

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

| | |
|-----------------------------------|----------------------|
| CITY OF BENTON FIRE DEPARTMENT,) | |
| Petitioner,) | |
| v.) | PCB 2017-001 |
| ILLINOIS ENVIRONMENTAL) | (LUST Permit Appeal) |
| PROTECTION AGENCY,) | |
| Respondent.) | |

NOTICE OF FILING AND PROOF OF SERVICE

| | |
|----------------------------------|-------------------------------|
| TO: Carol Webb, Hearing Officer | Melanie Jarvis |
| Illinois Pollution Control Board | Division of Legal Counsel |
| 1021 N. Grand Avenue East | 1021 North Grand Avenue East |
| P.O. Box 19274 | P.O. Box 19276 |
| Springfield, IL 62794-9274 | Springfield, IL 62794-9276 |
| (Carol.Webb@illinois.gov) | (Melanie.Jarvis@illinois.gov) |

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board, Motion for Authorization of Payment of Attorney's Fees as Costs of Corrective Action, copies of which are herewith served upon the above persons.

The undersigned hereby certifies that I have served this document by e-mail upon the above persons at the specified e-mail address before 5:00 p.m. on the 22nd day of March, 2018. The number of pages in the e-mail transmission is 14 pages.

Respectfully submitted,

CITY OF BENTON FIRE DEPARTMENT,
Petitioner

BY: LAW OFFICE OF PATRICK D. SHAW

BY: /s/ Patrick D. Shaw

Patrick D. Shaw
LAW OFFICE OF PATRICK D. SHAW
80 Bellerive Road
Springfield, IL 62704
217-299-8484
pdshaw1law@gmail.com

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| CITY OF BENTON FIRE DEPARTMENT, |) | |
| Petitioner, |) | |
| v. |) | PCB 2017-001 |
| |) | (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, CITY OF BENTON FIRE DEPARTMENT, 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 February 22, 2018, the Board entered an interim opinion and order reversing the Agency's underlying decision as premature. City of Benton Fire Department v. IEPA, PCB 17-01, at p. 7 (Feb. 22, 2018).

2. Furthermore, the Board directed Petitioner to file a statement of legal fees that may be eligible for reimbursement and justification why the Board should exercise its discretion to reimburse those fees. Id.

3. Attached hereto is the Affidavit of Patrick D. Shaw, documenting the legal costs in this matter, which are \$20,357.80. 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). His billing rate is \$200 per hour, which is believed to be a reasonable rate for environmental attorneys who practice before the Board, and which has been the billing rate in previous attorney-fee awards. E.g., Burgess v. IEPA, PCB No. 16-103, at p. 3 (Feb. 4, 2016)

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).

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 petitioner has prevailed. Abel Investments v. IEPA, PCB 16-108, at p. 4 (Mar. 2, 2017); Knapp Oil Co. v. IEPA, PCB 16-103, at p. 3 (Nov. 17, 2016); Burgess v. IEPA, PCB 15-186, at p. 11 (Nov. 5, 2015); Estate of Gerald D. Slightom v. IEPA, PCB 2011-025 (Nov. 5, 2015); Chatham

BP v. IEPA, 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 apportioned award).

7. The Board's Order herein found the Agency's two-step budget process, required "only by the Agency forms and instructions," was not supported by the regulations or statute. PCB 17-01, at p. 6. As a result of this finding, the cuts made by the Agency were invalidated as the Agency's determination was procedurally defective. See Dickerson Petroleum v. IEPA, PCB 09-87, at p. 8 (Dec. 2, 2010) (finding that although the Board did not address the substance of the Agency's deductions, the Agency's procedural defects justified reimbursement of \$62,780.63). Petitioner is now free to submit an application for payment for the amount expended, subject to the requirements of Section 57.8 of the Act.

8. The Board has also considered whether 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). In addition, where the Agency has relied upon an unpromulgated rule, the Board has found this to be a "compelling reason for allowing reimbursement of legal fees" since the Administrative Procedure Act authorizes reimbursement

of all litigation expenses in any case in which an invalid rule is relied upon by an administrative agency. Illinois Ayers Co. v. IEPA, PCB No. 03-214, at p. 29 (Aug 5, 2004) (citing 5 ILCS 100/10-55); cf. Citizens Organizing Project v. IDNR, 189 Ill.2d 593, 599 (2000) (awarding non-prevailing party attorney fees where procedural rule invalidated in order to discourage agency enforcement of dubious rules).

