

ILLINOIS POLLUTION CONTROL BOARD
September 3, 2015

CHATHAM BP, LLC,)	
)	
Petitioner,)	
)	
v.)	PCB 15-173
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

WILLIAM D. INGERSOLL; BROWN, HAY & STEPHENS, LLP; APPEARED ON BEHALF OF PETITIONER, and

SCOTT B. SIEVERS, SPECIAL ASSISTANT ATTORNEY GENERAL, APPEARED ON BEHALF OF RESPONDENT.

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

On March 30, 2015, Chatham BP, LLC (Chatham BP) appealed a February 25, 2015 determination by the Illinois Environmental Protection Agency (Agency or Illinois EPA) concerning Chatham BP’s underground storage tank (UST) site located at 300 North Main Street, Chatham, Sangamon County. That determination rejected a Stage 2 site investigation plan and budget. After conducting a hearing on May 27, 2015, the Board reversed the Agency’s rejection of the plan on July 23, 2015. Because the Agency had not reached a determination on the associated budget, the Board stated that, at the conclusion of this case, it would remand the budget to the Agency. The Board also set deadlines for Chatham BP to file a statement of legal fees that may be eligible for reimbursement and for the Agency to respond.

On August 4, 2015, Chatham BP filed a motion for authorization of payment of legal fees, to which the Agency responded on August 18, 2015. For the reasons stated below, the Board today exercises its discretion and directs the Agency to reimburse Chatham BP \$11,485.08 in legal fees and costs from the UST Fund. Having concluded its consideration of the issues presented in this appeal, and pursuant to its July 23, 2015 interim opinion and 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 before summarizing Chatham BP’s motion for authorization of payment of legal fees and the Agency’s response. After providing the statutory and regulatory background, the Board discusses the issues presented, reaches its conclusion, and issues its order.

ABBREVIATED PROCEDURAL HISTORY

On March 30, 2015, Chatham BP filed its petition for review. On April 2, 2015, the Board accepted the petition for hearing and directed the Agency to file the entire record of its determination by May 4, 2015. On May 11, 2015, the Agency filed the administrative record, accompanied by a motion for leave to file *instanter*.

Pursuant to an April 14, 2015 hearing officer order, the hearing took place as scheduled on May 27, 2015. The Board received the transcript (Tr.) on June 2, 2015. At hearing, the hearing officer granted the Agency's motion for leave to file the administrative record *instanter*. Tr. at 5. On June 16, 2015, Chatham BP filed its post-hearing brief. On June 25, 2015, the Agency filed its post-hearing brief accompanied by a motion for leave to file *instanter*.

In a July 23, 2015 interim opinion and order, the Board first granted the Agency's motion for leave to file its post-hearing brief *instanter*. The Board then found that Chatham BP had met the burden of proving that its proposed Stage 2 Site Investigation plan would not violate the Environmental Protection Act (Act) and Board regulations and reversed the Agency's rejection of that plan. In the absence of an Agency determination on the associated proposed budget, the Board stated that, at the conclusion of the case, it would remand the budget to the Agency for its review. The Board also set a deadline for Chatham BP to file a statement of legal fees that may be eligible for reimbursement and for the Agency to respond.

On August 4, 2015, Chatham BP filed a motion for authorization of payment of legal fees (Mot.). The motion was accompanied by a single exhibit entitled "Summary of Fees and Costs" (Exh.) and an affidavit of Mr. William D. Ingersoll (Aff). On August 18, 2015, the Agency filed its response to Chatham BP's motion (Resp.).

SUMMARY OF CHATHAM BP'S MOTION

Chatham BP requests that the Board grants its motion for authorization of payment of legal fees under Section 57.8(1) of the Act (415 ILCS 5/57.8(1) (2014)) and authorize payment of \$11,485.08 in legal fees and costs from the UST Fund. Mot. at 1, 6. In the following subsections of the opinion, 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) of the Act. Mot. at 2-3, citing Ill. Ayers Oil Co. v. IEPA, PCB 03-214, slip op. at 7 (Aug. 5, 2004) (Ill. Ayers). Chatham BP argues that the Board already has determined whether the issues in this appeal constitute "seeking payment" under the UST program. Mot. at 3, citing Wheeling/GWA Auto Shop v. IEPA, PCB 10-70 (Sept. 22, 2011) (Wheeling); Ill. Ayers, slip op. at 8.

