

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

RELIABLE STORES, INC.,)
)
 Petitioner,)
)
 v.) PCB 19-2
) (UST Appeal)
OFFICE OF THE STATE FIRE MARSHAL,)
)
 Respondent.)

NOTICE OF ELECTRONIC FILING

To: Patrick D. Shaw Carol Webb
Law Office of Patrick D. Shaw Hearing Officer
80 Bellerive Road Illinois Pollution Control Board
Springfield, Illinois 62704 1021 North Grand Avenue East
Pdshaw1law@gmail.com P.O. Box 19274
Springfield, Illinois 62794-9274
Carol.Webb@Illinois.gov

Don Brown
Clerk
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 W. Randolph Street
Chicago, Illinois 60601
Don.Brown@illinois.gov

PLEASE TAKE NOTICE that on the 24th day of June, 2021, I caused to be filed with the Clerk of the Illinois Pollution Control Board, Respondent's Motion for Stay of Petitioner's Motion for Authorization of Payment of Attorney's Fees as Costs of Corrective Action, a true and correct copy of which is attached hereto and is hereby served upon you.

OFFICE OF THE STATE FIRE MARSHAL

By: /s/ Daniel Robertson
Daniel Robertson
Assistant Attorney General
Environmental Bureau
69 W. Washington St., 18th Floor
Chicago, IL 60602
(312) 814-3532
drobertson@atg.state.il.us
Daniel.L.Robertson@illinois.gov (Temporary)

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

RELIABLE STORES, INC.,)	
)	
Petitioner,)	
)	
v.)	PCB 19-2
)	(UST Appeal)
OFFICE OF THE STATE FIRE MARSHAL,)	
)	
Respondent.)	

**RESPONDENT’S MOTION FOR STAY OF PETITIONER’S MOTION FOR
AUTHORIZATION OF PAYMENT OF ATTORNEY’S FEES
AS COSTS OF CORRECTIVE ACTION**

The Office of the State Fire Marshal (“OSFM”) respectfully requests that the Illinois Pollution Control Board (“Board”) grant this motion to stay Petitioner, Reliable Stores, Inc.’s May 5, 2021 Motion for Authorization of Payment of Attorney’s Fees as Costs of Corrective Action (“Fees Motion”). The OSFM requests this stay because a ruling on Reliable Stores’ Fees Motion is premature in light of the pending appeal, and because jurisdiction of this matter has shifted to the First District Appellate Court. In addition, staying the Fees Motion would not violate the Illinois Environmental Protection Act (“Act”) or Board regulations. Alternatively, if the Board denies this motion for stay, the OSFM respectfully requests an opportunity to respond to the legal fees sought in the Fees Motion.

I. BACKGROUND

Reliable Stores sought the Board’s review of a June 12, 2018 determination of the OSFM. The OSFM’s determination concerns Reliable Stores’ leaking underground storage tank (“UST”) site located at 905 W. Roosevelt in Maywood, Cook County. Eligibility for cleanup cost reimbursement from the UST Fund requires a confirmed release from a UST or UST system. In this instance, the OSFM denied Reliable Stores’ application for eligibility because the release came

from an above-ground dispenser. The parties filed cross-motions for summary judgment. On April 1, 2021, the Board issued a final appealable Order and Opinion granting Reliable Stores' motion for summary judgment, denied the OSFM's cross-motion for summary judgment, reversed the OSFM's June 12, 2018 determination denying Reliable Stores' application for UST Fund eligibility, and remanded the matter to the OSFM to determine Reliable Stores' applicable UST Fund deductible. *See* PCB 19-2, Opinion and Order of the Board (April 1, 2021) at 8-9.

On May 4, 2021, in accordance with the Board's April 1, 2021 Opinion and Order (PCB 19-2, Opinion and Order of the Board (April 1, 2021) at 9), the OSFM filed a petition for direct administrative review in the First District Appellate Court of Illinois, on the issue of whether the OSFM correctly denied Reliable Stores' application for eligibility for reimbursement from the UST Fund. *See* PCB 19-2, Petition for Direct Administrative Review (May 4, 2021). The next day, on May 5, 2021, Reliable Stores filed its Fees Motion.¹ The OSFM now requests that the Board stay a determination on the Fees Motion until the pending appeal concludes.