9. Few decisions can have as much importance to the program as those reflected in the Agency forms and instructions that are ultimately determined to be erroneous. The Agency has increasingly used a two-step budget process to re-review previous budget decisions. For example, in City of Monmouth v. IEPA, PCB 2017-055, the Petition for Review alleges that the proposed budget approved \$34,646.24 for consulting personnel costs, and after the work was performed, an actual budget of \$23,027.43 was submitted as directed by the Agency's forms and instructions. The Agency then cut \$11,175.86 from the second budget in derogation of the limitation on the Agency re-reviewing the budget and cutting costs incurred within the approved budget. (415 ILCS 5/57.8(a)(1)) Eliminating the two-step budget process will speed up site investigation and require less administrative costs.

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

WHEREFORE, Petitioner, CITY OF BENTON FIRE DEPARTMENT, requests that the Board authorize payment from the Leaking Underground Storage Tank Fund the amount of \$20,357.80, 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,

CITY OF BENTON FIRE DEPARTMENT,
Petitioner,

BY: LAW OFFICE OF PATRICK D. SHAW
Its attorney

BY: /s/ Patrick D. Shaw

Patrick D. Shaw
LAW OFFICE OF PATRICK D. SHAW
80 Bellerive Road
Springfield, IL 62704
217-299-8484
pdshaw1law@gmail.com

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| CITY OF BENTON FIRE DEPARTMENT, |) | |
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| 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, CITY OF BENTON FIRE DEPARTMENT, in the case entitled City of Benton Fire Department v. IEPA, PCB 2017-001.
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 before the Board, and believe this rate to be comparable, if not less, than other such attorneys.
4. In reviewing the printout, there was one entry for July 28, 2017, that was not

supposed to be charged to the client. When the client identified the oversight, I issued a \$140.00 credit that does not appear in the history report. Therefore, \$140.00 has been deducted from total litigation costs.

5. I began working on the appeal in July of 2016, and the Agency filed the record in January of 2017. Beginning in June of 2017, cross-motions for summary judgment were filed, which were denied by the Board that August. The Board indicated that there remained questions that needed to be resolved through hearing, which was held in October of 2017 and followed by post-hearing briefing.

6. 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.

7. The legal defense costs incurred in seeking payment for corrective action herein total \$20,357.80, consisting of \$20,280.00 in attorney-time, and \$77.80 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:
Chase Environmental Group, Inc.
418 S. Poplar
P.O. Drawer AB
Centralia IL 62801

March 22, 2018

Professional Services

| | <u>Hrs/Rate</u> | <u>Amount</u> |
|--|-------------------|---------------|
| 7/15/2016 Receive copy of Agency ltr; tel cleint re appealing; e-mail decision deadline info Benton FD | 0.40 200.00/hr | 80.00 |
| 7/18/2016 Draft Petition for Review; tel client; e-mail draft to client for review; receive breakdowns of consulting materials form from client; receive & review e-mails to and from Agency Benton FD | 4.50 200.00/hr | 900.00 |
| 7/25/2016 E-mail to client re waiver of decision deadline question from Hrg Officer Benton FD | 0.10 200.00/hr | 20.00 |
| 8/3/2016 Tel conf. w/ Hrg Officer Benton FD | 0.10 200.00/hr | 20.00 |
| 8/12/2016 Draft waiver of decision deadline Benton FD | 0.10 200.00/hr | 20.00 |
| 8/16/2016 Receive & review Board order accepting petition for review and Hrg Officer order Benton FD | 0.10 200.00/hr | 20.00 |
| 8/23/2016 Meeting w/ consultant re strategy (partial) Benton FD | 0.30 200.00/hr | 60.00 |
| 9/7/2016 Receive & review Hrg Officer Order Benton FD | 0.10 200.00/hr | 20.00 |
| 9/12/2016 Draft waiver of decision deadline Benton FD | 0.10 200.00/hr | 20.00 |



Chase Environmental Group, Inc.

