

**BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS**

ALLEN McAFEE,)	
Petitioner,)	
)	
v.)	PCB No. 15-84
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
Respondent.)	

NOTICE OF FILING AND PROOF OF SERVICE

TO: John T. Therriault, Acting Clerk	Carol Webb
Illinois Pollution Control Board	Hearing Officer
100 West Randolph Street	Illinois Pollution Control Board
State of Illinois Building, Suite 11-500	1021 N. Grand Avenue East
Chicago, IL 60601	P.O. Box 19274
	Springfield, IL 62794-9274
Melanie Jarvis	
Illinois Environmental Protection Agency	
1021 N. Grand Avenue East	
P.O. Box 19276	
Springfield, IL 62794-9276	

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 MOTION FOR AUTHORIZATION OF PAYMENT OF ATTORNEY'S FEES AS COSTS OF CORRECTIVE ACTION, 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 16th day of March, 2015.

BY: /s/ Patrick D. Shaw

LAW OFFICE OF PATRICK D. SHAW
80 Bellerive Road
Springfield, IL 62704
217-299-8484

THIS FILING SUBMITTED ON RECYCLED PAPER

**BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS**

ALLEN McAFEE,)	
Petitioner,)	
)	
v.)	PCB No. 15-84
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
Respondent.)	

**MOTION FOR AUTHORIZATION OF PAYMENT OF
ATTORNEY'S FEES AS COSTS OF CORRECTIVE ACTION**

NOW COMES Petitioner, ALLEN McAFEE, by its undersigned counsel, and pursuant to Section 57.8(1) of the Illinois Environmental Protection Act (415 ILCS 5/57.8(1)), petitions the Illinois Pollution Control Board (hereinafter "the Board") for an order authorizing payment of legal costs, and in support thereof states as follows:

1. On March 5, 2015, the Board struck the requirement that a project labor agreement (PLA) be used for site investigation activities from the Illinois Environmental Protection Agency's denial letter. Furthermore, the Board directed Petitioner to file a statement of attorney's fees and an argument as to their eligibility for reimbursement. (Interim Order, at pp. 16 & 17)

2. Under Section 57.8(1) of the Environmental Protection Act, the legal costs for seeking payment under the Leaking Underground Storage Tank Program are reimbursable from the underground storage tank fund if the owner or operator prevails before the Board. (415 ILCS 5/57.8(1)).

3. Petitioner has clearly prevailed before the Board as he has obtained the relief requested, namely removal of the PLA requirement from the site investigation plan and budget.

A party may prevail before the Board by obtaining the reversal of a plan or budget, as these are necessary prerequisites to seeking payment under the Act. Illinois Ayers Oil Co. v. IEPA, PCB 03-214, at p. 8 (Aug. 5, 2014) Furthermore, compliance with any PLA obligation is mandatory “if payment from the Underground Storage Tank Fund is to be requested.” (415 ILCS 5/57.7(c)(3))

4. Once a new determination letter is issued, Petitioner can resume with a traditional site investigation plan without the additional costs, delays and uncertainties associated with PLAs. The Illinois EPA’s underlying determination directed that any additional costs associated with implementing the PLA which exceed maximum reimbursement rates be addressed through competitive bidding. In prior rulemakings, evidence submitted to the Board estimated the cost to complete the competitive bidding process to be \$8,853.27. In re Amendments Under P.A. 96-908, at pp. 49-50 (First Notice, Sept. 22, 2011). However accurate that estimate might be, it would clearly be disproportionate to the costs of the site investigation work that would have been subject to PLAs. In the underlying case, \$2,671.24 pertained to the drilling and monitoring well costs. (R. 183) Thus, Petitioner has clearly prevailed on a meaningful issue.

5. The award of legal costs are discretionary with the Board. Ted Harrison Oil Co. v. IEPA, PCB 99-127 (Oct. 16, 2003). In Illinois Ayers Co. V. IEPA, PCB No. 03-214 (Aug. 5, 2004), the petitioner urged the Board to follow federal precedents arising under public interest statutes, which assume that a prevailing party “should ordinarily recover an attorney’s fee unless special circumstances would render such an award unjust.” Hensley v. Eckerhart, 461 U.S. 424, 429 (1983). While the Board made no express comment on this presumption, the Board appears to have authorized payment of reasonable legal defense costs in all cases where petitioners have

