

BEFORE THE POLLUTION CONTROL BOARD  
OF THE STATE OF ILLINOIS

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

**NOTICE OF FILING AND PROOF OF SERVICE**

TO: Carol Webb, Hearing Officer  
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PLEASE TAKE NOTICE that I have today electronically filed with the PETITIONER'S RESPONSE TO OBJECTION TO ATTORNEY FEES, 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 10<sup>th</sup> day of April, 2018. The e-mail transmission is seven pages.

Respectfully submitted,

CITY OF BENTON FIRE DEPARTMENT,  
Petitioner

BY: LAW OFFICE OF PATRICK D. SHAW

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**PETITIONER'S RESPONSE TO OBJECTION TO ATTORNEY FEES**

NOW COMES Petitioner, CITY OF BENTON FIRE DEPARTMENT, pursuant to 35 Ill. Adm. Code § 101.500(d), by its undersigned counsel, and in response to the Agency's Objection to Attorney Fees, states as follows:

**ARGUMENT**

The Board's first analysis of the "prevails before the Board" requirement for an attorney fee award was in Illinois Ayers v. IEPA, PCB 03-214 (August 5, 2004), in which the Petitioner obtained reversal of some portions of the plan and budget, as well as a recognition that the Agency rate sheet was an invalid rule. The Agency argued that the statute requires success in "seeking payment under this Title," and consequently success at the budget stage as opposed to the payment stage is insufficient to prevail within the meaning of the statute. (Ayers, slip. op. at pp. 7-8) The Board disagreed, finding that challenging the Agency's decision denying the work plan and budget was a necessary step to request reimbursement. (Ayers, slip. op. at p. 8)

Here, the Petitioner's consultant had submitted an actual cost budget "required . . . by the Agency forms and instructions." City of Benton v. IEPA, PCB 2017-001, slip op. at p. 6 (Feb. 22, 2018) Those forms and instructions mandate that "actual costs for conducting the Stage 1

site investigation must be submitted on budget forms . . .” and “Stage 1 site investigation budgets must always be submitted as actual costs incurred.” (Hrg. Ex. 1, at pp. 2 & 6) The Agency has authority to mandate that “plans, budgets, and reports must be submitted to the Agency on forms prescribed and provided by the Agency.” (35 Ill. Adm. Code § 734.135(a)) The Board itself had previously evidenced no apparent concerns with actual cost budgets, although the exact issue of the rule’s validity was not raised. Abel Investments v. IEPA, PCB 2016-108, slip op. at p. 2 FN1 (Dec. 15, 2016).

Thus, the Agency presented two alternatives to consultants, submit the actual cost budget as required by Agency forms and instructions or ignore the Agency’s requirement and directly submit a payment application, knowing with near certainty that the Agency will reject the entire submittal, not just specific items as it did here. In either case, the Agency’s requirements would pose a hurdle to be surmounted in order to obtain payment under this Title. The Agency enforced this requirement throughout this proceeding, requiring Petitioner to demonstrate compliance with an invalid Agency procedure.

While Petitioner did not urge the Board to invalidate the actual cost budget rule, Petitioner did argue that the unique nature of the Agency’s requirement necessarily limits the Agency’s review. (Petitioner’s Mot. S.J., at pp. 12-15; Petitioner’s Post-Hrg Brief, at pp. 14-17) The goal of these arguments was to seek to limit the Agency’s review of actual cost budgets given that the Agency was using authority under Section 57.7 of the Act to strike costs after they were necessarily incurred. The Board went further than limiting Agency review of actual cost budgets, it eliminated the requirement for such budgets altogether. Thus the result of the Board’s decision was greater than that urged, but resulted in the relief sought – the Agency reductions in

the actual cost budget are not binding and have no effect in seeking payment.

In denying cross-motions for summary judgment, the Board identified two issues remaining: whether the consultant's costs were reasonable and "what was the purpose of the Agency's review of the actual costs of Stage 1 investigation." (Benton, slip op. at p. 2 (Aug. 17, 2017)) Only the Agency knew the purpose of its review of actual costs budgets, and the closest it came to an explanation was that the previous budget approved by certification was not a "real budget." (Resp. Brief, at p. 12) Whether or not this qualifies as an explanation or not, it clearly was not a legally supportable explanation as explained by Petitioner. (Reply Brief, at p. 8)

