

ILLINOIS POLLUTION CONTROL BOARD
February 5, 2015

CHATHAM BP, LLC,)	
)	
Petitioner,)	
)	
v.)	PCB 14-1
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

OPINION AND ORDER OF THE BOARD (by J.D. O’Leary):

Petitioner Chatham BP, LLC (Chatham BP) appealed a May 28, 2013 determination of the Illinois Environmental Protection Agency (Agency) concerning Chatham BP’s underground storage tank (UST) site at 300 North Main Street, Chatham, Sangamon County. In that determination, the Agency first rejected a Stage 2 site investigation plan and budget and required submission of a Stage 3 site investigation plan. On that issue, the Board granted Chatham BP’s motion for summary judgment, reversing the Agency’s rejection. The Agency’s determination also reduced reimbursement of drum disposal costs for Stage 1 site investigation. After the July 29, 2014 hearing on that issue, the Board found that the disputed costs would not violate the Act and Board’s regulations and directed the Agency to reimburse them.

Chatham BP filed a motion for authorization of payment of legal fees under Section 57.8(l) of the Environmental Protection Act (Act) (415 ILCS 5/57.8(l) (2012)), to which the Agency has not filed a response. For the reasons stated below, the Board today exercises its discretion and directs the Agency to reimburse Chatham \$21,314.70 in legal fees and costs from the UST Fund. Having concluded its consideration of this appeal and pursuant to its January 9, 2014 order, the Board remands Chatham BP’s proposed Stage 2 site investigation budget to the Agency for its review.

The Board’s order begins with an abbreviated procedural history and then summarizes Chatham BP’s motion for authorization of payment of legal fees. After providing the statutory and regulatory background, the Board discusses the issues, decides the motion, and issues its final order in this proceeding.

ABBREVIATED PROCEDURAL HISTORY

On July 1, 2013, Chatham BP filed its petition for review (Pet.). On August 20, 2013, Chatham BP filed a motion for summary judgment. On August 27, 2013, the Agency filed a cross motion for summary judgment accompanied by a memorandum of law in support of its motion. On September 3, 2013, the Agency filed its response to Chatham BP’s motion. On September 10, 2013, Chatham BP filed its response to the Agency’s motion.

On January 9, 2014, the Board adopted an opinion and order first addressing the issue of Chatham BP's proposed Stage 2 site investigation plan. On that issue, the Board granted Chatham BP's motion for summary judgment, reversing the Agency's rejection of that plan, and denied the Agency's cross-motion for summary judgment. On the issue of Chatham BP's drum disposal costs, the Board found that an issue of material fact existed. The Board denied the parties' cross-motions for summary judgment and directed them to proceed to hearing on that issue. The hearing took place on July 29, 2014, in Springfield.

On September 4, 2014, the Board adopted an opinion and order finding that Chatham BP has met its burden of proving that the disputed drum disposal costs would not violate the Act and Board regulations and directing the Agency to reimburse those costs. On October 7, 2014, Chatham BP filed a motion for reconsideration of the Board's September 4, 2014 order and a motion for authorization of payment of legal fees (Mot.). Accompanying the motion were an affidavit of William D. Ingersoll (Aff.) and an Exhibit 1 entitled "Summary of Fees and Costs" (Exh. 1). The Agency filed no response to the motion.

On December 18, 2014, the Board granted the unopposed motion for reconsideration. On reconsideration, the Board re-characterized its September 4, 2014 opinion and order as "interim" in nature and accepted Chatham BP's motion for authorization of payment of fees. The Board set a deadline of January 20, 2015, for the Agency to respond, but the Board has received no response from the Agency.

SUMMARY OF CHATHAM BP'S MOTION FOR AUTHORIZATION OF PAYMENT OF LEGAL FEES

Chatham BP requests that the Board grant its motion for authorization of payment of legal fees under Section 57.8(1) of the Act and authorize payment of \$21,314.70 in legal fees and costs from the UST Fund. Mot. at 6. In the following subsections, the Board summarizes Chatham BP's arguments in support of this request.