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| | <u>Hrs/Rate</u> | <u>Amount</u> |
|---|-------------------|---------------|
| 10/4/2016 Telephone conf. w/ IEPA atty; tel conf. w/ Board Hrg Officer; e-mail subject of conversation with IEPA to client Benton FD | 0.20 200.00/hr | 40.00 |
| 10/5/2016 Tel client regarding potential IEPA settlement position Benton FD | 0.40 200.00/hr | 80.00 |
| 10/31/2016 Review file and e-mail proposed strategy to client Benton FD | 0.70 200.00/hr | 140.00 |
| 11/1/2016 Telephone IEPA atty; tel conf. w/ Hrg Officer; receive & review Hrg Officer Order Benton FD | 0.10 200.00/hr | 20.00 |
| 11/2/2016 Receive & review settlement proposal/response from IEPA; e-mail to client w/ comments; tel conf. w/ client Benton FD | 0.30 200.00/hr | 60.00 |
| 11/7/2016 Research constuction treatises at S.Ct. library for definitions of "time and materials" billing Benton FD | 0.50 200.00/hr | 100.00 |
| Conference at consultants regarding strategy and response to settlement ltr Benton FD | 1.50 200.00/hr | 300.00 |
| 11/14/2016 Draft and filie waiver of decision deadline Benton FD | 0.10 200.00/hr | 20.00 |
| 11/15/2016 Telephone conf. w/ client re strategy Benton FD | 0.60 200.00/hr | 120.00 |
| 12/8/2016 Telephone consultant re appeal Benton FD | 0.70 200.00/hr | 140.00 |
| 1/9/2017 Tel conf. w/ Agency & Hrg Officer; receive Hrg Officer order Benton FD | 0.10 200.00/hr | 20.00 |
| 1/31/2017 Receive and preliminary review of administrative record Benton FD | 1.00 200.00/hr | 200.00 |
| 3/13/2017 Review file; tel conf. w/ Agency; tel conf. w/ Board Hrg Officer Benton FD | 0.10 200.00/hr | 20.00 |
| 3/16/2017 Receive & review e-mail from Hrg Officer; and Hrg Officer order regarding record Benton FD | 0.10 200.00/hr | 20.00 |
| 3/22/2017 Draft and file waiver of decision deadline Benton FD | 0.10 200.00/hr | 20.00 |

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| | <u>Hrs/Rate</u> | <u>Amount</u> |
|--|-------------------|---------------|
| 4/17/2017 Receive & review Board order re record (dated 4/12/2017) Benton FD | 0.10 200.00/hr | 20.00 |
| 4/18/2017 Tel status conf. w/ Hrg Officer and IEPA attorney Benton FD | 0.10 200.00/hr | 20.00 |
| 6/19/2017 Review file and draft factual background; tel status conf. Benton FD | 4.00 200.00/hr | 800.00 |
| 6/20/2017 Draft motion for summary judgment; tel client Benton FD | 4.80 200.00/hr | 960.00 |
| 6/23/2017 Draft motion for summary judgment Benton FD | 4.80 200.00/hr | 960.00 |
| 6/26/2017 Revise motion for summary judgment; e-mail draft to client Benton FD | 5.00 200.00/hr | 1,000.00 |
| 6/27/2017 Revise and file motion for summary judgment Benton FD | 2.30 200.00/hr | 460.00 |
| 6/28/2017 E-mail motion to Hrg Officer and IEPA; draft amended proof of service Benton FD | 0.50 200.00/hr | NO CHARGE |
| 6/29/2017 Tel client re motion Benton FD | 0.20 200.00/hr | 40.00 |
| 7/12/2017 Receive and review response to motion for summary judgment; e-mail to client w/ thoughts; tel client Benton FD | 0.40 200.00/hr | 80.00 |
| 7/19/2017 Tel conf. w/ client Benton FD | 0.80 200.00/hr | 160.00 |
| 7/27/2017 Research and draft response to motion for summary judgment; tel conf. w/ client Benton FD | 7.50 200.00/hr | 1,500.00 |
| 7/28/2017 Revise response to motion for summary judgment Benton FD | 1.20 200.00/hr | 240.00 |
| Draft motion for extention of time to file response (no charge) Benton FD | 0.70 200.00/hr | 140.00 |
| 7/31/2017 E-mail copy of response to client w/ comments; tel conf. w/ client Benton FD | 0.70 200.00/hr | 140.00 |
| 8/3/2017 Receive & review Agency's Reply to MSJ; tel client Benton FD | 0.50 200.00/hr | 100.00 |