prevailed. PAK-AGS v. IEPA, PCB No. 15-14 (March 5, 2015); Chatham BP v. IEPA, PCB No. 14-1 (Feb. 5, 2015); Wheeling/GWA Auto Shop, v. IEPA, PCB No. 10-70 (Sept. 22, 2011); Evergreen FS v. IEPA, PCB No. 11-51 (Sept. 6, 2012); Zervos Three, v. IEPA, PCB No. 10-54 (June 2, 2011); Dickerson Petroleum v. IEPA, PCB Nos. 09-87; 10-5 (Dec. 2, 2010); Prime Location Properties v. IEPA, PCB No. 9-67 (Nov. 5, 2009); Swif-T Food Mart v. IEPA, PCB No. 03-185 (Aug. 19, 2004); Illinois Ayers Co. v. IEPA, PCB No. 03-214 (Aug 5, 2004). In exceptional circumstances, the Board has reduced the amount of recovery, but still awarded substantial legal fees to the prevailing party. E.g., Webb & Sons. v. IEPA, PCB No. 07-24 (May 3, 2007) (award in proportion to degree of success); Prime Location Properties, PCB 09-67 (Nov. 15, 2012) (post-mandate attorneys fees disallowed).

6. Historically, the Board has initially and fully considered the reasonableness of the claimed legal defense costs before exercising its discretion to authorize their payment. Evergreen FS, v. IEPA, PCB No. 11-51 (Sept. 6, 2012).

7. Attached hereto is the Affidavit of Patrick D. Shaw, documenting the legal costs in this matter, which are \$10,315. This affidavit is modeled on previous affidavits utilized by undersigned counsel under similar circumstances and which have been found sufficient by the Board. E.g., Prime Location Properties v. IEPA, PCB No. 9-67, at p. 5 (Nov. 5, 2009), aff'd IEPA v. PCB, 2012 IL App (5th) 100072-U.

8. The Board has previously recognized undersigned counsel's experience in underground storage tank appeals, and substantially approved the legal defense costs requested in previous decisions. PAK-AGS v. IEPA, PCB No. 15-14 (March 5, 2015) (awarding \$10,355); Evergreen FS v. IEPA, PCB No. 11-51, at p. 5 (Sept. 6, 2012) (awarding \$13,473.80); Prime

Location Properties v. IEPA, PCB No. 9-67 (Nov. 5, 2009) (awarding \$10,088.18). Shaw's hourly rate is \$200 per hour and is believed to be a reasonable rate for environmental attorneys.

9. The Board has previously recognized that the adjudication of contested cases is an essential element in the formation of the policies that govern the UST reimbursement program. Platolene 500 v. IEPA, PCB 92-9, at 12-14 (May 7, 1992). In challenging the Agency's decision, Petitioner has contributed to the body of law in which UST reimbursement decisions are based. There are a pending appeals or requests for 90-day extensions filed with the Board concerning PLAs imposed on site investigation plans. E.g., Rumaneh & Oweisi v. IEPA, PCB 2015-095; GBL Properties (6020 State) v. IEPA, PCB 2015-163; Darji Enterprise v. IEPA, PCB 2015-161; Spicuzza v. IEPA, PCB 2015-162.

10. Moreover, the benefits of this contribution are mostly to be appreciated by future Fund claimants that can look to Board precedent in shaping future decisions. The most immediate and direct purpose of statutory fee awards is to encourage such claims for reimbursement, particularly where not insisting on proper reimbursement may be less costly than litigation. See Chicago v. Illinois Commerce Com., 187 Ill. App. 3d 468, 470 (1st Dist. 1989).

11. With respect to the specifics of this appeal, the Board interpreted new statutory language, which poses novel issues pertaining to labor laws for the first time. In the process, the Board determined an important jurisdictional issue pertaining to its authority to review PLA requirements in an Agency determination letter. This case may serve as guidance in future PLA disputes.

WHEREFORE, Petitioner, ALLEN McAFEE, requests that this Board authorize the payment from the leaking underground storage tank fund the amount of \$10,315 in attorney's fees and litigation costs pursuant to 415 ILCS 5/57.8(1).

