

ILLINOIS POLLUTION CONTROL BOARD
November 5, 2020

PIASA MOTOR FUELS, INC.,)	
)	
Petitioner,)	
)	
v.)	PCB 18-54
)	(UST Appeal - Land)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by J. Van Wie):

Piasa Motor Fuels, Inc. (Piasa) petitioned the Illinois Pollution Control Board (Board) to appeal a November 27, 2017 determination by respondent Illinois Environmental Protection Agency (Agency) partially denying Piasa’s request for Reimbursement of costs allegedly incurred in a leaking underground storage tank (UST) abatement action (Petition or Pet.). This abatement was related to a service station known as Campus 76 Kwick Shop, in the City of Glen Carbon, County of Madison, Illinois ((LPC # 1190305016) (Property)). In late 2019, the Agency filed a motion to dismiss and the parties filed cross motions for summary judgment.

On April 16, 2020, the Board denied the Agency’s motion to dismiss, granted in part and denied in part the Agency’s cross-motion for summary judgment, and granted in part and denied in part Piasa’s motion for summary judgment. The Board also denied Piasa’s request to be reimbursed \$11,787.53 in costs incurred in excavating backfill from its own property, and granted recovery of \$1,003.12 in additional excavation, transport, and disposal costs, as well as associated carrying costs, where the Agency failed to use a “swell factor” 1.05 multiplier as required by the Board’s regulations.

On May 20, 2020, Piasa filed a Motion for Authorization of Payment of Attorney’s Fees as Cost of Corrective Actions (Motion or Mot.). On May 28, 2020, the Agency filed its response. On June 11, 2020, Piasa filed a Motion for Leave to File Reply in Support of Motion for Attorney’s Fees Instant. As a preliminary matter, the Board grants Piasa’s Motion for Leave to File Reply in Support of Motion for Attorney’s Fees Instant, and will consider its instant Reply in this order. This order authorizes payment to Piasa of \$817.42 in attorney’s fees as a cost of corrective actions.

RELEVANT FACTS

In August of 1999, a release was reported from the underground storage tanks at the Property, which was assigned Incident Number 99-1940. Pet. at 1. In November of 1999 during tank removal, a second incident was reported, which was assigned Incident Number 99-

2577. *Id.* Subsequently, Piasa conducted site classification and investigation work, and the extent of the contamination plume was further delineated through multiple rounds of corrective action. *Id.*

On February 1, 2013, Piasa submitted a corrective action plan (Plan) for the excavation and landfill disposal of on-site soils exceeding Tier 2 industrial/commercial site remediation objectives. *Id.* at 1-2. The estimated volume of the contaminated soil to be excavated was 2,870 cubic yards. *Id.* at 2. The total budget for the work was \$351,175.21, including \$191,400.30 for excavating, transporting and disposing of 2,870 cubic yards of contaminated soil and \$67,158.00 for backfilling the excavation. *Id.* at 2. The Plan did not provide any details regarding backfill other than anticipated volume.

On March 5, 2013, the Agency approved the Plan and budget without any modifications. *Id.* at 2. In November and December of 2013, corrective action work was performed. *Id.* at 2. On March 14, 2014, Piasa submitted a corrective action documentation report to the Agency, indicating that the actual extent of the excavation was less than that approved in the Plan and budget, amounting to 2,435 cubic yards of soil using the formula required by 35 Ill. Adm. Code 734.825(a). *Id.* at 2. The report allegedly used a 1.5 multiplier from Section 734.825(a) of the Board regulations to convert cubic yards to tonnage. *Id.* at 2. The report indicated 3,652.50 tons were excavated and attached copies of landfill weight tickets and manifests showing 3,629.74 tons of contaminated soil were disposed in the Roxana Landfill. *Id.* at 2.