Chatham BP contends that its proposed Stage 2 plan and budget sought payment from the UST Fund. Mot. at 3. Chatham BP cites Wheeling, in which the Board reversed Agency reductions in a budget but remanded for further review. Mot. at 3. Chatham BP notes the

Board's finding that the petitioner in Wheeling had sought payment from the UST Fund because "approval of the CAP [corrective action plan] budget is a prerequisite to the UST Fund reimbursement." *Id.* Chatham BP argues that Wheeling followed Illinois Ayers, in which the Board reversed budget modifications by the Agency and ordered specific amounts restored. *Id.* In addition, Chatham BP suggests that this is consistent with the Board's determination to award legal fees in a previous case addressing these parties and this site. *Id.*, citing Chatham BP, LLC v. IEPA, PCB 14-1, slip op. at 4-5 (Feb. 5, 2015).

Chatham BP argues that it prevailed because the Board reversed the Agency's rejection of its Stage 2 plan. Mot. at 3. Chatham BP adds that the Agency's rejection of its proposed plan was the Agency's basis to reject the proposed budget. *Id.* Chatham BP concludes that the case is subject to Section 57.8(l) because it pursued this appeal to seek payment from the UST Fund and prevailed before the Board. *Id.*

Exercise of Board Discretion

Chatham BP argues that, if the Board finds that Section 57.8(l) applies, "it must determine whether to exercise its discretion to award the fees and costs." Mot. at 4, citing Ill. 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, citing J.B. Esker & Sons v. Cle-Pa's P'ship., 325 Ill. App. 3d 276, 283 (5th Dist. 2001); Sampson v. Miglin, 279 Ill. App. 3d 270, 281 (1st Dist. 1996); Prime Location Prop. v. IEPA, PCB 09-67, slip op. at 4 (Nov. 5, 2009) (Prime Location); Swif-T Food Mart v. IEPA, PCB 03-185, slip op. at 3 (Aug. 19, 2004) (Swif-T); Illinois Ayers, slip op. at 8. Chatham BP adds that it "must set forth with specificity 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." Mot. at 4, citing J.B. Esker & Sons, 325 Ill. App. 3d at 283; Prime Location, slip op. at 4. 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. . . ." Mot. at 4.

Chatham BP states 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 4. Chatham BP further states that, when making this determination, 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.*, citing Cretton v. Protestant Mem'l. Med. Ctr., 371 Ill. App. 3d 841, 867-68 (5th Dist. 2007); Prime Location, slip op. at 4.

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 "carefully analyzed the issue of whether a second letter following the final decision can be effective and moot an appeal of that final decision." *Id.* Chatham BP further

argues that “[a] 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 cases.” *Id.* Chatham BP concludes that the record on these factors justifies an exercise of the Board’s discretion to award attorney fees. *Id.*

SUMMARY OF AGENCY’S RESPONSE

The Agency states that Chatham BP, as the party seeking reimbursement of legal fees and costs, “bears the burden of presenting sufficient evidence for the Board to decide as their reasonableness.” Resp. at 2, citing Evergreen FS, Inc. v. IEPA, PCB 11-51, 12-61 (cons.), slip op. at 4 (Sept. 6, 2012) (Evergreen FS). The Agency adds that the Board determines the reasonableness of fees and costs by considering 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.*’” Resp. at 2 (emphasis in original), citing Evergreen FS, slip op. at 4. The Agency asserts that Chatham BP’s fees and costs lack this reasonable connection, “as the litigation came after the underlying dispute was already resolved.” Resp. at 2.