Respectfully submitted,

ALLEN McAFEE,
Petitioner,

BY: LAW OFFICE OF PATRICK D. SHAW
Its attorneys

BY: /s/ Patrick D. Shaw

Patrick D. Shaw
LAW OFFICE OF PATRICK D. SHAW
80 Bellerive Road
Springfield, IL 62704
217-299-8484

**BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS**

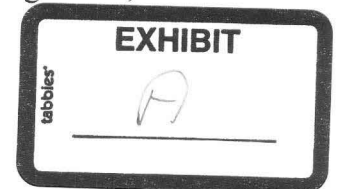
ALLEN McAFEE,)	
Petitioner,)	
)	
v.)	PCB No. 15-84
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
Respondent.)	

STATE OF ILLINOIS)
) ss.
COUNTY OF SANGAMON)

**AFFIDAVIT OF PATRICK D. SHAW
VERIFYING ATTORNEY FEES**

Affiant, Patrick D. Shaw, being first duly sworn, states as follows:

1. The statements made herein are based upon my personal knowledge, and I am competent to testify hereto.
2. I am an attorney duly licensed to practice law in the State of Illinois; and I am the attorney of record for Petitioner, ALLEN McAFEE, in the case entitled ALLEN McAFEE v. IEPA, PCB 15-84.
3. During the pendency of this appeal, my hourly billing rate was \$200 per hour, and I am generally familiar with the hourly rates of environmental attorneys practicing in Springfield, Illinois, and believe this rate to be comparable, if not less, than other such attorneys.
4. I began working on the appeal in October of 2014, when I received queries about an Agency decision requiring a project labor agreement. I gathered information and filed a petition for review later that month.
5. The Agency filed a motion to dismiss the Petition on jurisdictional grounds,



which required significant research pertaining to an important, but unanticipated issue. More time was spent responding to this motion (16.6 hours), than in the initial brief (10.8 hours), though research from the former was relied upon in the latter.

6. Anticipating that the issues of statutory interpretation did not require any additional information, no evidence was submitted at the hearing, and apparently counsel forgot to bill any time for the 5 to 10 minutes used at the hearing to make a briefing schedule.

7. After the initial brief was filed, the law firm of Mohan, Alewelt, Prillaman & Adami had dissolved, and beginning in February I continued to work as a sole practitioner. I retained copies of the electronic records from the law firm's billing program in the event I would need them to prove legal costs. (Exhibit 1)

8. As a sole practitioner, I prepared the reply brief and this attorney fee petition. I utilize similar billing software. (Exhibit 2)

9. Attached hereto as Exhibits 1 and 2 is an accurate summary of the legal work done and the attorney's fees incurred with respect to this matter. This summary has been taken from the respective billings programs of my former law firm and current sole practice, and reflects actual work performed and fees incurred. The summary reveals the date the work was performed, the description of the work performed, the amount of time spent, and the total fees incurred.

10. My attorney fee billable time for this appeal was \$10,240. In addition, legal costs include the \$75.00 filing fee with the Board, bringing the total legal costs to \$10,315.

FURTHER AFFIANT SAYETH NOT.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.



Patrick D. Shaw

3/16/2015
10:48 AM

Mohan, Alewelt, Prillaman & Adami
Slip Listing

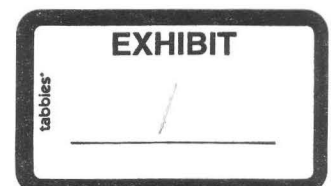
Page 1

Selection Criteria

Slip Classification Open
 Refe. Selection Include: Allen McAfee
 Slip Selection Exclude: 6309

