

ILLINOIS POLLUTION CONTROL BOARD
March 19, 2015

PIASA MOTOR FUELS, INC.,)	
)	
Petitioner,)	
)	
v.)	PCB 14-131
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

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

Petitioner Piasa Motor Fuels, Inc. (Piasa) requests that the Board authorize payment of legal fees from the Underground Storage Tank (UST) Fund. Piasa appealed an April 8, 2014 determination of the Illinois Environmental Protection Agency (Agency or IEPA or Illinois EPA) to modify a proposed Stage 2 site investigation plan for its UST site at 4101 Alby Street, Alton, Madison County. On December 4, 2014, the Board affirmed the Agency’s determination regarding costs for soil investigation boring and sampling below the groundwater table. However, the Board reversed the Agency’s determination regarding groundwater investigation boring and sampling below the groundwater table in five borings completed as groundwater monitoring wells. Noting that Piasa had requested reimbursement of legal fees, the Board allowed Piasa to file a statement of its legal costs that may be eligible for reimbursement and also set a deadline for the Agency to respond.

For the reasons below, the Board today finds that Piasa has prevailed to the extent of 43.75 percent of the issues raised in its appeal and also finds Piasa’s requested legal fees and costs to be reasonable. The Board exercises its discretion under Section 57.8(1) of the Act and directs the Agency to reimburse Piasa 43.75 percent of its requested fees and costs, or \$11,049.40, from the UST Fund.

This opinion and order first provides the procedural history before summarizing Piasa’s motion for payment of fees and the Agency’s response. The Board then provides statutory and legal background before discussing the issues presented, reaching its conclusion, and issuing its order.

PROCEDURAL HISTORY

On May 16, 2014, Piasa filed a petition for review (Pet.). On June 5, 2014, the Board accepted the petition for hearing. On July 29, 2014, the hearing officer scheduled a hearing on September 10, 2014, in Springfield.

On August 22, 2014, the Agency filed a motion for leave to file the administrative record *instanter* accompanied by the administrative record (R.). On September 9, 2014, Piasa filed a motion to supplement the record with a single one-page document.

The hearing took place as scheduled on September 10, 2014, and the Board received the transcript (Tr.) on September 18, 2014. During the hearing, the hearing officer granted Piasa's unopposed September 9, 2014 motion to supplement the record. Tr. at 7. Also during the hearing, the hearing officer admitted into the record four petitioner's exhibits (*see* Tr. at 14-15, 40, 49) and one respondent's exhibit (*see* Tr. at 171-72). Although the hearing officer set a deadline of September 24, 2014, to file public comments, the Board received no public comment on this case.

On October 6, 2014, Piasa filed its post-hearing brief. In an order dated October 16, 2014, the hearing officer extended the Agency's deadline to file its post-hearing brief to October 27, 2014, and set a deadline of November 3, 2014, for Piasa to file a reply. On October 27, 2014, the Agency filed its post-hearing brief. On November 3, 2014, Piasa filed its reply.

On December 4, 2014, the Board adopted an interim opinion and order (Board Order) that first granted the Agency's unopposed motion for leave to file the administrative record *instanter*. In addition, the Board affirmed the Agency's determination regarding costs for soil investigation boring and sampling below the groundwater table. However, the Board reversed the Agency's determination regarding costs for groundwater investigation boring and sampling below the groundwater table in five borings completed as groundwater monitoring wells. The Board set a deadline of December 5, 2014, for Piasa to file a statement of its legal costs that may be eligible for reimbursement and also allowed the Agency to file a response within 30 days of service of Piasa's statement.

On January 5, 2015, Piasa filed a motion for authorization of payment of legal fees (Mot.) accompanied by an affidavit of William D. Ingersoll (Aff.) and a summary of fees and costs (Exh. 1). On February 4, 2015, the Agency filed its response (Resp.).

SUMMARY OF PIASA'S MOTION FOR AUTHORIZATION OF PAYMENT

Piasa 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 \$25,255.77 in legal fees and costs from the UST Fund. Mot. at 7. In the following subsections, the Board summarizes Piasa's arguments.