On February 1, 2013, Piasa submitted an application for reimbursement for corrective action activities to the Agency, seeking \$300,744.45 (First Submission). *Id.* at 2. On July 10, 2014, the Agency responded (Agency's First Response), approving reimbursement for all but \$57,982.12 of those requested costs, denying the remainder for a lack of supporting documentation. *Id.* at 2. Specifically, the Agency's First Response stated that Piasa did not provide support for the excavation, transportation, and disposal costs for approximately 15 cubic yards of contaminated soil. The Agency's First Response also stated that it could not determine the amount paid for backfill costs, because the majority of the backfill was excavated and hauled from the property owners' site and

[t]he costs were incurred as a result of providing the equipment, labor and transportation of the backfill from the other property to the site, as well as placing the backfill into the excavation but the consultant was unable to provide the necessary time and material breakdowns in order for the backfill costs to be paid.
R. 1274.

On August 19, 2014, Piasa submitted an additional application for reimbursement for the remaining \$57,982.12 (Second Submission), enclosing time and materials information for its backfill costs and other support. *Pet.* at 2-3. On December 11, 2014, the Agency responded (Agency's Second Response), approving reimbursement of \$45,181.47 of backfill costs and denying reimbursement for backfill costs related to the excavation and stockpiling of soil from the owner's property, as well as the approximately 15 cubic yards of excavation, transportation and disposal costs raised in the Agency's First Response. R. 1461.

On July 19, 2017, Piasa submitted a third “application for payment for \$20,776.86, which included additional support for reimbursement for excavation, transportation and disposal costs, as well backfill costs,” and “included \$7,976.22 in handling charges not previously submitted” (Third Submission). Pet. at 3. The Third Submission offered arguments related to additional Freedom of Information Act (FOIA) documents in support of reimbursement for excavation, transportation, disposal, and backfill costs, and provided factual support for the requested handling charges. *Id.* at 3. On November 27, 2017, the Agency approved payment of \$7,720.42 in handling charges, and denied reimbursement for the remainder of the application (Agency’s Third Response). *Id.* at 3.

On January 2, 2018, Piasa filed a petition for review of the Agency’s Third Response alleging that the Agency incorrectly disallowed: (1) \$1,003.12 for excavation, transportation, and disposal of approximately 15 cubic yards of contaminated soil, because the Agency failed to use a “swell factor” 1.05 multiplier (35 Ill. Adm. Code 734.825(a)); (2) \$11,787.53 for the excavation of backfill material, because the Agency incorrectly considered this cost as not approved in a budget; and (3) \$255.80 in associated handling charges. Pet. at 3-6.

On November 11, 2019, Piasa moved for summary judgment, arguing that the Agency: (1) does not have authority to review costs that are below approved budget amounts; (2) incorrectly assumed that the excavating costs for backfill were related to overburden removal and return; and (3) failed to use a “swell factor” 1.05 multiplier as required by the Board’s regulations.

On April 16, 2020, the Board rejected Piasa’s first argument, finding that having total costs come in under the approved budget amount does not prevent the Agency from requiring documentation and reviewing the costs incurred. The Board also denied Piasa’s second argument requesting reimbursement of \$11,797.53 “associated with excavating and stockpiling soils on the adjacent property, prior to them being hauled to the site for use as backfill” (MSJ at 7, *quoting* R. 1532), finding that Piasa should have disclosed in its proposed Plan its intent to use backfill excavated from its property, and that Piasa failed to demonstrate the reasonableness of the backfill excavation costs for which it sought reimbursement. The Board, however, did agree with Piasa’s third argument that the Board regulations specifically require the Agency to use a “swell factor” 1.05 multiplier to determine the volume of soil removed and disposed of to be reimbursed, granting Piasa’s motion for summary judgment in part for \$1,003.12 in excavation, transport, and disposal costs, as well as associated carrying costs.