II. LEGAL STANDARD

The Board's procedural rules provide for motions to stay. 35 Ill. Adm. Code 101.514. The "procedure for stay of any final Board order during appeal will be as provided in Rule 335 of the Rules of the Supreme Court of Illinois (Ill. S. Ct. Rule 335)." 35 Ill. Adm. Code 101.906(c). Illinois Supreme Court Rule 335(g) provides that an "[a]pplication for a stay of a decision or order of an agency pending direct review in the Appellate Court shall ordinarily be made in the first instance to the agency." "If an appeal is prosecuted by a public, municipal, governmental, or quasi-municipal corporation, or by a public officer in that person's official capacity for the benefit of the

¹ On June 10, 2021, the OSFM filed an unopposed motion for extension of time to file a responsive pleading to the Fees Motion, citing a lack of notice because of a network compromise at the Attorney General's Office. On June 18, 2021, the Board's Hearing Officer granted the motion.

public, the circuit court, or the reviewing court or a judge thereof, may stay the judgment pending appeal without requiring that any bond or other form of security be given.” Ill. S. Ct. Rule 305(i).

The decision to grant or deny a motion for stay is “vested in the sound discretion of the Board.” *See* People v. State Oil Co., PCB 97-103 (May 15, 2003) (granting motion for stay after petition for review filed with Appellate Court), *aff'd sub nom* State Oil Co. v. PCB, 352 Ill.App.3d 813 (2d Dist. 2004). The Board has been reluctant to stay its orders when a stay may result in harm to the public or the environment. *See, e.g.*, Panhandle Eastern Pipe Line Co. v. IEPA, PCB 98-102 (July 8, 1999) (denying motion for stay where movant sought to delay meeting requirements designed to prevent significant deterioration in air quality), *aff'd sub nom* Panhandle Eastern Pipe Line Co. v. PCB and IEPA, 314 Ill. App. 3d 296 (4th Dist. 2000).

The Board has granted stays of its orders with respect to the payment of penalties. *See, e.g.*, IEPA v. Piolet Bros. Trading, Inc., PCB 80-185 (Feb. 4, 1982) (granting motion for stay of order’s provision requiring penalty payment, but denying motion for stay of order’s provision requiring respondent to cease and desist from violations), *aff'd sub nom* Piolet Bros. Trading, Inc. v. PCB, 110 Ill. App. 3d 752 (5th Dist. 1982). When granting a stay with respect to the payment of penalties, the Board has reasoned that “[p]ayment of monetary penalty can be delayed without prejudice to the public and it has been our practice to allow such motions pending appeal.” Citizens for a Better Environment v. Stepan Chemical Co., PCB 74-201, 74-270, 74-317, slip op. at 1 (June 26, 1975); IEPA v. Northern Illinois Service Co., AC 05-40, slip op. at 2-3 (Apr. 19, 2007).

III. ARGUMENT

The Board's award of attorney's fees is discretionary in matters where an owner or operator prevails in seeking payment under Title XVI of the Act. 415 ILCS 5/57.8(1) (2020) (The Board "may authorize payment of legal fees."). In this case, the Board did not issue an order authorizing Reliable Stores to file for payment of attorney's fees. Even if the Board had issued such an order, the Board should stay review of the Fees Motion pending the Appellate Court's review because such a stay is necessary to prevent irreparable harm to the public, and because the Board has been divested of jurisdiction, which is now in to the Appellate Court.

A. A Stay of the Board's Review of the Fees Motion is Appropriate Pending the Appellate Court's Review.

The Board has previously granted motions to stay final orders directing payment of civil penalties and attorney's fees, without requiring the posting of any appeal bond or other security. People of the State of Illinois v. John Prior, et al., PCB 02-177, slip op. at 1 (Sept. 16, 2004).

