

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

SHARON BURGESS,)	
Petitioner,)	
v.)	PCB 2015-186
)	(LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
Respondent.)	

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

NOW COMES Petitioner, SHARON BURGESS, 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 November 5, 2015, the Board entered an interim opinion and order reversing the Agency's underlying decision and remanding the case to the Agency to approve the requested amounts. Burgess v. IEPA, PCB 15-186, at p. 21 (Nov. 5, 2015).

2. Furthermore, the Board directed Petitioner to file a statement of legal fees that may be eligible for reimbursement and arguments in favor of the Board exercise of its discretion to direct the Agency to award those fees. Id. at p. 22.

3. Attached hereto is the Affidavit of Patrick D. Shaw, documenting the legal costs in this matter, which are \$11,304.16. This affidavit is modeled on previous affidavits utilized by undersigned counsel and found to have been sufficient by the Board. E.g., Prime Location Properties v. IEPA, PCB No. 9-67, at p. 5 (Nov. 5, 2009). It sets forth 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. Id.

4. The Board has previously recognized undersigned counsel's experience in underground storage tank appeals. Prime Location Properties v. IEPA, PCB No. 9-67, at p. 6 (Nov. 5, 2009). Shaw's billing rate is \$200 per hour, which is believed to be a reasonable rate for environmental attorneys.

5. All of the legal costs sought herein were incurred "seeking payment under Title XVI and the plain language of Section 57.8(l) of the Act allows for the awarding of legal fees." Illinois Ayers Oil Co. v. IEPA, PCB 03-214, at p. 8 (Aug 5, 2004) (citation omitted).

6. The award of legal costs are discretionary with the Board. Ted Harrison Oil Co. v. IEPA, PCB 99-127 (Oct. 16, 2003). 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). In Illinois Ayers Co. V. IEPA, PCB 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 has made no express comment on this presumption, the Board has generally awarded litigation costs whenever the "case raised important issues regarding Agency determinations on reimbursement from the UST Fund." PAK-AGS v. IEPA, PCB 15-14, at p. 7 (March 5, 2015).

7. This appeal raised important issues regarding the reimbursement of prevailing wage rates under the Leaking Underground Storage Tank Program ("LUST Program"). For the last ten years, the State of Illinois has sued multiple consultants and contractors for failing to

comport with the Prevailing Wage Act when performing work under the LUST Program. See CW3M v. Department of Labor, 2013 IL App (4th) 120246-U (Jan. 30, 2013) (holding that applicability of prevailing wage to 2003 and 2005 releases not yet ripe). As demonstrated herein, prevailing wages can increase the actual costs to perform corrective action by one-third. See Petitioner's Post-Hearing Brief, at p. 3 (Sept. 1, 2015). The disparities between prevailing wage and Subpart H rates could only be expected to increase over time, particularly so long as the Agency refuses to open a rulemaking to address changing circumstances. In any event, one of the reasons for creating a statutory fee-shifting provision is to give "those subject to regulation an incentive to oppose doubtful rules where compliance would otherwise be less costly than litigation." Citizens Organizing Project v. IDNR, 189 Ill.2d 593 (Jan. 21, 2000). While the Illinois Supreme Court in that case was discussing rules so doubtful as to be invalid, the principle applies here nonetheless. In prevailing on the case herein, Petitioner helped create a body of precedent that will help others subject to these regulations in the future.

8. As a general matter, the Board has exercised its discretion to award reasonable legal defense costs in all cases where it evaluated its discretion. Estate of Gerald D. Slightom v. IEPA, PCB 2011-025 (Nov. 5, 2015); Chatham BP v. IPEA, PCB 15-173 (Sept. 3, 2015); McAfee v. IEPA, PCB 15-84 (May 21, 2015); Piasa Motor Fuels, Inc. v. IEPA, PCB 14-31 (Mar. 19, 2015); PAK-AGS v. IEPA, PCB 15-14 (March 5, 2015); Chatham BP v. IEPA, PCB 14-1 (Feb. 5, 2015); Wheeling/GWA Auto Shop, v. IEPA, PCB 10-70 (Sept. 22, 2011); Evergreen FS v. IEPA, PCB 11-51 (Sept. 6, 2012); Zervos Three, v. IEPA, PCB 10-54 (June 2, 2011); Dickerson Petroleum v. IEPA, PCB 09-87 (Dec. 2, 2010); Prime Location Properties v. IEPA, PCB 9-67 (Nov. 5, 2009); Swif-T Food Mart v. IEPA, PCB No. (Aug. 19, 2004); Illinois Ayers Co. v.