PARTY ARGUMENTS

Piasa Motion

On May 20, 2020, after prevailing on one of the three issues that it raised on appeal and receiving summary judgment for \$1,003.12 in requested reimbursement from the Leaking Underground Storage Tank Fund (Fund), and an order directing the Agency to recalculate the handling charges relating to that amount, Piasa moved for reimbursement of its attorney’s fees. Specifically, Piasa requests that the Board authorize payment from the Leaking Underground Storage Tank Fund in the amount of \$11,677.40 for attorney’s fees and litigation costs pursuant

to 415 ILCS 5/57.8(1) (2018). Mot. at 5. The attached affidavit of Patrick D. Shaw sets out all of 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 3. The affidavit does not differentiate how much was billed for one issue versus another.

Piasa argues that Section 57.8(1) of the Illinois Environmental Protection Act authorizes the Board to reimburse legal fees of parties that prevail on some, but not all issues. Mot. at 2, *citing Abel Investments, LLC v. IEPA*, PCB 16-108, slip op. at 2 (March 2, 2017). “A petitioner also need not prevail on all claims in order to be awarded the entirety of its reasonable legal costs, but merely raise ‘significant issues regarding IEPA’s review and determination under the UST program.’” Mot. at 4, *quoting Abel Investments*, PCB 16-108, slip op. at 3 (March 2, 2017).

Piasa requests reimbursement of all legal fees incurred, arguing that: (1) all legal costs sought were incurred “seeking payment under Title XVI and the plain language of Section 57.8(1) of the Act allows for the awarding of legal fees;” (2) the issues are inextricably intertwined by common facts and procedural issues; and (3) the “swell factor,” upon which Piasa prevailed, “does not appear to have been reduced to a guidance document, [but] is still tantamount to a rule of general applicability, the correction of which provides significant benefit to the future and proper administration of the UST program.” Mot. 3-4, *quoting Illinois Ayers Oil Co. v. IEPA*, PCB 03-214, at p. 8 (Aug 5, 2004).

Agency Response

On May 28, 2020, the Agency opposed Piasa’s motion, arguing that the Board did not issue an interim order authorizing the parties to file for payment of attorney’s fees. Resp. at 2. In support, the Agency noting that the Board “**may authorize** payment of legal fees” to an owner or operator that prevails before the Board in seeking payment under Title XVI of the Act, but the Board did not in the April 16, 2020 order. *Id.*, *quoting* 415 ILCS 5/57.8(1) (emphasis added).

In the alternative, the Agency argues that Petitioner should receive only 7 percent of the legal fees requested because it only prevailed on 7 percent of the costs sought in its appeal. Resp. at 2-3. The Agency argues that Illinois courts have recognized the general principle that a party is not entitled to fees on unsuccessful claims. *Id.* at 2, *citing Globalcom, Inc. v. Illinois Commerce Com’n*, 347 Ill. App. 3d 592, 618; 806 N.E.2d 1194, 1214 (1st Dist. 2004). While the Agency acknowledges that there may be difficulty parsing legal fees into discrete claims, it argues that when courts can identify and separate claims, legal fees are awarded on only the successful claims. Resp. at 2-3, *citing Cannon v. William Chevrolet/GEO, Inc.*, 341 Ill. App. 3d 674, 687; 794 N.E.2d 843, 854 (1st Dist. 2004) (“court must evaluate whether the claims (1) involved a common core of facts or related legal theories, and (2) whether the plaintiff achieved a level of success making it appropriate to award attorney’s fees for hours reasonably expended on the unsuccessful claims as well.”); *Franz v. Calaco Development Corp.*, 352 Ill. App. 3d 1129, 1151-1152; 818 N.E.2d 357, 377-378 (2nd Dist. 2004). The Agency further argued that the Board has used the monetary value of successful claims related to the total monetary value of claims sought to award the same percentage of total legal fees. Resp. at 3, *citing Webb and Sons*

v. IEPA, (May 3, 2007) PCB 2007-024 (granting 45% of attorney's fees where party was awarded 45% of the money sought in the appeal).

Piasa's Instanter Reply

On June 11, 2020, Piasa requested leave to file a reply instanter, arguing that it "would be materially prejudiced if it were unable to reply to these new, novel arguments made in the Response." Mot. for Leave at 2.