Statutory and Regulatory Requirements

Chatham BP states that the Board must determine whether this proceeding and its request for fees fall within the terms of Section 57.8(1). Mot. at 3, citing Illinois Ayers Oil Co. v. IEPA, PCB 03-214, slip op. at 7 (Aug. 5, 2004) (Illinois Ayers).

Chatham BP notes that the Board's July 29, 2014 hearing addressed issues related to the Agency's "disputed reduction in drum disposal costs." Mot. at 2. Chatham BP argues that it sought payment within the meaning of Section 57.8(1) because it appealed the Agency's reduction of reimbursement. *Id.* at 3. Chatham further argues that it prevailed before the Board on that issue, as the Board reversed the Agency's reduction "and ordered the payment of the complete amount requested." *Id.*

Chatham BP argues that its appeal of the Agency's rejection of the proposed Stage 2 site investigation plan also sought payment from the UST Fund. Mot. at 4. Chatham BP notes that

the Board granted its motion for summary judgment on that issue. *Id.* at 2. The Agency added that the Agency’s rejection of the plan was the only basis on which it rejected the associated proposed budget. *Id.* at 4.

Chatham BP claims that, in Wheeling/GWA Auto Shop v. IEPA, PCB 10-70 (Sept. 22, 2011) (Wheeling), the Board reversed Agency reductions in a proposed budget but remanded the budget for additional review. Mot. at 3-4. Chatham BP further claims that the Board found that Wheeling had sought payment because approval of the budget was “a prerequisite to UST Fund reimbursement.” *Id.* at 4. Chatham BP argues that Wheeling followed Illinois Ayers, in which the Board reversed Agency budget modifications and ordered specific amounts restored to the budget. Mot. at 3. In addition, Chatham BP cites Zervos Three v. IEPA, PCB 10-54, slip op. at 4 (June 2, 2011), in which the Board awarded fees and costs to a party that had prevailed on summary judgment. *Id.* at 4.

Chatham BP concludes that it “has prevailed before the Board here” (Mot. at 4) and that “[a]n attorney fee award is warranted” (*id.* at 3).

Exercise of Board Discretion

Chatham BP argues that, “[i]f the Board finds Section 57.8(1) applicable, it must determine whether to exercise its discretion to award the fees and costs.” Mot. at 4, citing Illinois Ayers, slip op. at 7. Chatham BP states that it has the burden of presenting “sufficient evidence as to the reasonableness of those fees and costs.” Mot. at 4 (citations omitted). Chatham BP adds that it “must set forth with specificity the legal service provided, the identity of the attorney providing the legal services, and an itemization of the time expended for the individual service, and the hourly rate charge.” Mot. at 4 (citations omitted). Chatham BP argues that the affidavit of Mr. Ingersoll and information from his law firm’s timekeeping and billing system “should provide all of the required information. . . .” *Id.* at 4-5.

Chatham BP claims that, to determine the reasonableness of attorney fees, the Board reviews the entire record of the proceeding and relies upon its experience and knowledge. Mot. at 5. Chatham BP argues that the Board assesses 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.” *Id.* (citations omitted).

Chatham BP notes that Mr. Ingersoll’s affidavit describes the experience of attorneys working on its behalf in this matter. Mot. at 5; *see* Aff. at 1. Addressing the nature and difficulty of the case, Chatham BP states that “[t]he Board is well aware of the analyses it made to decide this case and the pleadings that led to those decisions.” Mot. at 5. Chatham BP argues that the Board’s decisions in this case have clarified the UST regulations regarding the transition from Stage 2 to Stage 3 of site investigation and the determination of the volume of waste generated by drilling wells. *Id.* Chatham BP further argues that “review of other Board decisions awarding fees pursuant to Section 57.8(1) shows that the fees charged here are

comparable to rates approved by the Board in earlier case.” *Id.* Chatham BP concludes that the record on these factors justifies an exercise of discretion to award attorney fees. *Id.*

STATUTORY AND REGULATORY PROVISIONS

Under Section 57.9 of the Act, costs associated with “corrective action” may be reimbursed from the UST Fund. 415 ILCS 5/57.9(a)(7) (2012). “‘Corrective action’ means activities associated with compliance with the provisions of Sections 57.6 [early action] and 57.7 [site investigation and early action] of this Title [XVI Petroleum Underground Storage Tanks].” 415 ILCS 5/57.2 (2012).

