

ILLINOIS POLLUTION CONTROL BOARD
October 20, 2022

DERSCH ENERGIES, INC.,)	
)	
Petitioner,)	
)	
v.)	PCB 17-3
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

OPINION AND ORDER OF THE BOARD (by C.M. Santos):

Dersch Energies, Inc. (Dersch) appealed a determination by the Illinois Environmental Protection Agency (IEPA or Agency) concerning 12 modifications to Dersch’s corrective action budget for its underground storage tank (UST) site in Lawrenceville, Lawrence County. In an order on June 17, 2021, the Board granted Dersch’s motion for summary judgment on the single issue of the budget for a measuring wheel. After conducting a hearing on September 15, 2021, the Board on August 11, 2022, reversed each of the other 11 contested items and restored Dersch’s proposed amounts to its corrective action budget.

Dersch now requests that the Board authorize payment of its legal fees. The Board finds that Dersch’s appeal sought payment from the UST Fund and that it prevailed before the Board under Section 57.8(1) of the Environmental Protection Act (Act) (415 ILCS 5/57.8(1) (2020)). The Board exercises its discretion to award legal fees and directs IEPA to reimburse Dersch \$32,676.30 from the UST Fund.

The Board’s order begins below with an abbreviated procedural history. After providing the statutory and regulatory background, the Board discusses the issues, reaches its conclusion, and issues its order.

ABBREVIATED PROCEDURAL HISTORY

On June 17, 2021, the Board granted Dersch’s motion for summary judgment on the single issue of its proposed budget for a measuring wheel but otherwise denied the parties’ cross motions for summary judgement. The Board directed its hearing officer to proceed to hearing on the 11 remaining disputed budget modifications.

The hearing took place on September 15, 2021. On August 11, 2022, the Board issued an interim opinion and order reversing IEPA’s 11 disputed modifications of Dersch’s corrective action budget. The Board restored those contested items to Dersch’s budget.

In its interim opinion and order, the Board directed Dersch to file by September 12, 2022, a statement of legal fees that may be eligible for reimbursement and its arguments why the Board should exercise its discretion to reimburse those fees. Dersch timely filed its motion for authorization of payment of fees (Mot.) on September 12, 2022. Attached to the motion was the affidavit of Patrick D. Shaw (Aff.), Dersch's attorney.

The Board's interim opinion and order allowed IEPA to respond within 14 days after being served with Dersch's statement, but IEPA did not respond. Because it did not file a response to Dersch's motion, IEPA is deemed to have waived objection to the Board granting the motion. 35 Ill. Adm. Code 101.500(d).

STATUTORY AND REGULATORY AUTHORITIES

Costs associated with "corrective action" may be reimbursed from the UST Fund. 415 ILCS 5/57.9(a)(7) (2020). "'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 (2020).

Section 57.8 of the Act addresses reimbursement from the UST Fund, and subsection (l) 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) (2020); *see also* 35 Ill. Adm. Code 734.630(g).

BOARD DISCUSSION

Below, the Board first addresses whether this appeal falls within the scope of Section 57.8(l) of the Act and, if it does, whether the Board will exercise its discretion to award Dersch's requested legal fees and costs.

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." Knapp Oil Co. v. IEPA, PCB 16-103, slip op. at 2 (Nov. 17, 2016), citing Ill. Ayers Oil Co. v. IEPA, PCB 03-214, slip op. at 7 (Aug. 5, 2004) (Ill. Ayers).

Dersch argues that it "prevailed in full in reversing the Agency's twelve deductions totaling over \$7,000 in corrective action costs." Mot. at 4. The Board granted Dersch's motion for summary judgment on the single issue of its proposed budget for a measuring wheel. Dersch Energies, Inc. v. IEPA, PCB 17-3, slip op. at 25-26 (June 17, 2021). In its interim opinion and order, the Board reversed the 11 remaining disputed IEPA determinations to modify Dersch's corrective action budget. The Board's interim opinion and order restored these items to the budget. *Id.*, slip op. at 36-37 (Aug. 11, 2022). The Board concludes that Dersch has prevailed before it.

