constitutional authority to promulgate *procedural* rules. Cermak Helth Services v. ISLLRB, 144 Ill.2d 326, 332 (1991).

The Board has been delegated the authority to "conduct proceedings . . . for review of final determinations . . . [and] may also conduct other proceedings as may be provided by this Act or any other statute or rule." (415 ILCS 5/5(d)) "In addition, section 26 of the Act empowers the Board to adopt the procedural rules necessary to accomplish the purposes of the Act." Modine Mfg. Co. v. Pollution Control Board, 40 Ill. App. 3d 498, 501 (2nd Dist. 1976)

Given this background, Petitioner first submits that the Board's jurisdiction cannot be constrained by the procedural rules promulgated by the Illinois Supreme Court to govern the court system, which the Board is not a part of. This is particularly true where those rules themselves only apply "[i]nsofar as appropriate." (S. Ct. R. 335) While the procedural rules of the courts may offer guidance to interpret the meaning to be attributed to the Appellate Court's decision on administrative review, the Board's jurisdiction ultimately must originate from the Act, and any jurisdicitional limitations stemming from the appeal must be expressed and not merely implied. Cf. Cermak Helth Services, 144 Ill.2d at 332 (refusing to create a conflict

between legislative and judicial rule by implication).

II. THE BOARD HAS STATUTORY AUTHORITY TO AUTHORIZE LEGAL DEFENSE COSTS TO BE REIMBURSED FROM THE FUND AND BY IMPLICATION CONDUCT SUCH SUPPLEMENTAL PROCEEDINGS NECESSARY TO ACCOMPLISH THAT PURPOSE.

Petitioner has sought a supplemental award of attorney fees pursuant to the Board's authority under Section 57.8(l) of the Act, which 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))

A number of observations can be readily drawn from the statutory language. First, this is not a strictly a fee-shifting provision since "the loser" is not directed to pay the attorneys' fees of the prevailing litigant. See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975). Instead, this is a fairly unique statutory arrangement wherein the legislature has created a fund of monies collected from a gasoline tax for multiple purposes, including administration of the fund, as well as payment of costs of corrective action. (415 ILCS 5/57.11)[1] The traditional approach to accessing this fund is not adjudicative, but it involves an appropriate application or request for payment to either the Illinois EPA or the OSFM. (Id.) In fact, the Agency is expected to pay attorneys' fees from the statutory fund when they constitute corrective action. City of Roodhouse v. IEPA, PCB No. 92-31 (Sept. 17, 1992) (legal work relating to creating easement

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[1] For this reason, Supreme Court Rule 374 ("Costs in the Reviewing Courts") does not apply. Petitioner is not seeking legal defense costs from the Agency, and thus does not implicate that Rule or the numerous restrictions on seeking money from the State.

for pipeline was reimbursable corrective action and not "legal defense costs"). Thus the legal defense costs are considered to be a part of the useful administration of the LUST Fund, at least where petitioners are deemed prevailing parties.

The second point to be drawn from the statute is that it is solely the Board's authorization, and discretion, that is the condition precedent to the Agency paying legal defense costs as corrective action. The Appellate Court has no authority to authorize that any legal defense costs be treated as corrective action; it only has the authority to review the Board's decision. Under the Administrative Review Law, the questions presented for administrative review must be based upon the record and "[n]o new or additional evidence in support of or in opposition to any finding, order, determination or decision of the administrative agency shall be heard by the court." (735 ILCS 5/3-110) The Petitioner's supplemental request for reimbursement of attorney's fees was not in the administrative record of the Appellate Court, and thus the Appellate Court was without jurisdiction under the Administrative Review Law to address them one way or the other.

The third point stemming from the statutory language is that the legislature utilized traditional "prevailing party" language found in many fee-shifting statutes and contracts. Thus, while the statutory fund is in many respects *sui generis*, the legislature wanted the Board to utilize its discretion in accordance with well-established terminology found in both statutes and contracts. See McNiff v. Mazda Motor of Am., 384 Ill. App. 3d 401, 408 (4th Dist. 2008) (allowing attorney fees incurred on appeal of prevailing party statute).

The Board's authority to authorize legal defense costs to a prevailing party necessarily requires the Board to engage in supplemental proceedings after the main case is completed:

> **Regardless of when attorney's fees are requested, the court's decision of entitlement to fees will therefore require an inquiry separate from the decision on the merits -- an inquiry that cannot even commence until one party has "prevailed." . . . Their award is uniquely separable from the cause of action to be proved at trial.**

White v. N.H. Dep't of Employment Sec., 455 U.S. 445, 451-452 (1982).

Illinois courts have followed the Supreme Court's reasoning in treating a prevailing party statute as a separate inquiry. Coldwell Banker Havens v. Renfro, 288 Ill. App. 3d 442, 447 (5th Dist. 1997) ("it cannot be determined who is the successful party until a final judgment is reached."); Touchdown Sportswear, Inc. v. Hickory Point Mall Co., 165 Ill. App. 3d 72, 74 (4th Dist. 1987) ("For the sake of judicial economy, it would seem unwise to require proof of attorney fees before a party has been found to have prevailed.") The Board has similarly treated the authorization of legal defense costs as a separate inquiry, which is only addressed after a final order from the Board. It would appear to be unquestionable that the statutory authority to authorize legal defense costs to a prevailing party necessitates "other proceedings" to determine their availability and amount.

