

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CHATHAM BP, LLC,)	
)	
Petitioner,)	
)	
v.)	
)	PCB No. 15 – 173
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	(UST Appeal)
Respondent.)	

NOTICE OF FILING

PLEASE TAKE NOTICE that today I have filed with the Office of the Clerk of the Pollution Control Board the Motion for Authorization of Legal Fees Pursuant to Section 57.8(l) of CHATHAM BP LLC. Copies of these documents are hereby served upon you.

To:	Pollution Control Board, Attn: Clerk	Scott B. Sievers
	100 West Randolph Street	Division of Legal Counsel
	James R. Thompson Center, Suite 11-500	Illinois Environmental Protection Agency
	Chicago, Illinois 60601-3218	1021 North Grand Avenue, East
		P.O. Box 19276
		Springfield, Illinois 62794-9276

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, Illinois 62794-9274

Respectfully submitted,
CHATHAM BP, LLC

Dated: August 4, 2015

By: /s/William D. Ingersoll
Its Attorney

BROWN, HAY & STEPHENS, LLP
William D. Ingersoll
Registration No. 6186363
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CHATHAM BP, LLC)	
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Petitioner,)	
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)	PCB No. 15-173
ILLINOIS ENVIRONMENTAL)	(UST Appeal)
PROTECTION AGENCY,)	
Respondent.)	

**MOTION FOR AUTHORIZATION OF PAYMENT
OF LEGAL FEES PURSUANT TO SECTION 57.8(l)**

Petitioner, CHATHAM BP, LLC, by its undersigned attorney, pursuant to the Illinois Pollution Control Board’s (“Board”) Interim Opinion and Order of July 23, 2015 and Section 57.8(l) of the Environmental Protection Act (“Act”) (415 ILCS 5/57.8(l)) hereby moves the Board to authorize the payment of Petitioner’s legal fees and costs incurred in the pursuit of this matter. In support of its motion, Petitioner says as follows:

BACKGROUND

1. Petitioner filed its Petition herein on March 30, 2015 to challenge a February 25, 2015 decision of the Illinois Environmental Protection Agency (“IEPA”) Leaking Underground Storage Tank (“LUST”) Program. The IEPA decision rejected a Stage 2 site investigation plan and budget and required submission of a Stage 3 site investigation plan. Included in that Petition was a Prayer for Relief that Petitioner be awarded attorney fees and costs. Heretofore, that issue remains unaddressed.

2. A hearing was held by the Board on May 27, 2015 and testimony was presented by both parties. Briefly summarized, the testimony at hearing showed that:

- the IEPA's decision of February 25, 2015 was a mistake apparently caused by a lack of communication about, or miscommunication of, the outcome of the Board's decisions on the same issues in the preceding case of *Chatham BP, LLC. v. IEPA*, PCB 14-1;
- the IEPA issued a subsequent letter on March 27, 2015 in its apparent attempt to correct the mistake;
- the Petition herein was filed prior to Petitioner's knowledge of the May 27, 2015 letter.

3. The Board issued its Interim Opinion and Order on July 23, 2015 reversing the IEPA's rejection of the Stage 2 site investigation plan, with its Order as follows:

1. *The Board reverses the Agency February 25, 2015 rejection of Chatham BP's proposed Stage 2 site investigation plan.*
2. *Having reversed the rejection of the plan, and in the absence of an Agency determination on the associated proposed Stage 2 site investigation budget, the Board at the conclusion of this case will remand the proposed budget to the Agency for its review.*
3. *Chatham BP is directed to file a statement of 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. Chatham BP must file its statement by Monday, August 24, 2015, which is the first business day following the 30th day after the date of this order. The Agency may file a response within 14 days after being served with Chatham BP's statement.*

APPLICABILITY OF SECTION 57.8(1)

4. Section 57.8(1) 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.

5. In deciding upon a request for fees in cases such as this, the Board must first determine "whether the proceeding falls within the parameters of the statutory provision."

Illinois Ayers Oil Co. v. IEPA, PCB03-214, slip op. at 7 (August 5, 2004). The instant case definitely involves the LUST Program and would be subject to the provisions of Section 57.8(1). The Board has previously considered whether the issues on appeal were “seeking payment” consistent with the plain language of Section 57.8(1). *Illinois Ayers*, slip op. at 8; *Wheeling/GWA Auto Shop v. IEPA*, PCB10-70 (September 22, 2011). Second, Section 57.8(1) requires that the Petitioner must have prevailed before the Board. *Zervos Three v. IEPA*, PCB 10-54 at 4 (June 2, 2011) citing to *Illinois Ayers* and the earlier *Zervos* order of January 20, 2011.

