BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

BENTON FIRE DEPARTMENT Petitioner,	))	
v.	)	PCB 2017-001
	)	(UST Appeal - Land)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)))	

NOTICE

Don Brown, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

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

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

PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board **OBJECTION TO ATTORNEY FEES,** copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

_____

Melanie A. Jarvis
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P.O. Box 19276
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217/782-5544
217/782-9143 (TDD)
Dated: March 28, 2018

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

BENTON FIRE DEPARTMENT Petitioner,	))	
v.	)	PCB 2017-001
	)	(UST Appeal - Land)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	))	

OBJECTION TO ATTORNEY FEES

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA" or "Agency"), by one of its attorneys, Melanie A. Jarvis, Assistant Counsel and Special Assistant Attorney General, and hereby submits an **OBJECTION TO ATTORNEY FEES,** in the above captioned matter.

ARGUMENT

A Petitioner in a Leaking Underground Storage Tank action is expressly prohibited from payment of legal fees as corrective action, except in a case where (1) Petitioner prevails following a Board hearing and (2) the Board, in its discretion, finds that the payment of fees is just. 415 ILCS 5/57.8(l). Section 57.8(l) of the Act 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. 415 ILCS 5/57.8(l) (2010) (emphasis added).

Further, Section 734.630(g) of the Board's rules sets forth the requirement that the Board grant an exception to the mandate that such cost not be paid any payment of legal fees from the Leaking UST Fund. When the Board itself reviewing this issue, in promulgating a rule, it found

and wrote expressly that legal fees or costs are ineligible for payment from the Leaking UST Fund, "unless the owner or operator ***prevails*** before the Board ***and the Board authorizes*** payment of such costs." 35 Ill. Adm. Code 734.630(g) (emphasis added).

The State would offer for the Board's consideration of Petitioners request that Section 57.8(l) of the Act provides that the Board "may authorize payment of legal fees" only if the owner or operator "***prevails before the Board***" under Title XVI of the Act. 415 ILCS 5/57.8(l) (2010); *see* 35 Ill. Adm. Code 732.606(g). As such, the State notes that the Act and regulation are very similar to the legal concept of "fee-shifting". *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 Comm. Comm'n., 347 Ill. App. 3d 592, 618, 806 N.E.2d 1194, 1214. The Board has stated that "[t]he plain language of Section 57.8(l) of the Act ... guides the Board in [its] analysis of when to allow the prevailing party to receive legal defense costs." Illinois Ayers Oil Co., PCB 03-214, slip op. at 7. Following these examples, the Board must determine whether the record demonstrates that Benton has "prevailed" before the Board in seeking payment under Title XVI. 415 ILCS 5/57.8(l) (2010). Without such a finding, Petitioner's request cannot be granted.

On February 22, 2018, the Board issued a decision in the above captioned matter. The Board held the following:

> "Because the Board finds that the Agency's review was not timely, the Board need not consider whether the Agency properly disapproved the consultant's materials costs."

Thus, it is clear that the merits of the Agency's determination was not reviewed nor could it be reviewed. Importantly, the Board should recognize a few central facts. First, the Petitioner, itself, presented the costs to the Agency within its application. So, while the Agency made a determination on the costs, it was not the Agency which initiated a request for a review – that was Petitioner. In other words, this matter is not presented to the Board because of the Agency's action, it is because of the Petitioner's request.[1]. To prevail on the issue, Petitioner, therefore must logically present an argument that payment of the costs it seeks was appropriate or that the Agency's denial of such was incorrect. The only fair conclusion for the Board's finding is that Petitioner should not have requested costs at this stage and that the Agency's rationale for denial/modification of such was untimely (and that the rationale for this action was not before the Board for review). As such, Petitioner did not 'prevail' in its request.

The Board's order further stated that:

1. The Board **denies Benton Fire's request** to direct the Agency to approve the application for payment as submitted because the approval violates the Act and Board rules.
2. The Board **strikes as premature** the parts of the Agency's June 10, 2016 determination that approve Stage 1 Site Investigation Actual Costs with modifications.

What occurred in these two findings. Firstly, the Petitioner was denied. Hardly a convincing rationale to offer that payment of fees for 'prevail[ing]' exists. Secondly, and persuasively, the Agency's rationale for its action on the request was 'stricken' which again

[1] The Agency would offer that the record is clear on the point that the Agency attempted to engage a much fuller discussion of Petitioner's costs request; but we rebuffed by Petitioner. At such point, the Agency needed to present some review of the matter or risk having its inaction argued against it in the future.

is not a dispositive review of the rationale. Once more, this finding is in stark contrast to a claim that Petitioner must be paid attorney fees for 'prevailing' on the matter.

In law, ripeness is the evaluation of the timeliness of an action, which in this case is an administrative action. The basic rationale of the "ripeness doctrine" arises out of the courts' reluctance to apply declaratory judgment and injunctive remedies unless administrative determinations arise in context of a controversy ripe for judicial resolution, is to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties, and court is required to evaluate both fitness of issues for judicial decision and hardship to parties of withholding court consideration. Abbott Labs. v. Gardner, 387 U.S. 136, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967),

In this case, the Board held that the cause (that of a request by Petitioner for approval/review of its costs) was not timely for a decision on the underlying issues to be made. The decision was based upon procedural grounds (when can this review/determination be made) as opposed to a finding on the merits of a review of the costs or the rationale for modifying them. In short, the merits of the issue raised by Petitioner were never considered or ruled on by the Board.

Under the law, what does it mean to be the prevailing party in a lawsuit? Under the Supreme Court of the United States' review of this term, "plaintiffs may be considered 'prevailing parties' for attorneys' fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). At a minimum, to be considered a prevailing party,

the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant. Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 792, 109 S.Ct. 1486, 1493, 103 L.Ed.2d 866 (1989). Thus, a prevailing party must actually benefit from the lawsuit.

Petitioner did not get its costs approved, and the Board struck parts of the Agency's rationale for review of that issue. In fact, the Board's decision will delay the Petitioner from getting its cost approved and reimbursed. Instead of being able to be reimbursed after approval of the Stage 1 Actual Cost budget, Petitioner must now wait until after the completion of Stage 2 to be reimbursed for Stage 1 costs. Further, the Board's decision will cost the Petitioner more money in legal and other fees due to the delay in getting the underlying issues in the case resolved. The Petitioner definitely did not benefit on the merits from the Board's decision. Because neither party prevailed in front of the Board, attorney fees should not be awarded. Further, again, there must be a high burden to allowing for attorney's fees, which the Act and regulations expressly exclude from payment. And, when the Board engages in such a review, which is discretionary ('may') the Board should place a very high burden upon the Petitioner who is expressly seeking to fit within a very narrow exception to a very definitive prohibition (which prohibition is consistent with a very simple and universal legal tenant – you pay for your own representation). The statute clearly states that a Petitioner in a Leaking Underground Storage Tank action may only obtain payment of legal fees if they ***prevail*** before the Board. As no one prevailed, legal fees cannot be legally awarded to the Petitioner in this case.

WHEREFORE: for the above noted reasons, the Illinois EPA respectfully requests the Board deny Petitioner's request for Attorney fees.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent

Melanie A. Jarvis
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217/782-5544, 217/782-9143 (TDD)
Dated: March 28, 2018

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on **March 28, 2018**, I served true and correct copies of **OBJECTION TO ATTORNEY FEES** via the Board's COOL system and email, upon the following named persons:

Don Brown, Clerk
Illinois Pollution Control Board
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Chicago, IL 60601

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