Rate Info - identifies rate source and level

Slip ID	Dates and Time	Posting Status	Description	Attorney Activity Client Reference	Units DNB Time	Rate Rate Info Bill Status	Slip Value
6177	TIME			PDS	0.20	200.00	40.00
	10/3/2014			RR	0.00	T@1	
	WIP			Env'tl Mgt. Inc			
			Receive & review Agency decision requiring PLA, preliminary review and mark calander	Allen McAfee	0.00		
			Exported				
6195	TIME			PDS	0.40	200.00	80.00
	10/17/2014			RR	0.00	T@1	
	WIP			Env'tl Mgt. Inc			
			Receive & review e-mail w/ legal question regarding PLAs; review statute, e-mail response; receive & review reply	Allen McAfee	0.00		
			Exported				
6200	TIME			PDS	1.80	200.00	360.00
	10/21/2014	10:00 AM		R	0.00	T@1	
	WIP			Env'tl Mgt. Inc			
			Research PLA issues; draft memo; conf w/ FCP	Allen McAfee	0.00		
			Exported				
6201	TIME			PDS	2.60	200.00	520.00
	10/22/2014	9:00 AM		DR	0.00	T@1	
	WIP			Env'tl Mgt. Inc			
			Draft petition for review; e-mail to client with questions	Allen McAfee	0.00		
			Exported				
6206	TIME			PDS	0.10	200.00	20.00
	10/27/2014			RV	0.00	T@1	
	WIP			Env'tl Mgt. Inc			
			Revise and file petition for review	Allen McAfee	0.00		
			Exported				
6281	TIME			PDS	0.10	200.00	20.00
	11/10/2014			RR	0.00	T@1	
	WIP			Env'tl Mgt. Inc			
			Receive & review Board order accepting appeal	Allen McAfee	0.00		
			Exported				
6226	TIME			PDS	0.10	200.00	20.00
	11/10/2014			Email	0.00	T@1	
	WIP			Env'tl Mgt. Inc			
			E-mail to/from Hearing Officer re scheduling hrg/phone conference	Allen McAfee	0.00		
			Exported				



3/16/2015
10:48 AMMohan, Alewelt, Prillaman & Adami
Slip Listing

Page 2

Slip ID		Attorney	Units	Rate	Slip Value
Dates and Time		Activity	DNB Time	Rate Info	
Posting Status		Client		Bill Status	
Description		Reference	Variance		
6232	TIME	PDS	0.60	200.00	120.00
11/12/2014		RR	0.00	T@1	
WIP		Env't'l Mgt. Inc			
Receive & review e-mails from Jarvis; tel conf. w/ Jarvis; tel conf. w/ Hrg Officer and Jarvis		Allen McAfee	0.00		
Exported					
6277	TIME	PDS	0.10	200.00	20.00
11/12/2014		RR	0.00	T@1	
WIP		Env't'l Mgt. Inc			
Receive & review Notice of Hearing		Allen McAfee	0.00		
Exported					
6282	TIME	PDS	0.50	200.00	100.00
11/13/2014		RR	0.00	T@1	
WIP		Env't'l Mgt. Inc			
Receive & review IEPA Mot. to Dismiss		Allen McAfee	0.00		
Exported					
6280	TIME	PDS	0.10	200.00	20.00
11/17/2014		RR	0.00	T@1	
WIP		Env't'l Mgt. Inc			
Receive & review Hearing Officer Order		Allen McAfee	0.00		
Exported					
6257	TIME	PDS	4.70	200.00	940.00
11/21/2014		REV	0.00	T@1	
WIP		Env't'l Mgt. Inc			
Review legislative history of statute; make outline		Allen McAfee	0.00		
Exported					
6258	TIME	PDS	4.20	200.00	840.00
11/24/2014		R	0.00	T@1	
WIP		Env't'l Mgt. Inc			
Research and draft response to motion to dismiss; assemble legislative transcripts		Allen McAfee	0.00		
Exported					
6259	TIME	PDS	4.20	200.00	840.00
11/25/2014		R	0.00	T@1	
WIP		Env't'l Mgt. Inc			
Research and draft response to motion to dismiss		Allen McAfee	0.00		
Exported					
6260	TIME	PDS	3.50	200.00	700.00
11/26/2014		RV	0.00	T@1	
WIP		Env't'l Mgt. Inc			
Revise and file motion response to dismiss		Allen McAfee	0.00		
Exported					
6288	TIME	PDS	0.40	200.00	80.00
12/1/2014		Email	0.00	T@1	
WIP		Env't'l Mgt. Inc			
E-mail to client recent motion filings and opinions re dispute		Allen McAfee	0.00		
Exported					