Board Decision

Piasa argues that its petition challenged the Agency's decision to modify its proposed Stage 2 site investigation plan and budget "so as to disapprove all soil sampling below the water table in both Stage 1 and Stage 2 activities." Mot. at 1. Piasa cites the following language from the Agency's decision letter:

[p]lease be advised that Illinois EPA does not approve of the soil sampling that was performed below the water table. It has not been demonstrated that such samples were warranted as part of Stage I and such samples are specifically prohibited in Stage II. Therefore the Illinois EPA is modifying the plan to exclude all activities associated with such sampling. Mot. at 1-2; *see* R. at 356.

Piasa acknowledges that the Board affirmed “the Agency’s April 8, 2014 determination regarding costs for soil investigation boring and sampling below the groundwater table.” Board Order at 33; *see* Mot. at 2. Piasa emphasizes, however, that the Board reversed “the Agency’s determination regarding costs for groundwater investigation boring and sampling below the groundwater table in borings B-4, B-5, B-10, B-12, and B-14 completed as groundwater monitoring wells.” Board Order at 33; *see* Mot. at 2. Piasa also notes the Board’s statement that, “[h]aving partially reversed the Agency’s determination to modify Piasa’s Stage 2 Site Investigation, the Board concludes that Piasa has prevailed before the Board for the purposes of Section 57.8(l) of the Act.” Board Order at 32.

Board Discretion

Piasa argues that, “since the Board found Section 57.8(l) to apply, it then must determine whether to exercise its discretion to award the fees and costs.” Mot. at 3, citing Illinois Ayers Oil Co. v. IEPA, PCB 03-214, slip op. at 7 (Aug. 5, 2004). Piasa states that it bears the burden of presenting to the Board “sufficient evidence as to the reasonableness of those fees and costs.” Mot. at 3 (citations omitted). Piasa further states that it is required to provide specific information about the services provided, time required, and rates charged. *Id.* (citations omitted). Piasa adds that it has submitted an affidavit of its attorney in this matter and a summary of fees and costs in order to provide this information. *Id.*; *see* Aff.; Exh. 1. Piasa argues that the Board considers the entire record and may take into account various factors in determining whether the requested reimbursement is reasonable. Mot. at 3-4 (citations omitted).

Piasa notes that Mr. Ingersoll’s affidavit describes the experience of attorneys working on its behalf in this matter. Mot. at 4; *see* Aff. at 1. Addressing the nature and difficulty of the case, Piasa 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 4. Piasa argues that the Board’s decision in this case has clarified interpretation of the UST regulations. *Id.*, citing 35 Ill. Adm. Code 734.315 (a)(1), (a)(2) Piasa further argues that “review of other Board decisions awarding fees pursuant to Section 57.8(l) shows that the fees charged here are comparable to rates approved by the Board in earlier cases.” Mot. at 4. Piasa concludes that the record on these factors justifies an exercise of the Board’s discretion to award attorney fees. *Id.*

Partial Reimbursement

Piasa argues that, although the Board partially affirmed the Agency’s determination, “a full reimbursement of the legal fees and costs of pursuing this matter is justified.” Mot. at 4.

Piasa cites Webb & Sons, Inc. v. IEPA, PCB 07-24 (May 3, 2007) and claims that the Board’s decision in that case relied on Cannon v. William Chevrolet/GEO, Inc., 341 Ill. App. 3d

674 (1st Dist. 2004). Mot. at 5. Piasa argues that Cannon analyzes “whether plaintiff’s failing claims were distinct in all respects from the prevailing claims; and, whether a level of success was achieved making it appropriate to award fees for the hours spent on the unsuccessful claims as well.” *Id.*, citing Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933 (1983). Piasa suggests that the Agency’s decision letter blurred any distinction that may have existed between the claims appealed in this matter. Mot. at 4. Piasa again cites the Agency’s decision letter:

[p]lease be advised that Illinois EPA *does not approve of the soil sampling that was performed below the water table*. It has not been demonstrated that such samples were warranted as part of Stage I and such samples are specifically prohibited in Stage II. Therefore the Illinois EPA is *modifying the plan to exclude all activities associated with such sampling*. Mot. at 5 (emphasis in original), *see* R. at 356.