The Agency notes that Chatham BP’s attorneys report receiving the contested determination on February 27, 2015. Resp. at 2, citing Mot., Exh. 1. The Agency argues that, although Section 40 of the Act allows 35 days to file an appeal, “Chatham BP’s counsel didn’t waste any time generating billable hours.” Resp. at 2; *see* 415 ILCS 5/40(a) (2014). The Agency notes that Chatham BP’s billing records show that attorneys began drafting a petition for review five days after receiving the decision. Resp. at 2, citing Mot., Exh. 1. The Agency also notes that billing records show e-mail and telephone communications with Agency counsel, the last of these a teleconference on March 19, 2015. Resp. at 3, citing Mot., Exh. 1. The Agency suggests that these communications sought to settle the parties’ dispute without hearing. Resp. at 3. The Agency states that “Chatham BP’s counsel apparently abandoned any attempt at such resolution,” as communications ended 11 days before filing the petition for review. Resp. at 3. The Agency adds that Chatham BP did not request a 90-day extension of the appeal period (*see* 415 ILCS 5/40(a) (2014)) and filed its petition for review four days before the deadline to do so. Resp. at 3. The Agency argues that “billing records show Chatham BP’s counsel eagerly rushing to capitalize on Illinois EPA’s mistake.” *Id.*

The Agency notes Chatham BP’s contention that it was not aware when it filed its petition for review on March 30, 2015, that the Agency had issued a March 27, 2015 letter attempting to correct its previous determination. Resp. at 3. The Agency states that it “has no reason to doubt this contention.” *Id.* The Agency argues that,

while Chatham BP did not seek a 90-day filing extension; wait later in the 35-day window to file Chatham BP’s Petition for Review; or apparently contact Illinois EPA in the 11 days before filing it to see if Illinois EPA would be remedying its error and if this litigation could be avoided, Chatham BP knew of Illinois EPA’s March 27, 2015 letter fixing its mistake by the time Hearing Officer Carol Webb contacted the parties on April 13, 2015 to arrange a status call. Resp. at 4.

The Agency argues that at this point Chatham BP determined to proceed to hearing “[r]ather than withdraw litigation filed over a dispute that had since been resolved.” Resp. at 4. The Agency further argues that the Board should at a minimum “deny recovery of all attorney’s fees and costs incurred by Chatham BP from this point forward.” *Id.*

The Agency argues that the Board should exercise its discretion by denying Chatham BP’s motion, “as no reasonable connection exists between the attorney’s fees and costs charged to Chatham BP and the litigation, as the litigation came after the underlying dispute was already resolved.” Resp. at 5.

Alternatively, the Agency argues that the Board should exercise its discretion by denying Chatham BP’s motion to the extent of fees incurred on and after April 13, 2015. Resp. at 5. The Agency states that this is the date on which Chatham BP elected to proceed with litigation “despite having already received Illinois EPA’s March 27, 2015 letter fully remedying its error.” *Id.*; see Chatham BP v. IEPA, PCB 15-173 (Apr. 14, 2015) (notice of hearing)

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) (2014). “‘Corrective action’ means activities associated with compliance with the provisions of Sections 57.6 [early action] and 57.7 [site investigation and corrective action] of this Title [XVI Petroleum Underground Storage Tanks].” 415 ILCS 5/57.2 (2014).

Section 57.8(l) of the Act addresses reimbursement from the UST Fund for activities responding to a confirmed release and 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) (2014).

Section 734.630(g) of the Board’s UST regulations provides in its entirety 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 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

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, slip op. at 7. In its interim opinion and order, the Board found that Chatham BP had met its burden of proving that its proposed Stage 2 site investigation plan would not violate the Act and Board regulations. Accordingly, the Board reversed the Agency’s February 25, 2015 rejection of that 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 the petitioner prevails in appealing the Agency's rejection of a plan under Section 57.7 of the Act. Prime Location, slip op. at 3; Illinois Ayers, slip op. at 7-8.

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 that, under Section 57.8(1) of the Act, it may exercise its discretion to determine whether to award Chatham BP the legal fees and costs requested in its motion for authorization of payment.

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, 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 at 283; Sampson v. Miglin, 279 Ill. App. 3d at 281. 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 & Sons v. Cle-Pa's P'ship., 325 Ill. App. 3d at 283.

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 at 868; Sampson v. Miglin, 279 Ill. App. 3d at 281. 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 v. Protestant Mem'l. Med. Cent., Inc., 371 Ill. App. 3d at 867-68; Sampson v. Miglin, 279 Ill. App. 3d at 281. The Board may apply its own expertise "to assess the time required to complete particular activities." Cretton v. Protestant Mem'l. Med. Cent., Inc., 371 Ill. App. 3d at 868.