6. Petitioner contends the Stage 2 plan and budget decision in the summary judgment was “seeking payment.” The circumstances regarding this budget decision closely track the *Wheeling* case, which followed the logic in *Illinois Ayers*. In *Illinois Ayers*, the Board reversed the modifications and also ordered restoring specific amounts to the budget. In *Wheeling*, the Board reversed the IEPA reduction in a budget, but remanded that part for further review. Determining that “approval of the CAP budget is a prerequisite to UST Fund reimbursement”, the Board found that *Wheeling* was “seeking payment” from the UST Fund. Citing *Illinois Ayers*. See also *Zervos* regarding an award of fees and costs by prevailing on a motion for summary judgment. Consistent with the logic in *Illinois Ayers* and *Wheeling*, Petitioner respectfully contends that all parts of this appeal were pursued in “seeking payment” from the Fund. Finally, this is consistent with the Board’s discussion of “Whether Section 57.8(1) Applies” in the first case for this site and issue. See *Chatham BP, LLC. v. IEPA*, PCB 14-1 Opinion and Order of February 5, 2015 at pages 4 – 5.

7. Petitioner has prevailed before the Board here. The Board reversed the IEPA’s rejection of Petitioner’s Stage 2 Plan and the rejection of the plan was the only stated basis of IEPA’s budget rejection.

BOARD DISCRETION

8. If the Board finds Section 57.8(l) to apply, it must determine whether to exercise its discretion to award the fees and costs. *Illinois Ayers*. To evaluate a “fee shifting” provision, the Board must be presented sufficient evidence as to the reasonableness of those fees and costs, with the burden resting on the party requesting the award. *See Prime Location Properties, LLC v. IEPA*, PCB 09-67, slip op. at 4 (November 5, 2009); *Illinois Ayers*; *Swif-T-Food Mart v. IEPA*, PCB 03-185, slip op. at 3 (August 19, 2004); *J.B. Esker & Sons, Inc. v. Cle-Pa’s Partnership*, 325 Ill. App. 3d 276, 283 (Fifth Dist. 2001); *Sampson v. Miglin*, 279 Ill. App. 3d 270, 281 (First Dist. 1996). The party seeking the award “must set forth with specificity the legal services provided, the identity of the attorney providing the legal services, and itemization of the time expended for the individual service, and the hourly rate charged.” *Prime Location*; *J.B. Esker*. Accompanying this Motion, Petitioner provides an affidavit of the undersigned attorney, who has been Petitioner’s attorney of record in this matter, and information drawn from the law firm’s timekeeping/billing system. These should provide all of the required information described above for Board consideration.

11. The Board will also consider the entire record and its experience and knowledge in determining the reasonableness of the charges. The Board may take into account a number of factors, including “the skill and standing of the attorneys employed, the nature of the case, the novelty and difficulty of the issues involved, the degree of responsibility required, the usual and customary charge for the same or similar services in the community, and whether there is a reasonable connection between the fees charged and the litigation. *Prime Location*; *Cretton v. Protestant Memorial Medical Center, Inc.*, 371 Ill. App. 3d 841, 867-68 (5th Dist. 2007); and, *Sampson*, at 281.

12. The experience of the undersigned attorney working on Petitioner's behalf in this matter is described in the accompanying affidavit. A review of other Board decisions awarding fees pursuant to Section 57.8(l) shows that the fees charged here are comparable to rates approved by the Board in earlier cases. The Board decision in this matter has carefully analyzed the issue of whether a second letter following the final decision can be effective and moot an appeal of that final decision. The Board is well aware of the analyses it made to decide this case and the pleadings that led to those decisions. Petitioner believes that counsel's efforts can be recognized as satisfying the elements supporting the Board exercising its discretion to make the award requested here.

WHEREFORE, CHATHAM BP, LLC respectfully requests that this Board grant this Motion for Authorization of Payment of Legal Fees and authorize payment of legal fees and costs from the Underground Storage Tank Fund in the amount of \$11,485.08.