Piasa's attached reply seeks to address both of the Agency's arguments. First, Piasa argues that a post-judgment motion is the proper procedure to seek an attorney fee award, citing five orders where attorney's fees were awarded without the Board first authorizing the parties to file for payment of attorney's fees in an interim order. Rep. at 1, *citing Chatham BP v. IEPA*, PCB 14-1 (Feb. 5, 2015); *Evergreen FS v. IEPA*, PCB 11-51 (Sept. 6, 2012); *Swif-T Food Mart v. IEPA*, PCB No. 03-185 (Aug. 19, 2004); *Illinois Ayers*, PCB No. 03-214 (Aug 5, 2004); *Ted Harrison Oil Co. v. IEPA*, PCB 99-127 (Oct. 16, 2003).

Second, Piasa argues that the Board should disregard its holding in Webb & Sons in favor of Abel Investments, in which the Board awarded full attorney's fees in a partially successful appeal, stating that the case "raised important issues regarding Agency determinations on reimbursement from the UST Fund." Rep. at 3-4, *citing Abel Investments*, PCB 16-108, slip op. at 3 (March 2, 2017), *citing Burgess v. IEPA*, PCB 15-186, slip op. at 5-6 (Feb. 4, 2016). Piasa further argues that "it appears that the Board's finding in Abel of 'significant issues regarding IEPA's review and determination under the UST program' is the primary distinction with Webb & Sons v. IEPA." Rep. at 4. Piasa also argued that its requested attorney's fees were "on the low side," comparing them to several examples of cases requesting more in attorney's fees from the Board. Rep. at 3.

DISCUSSION

Title XVI of the Act establishes the Leaking Underground Storage Tank Program. 415 ILCS 5/57 (2018). The purposes of Title XVI include administering a UST Fund and establishing requirements for eligible owners to seek reimbursement from it. 415 ILCS 5/57(3), 57(4) (2018). Section 57.8(1) of the Act provides that the Board "may authorize payment of legal fees" if the owner prevails before the Board in seeking payment under Title XVI. 415 ILCS 5/57.8(1) (2018). Because this subsection of the Act provides for the reimbursement of legal fees incurred in prevailing before the Board, it constitutes a "fee-shifting" statute. *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*, 347 Ill. App. 3d at 618, 806 N.E.2d at 1214 (citations omitted).

Authorization to File Request for Legal Fees

This order addresses whether: (1) Piasa is authorized to file a request for legal fees; (2) Piasa's requested attorney's fees are reasonable; and (3) the Board should use its discretion to award attorney's fees. "The first question the Board must address is whether or not the proceeding falls within the parameters of the statutory provision." Illinois Ayers, PCB 03-214, slip op. at 7 (Aug. 5, 2004). Piasa prevailed in at least one claim, and its request for reimbursement is "seeking payment" within the meaning of Section 57.8(1) of the Act (415 ILCS 5/57.8(1) (2018)). The only support the Agency offers for its argument that the Board must first issue an interim order authorizing the parties to file for payment of attorney's fees is the Section 57.8(1) language that the Board "**may authorize** payment of legal fees" to an owner or operator that prevails before the Board in seeking payment under Title XVI of the Act. Resp. at 2, quoting 415 ILCS 5/57.8(1) (emphasis added). On the other hand, Piasa cites five instances where no such interim order was issued or required by the Board. Resp. at 1. Further, Piasa requested attorney's fees in its petition. Pet. at 6. The Board does not read into Section 57.8(1) the requirement for an interim order authorizing filing for payment of attorney's fees. Therefore, the Board finds that Piasa's motion is permitted and falls within the parameters of Section 57.8(1).

