ILLINOIS POLLUTION CONTROL BOARD
July 12, 2012

PRIME LOCATION PROPERTIES, LLC,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 09-67
	)	(UST Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by T.E. Johnson):

The Board is presented with the following issue for the first time in an underground storage tank (UST) appeal: whether Section 57.8(l) of the Environmental Protection Act (Act) (415 ILCS 5/57.8(l) (2010)) authorizes the Board to award, to a petitioner who prevailed before the Board, legal fees and costs incurred *during the Appellate Court's administrative review affirming the Board*. Before this issue can be decided, however, the Board must determine whether it has jurisdiction to rule upon the petitioner's pending motion for such legal fees and costs. Below, the Board provides background and then directs the parties to brief this jurisdictional question.

BACKGROUND

The petitioner, Prime Location Properties, LLC (Prime), sought Board review of a determination of the Illinois Environmental Protection Agency (Agency). In the determination, the Agency rejected Prime's amended plan and budget for a leaking UST site located at 600 W. 10th Street in Metropolis, Massac County. On August 20, 2009, the Board issued an interim opinion and order, reversing the Agency's determination and remanding the matter to the Agency to consider the merits of Prime's plan and budget. The Board's interim decision also denied Prime's request to sanction the Agency for late record-filing and denied the Agency's motion to dismiss based upon the alleged unauthorized practice of law. In addition, the interim decision reserved ruling upon the issue of reimbursement of Prime's legal fees and costs for prosecuting the appeal before the Board, but directed the parties to make further filings on the issue. In its final opinion and order, dated November 5, 2009, the Board incorporated by reference the August 20, 2009 interim opinion and order and directed that $10,088.18 in legal fees and costs be reimbursed to Prime from the UST Fund as corrective action costs.

The Agency appealed to the Fifth District Appellate Court, seeking review of the Board's decision to deny the Agency's dismissal motion, reverse the Agency's UST determination, and award legal fees and costs to Prime. In a March 2, 2012 order filed under Supreme Court Rule 23(b), the Appellate Court affirmed the Board's decision in all respects. *See* IEPA v. PCB, 2012 IL App (5th) 100072-U. On April 11, 2012, the Appellate Court's mandate issued.

On May 11, 2012, Prime filed with the Board a motion for UST Fund reimbursement of an additional $12,501.15 in legal fees and costs incurred by Prime, citing Section 57.8(l) of the Act, which reads as follows:

> Corrective 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) (2010).

Attached to Prime's motion is an affidavit of counsel documenting "legal costs for seeking payment that arose after July 31, 2009," which consist of attorney fee billable time ($11,962.50) and costs ($538.65). Motion at 3, 5. According to the affidavit, most of these requested legal fees and costs were incurred in defending the Board's decision during the Agency's appeal before the Appellate Court, but some were incurred in connection with Prime's pursuit of legal fees and costs before the Board in 2009. On May 18, 2012, the Agency filed a response opposing Prime's motion for supplemental legal fees and costs.

DISCUSSION

Neither the Fifth District Appellate Court's Rule 23 order nor its mandate refers to any "remand" to the Board. The mandate states: "It is the decision of this Court that the judgment on appeal be AFFIRMED. And it is further considered by the Court, that the costs of appeal shall be taxed as provided by law." As to the latter sentence of the mandate, the Board notes that pursuant to Supreme Court Rule 374 ("Costs in the Reviewing Courts"), "[e]xcept as otherwise provided by law, . . . if a judgment is affirmed, costs shall be taxed against the appellant unless excused by the court for good cause shown . . . ." Ill. Sup. Ct. R. 374(a) (eff. Feb. 1, 1994).

However, Rule 374 further provides that "[c]osts pursuant to this rule shall not be taxed against any public, municipal, governmental, or quasi-municipal corporation . . . ." Ill. Sup. Ct. R. 374(d) (eff. Feb. 1, 1994); *see also* Dept. of Revenue v. Appellate Court of First Dist., 67 Ill. 2d 392, 396 (1977) ("Statutes which in general terms authorize imposing costs in various actions or proceedings but do not specifically refer to the State are not sufficient authority to hold the State liable for costs."). Even if costs were available under Supreme Court Rule 374, no bill of costs against the Agency was filed with the Clerk of the Fifth District Appellate Court. *See* Ill. Sup. Ct. R. 374(c) (eff. Feb. 1, 1994).

In its Rule 23 order, the Appellate Court observed that the Agency appealed the Board's decision "directly to this court pursuant to section 41 of the Illinois Environmental Protection Act (415 ILCS 5/41(a) (West 2008)) and Supreme Court Rule 335 (eff. Feb. 1, 1994)." IEPA v. PCB, 2012 IL App (5th) 100072-U, ¶ 13. Section 41(a) of the Act provides:

> 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) (2010); *see, e.g.*, ESG Watts, Inc. v. PCB, 191 Ill. 2d 26, 29-30 (2000) ("Section 41(a) thus incorporates by reference the requirements of the Administrative Review Law . . . and the rules adopted pursuant thereto," including Supreme Court Rule 335.).

Supreme Court Rule 335 addresses the direct review of administrative orders by the Appellate Court. The Illinois Supreme Court adopted Rule 335 pursuant to the State Constitution and the former Administrative Review Act, now the Administrative Review Law, 735 ILCS 5/3-101 *et seq*. (2010). *See* AFSCME, Council 31 v. State Labor Relations Bd., 196 Ill. App. 3d 238, 243 (4th Dist 1990). Supreme Court Rule 335(i)(1) states 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) (eff. Feb. 1, 1994); *see, e.g.*, ESG Watts, 191 Ill. 2d at 31 (interpreting "[i]nsofar as appropriate" in Rule 335(i)(1)); County of Cook, Cermak Health Services v. Illinois State Local Labor Relations Bd., 144 Ill. 2d 326, 331 (1991) (interpreting "[i]nsofar as appropriate" in former Rule 335(h)(1), now Rule 335(i)(1)). 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) (eff. July 1, 1982).

Neither Prime's motion for supplemental legal fees and costs, nor the Agency's response in opposition, mentions any Supreme Court Rule. The Board directs the parties to brief the issue of whether Supreme Court Rule 369(b), in conjunction with Supreme Court Rule 335(i)(1), has revested the Board with jurisdiction to entertain Prime's motion for supplemental legal fees and costs. The parties' briefs should include analysis of the pertinent holdings in McNeil v. Ketchens, 2011 IL App (4th) 110253, ¶ 21, Maschhoff v. Klockenkemper, 343 Ill. App. 3d 500, 505 (5th Dist. 2003), Coldwell Banker Havens, Inc. v. Renfro, 288 Ill. App. 3d 442, 446-47 (5th Dist. 1997), and Stein v. Spainhour, 196 Ill. App. 3d 65, 67-69 (4th Dist. 1990). Prime must file its brief by August 17, 2012. The Agency must file its response brief by September 10, 2012. The Board will thereafter issue an order addressing Prime's motion.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on July 12, 2012, by a vote of 5-0.

John Therriault, Assistant Clerk
Illinois Pollution Control Board