Section 57.8(l) of the Act provides in its entirety that “[c]orrective 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) (2012).

Section 734.630(g) of the Board’s UST regulations provides that costs ineligible for payment from the UST Fund include, but are not limited to, “[l]egal fees or costs, including but not limited to legal fees or costs for seeking payment under this Part [734] unless the owner or operator prevails before the Board and the Board authorizes payment of such costs.” 35 Ill. Adm. Code 734.630(g).

BOARD DISCUSSION

Chatham BP moved that the Board authorize payment of legal fees from the UST Fund in the amount of \$21,314.70. Pet. at 6; Exh. 1 (Summary of Fees and Costs). The Board’s procedural rules provide that, “[w]ithin 14 days after service of a motion, a party may file a response to the motion. If no response is filed, the party will be deemed to have waived objection to the granting of the motion, but the waiver of objection does not bind the Board or the hearing officer in its disposition of the motion. 35 Ill. Adm. Code 101.500(d). In accepting Chatham BP’s motion for authorization of payment of fees, the Board set a deadline of January 20, 2015, for the Agency to file a response. As noted above under “Procedural History,” the Agency has not filed a response. Although the Agency is deemed to have waived objection to the granting of the motion, the Board discusses it below.

Whether Section 57.8(l) Applies

“The first question the Board must address is whether or not the proceeding falls within the parameters of the statutory provision.” Illinois Ayers Oil Co. v. IEPA, PCB 03-214, slip op. at 7 (Aug. 5, 2004). On January 9, 2014, the Board granted Chatham BP’s motion for summary judgment, denied the Agency’s cross-motion for summary judgment, and reversed the Agency’s rejection of Chatham BP’s proposed Stage 2 site investigation plan. The Board has found that obtaining plan approval is a prerequisite to seeking reimbursement from the UST Fund and has ordered reimbursement of legal fees where petitioner prevails in appealing the Agency’s rejection of a plan under Section 57.7 of the Act. Prime Location Properties v. IEPA, PCB 09-67, slip op. at 3 (Nov. 5, 2009); Illinois Ayers, slip op. at 7-8. Also, on September 4, 2014, the

Board reversed the Agency's determination to reduce reimbursement of Chatham BP's drum disposal costs by \$1,145.92 and directed the Agency to reimburse costs in that amount.

The Board concludes that Chatham BP's appeal sought payment from the UST Fund and that it has prevailed before the Board. The Board finds under Section 57.8(l) of the Act that it may exercise its discretion to determine whether to award Chatham BP legal fees and costs in this case.

Whether to Exercise the Board's Discretion to Award Fees

In determining whether to exercise its discretion to authorize payment, the Board considers the reasonableness of the requested legal fees and costs. Prime Location, slip op. at 4, citing Illinois Ayers, slip op. at 8-9; Swif-T Food Mart v. IEPA, PCB 03-185, slip op. at 3 (Aug. 19, 2004). As the party seeking reimbursement of fees, Chatham BP has the burden of presenting sufficient evidence with which the Board can determine the reasonableness of the fees. Prime Location, slip op. at 4, citing J.B. Esker & Sons, Inc. v. Cle-Pa's P'ship., 325 Ill. App. 3d 276, 283, 757 N.E.2d 1271, 1277 (5th Dist. 2001) (citation omitted); Sampson v. Miglin, 279 Ill. App. 3d 270, 281, 664 N.E. 2d 281, 288-89 (1st Dist. 1996). Chatham BP "must set forth with specificity the legal services provided, the identity of the attorney providing the legal services, an itemization of the time expended for the individual service, and the hourly rate charged." Prime Location, slip op. at 4, citing J.B. Esker, 325 Ill. App. 3d at 283, 757 N.E.2d at 1278.