Piasa argues that the Agency excluded from the proposed plan all activities associated with sampling below the water table. Mot. at 6. Piasa claims that this exclusion does not distinguish samples from soil borings and samples from borings drilled for monitoring wells. *Id.* Piasa further claims that the Agency “did not even defend the issue related to the monitoring well borings and soil sampling.” *Id.* Piasa asserts that the Agency’s decision letter did not distinguish these issues from one another and that this “lack of precision” prevents them from being separated. *Id.* Piasa states that achieving the relief it sought, even on an issue the Agency ignored, required it to proceed on all issues and expend the full amount shown in its summary of fees. *Id.*, citing Exh. 1.

Piasa claims that separating costs attributable to the reversed and affirmed determinations presents complicated factual questions. Mot. at 6. Piasa argues that “[t]his matter did not involve specific amounts of money, but rather soil sampling plus any activities related to them.” *Id.* Piasa further argues that proper distinctions between samples “would be much more complicated than just apportioning reversal to five out of twelve borings. Rather, it would require how much drilling would have been precluded, and then, how many samples would not have been needed.” *Id.* Piasa argues that drilling does not end at the groundwater table but ends with the four-foot segment that includes the point of groundwater contact. *Id.* Noting that sampling must occur at five-foot intervals, Piasa asks whether a sample from the deepest four-foot segment drilled should be excluded from reimbursement if it is within that five-foot interval. *Id.*

In addition, Piasa claims that the Board’s decision interpreted the UST regulations and clarified administration of the program for the Agency and regulated entities. Mot. at 4-5, 6. Piasa claims that, although it did not prevail on all issues, the Board’s findings will help plan future site investigations and Agency review of them. *Id.* at 6.

SUMMARY OF AGENCY’S RESPONSE

The Agency first notes that the Board affirmed the Agency’s determination regarding costs for soil investigation below the groundwater table. The Agency adds that the Board reversed the Agency only regarding costs for groundwater investigation below the groundwater

table in five borings completed as monitoring wells. Resp. at 1, citing Board Order at 33. The Agency claims that Piasa “seeks not just its legal fees for the portion of the case in which it prevailed but for the entire case.” Resp. at 1.

Piasa’s Petition for Review

The Agency cites the Board’s procedural rules, which provide that a petition for review of an Agency UST decision must include “[a] statement specifying the grounds of appeal.” Resp. at 1, citing 35 Ill. Adm. Code 105.408(c). The Agency argues that Piasa’s petition contested only the determination concerning soil investigation and Section 734.315(a)(1) of the UST rules. Resp. at 1-2, citing Pet at 1-5. The Agency further argues that the petition “never even mentioned groundwater investigation or Section 734.315(a)(2).” Resp. at 2, citing Pet. at 1-5.

The Agency claims that it “prevailed on the grounds of appeal asserted in the Petition for Review.” Resp. at 2. The Agency argues that awarding Piasa “legal fees on a point it never even asserted in its petition would be to award it a windfall.” *Id.* The Agency concludes that the Board should deny Piasa’s entire request for payment of legal fees.

Partial Reimbursement

The Agency argues that, if the Board considers exercising its discretion to award fees, it should do so only to the extent that Piasa prevailed. The Agency states that Piasa appealed a determination regarding soil sampling below the groundwater table that it had submitted as part of a Stage 2 site investigation plan. Resp. at 2, citing Pet. at 3-4 (¶¶8-11). The Agency further states that “[t]hat plan reported 12 borings from which 32 samples were taken, with 14 of those samples having been taken below the groundwater table in borings converted to groundwater monitor wells.” Resp. at 2, citing R. at 240-41, 320-31. The Agency adds that the Board affirmed its “determination as to the soil samples taken below the groundwater table, except for those taken in monitoring wells, for which it was reversed.” Resp. at 2. The Agency calculates that “the Board has ruled in Illinois EPA’s favor as to 18 of the 32 samples, or 56.25 percent.” *Id.* The Agency adds that the Board ruled in Piasa’s favor “as to 14 of the 32 samples, or 43.75 percent.” *Id.*