3/16/2015
10:48 AMMohan, Alewelt, Prillaman & Adami
Slip Listing

Page 3

Slip ID	Dates and Time	Posting Status	Description	Attorney Activity Client Reference	Units DNB Time	Rate Rate Info Bill Status	Slip Value
6278	12/2/2014	TIME	WIP Receive & review Reply to Petitioner's Motion to Dismiss Exported	PDS RR Env'tl Mgt. Inc Allen McAfee	0.30 0.00 0.00	200.00 T@1	60.00
6294	12/4/2014	TIME	WIP Receive & review Board order; e-mail to client with thoughts Exported	PDS RR Env'tl Mgt. Inc Allen McAfee	0.60 0.00 0.00	200.00 T@1	120.00
6279	12/5/2014	TIME	WIP Receive & review Agency appearance and record; respond to e-mail from client w/ question Exported	PDS RR Env'tl Mgt. Inc Allen McAfee	0.30 0.00 0.00	200.00 T@1	60.00
6307	12/11/2014	TIME	WIP Receive & review supplemental record from IEPA; e-mail copy to client Exported	PDS RR Env'tl Mgt. Inc Allen McAfee	0.30 0.00 0.00	200.00 T@1	60.00
6320	12/18/2014	TIME	WIP File waiver of decision deadline Exported	PDS FIL Env'tl Mgt. Inc Allen McAfee	0.10 0.00 0.00	200.00 T@1	20.00
6342	1/6/2015	TIME	WIP Draft factual background for brief Exported	PDS DR Env'tl Mgt. Inc Allen McAfee	1.00 0.00 0.00	200.00 T@1	200.00
6367	1/7/2015	TIME	WIP Draft brief Exported	PDS DR Env'tl Mgt. Inc Allen McAfee	2.00 0.00 0.00	200.00 T@1	400.00
6346	1/8/2015	TIME	WIP Research and draft brief Exported	PDS R Env'tl Mgt. Inc Allen McAfee	5.00 0.00 0.00	200.00 T@1	1000.00

3/16/2015
10:48 AM

Mohan, Alewelt, Prillaman & Adami
Slip Listing

Page 4

Slip ID	Dates and Time	Posting Status	Description	Attorney Activity Client Reference	Units DNB Time	Variance	Rate Rate Info Bill Status	Slip Value
6368	1/9/2015	TIME	WIP Revise and file brief Exported	PDS RV Env'tl Mgt. Inc Allen McAfee	2.80 0.00 0.00		200.00 T@1	560.00
6348	1/12/2015	TIME	WIP E-mail to client brief w/ comments Exported	PDS Email Env'tl Mgt. Inc Allen McAfee	0.30 0.00 0.00		200.00 T@1	60.00
6374	1/20/2015	TIME	WIP Receive response brief Exported	PDS REC Env'tl Mgt. Inc Allen McAfee	0.10 0.10 0.00		200.00 T@1 No Charge	20.00
6377	1/26/2015	TIME	WIP Review and forward response brief to client w/ comments Exported	PDS REV Env'tl Mgt. Inc Allen McAfee	0.40 0.00 0.00		200.00 T@1	80.00
Grand Total				Billable Unbillable Total	36.70 0.10 36.80			7340.00 20.00 7360.00

3/16/2015
1:15 PM

Law Office of Patrick D. Shaw
Slip Listing

Page 1

Selection Criteria

Slip Classification Open
Refe. Selection Include: McAfee

Rate Info - identifies rate source and level

Slip ID	Dates and Time	Posting Status	Description	Timekeeper	Activity	Client	Reference	Units	DNB Time	Est. Time	Variance	Rate	Rate Info	Bill Status	Slip Value
23	2/4/2015	Billed	Draft reply brief	Patrick D Shaw	Draft	Environmental Manage	McAfee	5.60	0.00	0.00	0.00	200.00	T@1		1120.00
24	2/5/2015	Billed	Revise and file reply brief	Patrick D Shaw	Revise	Environmental Manage	McAfee	3.40	0.00	0.00	0.00	200.00	T@1		680.00
30	2/9/2015	Billed	E-mail filing w/ comments to client; tel client	Patrick D Shaw	E-mail	Environmental Manage	McAfee	0.20	0.00	0.00	0.00	200.00	T@1		40.00
66	3/6/2015	WIP	Receive & review Board decision and dissent; e-mail to client with thoughts; receive response	Patrick D Shaw	Receive & Review	Environmental Manage	McAfee	1.00	0.00	0.00	0.00	200.00	T@1		200.00
67	3/11/2015	WIP	Review billing records; review recent atty fee cases; start draft atty fee petition	Patrick D Shaw	Review	Environmental Manage	McAfee	1.00	0.00	0.00	0.00	200.00	T@1		200.00
68	3/16/2015	WIP	Draft petition for attorney fees	Patrick D Shaw	Draft	Environmental Manage	McAfee	3.30	0.00	0.00	0.00	200.00	T@1		660.00
Grand Total															
				Billable				14.50							2900.00
				Unbillable				0.00							0.00
				Total				14.50							2900.00