While Chatham BP "must present a sufficient basis for determining whether the requested charges are reasonable, the Board may also consider the entire record and its experience and knowledge of the case in assessing whether the charges are reasonable." Prime Location, slip op. at 4, citing Cretton v. Protestant Mem'l. Med. Cent., Inc., 371 Ill. App. 3d 841, 868, 864 N.E.2d 288, 315 (5th Dist. 2007); Sampson, 279 Ill. App. 3d at 281, 664 N.E.2d at 289. In determining whether Chatham BP's request is reasonable, the Board may consider 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, slip op. at 4, citing Cretton, 371 Ill. App. 3d at 867-68, 864 N.E.2d at 315; Sampson, 279 Ill. App. 3d at 281, 664 N.E.2d at 289. The Board may apply its own expertise "to assess the time required to complete particular activities." Cretton, 371 Ill. App. 3d at 868, 864 N.E.2d at 315.

Chatham BP's motion is accompanied by an affidavit of Mr. Ingersoll and a 6-page summary of fees and costs. From the affidavit and summary, the Board can determine the rate and hours billed; the person providing legal services; the date on which the person provided them; a description of those services; and the amount charged. Aff.; Exh. 1; see J.B. Esker, 325 Ill. App. 3d at 283, 757 N.E.2d at 1278 (citation omitted).

The Board's review of the summary of fees and costs shows that Mr. Ingersoll's services began on June 3, 2013, and continued to October 7, 2014. Exh. 1; see Aff. The work includes a limited number of hours performed by colleagues, as described in the affidavit. See Aff. The

summary of fees describes work performed and time allocated to that work in tenths of an hour. Exh. 1. The Board finds that the listings are itemized specifically enough to assess the reasonableness of the charges. *See Prime Location*, slip op. at 5, citing *Sampson*, 279 Ill. App. 3d at 281-82, 664 N.E.2d at 289. The summary submitted by Chatham BP is generally similar to information provided in UST cases in which the Board has directed the Agency to reimburse fees and costs. *See, e.g., Swif-T*, slip op. at 2-3 (Aug. 19, 2004). As noted above, the Agency has filed no response to Chatham BP's motion for authorization of payment of fees. The Agency has thus not disputed sworn statements regarding the experience of Chatham BP's attorney. The Agency has likewise not disputed the reasonableness of the rates at which reimbursement has been requested.

The Board concludes that this appeal presented significant issues regarding Agency determinations in the UST process and applicable regulatory requirements. Based on its review of the record, the absence of an Agency response, and prior Board decisions, the Board finds Chatham BP's requested legal fees and costs to be reasonable. Accordingly, the Board will exercise its discretion under Section 57.8(1) of the Act to direct the Agency to reimburse Chatham BP from the UST Fund in the amount of \$21,314.70 in legal fees and costs.

CONCLUSION

The Board exercises its discretion under Section 57.8(1) of the Act and directs the Agency to reimburse Chatham BP \$21,314.70 in legal fees and costs from the UST Fund. Having concluded this case and pursuant to its January 9, 2014 order, the Board remands Chatham BP's proposed Stage 2 site investigation budget to the Agency for its review.

ORDER

- 1) The Board exercises its discretion under Section 57.8(1) of the Act and directs the Agency to reimburse Chatham BP \$21,314.70 in legal fees and costs from the UST Fund.
- 2) Having concluded its consideration of this appeal and pursuant to its January 9, 2014 order, the Board remands Chatham BP's proposed Stage 2 site investigation budget to the Agency for its review.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on February 5, 2015, by a vote of 4-0.



John T. Therriault, Clerk
Illinois Pollution Control Board