Reasonableness of Requested Fees

Historically, the Board has first considered the reasonableness of the claimed legal costs before considering whether to exercise its discretion to authorize their payment. See Evergreen FS, PCB 11-51 (Sept. 6, 2012), see also Illinois Ayers, PCB 03-214, slip op. at 8 (Aug. 5, 2004). As the party seeking reimbursement, Piasa has the burden of presenting sufficient evidence with which the Board can determine the reasonableness of the fees. See Prime Location Properties v. IEPA, PCB 09-67, at 4 (Nov. 5, 2009), citing J.B. Esker & Sons, Inc. v. Cle-Pa's Partnership, 325 Ill. App. 3d 276, 283, 757 N.E.2d 1271 (5th Dist. 2001). Piasa "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." *Id.*

The Board may take into account a number of 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, PCB 09-67, slip op. at 4, quoting Cretton, 371 Ill. App. 3d at 867-68 (setting forth factors trial court should consider to assess fee reasonableness).

Piasa provided an affidavit setting forth the legal services provided, the identity of the attorney providing the legal services, itemization of the time expended for the individual service, and the hourly rate charged. Mot. at 3. They comprised 61.1 billed hours for total fees of \$11,600. Aff. Exh. A. The affidavit describes work performed and the time allocated to that work in tenths of an hour. *Id.* The affidavit also includes \$77.40 of itemized costs for copying and the Board filing fee. *Id.* at 3-4. The affidavit does not differentiate how much was billed for one issue versus another. The listings are itemized specifically enough to assess the reasonableness of the charges. See Prime Location, PCB 09-67, slip op. at 5, citing Sampson v. Miglin, 279 Ill. App. 3d 270, 281-82, 664 N.E.2d 281 (1st Dist. 1996). The Board has previously recognized undersigned counsel's experience in underground storage tank appeals.

Mot. at 3, *citing Prime Location*, PCB No. 9-67, slip. op at 6. The Agency does not challenge whether the legal fees were reasonable for the work done, only that the Board should exercise its discretion to not authorize full reimbursement. For these reasons, the Board finds that the legal fees were reasonable and turns to whether the Board should exercise its discretion to authorize reimbursement.

Board Discretion

“[T]he general rule is that a party is not entitled to fees for its unsuccessful claims.” *Globalcom*, 347 Ill. App. 3d at 618, 806 N.E.2d at 1214 (citation omitted). However, a petitioner need not prevail on all claims in order to be awarded its reasonable legal costs if it raises “significant issues regarding IEPA’s review and determination under the UST program.” *Abel Investments*, PCB 16-108, slip op. at 3 (March 2, 2017).

Where a petitioner has partially prevailed, the Board has used its discretion both to award the entire amount of requested legal fees and to award only a portion of the requested legal fees. *E.g.*, *Illinois Ayers*, PCB 03-214, slip op. at 9 (Aug. 5, 2004) (awarding entire amount); *Abel Investments*, PCB 16-108, slip op. at 3 (March 2, 2017) (awarding entire amount); *Webb & Sons*, PCB 07-24, slip op. at 5 (May 3, 2007) (awarding partial amount).

In *Illinois Ayers*, the petitioner prevailed on nearly all its claims involving budget approval and the Agency did not oppose the reasonableness of attorney’s fees. *Illinois Ayers*, PCB 03-214, slip op. at 8-9 (Aug. 5, 2004). Rather, the Agency opposed legal fees because the underlying dispute arose regarding budget approval of technical issues, not actual requests for reimbursement. *Id.* at 9.

In *Abel Investments*, the petitioner prevailed on roughly half of its monetary claims and the Agency waived all opposition, failing to even respond to the attorney’s fee motion. *Abel Investments*, PCB 16-108, slip op. at 2-3 (March 2, 2017). In approving petitioner’s full fee request, the Board concluded that Abel’s appeal presented significant issues regarding IEPA’s review and determination under the UST program. *Id.*, *citing Burgess v. IEPA*, PCB 15-186, slip op. at 5-6 (Feb. 4, 2016) (Board held case raised significant issues regarding disparities between the prevailing wage and Subpart H rates).

