

ILLINOIS POLLUTION CONTROL BOARD
November 1, 2012

FREEDOM OIL COMPANY,)	
)	
Petitioner,)	
)	
v.)	PCB 10-46
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

OPINION AND ORDER OF THE BOARD (by T. A. Holbrook):

In an opinion and order dated August 9, 2012, the Board partially affirmed and partially reversed a determination of the Illinois Environmental Protection Agency (Agency) to reimburse Freedom Oil Company (Freedom Oil) \$55,057.50 of the requested \$84,652.35 from the Underground Storage Tank Fund (UST Fund). The requested costs were associated with early action activities at Freedom Oil's property located at 712 El Dorado Road, Bloomington, McLean County. Also in that opinion and order, the Board reserved ruling on whether to exercise its discretion to award attorney fees under Section 57.8(1) of the Environmental Protection Act (Act) (415 ILCS 5/57.8(1) (2010)). The Board allowed Freedom Oil until September 24, 2012, to file a request for attorney fees. However, Freedom Oil did not file a request for reimbursement of fees by that deadline.

For the reasons described below, the Board finds that the Agency shall not reimburse Freedom Oil from the UST Fund for any of its attorney fees.

PROCEDURAL HISTORY

On December 28, 2009, the Board received from Freedom Oil a petition seeking the Board's review of a November 23, 2009 determination of the Agency. In an order dated January 7, 2010, the Board accepted the petition for hearing.

In an order dated April 16, 2012, the hearing officer scheduled a hearing on May 9, 2012 in Springfield. Also on April 16, 2012, the Agency filed the administrative record of its decision.

The hearing took place as scheduled on May 9, 2012, and the Board received the transcript on May 11, 2012. During the hearing, Allan Green of Midwest Environmental Consulting and Remediation Services (MECRS) testified on behalf of Freedom Oil, and Brian Bauer testified on behalf of the Agency.

On June 11, 2012, Freedom Oil filed its post-hearing brief. On July 2, 2012 the Agency filed its post-hearing brief.

In an opinion and order dated August 9, 2012, the Board affirmed the Agency's determination to reduce reimbursement for excavation by \$7,024.08 and for backfill by \$3,729.51. However, the Board's opinion and order reversed the Agency's determination to reduce reimbursement for asphalt replacement by \$2,574.80 and directed that the amount of this deduction be paid from the UST Fund. The Board concluded that Freedom Oil had in part prevailed before the Board and reserved ruling on whether to exercise its discretion to award attorney fees under Section 57.8(1) of the Act.

Accordingly, the opinion and order permitted Freedom Oil to file on or before Monday, September 24, 2012, a statement of its legal fees and costs that may be eligible for reimbursement under the Act and its argument why the Board could exercise its discretion to direct the Agency to reimburse those costs. The order and opinion also permitted the Agency to file a response to any statement submitted by Freedom Oil. The Board has not received a request for reimbursement of attorney fees and costs from Freedom Oil.

DISCUSSION

Title XVI of the Act sets forth provisions for administration and oversight of the Leaking Underground Storage Tank Program, which includes the UST Fund. 415 ILCS 5/57 (2010). Title XVI also establishes requirements for eligible owners to seek reimbursement from the UST Fund. 415 ILCS 5/57(3), 57(4) (2010). Section 57.8(1) of the Act provides that the Board "may authorize payment of legal fees" if the owner prevails before the Board in seeking payment under Title XVI. 415 ILCS 5/57.8(1) (2010). Because this subsection of the Act provides for the reimbursement of legal fees incurred in prevailing before the Board, it constitutes 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 Board must strictly construe fee-shifting statutes, and the amount of fees to be awarded lies within the broad discretionary powers of the Board. See Globalcom, Inc. v. Illinois Commerce Comm'n., 347 Ill. App. 3d at 618, 806 N.E.2d at 1214 (citations omitted). This discretion includes determining the reasonableness of the requested fees. Illinois Ayers Oil Co. v. IEPA, PCB 03-214, slip op. at 8 (Aug. 5, 2004) (citations omitted). "[T]he general rule is that a party is not entitled to fees for its unsuccessful claims." Globalcom, 347 Ill. App. 3d at 618, 806 N.E.2d at 1214 (citation omitted).

The party requesting legal fees and costs bears the burden of presenting sufficient evidence from which the Board can render a decision as to their reasonableness. See Prime Location, PCB 09-67, slip op. at 4, citing J.B. Esker & Sons, Inc. v. Cle-Pa's Partnership, 325 Ill. App. 3d 276, 283 (5th Dist. 2001); Sampson v. Miglin, 279 Ill. App. 3d 270, 281 (1st Dist. 1996). The 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, PCB 09-67, slip op. at 4, quoting J.B. Esker, 325 Ill. App. 3d at 283.

In the Board's August 9, 2012 opinion and order, the Board concluded that Freedom Oil prevailed in part before the Board. Therefore, the Board's order allowed Freedom Oil to submit a statement of attorney fees and costs with the Board within 45 days from the date of the order. However, the Board has not received any filing from Freedom Oil. Without such a statement, the Board lacks a basis on which it might exercise its discretion and award attorney fees to Freedom Oil. Therefore, the Board concludes that it will not direct that Freedom Oil be reimbursed attorney fees and costs from the UST Fund under Section 57.8(l) of the Act.

CONCLUSION

The Board finds that it lacks a basis on which it might exercise its discretion and award attorney fees to Freedom Oil. Therefore, the Board concludes that it will not direct that Freedom Oil be reimbursed attorney fees and costs from the UST Fund under Section 57.8(l) of the Act.

ORDER

The Board denies Freedom Oil Company any reimbursement of legal fees and costs from the Underground Storage Tank Fund.

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) (2010); *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.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on October 18, 2012 by a vote of 4-0.



John T. Therriault, Assistant Clerk
Illinois Pollution Control Board