The Agency claims that “it won the majority of this case and the Petitioner should not be awarded any of its legal fees.” Resp. at 2. The Agency argues, however, that if the Board “is inclined to award Petitioner its fees, it should award them in proportion to the 43.75 percent of the case in which this Board found it to have prevailed.” *Id.*, citing Webb & Sons, Inc. v. IEPA, PCB 07-24 (May 3, 2007).

STATUTORY AND LEGAL BACKGROUND

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 “[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

Piasa has requested reimbursement of attorney fees and costs in the amount of \$25,255.77. Mot. at 7; *see* Pet. at 5. In its December 4, 2014 interim opinion and order, the Board reserved ruling on whether to exercise its discretion to award attorney fees and, if it chose to exercise that discretion, the amount of reimbursement. In the following subsections, the Board addresses these issues.

Application of Section 57.8(l)

In its December 4, 2014 interim opinion and order, the Board partially affirmed the Agency regarding costs for soil investigation sampling below the groundwater table but reversed the Agency’s determination regarding costs for groundwater investigation sampling below the groundwater table in five borings completed as groundwater monitoring wells. Board Order at 31-32. The Board concluded that, because it had partially reversed the Agency’s determination to modify Piasa’s Stage 2 site investigation plan, Piasa had prevailed before the Board for the purposes of Section 57.8(l) of the Act (415 ILCS 5/57.8(l) (2012)). Board Order at 32-33, citing Webb & Sons, Inc. v. IEPA, PCB 07-24, slip op. at 4-5 (May 3, 2007) (partial reimbursement). The Board noted that it had required the reimbursement of legal fees from the UST Fund where a petitioner prevailed in appealing the Agency’s modification of a plan and budget. Board Order at 32, citing Illinois Ayers Oil Co. v. IEPA, PCB 03-214, slip op. at 7-9 (Aug. 5, 2004).

Whether to Exercise the Board’s Discretion to Award Fees

The Agency argues that Piasa prevailed on a point it never asserted and that the Board should deny Piasa’s request. Resp. at 3. However, the Board is not persuaded by the Agency’s claim that Piasa’s petition failed to contest the modification of groundwater investigation costs. *See* Resp. at 1-2. Piasa claimed that the Board’s regulations do not prohibit soil sampling below the groundwater table during Stage 1 (Pet. at 3), which may require investigation of both soil and groundwater. While Piasa cited soil investigation requirements as “[r]elevant language,” the Board does not view this citation as limiting the petition solely to that issue. Piasa requested that the Board find the Agency’s determination regarding Stage 1 activities was not supported by statutory or regulatory authority. *See* Pet. at 5. Piasa did not limit that request to soil

investigation. *See id.* The Board does not consider this argument as a basis to deny Piasa's entire request for reimbursement.

However, the Board also is not persuaded by Piasa's claim that full reimbursement of legal costs is justified. *See* Mot. at 4. Piasa acknowledges that it only partially succeeded in reversing the Agency's determination. *Id.* Furthermore, the Board cannot agree with Piasa's suggestion that there are significant factual difficulties in distinguishing affirmed and reversed costs from one another. While the Agency favors denial of all requested fees, it analyzes the extent to which Piasa prevailed before the Board. Resp. at 3.