Belatedly, the Agency informs the Board that its decision will cause delay: "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." (Objection, at p. 5) To the contrary, Petitioner does need to complete the next step because the Board's regulations only require the next submittal to be approved, not completed. (35 Ill. Adm. Code § 734.605(h))

Moreover, it is simply absurd to believe that a two-step budget process would be shorter than a one-step. The underlying case is instructive. After the Stage 1 Site Investigation work was completed, Petitioner submitted a Site Investigation Report, which was approved on June 10, 2016 (Benton, slip op. at 1), on which date Petitioner could have submitted a payment application pursuant to the Board's regulations (35 Ill. Adm. Code § 734.605(h)), necessarily containing only the information required by the Board's regulations (35 Ill. Adm. Code § 734.605(b)) In contrast, the Agency's invalid rule required submitting an additional, superfluous

budget, which also needed to be approved before a payment application could be submitted. The Agency reviewer herein was not able to review the site investigation completion report and the actual cost budget within the 120 days contemplated by the Act, and sought an extension of the statutory decision deadline, which the consultant was criticized for not providing. Had the Agency not required an actual cost budget, there would have been no additional time required to prepare the actual cost budget, no additional time for the Agency to review the additional cost budget, and no need for a legal appeal of any deductions made to the actual cost budget.<sup>1</sup>

The Agency's reference to ripeness is confusing, in that it would presume this action should have been brought at a later date. The Agency issued a final decision under Section 57.7 of the Act (which governs budgets) with the standard appeal rights language. (R.001 & R.009) The time for challenging the Agency's budget cuts was within the next 35 days and no later. Applications for payment are subject to different standards and documentary requirements than those that arise under Section 57.8 of the Act. Cf. Benton, slip op. at p. 5 (discussing the difference between budgets and applications for payment in explaining why Board decisions on the latter are not applicable to the former).

In Illinois Ayers, the Board also found that invalid Agency rulemaking was a compelling reason for allowing reimbursement of legal fees. (slip op. at p. 9) The Board cited 5 ILCS 100/10-55 of the Administrative Procedure Act, which exists "to discourage enforcement of invalid rules and give those subject to regulation an incentive to oppose doubtful rules where

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<sup>1</sup> The Agency erroneously argues that the Stage 2 Site Investigation Plan would be the next step, but the steps would remain the same. After Stage 1 Site Investigation work was performed, the results of that investigation would be reported as part of the proposal for a Stage 2 Site Investigation Plan and Budget. Once the Stage 2 Site Investigation plan and budget were approved, an application for payment for the Stage 1 Site Investigation work could be submitted.

compliance would otherwise be less costly than litigation.” Citizens Organizing Project v. IDNR, 189 Ill.2d 593 (2000). Throughout this appeal, the Agency has enforced its invalid rule against Petitioner with the obvious goal of using the underlying decision to prevent payment at the reimbursement stage. “A prevailing party, for purposes of awarding attorney fees, is one that is successful on a significant issue and achieves some benefit in bringing suit.” Abel, slip op. at p. 2 (March 2, 2017). The Agency’s budget cuts were invalidated and the benefit to Petitioner is the ability to now seek payment under the Section 57.8 standards.

The benefit to the LUST Fund, however, can be measured in multiples, as there will be less expense for unnecessary administrative costs, allowing more resources to be directed towards actual remediation. (415 ILCS 5/57.11(a)(4))

Finally, the Agency’s threat that Petitioner will face “more money in legal fees” should not be considered as an argument against an attorney-fee award, particularly given the Agency’s conduct herein. Not only did it enforce an invalid budget requirement against Petitioner, the Agency testified at the hearing herein, that PID meters, digital cameras and measuring wheels are indirect costs when the Board had already directly ruled to the contrary. Compare Hrg. Trans, at p. 36 (Oct. 18, 2017) with Knapp Oil Co. v. IEPA, PCB 16-103, at p. 6 (Sept. 22, 2016) (camera and PID are direct costs); Abel Investments v. IEPA, PCB 16-108, at p. (Dec. 15, 2016) (measuring wheel is direct cost). This is not an isolated refusal to recognize the Board’s mandates. E.g., Knapp Oil Co. v. IEPA, PCB 17-87 (appealing denial of digital camera as indirect cost). On the basis of the “Agency’s unnecessary stubborn defiance of the Board,” an award of attorney fees are further appropriate. Grigoleit Co. v. Pollution Control Board, 245 Ill. App. 3d 337 (4<sup>th</sup> Dist. 1993).

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

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