In *Webb & Sons*, the petitioner prevailed on roughly half of its monetary claims. *Webb & Sons*, PCB 07-24, slip op. at 3. In contrast to *Illinois Ayers* and *Abel Investments*, the Agency directly opposed petitioner’s fee request, arguing that “when courts can identify and separate claims, fees are awarded only on the successful claims for which fees are allowed.” *Id.*, *citing Franz*, 352 Ill. App. 3d 1129, 1151-52, 818 N.E. 2d 357, 377-78 (2nd Dist. 2004). Based on the record and on the Agency’s concurrence that it was neither inappropriate nor inconsistent with precedent to do so, the Board in *Webb & Sons* directed reimbursement of 45 percent of the claimed legal fees. *Webb & Sons*, PCB 07-24, slip op. at 5.

Piasa argues that “it appears that the Board’s finding in *Abel* of ‘significant issues regarding IEPA’s review and determination under the UST program’ is the primary distinction with *Webb & Sons v. IEPA*.” Piasa seeks to demonstrate the significance of the swell factor

ruling, arguing that it “is still tantamount to a rule of general applicability, the correction of which provides significant benefit to the future and proper administration of the UST program.” Rep. at 4, *citing Abel Investments*, PCB 16-108, slip op. at 3 (March 2, 2017); Mot. 3-4. However, Piasa does not provide support for its statement that the swell factor finding, which applies the plain words of the Board’s regulations, provides significant benefit to the future and proper administration of the UST program. In comparison, the petitioner in *Burgess*, cited by *Abel Investments*, supported its claim of significance, asserting that: (1) “for the past decade, consultants and contractors have been sued by the State of Illinois for ‘failing to comport with the Prevailing Wage Act when performing work under the LUST Program;” (2) “prevailing wages can increase the costs of corrective action by one-third;” (3) “[t]he disparities between prevailing wage and Subpart H rates could only be expected to increase over time, so long as the Agency refuses to open a rulemaking to address changing circumstances;” and (4) “by prevailing in the underlying case, ‘petitioner helped create a body of precedent that will help others subject to these regulations in the future.’” *Burgess*, PCB 15-186, slip op. at 5-6 (Feb. 4, 2016). Accordingly, Piasa has not shown that its swell factor finding provides a significant benefit to the future and proper administration of the UST program.

Piasa also argues that the legal fees should be reimbursed because they involved a common core of facts. However, in considering reimbursement, a “court must evaluate whether the claims (1) involved a common core of facts or related legal theories, **and** (2) whether the plaintiff achieved a level of success making it appropriate to award attorney’s fees for hours reasonably expended on the unsuccessful claims as well.” *Cannon*, 341 Ill. App. 3d at 687 (emphasis added). Piasa has not demonstrated that it “achieved a level of success” with its full claim by being awarded 7 percent of the reimbursement it requested from the Fund. Therefore, the Board finds that Piasa did not achieve a level of success meriting awarding legal fees related to Piasa’s unsuccessful claims.

For the above stated reasons, the Board directs Piasa be reimbursed \$817.42, an amount equal to 7 percent of the legal fees sought by Piasa.

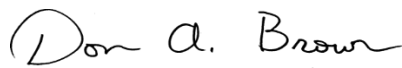
IT IS SO ORDERED.

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) (2018); *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. Filing a motion asking that the Board reconsider this final order is not a prerequisite to appealing the order. 35 Ill. Adm. Code 101.902.

<p style="text-align: center;">Names and Addresses for Receiving Service of Any Petition for Review Filed with the Appellate Court</p>

Parties	Board
Illinois Environmental Protection Agency Melanie Jarvis 1021 North Grand Avenue East P.O. Box 19276 Springfield, IL 62794 Melanie.Jarvis@Illinois.gov	Illinois Pollution Control Board Attn: Don A. Brown, Clerk James R. Thompson Center 100 West Randolph Street, Suite 11-500 Chicago, Illinois 60601
Piasa Motor Fuels, Inc. Attn: Patrick D. Shaw Law Office of Patrick D. Shaw 80 Bellerive Road Springfield, IL 62704 pdshaw1law@gmail.com	

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on November 5, 2020, by a vote of 4-0.



Don A. Brown, Clerk
 Illinois Pollution Control Board