The contested plan includes 12 borings, from which Piasa took 47 soil samples. R. at 240-41 (summary), 320-31 (logs). The Agency's rejection of Stage 1 soil sampling below the groundwater table involved 32 of the 47 samples. Resp. at 3. Further, the Board notes that 14 of the 32 samples taken below the groundwater table were from five borings completed as groundwater monitoring wells. *Id.* It was on these 14 samples that the Board reversed the Agency's determination. *See* Board Order at 31-33. Under the Agency's analysis, the Board affirmed the Agency's determination as to 18 of those 32 samples, or to an extent of 56.25 percent. *See* Resp. at 3. The Agency argues that, if the Board is inclined to exercise its discretion to award fees, it should award Piasa only the 43.75 percent extent to which Piasa prevailed. *Id.*

Piasa appears to have anticipated the Agency's analysis, as its motion argues that separating the affirmed and reversed costs from one another "would be much more complicated than just apportioning reversal to five out of twelve borings." Mot. at 6. Piasa notes that drilling proceeds in four-foot intervals. Piasa suggests that the Agency's analysis does not address "how much drilling would have been precluded. . . ." *Id.* However, the Agency based its plan modification specifically on sampling performed below the groundwater table. R. at 356-57. The Board specifically reversed the Agency's determination regarding samples below the groundwater tables in five borings completed as groundwater monitoring wells. Board Order at 32. The Board is persuaded that the Agency has provided a reasonable basis on which to determine the extent to which Piasa has prevailed in this appeal. The Board finds that Piasa has prevailed to the extent of 43.75 percent of the issues raised in its appeal of the Agency's determination. Webb & Sons, Inc. v. IEPA, PCB 07-24, slip op. at 4-5 (May 3, 2007) (partial reimbursement). The Board continues by considering whether to exercise its discretion by awarding attorney fees to that extent.

In determining whether to exercise its discretion to authorize payment, the Board considers the reasonableness of the requested legal fees and costs. Prime Location Properties, LLC v. IEPA, PCB 09-67, slip op. at 4 (Nov. 5, 2009), citing Illinois Ayers Oil Company v. IEPA, PCB 03-214, slip op. at 8-9 (Aug. 5, 2004); Swif-T Food Mart v. IEPA, PCB 03-185, slip op. at 3 (Aug. 19, 2004). As the party seeking reimbursement of fees, Piasa 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). 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.” Prime Location, slip op. at 4, citing J.B. Esker, 325 Ill. App. 3d at 283, 757 N.E.2d at 1278.

While Piasa “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 Piasa’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.

Piasa’s motion is accompanied by an affidavit of Mr. Ingersoll and a 4-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 May 15, 2014, and continued to January 5, 2015. Exh. 1; see Aff. The work includes specified hours performed by Mr. Ingersoll’s 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 Piasa 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). While the Agency opposes the request for payment, it has not disputed sworn statements regarding the experience of Piasa’s attorney or the reasonableness of the requested reimbursement rates. See Resp.

Above, the Board found that Piasa had prevailed to the extent of 43.75 percent of the issues raised in its appeal of the Agency’s determination. 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, including the Agency’s response and prior Board decisions, the Board finds Piasa’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 Piasa from the UST Fund in the amount of 43.75 percent of its requested legal fees and costs of \$25,255.77, or \$11,049.40.

CONCLUSION

Having previously found that Piasa met its burden of proving that sampling below the groundwater table in borings completed as monitoring wells would not violate the Act and Board regulations, the Board finds that Piasa has prevailed to the extent of 43.75 percent of the issues raised in its appeal of the Agency's April 8, 2014 determination. The Board finds that Piasa's requested legal fees and costs are reasonable. The Board exercises its discretion under Section 57.8(1) of the Act and directs the Agency to reimburse Piasa 43.75 percent of its requested fees and costs, or \$11,049.40, from the UST Fund.

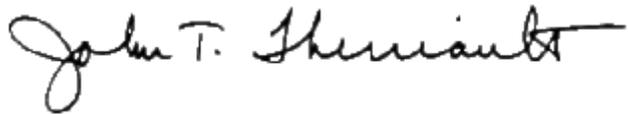
ORDER

The Board exercises its discretion under Section 57.8(1) of the Act and directs the Agency to reimburse Piasa \$11,049.40 in legal fees and costs from the UST Fund.

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) (2012); *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, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on March 19, 2015, by a vote of 4-0.



John T. Therriault, Clerk
Illinois Pollution Control Board