The Board considers several equitable factors when considering a stay, including: (1) whether a stay is necessary to secure the fruits of the appeal if the movant is successful; (2) whether the status quo should be preserved; (3) the respective rights of the litigants; (4) whether hardship on other parties would be imposed; and (5) whether there is a "substantial case on the merits." People v. AET Env'tl., Inc., PCB 07-95 (June 20, 2013), slip op. at 4 (citing Stacke v. Bates, 138 Ill. 2d 295, 304-06 (1990)); People v. Toyal, Inc., PCB 00-211 (Sep. 16, 2010), slip op. at 4-6. Whether a substantial case on the merits exists is not the sole consideration—the Board must balance it with the other factors. AET, PCB 07-95, slip op. at 4 (quoting Stacke, 138 Ill. 2d at 309). Ultimately, the movant for a stay must "show that the balance of the equitable factors weighs in favor of granting the stay." Stacke, 138 Ill. 2d at 309.

The equitable factors above support the necessity for a stay of the Fees Motion pending the appeal. The Board, in ruling that the release at issue in this matter came from a UST system meeting the requirements of Section 57.9(a) of the Act, 415 ILCS 5/57.9(a) (2020), effectively overturned thirty years of OSFM policy, whereby it relied on the origin point of a release in making an eligibility and deductible determination. *See* PCB 19-2, Respondent's Cross-Motion For Summary Judgment, Exh. A, Affidavit of Deanne Lock, ¶¶1 and 9-12 (July 23, 2020). The OSFM's appeal of the Board's decision is made in good faith and presents a "substantial case on the merits."

There is also no right of Reliable Stores' which is being prejudiced by the appeal, as the Fees Motion makes no indication that any hardship would result from the Board delaying a determination on whether or not to authorize payment of Reliable Stores' legal fees. No harm would result to the public or the environment if the stay is granted. The Board should also preserve the status quo pending the appeal because Illinois Courts have recognized the general principle that a party is not entitled to fees on unsuccessful claims. Globalcom, Inc. v. Illinois Commerce Commission, 347 Ill. App. 3d 592, 618 (1st Dist. 2004). If the Board directs payment of legal fees as costs of corrective action and the OSFM is successful on its appeal, it may cause irreparable harm to the public because the Act and Board regulations provide no clear and obvious mechanism for the OSFM, a state entity, to recover those legal fees.

Given the weight of the equitable factors generally considered by the Board, it is reasonable to delay a determination on whether or not attorney's fees should be awarded pending the Appellate Court's review.

B. The Board has Been Divested of Jurisdiction of this Matter Pending a Final Determination by the Appellate Court.

Section 41(a) of the Act provides in pertinent part:

Any party to a Board hearing . . . may obtain judicial review, by filing a petition for review within 35 days from the date that a copy of the order or other final action sought to be reviewed was served upon the party affected by the order or other final Board action complained of, under the provisions of the Administrative Review Law, as amended and the rules adopted pursuant thereto, except that review shall be afforded directly in the Appellate Court for the District in which the cause of action arose and not in the Circuit Court. 415 ILCS 5/41(a) (2020).

The OSFM filed its petition for direct administrative review on May 4, 2021, within 35 days from the date that a copy of the Board's April 1, 2021 Opinion and Order was served upon it. Illinois Supreme Court Rule 335 addresses statutory direct review of administrative agency orders by the Appellate Court. Rule 335(i)(1) provides that "[i]nsofar as appropriate, the provisions of Rules 301 through 373 (except for Rule 326) are applicable to proceedings under this rule." Ill. Sup. Ct. R. 335(i)(1).

Once a petition for review of a final Board decision is filed in the Appellate Court pursuant to Section 41(a) of the Act (415 ILCS 5/41 (a) (2020)), the Appellate Court's jurisdiction attaches and the Board is divested of jurisdiction. Prime Location Properties v. IEPA, PCB 09-67, slip op. at 3 (Nov. 15, 2012), *citing* People v. Community Landfill Co., PCB 03-191, slip op. at 4 (Nov. 5, 2009). Illinois Supreme Court Rule 369(b) provides that "[w]hen the reviewing court dismisses the appeal or affirms the judgment and the mandate is filed in the circuit court, enforcement of the judgment may be had and other proceedings may be conducted as if no appeal had been taken." Ill. Sup. Ct. R. 369(b).