Respectfully submitted,
CHATHAM BP, LLC

By: /s/William D. Ingersoll
One of Its Attorneys

Dated: August 4, 2015

BROWN, HAY & STEPHENS, LLP

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EXHIBIT 1
SUMMARY OF FEES AND COSTS
Brown, Hay & Stephens, LLP
Chatham BP, LLC v. IEPA, PCB 15-173

2/27/2015	WDI	RECEIPT/REVIEW OF IEPA DECISION LETTER DATED FEBRUARY 25, 2015; COMPARE WITH DECISION LETTER THAT WAS FOR THE SAME INCIDENT AND SITE AND WAS SUCCESSFULLY APPEALED	0.8	N/C
2/27/2015	WDI	COMPARE NEW LETTER AND PCB 14-1 DECISION LETTER WITH ALL BOARD ORDERS IN PCB 14-1 TO EVALUATE LEGAL STATUS AND OPTIONS FOR NEXT STEPS	1.3	N/C
2/27/2015	WDI	EMAIL COPIES OF BOTH LETTERS TO IEPA ATTORNEY AND REQUEST COMMENT	0.2	N/C
3/2/2015	WDI	BEGIN DRAFTING PETITION FOR REVIEW AND RELATED PLEADINGS	1.2	\$360.00
3/3/2015	WDI	REVIEW OF PLEADINGS IN PCB 14-1 AND CONTINUE DRAFTING PETITION PLEADINGS FOR FEBRUARY 25, 2015 IEPA DECISION	1.3	\$390.00
3/4/2015	WDI	ADDITIONAL FILE RESEARCH AND EMAIL EXCHANGES WITH CLIENT AND IEPA ATTORNEY REGARDING STATUS OF CURRENT IEPA DECISION LETTER.	0.4	\$120.00
3/5/2015	WDI	TELEPHONE CONFERENCE WITH IEPA ATTORNEY REGARDING THE LATEST PLAN REJECTION AND DISCUSS APPROPRIATE OUTCOME FROM PCB 14-1 DECISION IN OUR FAVOR.	0.5	\$150.00
3/9/2015	WDI	TELEPHONE CONFERENCE WITH CLIENT REGARDING A STRATEGY FOR PETITION ON LATEST IEPA DECISION	0.2	\$60.00
3/12/2015	WDI	REVIEW JANUARY 2015 SUBMITTAL TO IEPA TO COMPARE WITH SUBMITTAL THAT WAS THE SUBJECT OF THE APPEAL IN PCB 14-1	0.9	\$270.00
3/13/2015	WDI	EMAIL STATUS TO CLIENT	0.2	\$60.00
3/18/2015	WDI	TELECONFERENCE WITH CLIENT REGARDING STATUS OF DRAFT PETITION.	0.1	\$30.00

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3/19/2015	WDI	TELECONFERENCE WITH IEPA ATTORNEY REGARDING REVIEW OF CHATHAM BP BUDGET THAT WAS THE SUBJECT OF THE APPEAL IN PCB 14-1; CHECK REQUIREMENTS OF PCB ORDERS IN THAT CASE.	0.4	\$120.00
3/25/2015	WDI	COMPARING BOARD ORDERS WITH DECISION LETTERS AND WORK ON NEW PETITION.	1.1	\$330.00
3/26/2015	WDI	CONTINUE DRAFTING PETITION FOR REVIEW.	0.9	\$270.00
3/30/2015	WDI	CONTINUE DRAFTING PETITION	2.3	\$690.00
3/30/2015	WDI	CONSULTATION WITH CLAIRE MANNING REGARDING STRATEGY IN PETITION	0.4	\$120.00
3/30/2015	WDI	REVISIONS TO PETITION	0.5	\$150.00
3/30/2015	WDI	COMPILE PLEADINGS AND FILE WITH IPCB	0.5	\$150.00
3/30/2015	CAM	REVIEW AND SUGGEST CHANGES TO FILING ON BEHALF OF CW3M TO APPEAL AGENCY DECISION TO RECHARACTORIZE PREVIOUS SUBMITTAL AND DENIAL; DISCUSS WITH BILL INGERSOLL	0.6	\$180.00
3/31/2015	WDI	EMAIL EXCHANGE WITH IEPA ATTORNEY	0.1	\$30.00
3/31/2015	WDI	TELEPHONE CONFERENCE WITH CLIENT TWO TIMES REGARDING STRATEGY FOR DEALING WITH IEPA ON NEWEST PCB PETITION ~	0.3	\$90.00
4/1/2015	WDI	EMAIL EXHCHANGES WITH IEPA ATTORNEY REGARDING RECENT LETTER ISSUED BY IEPA; REVIEW SAID LETTER.	0.8	\$240.00
4/2/2015	WDI	TELECONFERENCE WITH IEPA ATTORNEY REGARDING STATUS OF PETITION AND ANY POTENTIAL FOR RESOLUTION.	0.2	\$60.00
4/14/2015	WDI	TELECONFERENCE WITH HEARING OFFICER WEBB AND IEPA ATTORNEY SIEVERS REGARDING CASE MANAGEMENT ISSUES - SCHEDULED HEARING FOR MAY 27; INFORMED CLIENT OF HEARING DATE/TIME.	0.5	\$150.00
4/21/2015	WDI	RESEARCH FOR RELATED LUST CASES REPORTED ON PCB WEBSITE.	0.4	\$120.00
5/6/2015	WDI	RECEIPT/REVIEW OF IEPA MOTION FOR EXTENSION OF TIME TO FILE RECORD.	0.2	\$60.00
5/12/2015	WDI	RECEIPT/INITIAL REVIEW OF IEPA'S ADMINISTRATIVE RECORD.	0.6	\$180.00