IEPA, PCB No. 03-214 (Aug 5, 2004); Ted Harrison Oil Co. V. IEPA, PCB 99-127 (Oct. 16, 2003); see also Webb & Sons. v. IEPA, PCB No. 07-24 (May 3, 2007) (discretion exercised to award 45% of fees which was proportionate with the degree of success).

13. Accordingly, Petitioner asks the Board to similarly exercise its discretion to award the legal defense costs incurred seeking payment for corrective action under Title XVI.

WHEREFORE, Petitioner, SHARON BURGESS, requests that the Board authorize payment from the Leaking Underground Storage Tank Fund the amount of \$11,304.16 in attorney's fees and litigation costs pursuant to 415 ILCS 5/57.8(1), and such other and further relief as the Board deems meet and just.

Respectfully submitted,

SHARON BURGESS
Petitioner,

BY: LAW OFFICE OF PATRICK D. SHAW
Its attorneys

BY: /s/ Patrick D. Shaw

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

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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, Sharon Burgess, in the case entitled Burgess v. IEPA, PCB 2015-186.
3. Attached hereto as Exhibit A is a printouts from my bookkeeping software detailing legal defense costs incurred in this matter. At all times relevant hereto my hourly rate has been \$200 per hour, which is the regular and ordinary billing rate charged all of my clients. 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 April of 2015, and the matter proceeded to hearing on August 11, 2015, followed by the filing of post-hearing briefs. Besides the need to

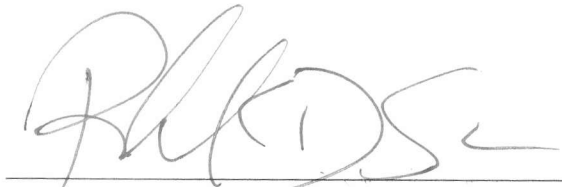
research and draft background on labor law issues, the only potential novelty in this appeal was that in order to help determine what, if any, testimony or exhibits to present at the hearing, I researched and prepared an initial draft of the "post-hearing" brief prior to the hearing based upon the Agency record.

5. Exhibit A identifies the legal work performed and the attorney's fees incurred in this matter. It reveals the date the work was performed, the description of the work performed, the amount of time spent, and the total fees incurred. Filing fees, postage and photocopying charges are also identified.

6. The legal defense costs incurred in seeking payment for corrective action herein total \$11,304.16, consisting \$11,200.00 in attorney-time, and \$104.16 in costs.

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

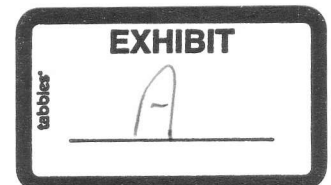
Law Office of Patrick D. Shaw
80 Bellerive Road
Springfield, IL 62704

Invoice submitted to:
CW3M Company
701 South Grand West
Springfield IL 62704

December 07, 2015

Professional Services

	<u>Hrs/Rate</u>	<u>Amount</u>
4/16/2015 Tel client re appealing prevailing wage issue Burgess	0.80 200.00/hr	160.00
4/20/2015 Review corrective action plan and budget; begin preparing petition for review Burgess	3.00 200.00/hr	600.00
4/21/2015 Draft petition for review Burgess	2.80 200.00/hr	560.00
4/22/2015 E-mail to client draft petition for review with comments; tel conf. w/ client; file petition for review Burgess	1.20 200.00/hr	240.00
5/8/2015 Draft limited appeal deadline waiver Burgess	0.10 200.00/hr	20.00
5/18/2015 Telephone status conference w/Hrg Officer Burgess	0.10 200.00/hr	20.00
5/26/2015 Receive & review Hrg Officer Order Burgess	0.10 200.00/hr	20.00
6/10/2015 Telephone Jarvis re Agency position on case Burgess	0.20 200.00/hr	40.00
6/12/2015 E-mail to client re conversation with IEPA; receive questions; e-mail response Burgess	1.50 200.00/hr	300.00