In its response, the Agency argues that Chatham BP's motion for authorization of payment should be denied in its entirety, as there is no reasonable connection between the requested fees and the litigation. Resp. at 2. The Agency asserts that "the litigation came after the underlying dispute was already resolved." *Id.* Alternatively, the Agency argues that the motion should be denied to the extent of costs incurred on and after April 13, 2015, when Chatham BP opted to proceed, even after receiving a letter "fully remedying" an erroneous Agency determination. *Id.* at 5.

The Board is not persuaded by the Agency's arguments and has addressed whether this appeal became moot. The Agency's post-hearing brief argued that its March 27, 2015 letter had provided Chatham BP with all of the relief it had requested. Chatham BP v. IEPA, PCB 15-173, slip op. at 16 (July 23, 2015). In its interim opinion and order, the Board noted that the parties had not requested an extension of the appeal deadline, that Chatham BP had filed a timely petition for review, that Chatham BP had not filed a motion to dismiss its appeal, and that the petition remained pending before the Board. *Id.* at 17. The Board's interim opinion and order also noted caselaw limiting the Agency's authority to reconsider its determinations. The Board stated that, even if could consider the March 27, 2015 letter as a valid reconsideration of the February 25, 2015 determination at issue, "it could not find that the subsequent letter moots this appeal." *Id.* The Board concluded "that the Agency's argument provides no basis to dismiss this case on the basis of mootness." *Id.*

The Agency argues that there is no reasonable connection between the requested fees and the litigation. Resp. at 2-5. The Agency believes that this appeal continued beyond a reasonable point. In the Board's view, this does not mean that the requested fees necessarily lack a reasonable connection to that litigation. In the interim opinion and order, the Board did not agree that litigation either began or continued after the underlying dispute had been fully resolved or became moot. The Board is not persuaded that the Agency's argument justifies denying the motion for authorization and proceeds to review Chatham BP's request.

Chatham BP's motion is accompanied by an affidavit of Mr. Ingersoll and a four-page summary of fees and costs. Aff.; Exh. 1. The Agency's response cites information in the summary and does not question its accuracy. *See generally* Resp. 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 of the fee charged. Aff.; Exh. 1; *see J.B. Esker & Sons v. Cle-Pa's P'ship.*, 325 Ill. App. 3d at 283.

The Board's review of the summary of fees and costs shows that Mr. Ingersoll's services began on February 27, 2015, continued to August 4, 2015, and include a total of 40.1 billed hours. Exh. 1; *see* Aff. The work includes billing for 0.6 hours of specified work provided by a single colleague, as described in the affidavit. *See* Exh. 1 at 2; Aff. at ¶3. The summary of fees describes work performed and the 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 v. Miglin, 279 Ill. App. 3d at 281-82. The summary submitted by Chatham BP is generally similar to information provided in other 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 Board is not persuaded by the Agency's argument that there is no reasonable connection between the attorney fees and costs and the litigation. The Agency's response does not dispute sworn statements regarding the experience of Chatham BP's attorney or the accuracy of the costs in Chatham BP's summary. The Agency also has not disputed the reasonableness of the hourly rates at which reimbursement has been requested.

The Board concludes that this appeal presented significant issues regarding the Agency's review and determinations under the UST program. Based on its review of the record, its

consideration of the Agency's response, and authorities including 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 \$11,485.08 in legal fees and costs.

CONCLUSION

For the reasons above, the Board finds that Chatham BP's appeal sought payment from the UST Fund and that it has prevailed before the Board. Having so found, the Board exercises its discretion under Section 57.8(1) of the Act and directs the Agency to reimburse Chatham BP \$11,485.08 in legal fees and costs from the UST Fund. Having concluded its consideration of the issues presented in this appeal, and pursuant to its interim opinion and order of July 23, 2015, 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 \$11,485.08 in legal fees and costs from the UST Fund.
2. Having concluded its consideration of the issues presented in this appeal, the Board remands Chatham BP's proposed Stage 2 site investigation budget to the Agency for its review.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2014); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Don A. Brown, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above interim opinion and order on September 3, 2015, by a vote of 5-0.



Don A. Brown, Assistant Clerk
Illinois Pollution Control Board