5/12/2015	WDI	ADDITIONAL REVIEW OF IEPA ADMINISTRATIVE RECORD; EMAIL REGARDING SAME TO CLIENT.	1.2	\$360.00
5/13/2015	WDI	RESEARCH REGARDING AGENCY LACK OF AUTHORITY TO RECONSIDER FINAL DECISIONS.	1.4	\$420.00
5/14/2015	WDI	RECEIPT/REVIEW OF RULE 237(b) NOTICE FROM IEPA; RESEARCH REGARDING RULE 237(b).	0.8	\$240.00
5/14/2015	WDI	TELECONFERENCE WITH CLIENT AND CONSULTANT REGARDING STATUS OF LITIGATION AND AVAILABILITY FOR HEARING.	0.3	\$90.00
5/18/2015	WDI	PREPARE AND FILE NOTICE TO APPEAR FOR IEPA EMPLOYEES TO BE AT HEARING.	0.6	\$180.00
5/18/2015	WDI	RESEARCH REGARDING IEPA DECISION LETTER AS FRAMING ISSUES IN APPEAL.	0.8	\$240.00
5/19/2015	WDI	DRAFT AND FILE MOTION TO QUASH.	2.3	\$690.00
5/26/2015	WDI	RESEARCH REGARDING ATTORNEY-CLIENT PRIVILEGE AND THE CLAIMS MADE BY IEPA IN THE ADMINISTRATIVE RECORD.	0.4	\$120.00
5/26/2015	WDI	REVIEW CASE LAW AND PREPARE LANGUAGE OF MOTION TO STRIKE TO BE PRESENTED AT HEARING.	0.5	\$150.00
5/26/2015	WDI	REVIEW AND MAKE NOTES FROM ENTRIES IN ADMINISTRATIVE RECORD AND BOARD ORDERS IN PCB 14-1 IN PREPARATION FOR 5-27-15 HEARING.	2.3	\$690.00
5/27/2015	WDI	HEARING PREP AND ATTENDANCE AT HEARING IN IPCB SPRINGFIELD OFFICE.	2.6	\$780.00
6/9/2015	WDI	REVIEW HEARING TRANSCRIPT; TAKE NOTES ON SAME.	1.3	\$390.00
6/16/2015	WDI	DRAFT PETITIONER'S POST-HEARING BRIEF; DRAFT ACCOMPANYING DOCUMENTS FOR FILING; E-FILED BRIEF WITH IPCB.	3.7	\$1,110.00
7/23/2015	WDI	REVIEW PCB DECISION OF 7-23-15 FOR NEXT STEPS TO BE TAKEN; EMAIL COPY OF DECISION WITH EXPLANATION TO CW3M.	1.3	\$390.00
7/27/2015	WDI	DRAFT FEE AFFIDAVIT.	0.6	\$180.00
7/29/2015	WDI	DRAFT MOTION FOR FEES - USE MOTION FROM PCB 14-1 AS TEMPLATE.	0.8	\$240.00
8/3/2015	WDI	REVIEW TIMEKEEPING DATA AND SELECT PROPER DATA FOR INCLUSION IN SUMMARY OF COSTS AND FEES.	1.2	\$360.00

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8/4/2015	WDI	REVISIONS TO MOTION AND AFFIDAVIT; DOUBLE-CHECK CLAIMED COSTS AND FEES FROM BILLING SYSTEM TO SUMMARY; FINALIZE PLEADINGS FOR FILING; E-FILE SAME WITH BOARD.	1.1	\$330.00
			Total Hours	40.1
			Total Fees	\$11,340.00
4/20/2015	WDI	IEPA-IPCB FILING FEES		\$75.00
6/23/2015	WDI	WESTLAW CHARGES FOR MAY 2015		\$70.08
			Total Expenses	\$145.08
			TOTAL	\$11,485.08

AFFIDAVIT OF WILLIAM D. INGERSOLL VERIFYING LEGAL FEES

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

I, William D. Ingersoll, being first duly sworn, states as follows:

1. I am an attorney duly licensed to practice law in the State of Illinois and am the attorney of record for Chatham BP, LLC in the matter entitled *Chatham BP, LLC v. Illinois EPA, PCB 15-173*.