	<u>Hrs/Rate</u>	<u>Amount</u>
6/15/2015 Telephone client re strategy; tel Melanie Jarvis; tel conf. w/ Hrg Officer; e-mails re schedule to/from client Burgess	0.90 200.00/hr	180.00
6/18/2015 Receive & review Notice of Hearing Burgess	0.10 200.00/hr	20.00
7/2/2015 E-mail to client re hrg and excerpt of Board precedent relevant to case Burgess	0.20 200.00/hr	40.00
7/27/2015 Receive & review e-mail from client (dated 7/20/15); e-mail reply Burgess	0.20 200.00/hr	40.00
Receive & tentative review of administrative record; e-mail to client w/ comments Burgess	0.40 200.00/hr	80.00
8/3/2015 Review record and begin draft brief Burgess	3.80 200.00/hr	760.00
8/4/2015 Draft brief Burgess	4.50 200.00/hr	900.00
8/5/2015 Revise and forward draft brief to client w/comments Burgess	3.20 200.00/hr	640.00
8/6/2015 Receive & review e-mail w/comments/corrections from client; respond w/ answers Burgess	0.30 200.00/hr	60.00
8/7/2015 Conference with consultant at office; additional research on issues discussed; forward chart of costs to consultant for review Burgess	3.50 200.00/hr	700.00
8/10/2015 Receive & review e-mail re chart; e-mail response regarding strategy for tomorrow's hearing; receive reply Burgess	0.50 200.00/hr	100.00
8/11/2015 Appearance for Hearing; tel client before and after hrg; receive & review e-mail from client Burgess	2.00 200.00/hr	400.00
8/14/2015 Receive & review Hearing Report Burgess	0.10 200.00/hr	20.00
8/24/2015 Draft and file waiver of deadline to allow reply Burgess	0.10 200.00/hr	20.00
8/26/2015 Review transcript; start drafting post-hearing brief Burgess	5.50 200.00/hr	1,100.00

	<u>Hrs/Rate</u>	<u>Amount</u>
8/27/2015 Telephone consultant; research prevailing wage caselaw; revise brief Burgess	4.80 200.00/hr	960.00
8/28/2015 Revise brief; draft e-mail message transmitting same to client for review Burgess	2.20 200.00/hr	440.00
9/1/2015 Revise and file post-hearing brief; e-mail copy to client; e-mail courtesy copy to Jarvis Burgess	4.00 200.00/hr	800.00
9/29/2015 Receive & review preliminarily Agency's response brief; e-mail to client w/comments; receive response Burgess	0.40 200.00/hr	80.00
10/2/2015 Draft reply brief; tel client Burgess	2.00 200.00/hr	400.00
10/5/2015 Draft response to motion to strike; revise and file reply and response Burgess	6.10 200.00/hr	1,220.00
10/7/2015 E-mail to client copy of reply brief and response to motion to strike w/ comments; review reply; tel conf. w/ client Burgess	1.40 200.00/hr	280.00
For professional services rendered	<u>56.00</u>	<u>\$11,200.00</u>
Additional Charges :		
4/22/2015 Filing fee for Petition for Review with Illinois Pollution Control Board (Burgess) Filing Fee		75.00
Copying cost for April 22,2015 Photocopies		1.60
Postage for April 22,2015 Postage		1.40
9/1/2015 Postage for September 1, 2015 Postage		5.48
Copying cost for September 1, 2015 Photocopies		13.20
10/5/2015 Postage for October 5, 2015 Postage		3.28
Copying cost for October 5, 2015 Photocopies		4.20
Total additional charges		<u>\$104.16</u>