Dersch states that “[a]ll of the legal costs sought herein were incurred ‘seeking payment under Title XVI.’” Mot. at 2, citing Ill. Ayers, slip op. at 8. The Board has found that approving a plan and budget is a prerequisite to reimbursement from the UST Fund. The Board has ordered reimbursement of legal fees when the petitioner prevails in an appeal of IEPA’s rejection of a plan and budget. Prime Location Properties v. IEPA, PCB 09-67, slip op. at 3 (Nov. 5, 2009) (Prime Location), citing Ill. Ayers, slip op. at 7-8. The Board concludes that Dersch’s appeal of IEPA’s budget modifications sought payment from the UST Fund.

Because Dersch prevailed when it sought payment from the UST Fund, the Board finds that this appeal falls within the scope of Section 57.8(l) of the Act. Accordingly, the Board may exercise its discretion to determine whether to award Dersch legal fees and costs requested in its motion.

Whether to Exercise the Board’s Discretion to Award Fees

Dersch states that, in earlier cases, the Board considered the “reasonableness” of the claimed legal defense costs before exercising its discretion to authorize their payment. Mot. at 2, citing Evergreen FS v. IEPA, PCB 11-51, 12-61 (cons.), slip op. at 4 (Sept. 6, 2012). The Board agrees. See City of Benton Fire Dept. v. IEPA, PCB 17-1, slip op. at 3 (May 24, 2018); Prime Location, slip op. at 4, citing Swif-T Food Mart v. IEPA, PCB 03-185, slip op. at 3 (Aug. 19, 2004); Ill. Ayers, slip op. at 8-9.

As the party seeking reimbursement, Dersch has the burden of presenting sufficient evidence with which the Board can determine the reasonableness of the fees. Abel Investments v. IEPA, PCB 16-108, slip op. at 2 (Mar. 2, 2017); Prime Location, slip op. at 4, citing J.B. Esker & Sons v. Cle-Pa’s P’ship., 325 Ill. App. 3d 276, 283, 757 N.E.2d 1271, 1277 (5th Dist. 2001); Sampson v. Miglin, 279 Ill. App. 3d 270, 281 (1st Dist. 1996). Dersch “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, 325 Ill. App. 3d at 283. While Dersch 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., 371 Ill. App. 3d 841, 868, 864 N.E.2d 288,315; Sampson, 279 Ill. App. 3d at 281, 664 N.E.2d at 289.

In determining whether Dersch’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.

Dersch argues that its appeal “involved significant issues, the resolution of which clarify the supporting documentation appropriate for a budget and should help resolve or simplify similar pending or future matters.” Mot. at 4; *see Pak-Ags v. IEPA*, PCB 15-14, slip op. at 7 (Mar. 5, 2015) (Pak-Ags). Because its appeal involved a number of legal issues, Dersch asserts that many required independent treatment. Mot. at 4. Dersch suggests that its request for reimbursement is consistent with the work required by its appeal, which “included multiple motions and eventually an evidentiary hearing and post-hearing briefs.” *Id.* Dersch adds that the Board “has generally awarded litigation costs whenever the petitioner has prevailed on the issues completely or substantially.” *Id.* (citations omitted).

Dersch further argues that the Board has recognized Mr. Shaw’s experience in UST appeals. Mot. at 2, citing Prime Location, slip op. at 6. Dersch adds that the Board has accepted Mr. Shaw’s hourly billing rate as reasonable in earlier awards of legal fees. Mot. at 2, citing City of Benton Fire Dept. v. IEPA, PCB 17-1, slip op. at 3 (May 24, 2018).

Dersch points out that Mr. Shaw’s affidavit is modeled on previous affidavits submitted to the Board and found to be sufficient. Mot. at 2, citing Prime Location, slip op. at 5. His affidavit is accompanied by an eight-page summary of fees and costs. Aff.; Exh. A. From the affidavit and summary, the Board can determine the date of services; a description of services; the hours and hourly rate billed; and the fee charged. *Id.* Mr. Shaw’s services began on August 8, 2016, a short time after IEPA issued its contested determination. His services continued to September 12, 2022, the date on which he filed the pending motion.