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| | <u>Hrs/Rate</u> | <u>Amount</u> |
|--|-------------------|---------------|
| 8/16/2017 Telephone conf. w/ Hrg Officer; receive & review Hrg Officer order Benton FD | 0.10 200.00/hr | 20.00 |
| 8/17/2017 Receive & review Board order; tel conf. w/ client; draft e-mail re opinions Benton FD | 1.70 200.00/hr | 340.00 |
| 8/22/2017 Tel conf. w/ consultant; receive e-mail on hrg availability Benton FD | 0.90 200.00/hr | 180.00 |
| 9/8/2017 E-mail regarding setting hrg Benton FD | 0.10 200.00/hr | 20.00 |
| 9/11/2017 E-mails w/ Hrg Officer, IEPA, and consultant re scheduling hrg Benton FD | 0.10 200.00/hr | 20.00 |
| 9/12/2017 E-mails regarding scheduling and IEPA appearance filing; receive Notice of Hearing Benton FD | 0.20 200.00/hr | 40.00 |
| 9/13/2017 Tel consultant regarding upcoming hearing Benton FD | 0.30 200.00/hr | 60.00 |
| 10/11/2017 Tel consultant re hearing Benton FD | 0.30 200.00/hr | 60.00 |
| 10/16/2017 E-mail information to consultant for hearing Benton FD | 0.30 200.00/hr | 60.00 |
| Review file and prepare for hrg; tel conf. w/ witness Benton FD | 4.50 200.00/hr | 900.00 |
| 10/17/2017 Research Piggush on Board website; prepare outline of witness questions and exhibits; tel conf. w/ consultant Benton FD | 4.00 200.00/hr | 800.00 |
| 10/18/2017 Preparation for hrg; evidentiary hearing; post-hrg conf. w/ consultant Benton FD | 2.50 200.00/hr | 500.00 |
| 10/20/2017 Tel client re hearing Benton FD | 0.30 200.00/hr | 60.00 |
| 10/26/2017 Receive & review e-mails from consultant with info for brief Benton FD | 0.20 200.00/hr | 40.00 |
| 11/3/2017 Receive and review transcript; e-mail copy to client with comments about briefing Benton FD | 0.50 200.00/hr | 100.00 |
| 11/7/2017 Research and draft portion of post-hrg brief Benton FD | 3.70 200.00/hr | 740.00 |

Chase Environmental Group, Inc.

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| | <u>Hrs/Rate</u> | <u>Amount</u> |
|--|-------------------|---------------|
| 11/9/2017 Draft post-hrg brief Benton FD | 4.00 200.00/hr | 800.00 |
| 11/13/2017 Revise and file post-hrg brief; e-mail copy to client w/ comments Benton FD | 4.60 200.00/hr | 920.00 |
| 11/17/2017 Telephone client re brief Benton FD | 0.10 200.00/hr | 20.00 |
| 11/29/2017 Receive and quick review of IEPA brief; e-mail copy to client; tel conf. w/ client Benton FD | 0.80 200.00/hr | 160.00 |
| 12/1/2017 Research caselaw on official notice and Agency arbitrariness; draft reply brief Benton FD | 4.00 200.00/hr | 800.00 |
| 12/4/2017 Draft reply brief; tel client; e-mail completed portion to client Benton FD | 6.30 200.00/hr | 1,260.00 |
| 12/5/2017 Revise and file reply; tel client Benton FD | 6.20 200.00/hr | 1,240.00 |
| 12/6/2017 E-mail to client copy of reply with comments Benton FD | 0.20 200.00/hr | 40.00 |
| 1/8/2018 Tel conf. w/ Hrg Officer and IEPA Benton FD | 0.10 200.00/hr | 20.00 |
| 2/5/2018 E-mail status re when Board opinion expected to client in response to queries Benton FD | 0.30 200.00/hr | 60.00 |
| 2/9/2018 E-mail to Hrg Officer regarding anticipated Board decision; e-mail to client Benton FD | 0.10 200.00/hr | 20.00 |
| 2/13/2018 E-mail to/from client re Board agenda Benton FD | 0.10 200.00/hr | 20.00 |
| 2/16/2018 Receive & review e-mail regarding potential Board decision; e-mail opinions re same to client Benton FD | 0.80 200.00/hr | 160.00 |
| 2/22/2018 Receive and review Board opinion; tel conf. w/ client Benton FD | 1.00 200.00/hr | 200.00 |
| 2/23/2018 Review Board decision closely; e-mail opinions to client; receive e-mail from client re Board decision; receive & review reply to opinion e-mail Benton FD | 2.80 200.00/hr | 560.00 |
| 3/12/2018 Telephone IEPA attorney re Agency position; tel conf. w/ client re going forward Benton FD | 1.40 200.00/hr | 280.00 |

Chase Environmental Group, Inc.

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| | <u>Hrs/Rate</u> | <u>Amount</u> |
|--|-------------------|---------------|
| 3/21/2018 Review billing records; draft initial statement of attorney fees; draft attorney fee motion Benton FD | 3.00 200.00/hr | 600.00 |
| 3/22/2018 Revise and file motion for attorney fees Benton FD | 1.20 200.00/hr | 240.00 |
| For professional services rendered | 102.60 | \$20,420.00 |
| Additional Charges : | | |
| 7/18/2016 Pollution Control Board Filing Fee | | 75.00 |
| Copying costs for July 18, 2016 | | 2.80 |
| Total additional charges | | \$77.80 |