This Board has previously noted that the Appellate Court has found that appellate court jurisdiction attaches when an appeal of a Board decision is properly made. *See* People v. Skokie Valley Asphalt, Co., et al., PCB 96-98, slip op. at 2 (Oct. 21, 2004), *citing* Cain v. Sukkar, 167 Ill.

App. 3rd. 941, 945 (4th Dist. 1988) (“Once an appeal has been duly filed in the appellate court by filing a notice of appeal, the trial court is restrained from entering any order which would change or modify the judgment or its scope, and from entering any order which would have the effect of interfering with the review of the judgment.”). In Skokie Valley Asphalt Co., the respondent simultaneously filed a motion to stay or extend the time to respond to a petition for attorney’s fees and costs along with a petition for appellate court review of the Board’s order finding violations of the Act and Board regulations. The Board held that it “cannot rule on the petition seeking attorney fees and the accompanying issues unless it regains jurisdiction.” *Id.*

It is the Board’s custom to set forth its initial decision in an interim order to allow parties to address requests for legal fees. Prime Location Properties, PCB 09-67, slip op. at 6. The Board has also authoritatively stated that it cannot take up the question of legal fees once a matter is appealed. In Prime Location Properties, the Board stated:

There is no question that Section 57.8(1) of the Act authorizes the Board to order UST Fund payment of legal fees incurred during the appeal brought to the Board. Section 57.8(1) makes no mention, however, of the Board conducting any further proceedings after final Board action is judicially reviewed. The General Assembly has referred to post-judicial review proceedings before the Board, but did not do so here. Cf. 415 ILCS 5/22.2d(c)(2) (2010). Section 41 of the Act contemplates post-judicial review proceedings before the Board, but only “under an order by the Appellate Court.” 415 ILCS 5/41 (2010). Prime Location Properties, PCB 09-67, slip op. at 6.

The Board no longer has jurisdiction of this case. The Board cannot rule on the Fees Motion and the accompanying issues unless it regains jurisdiction. The Board should therefore grant this motion for stay because it does not have jurisdiction to rule on the pending Fees Motion filed after the petition for review, until such time as directed by the Appellate Court.

IV. CONCLUSION

For all the reasons stated above, the OSFM respectfully requests that the Board stay Reliable Stores' Fees Motion pending the Appellate Court's review of the Board's April 1, 2021 opinion and order because the Fees Motion is premature and because the Board has been divested of jurisdiction to entertain such motions pending outcome of the First District Appellate Court's review. Alternatively, if the Board denies the motion for stay, the OSFM respectfully requests an opportunity to respond to the request for legal fees sought in the Fees Motion.

Respectfully Submitted,

OFFICE OF THE STATE
FIRE MARSHAL

By KWAME RAOUL
Attorney General of the State of Illinois

/s/ Daniel Robertson
Daniel Robertson
Assistant Attorney General
Environmental Bureau
69 W. Washington Street, Suite 1800
Chicago Illinois, 60602
312-814-3532
Daniel.L.Robertson@illinois.gov

CERTIFICATE OF SERVICE

I, DANIEL ROBERTSON, an Assistant Attorney General, do certify that I caused to be served this 24th day of June, 2021, the attached Notice of Electronic Filing and Respondent's Motion for Stay of Petitioner's Motion for Authorization of Payment of Attorney's Fees as Costs of Corrective Action upon the persons listed on the Notice of Electronic Filing *via email*.

/s/ Daniel Robertson _____
DANIEL ROBERTSON
Assistant Attorney General
Environmental Bureau
69 W. Washington St., 18th Floor
Chicago, IL 60602
(312) 814-3532
drobertson@atg.state.il.us
Daniel.L.Robertson@illinois.gov (Temporary)