2. My practice of law has been for many years concentrated in the area of environmental law, first with the Illinois EPA's Division of Legal Counsel and more recently, representing private sector clients with the firm of Brown, Hay & Stephens, LLP in Springfield, Illinois. I have been involved with numerous state and federal environmental programs, including the Leaking Underground Storage Tank Program. My practice has also included numerous matters before the Illinois Pollution Control Board.

3. Claire A. Manning, also of Brown, Hay & Stephens, LLP, performed certain work on this matter. Ms Manning has been engaged in the practice of law for more than 30 years, with much of that time dealing with issues of environmental law. She has represented clients in federal and state courts, and in administrative matters before the Illinois Pollution Control Board, Illinois Department of Public Health, the U.S. Department of Agriculture and others. She also represented underground storage tank contractors in the rulemaking that, in part, led to the reimbursement rules at issue in this case. Ms. Manning was Chairman of the Pollution Control Board for approximately ten years. Her experience provided valuable assistance regarding some issues in this case.

4. I began working on this matter shortly after Chatham BP, LLC's consultant contacted me regarding a February 25, 2015 Decision Letter from the Illinois EPA LUST Program. I evaluated the issues presented and provided legal advice related to pursuit of an appeal before the Pollution Control Board.

5. I previously represented Chatham BP, LLC in the matter docketed as *Chatham BP, LLC v. IEPA, PCB 14-1*, however that matter was concluded prior to my work on this matter. I prepared and filed a Petition for Review with the Board contesting the February 25, 2015 Illinois EPA Decision. Further, I prepared a Motion to Quash, represented Chatham BP, LLC at a Board hearing on May 27, 2015 and prepared a post-hearing brief. My representation in this case has also included numerous communications with Illinois EPA counsel, potential witnesses, and the assigned hearing officer.

6. Attached hereto as Exhibit 1 is an accurate description of legal work completed and legal fees incurred with respect to this matter. The description has derived from actual

billing invoices and reflects actual work performed and fees incurred. The information in Exhibit 1 shows the date work was performed, a brief description of the work performed, the amount of time spent, and the total TIME incurred for the work for any particular event or day. The legal work represented in Exhibit 1 as indicated by WDI was performed by me. Claire A. Manning also provided some assistance as shown by CAM in Exhibit 1.

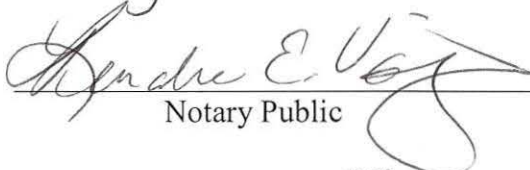
7. The total number of attorney hours expended on this matter is 40.1 hours, which is reasonable and necessary for the issues involved and the activity in this case. Exhibit 1 reflects a rate of \$300 per hour for attorney time. This hourly rate is reasonable as compares to attorneys in Illinois with similar environmental legal skills and experience before the Board, as well as rates that have been approved by the Board in other LUST Program appeals. Finally, because of the overlap of the cases, I have made every effort to avoid any duplication of work from PCB 14-1 minimize legal costs here. Accordingly, the total amount of legal fees and costs incurred and sought herein is \$11,485.08 and is reasonable, legitimate, and appropriate.

FURTHER AFFIANT SAYETH NOT.

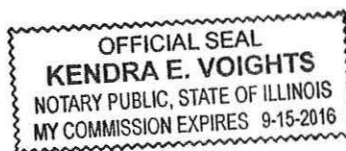


William D. Ingersoll, Affiant

Subscribed and Sworn to me this 4 day of August, 2015.



Notary Public



CERTIFICATE OF SERVICE

I, William D. Ingersoll, certify that I have this date served the attached Notice of Filing and Motion for Authorization of Legal Fees Pursuant to Section 57.8(1), by means described below, upon the following persons:

To: Pollution Control Board, Attn: Clerk
100 West Randolph Street
James R. Thompson Center, Suite 11-500
Chicago, Illinois 60601-3218
(Via Electronic Filing)

Scott B. Sievers
Division of Legal Counsel
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Dated: August 4, 2015

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