While the precise procedural posture of such post-judgment motions has not been specifically addressed by the Board, it would appear that the motions have been treated as a type of motion for reconsideration or modification of a final Board order. (35 Ill. Adm. Code § 101.520) The Board has denied a motion to supplement previously authorized legal defense costs where they fell outside the appropriate thirty-five day period for filing such motions. Illinois Ayers v. IEPA, PCB No. 03-214 (June 16, 2005).[2] In Coldwell Banker Havens, the

[2] In Illinois Ayers, the motion to supplement was filed over a year after the original Board decision, and more than 35 days from any of the Board's post-judgment orders.

prevailing party filed a motion for attorneys' fees within thirty days of the filing of the mandate. 288 Ill. App. 3d at 445.

These authorities demonstrate that the Board has authority to grant the requested relief under the authority of the Illinois Environmental Protection Act.

III. THE MANDATE DOES NOT LIMIT THE BOARD'S JURISDICTION TO CONDUCT OTHER PROCEEDINGS.

When the Illinois EPA filed an appeal from the Board's decision, jurisdiction of the case was vested in the Appellate Court. (735 ILCS 5/3-113; see Vogue Tyre v. OSFM, 354 Ill. App. 3d 20, 28 (1st Dist. 2004) (proper petition for review necessary to vest jurisdiction in Appellate Court) During the pendency of the appeal, the Board was without authority to enter any order involving a matter of substance. Bank v. Viola v. Nestrick, 94 Ill. App. 3d 511, 514 (3rd Dist. 1981) The parties cannot "by agreement, acquiescence, or otherwise" reinvest jurisdiction until the mandate is issued. Id.

The mandate issued from the Appellate Court on April 11, 2012, in the form of an affirmance of the Board's decision, with no remand order. While Petitioner still maintains that the Supreme Court's Rules are not binding upon the Board, the Appellate Court is bound by, or at least expected to operate consistently with, those Illinois Supreme Court rules that bear on the subject. Supreme Court Rule 369 addresses the form the mandate may take and the Appellate Court is directed to apply "as appropriate." (S. Ct. R. 335(i)) The relevant portion states:

> **Dismissal or Affirmance. When the reviewing court dismisses the appeal or affirms the judgment and the mandate is filed in the circuit court, enforcement of the judgment may be had and other proceedings may be**

conducted as if no appeal had been taken.

(S. Ct. R. 369(b)(emphasis added))

The Appellate Court's mandate was issued in reliance upon the framework of the above provision. The Appellate Court did not need to direct which, if any "other proceedings may be conducted" because that was not required of it.

In Stein v. Spainhour, 196 Ill. App. 3d 65, 68 (4th Dist. 1980), similar issues were presented. In the first appeal, the Appellate Court affirmed a trial court's assessment of damages and attorney's fees in a breach of lease judgment. After the mandate issued, affirming the circuit court and taxing costs as provided by law, the plaintiff filed for and was awarded additional attorney fees. The defendant appealed the decision, complaining that the additional fees were not costs and exceeded the mandate. The Appellate Court affirmed the award of additional fees, explaining that under Supreme Court Rule 369 the question is whether the award of additional fees constitute "other proceedings" under Rule 369(b) which they are. Id. At 68.

Similarly, in Maschhoff v. Kockenkemper, 343 Ill. App. 3d 500, 502 (5th Dist. 2003), the Appellate Court ruled that after the mandate was returned, affirming a judgment that included attorney's fees, the trial court had jurisdiction under Rule 369(b) to consider the additional attorney fees and costs from the subsequent trial, postrial and appellate proceedings.

The previously discussed case of Coldwell Banker Havens, 288 Ill. App. 3d 442, 447 (5th Dist. 1997) extends these principles to apply to not simply affirmance mandates, but also outright reversals, which are not even mentioned in Rule 369(b). The conclusion to be drawn here, particularly as to these two cases from the Fifth District which issued the mandate herein, is that where no specific directions are given to the inferior tribunal, the Appellate Court does not intend

to preclude "other proceedings" that were not presented to it on appeal, including supplemental fee awards.

These rulings provide clear interpretive guidance to the Appellate Court's expectations of how its mandate will be treated. "Illinois Supreme Court Rule 369(b) presupposes that after an affirmance, the trial court has jurisdiction over the subject matter and the parties – even absent a remand – because without such jurisdiction, the court would be precluded from entering any order at all, including an order relating to the affirmance, and Rule 369(b) contemplates further proceedings relating to the affirmance." McNeil v. Ketchens, 2011 IL App (4th) 110253, ¶ 21. A further consequence of a finding that the Board is without jurisdiction upon receipt of the mandate would be that the parties would be unable to modify, *even by mutual consent*, any aspects of the Board's original order that have become dated or inapplicable during the pendency of the appeal, now going on three years since the Board's interim order. The parties cannot agree to waive a jurisdictional issue. And while the Appellate Court is clearly quite capable of reviewing administrative decisions to determine if they are supported by proper evidence and adhere to legal requirements, the Appellate Court cannot be expected to be familiar enough with all of the regulatory programs in the state to assume that it can foresee and direct what other procedures may or may not be necessary.

Consistent with established Appellate Court practice found in the Illinois Supreme Court Rules and the decisions interpreting them, the Board should find that it has jurisdiction to consider post-mandate motions, including the motion to add additional legal defense costs, which are traditionally granted in court proceedings involving statutory awards.

WHEREFORE, Petitioner, PRIME LOCATION PROPERTIES, LLC renews its request that this Board authorize the payment from the leaking underground storage tank fund the amount of $12,501.15 in legal costs to PRIME LOCATION PROPERTIES, LLC, pursuant to 415 ILCS 5/57.8(1).

Respectfully submitted,

PRIME LOCATION PROPERTIES, LLC,
Petitioner,

BY: MOHAN, ALEWELT, PRILLAMAN & ADAMI,
Its attorneys

BY: /s/ Patrick D. Shaw

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