Mr. Shaw’s summary totals 163.1 billed hours for total fees of \$32,600. Exh. A at 2; *see* Aff. at 8. The summary describes work performed and the time allocated to that work in tenths of an hour. Exh. A. The summary also includes \$76.30 of itemized costs for copying and the Board’s filing fee. *Id.* at 8. 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 Dersch is generally similar to information provided in other UST cases in which the Board has directed IEPA to reimburse legal fees. *See, e.g., Burgess v. IEPA*, PCB 15-186, slip op. at 5-6 (Feb. 4, 2016) (Burgess). As noted above, IEPA has not filed a response or disputed the reasonableness of the requested fees and costs.

The Board concludes that this appeal presented significant issues regarding IEPA’s review and determinations under the UST program. Burgess, slip op. at 6, citing Pak-Ags, slip op. at 7; Chatham BP v. IEPA, PCB 14-1, slip op. at 6 (Feb. 5, 2015). Based on its review of the record and authorities including prior Board decisions, as well as the absence of an IEPA response to the motion, the Board finds Dersch’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 grant Dersch’s unopposed motion and direct IEPA to reimburse Dersch \$32,676.30 in legal fees and costs.

The Board incorporates by reference its findings of fact and conclusions of law from its August 11, 2022 interim opinion and order. This final opinion constitutes the Board’s findings of fact and conclusions of law.

ORDER

1. The Board reverses IEPA's modification of Dersch's proposed corrective action budget for plan design and preparation by a Professional Geologist and restores to Dersch's budget \$3,352.80, the full amount proposed.
2. The Board reverses IEPA's modification of Dersch's proposed corrective action budget for drafting and restores \$334.05, reflecting five hours by a Draftsperson/CAD IV at a rate of \$66.81 per hour.
3. The Board reverses IEPA's modification of Dersch's proposed corrective action budget for contaminant transport modeling and restores \$728.94, reflecting six hours by a Senior Project Manager at a rate of \$121.49 per hour.
4. The Board reverses IEPA's modification of Dersch's proposed corrective action budget for contaminant transport modeling and restores \$2,235.20, reflecting 20 hours by a Professional Geologist at a rate of \$111.76 per hour.
5. The Board reverses IEPA's modification of Dersch's proposed corrective action budget for a PID and restores \$148.00, the entire proposed amount for use of a PID.
6. The Board reverses IEPA's modification of Dersch's proposed corrective action budget for gloves and restores \$16.00, the entire proposed amount for gloves.
7. The Board reverses IEPA's modification of Dersch's proposed corrective action budget for use of a water level indicator and restores \$28.00, the entire proposed amount for use of a water level indicator.
8. The Board reverses IEPA's modification of Dersch's proposed corrective action budget for use of a slug and restores \$36.00, the entire proposed amount for use of a slug.
9. The Board reverses IEPA's modification of Dersch's proposed corrective action budget and restores \$34.10 for a total mileage budget of \$201.50.
10. The Board reverses IEPA's modification of Dersch's proposed corrective action budget and restores \$315.00, the entire proposed amount for copies.
11. The Board grants Dersch's motion to authorize payment of attorney's fees and directs IEPA to reimburse Dersch \$32,676.30 in legal fees from the UST Fund under Section 57.8(l) of the Act. 415 ILCS 5/57.8(l) (2020).

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) (2020); *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.

Names and Addresses for Receiving Service of Any Petition for Review Filed with the Appellate Court	
Parties	Board
Patrick D. Shaw Law Office of Patrick D. Shaw 80 Bellerive Road Springfield, Illinois 62704 pdshaw1law@gmail.com	Illinois Pollution Control Board Attn: Don A. Brown, Clerk 60 East Van Buren Street, Suite 630 Chicago, Illinois 60605 don.brown@illinois.gov
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I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on October 20, 2022, by a vote of 5-0.



Don A. Brown, Clerk
 Illinois Pollution Control Board