

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CHATHAM BP, LLC,)	
)	
Petitioner,)	
)	
v.)	PCB 2015-173
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

NOTICE

John T. Therriault
Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street, Suite
11-500
Chicago, IL 60601-3218

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, IL 62794-9274

William D. Ingersoll
Brown, Hay & Stephens, LLP
205 S. Fifth Street, Suite 700
P.O. Box 2459
Springfield, IL 62705-2459

PLEASE TAKE NOTICE that I have today caused to be filed an OBJECTION TO CHATHAM BP'S MOTION FOR LEGAL FEES with the Illinois Pollution Control Board, a copy of which is served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

Dated: August 18, 2015

Respondent,

Scott B. Sievers
Attorney Registration No. 6275924
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
(217) 782-5544

BY:



Scott B. Sievers
Special Assistant Attorney General

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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OBJECTION TO CHATHAM BP'S MOTION FOR LEGAL FEES

NOW COMES the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, by and through its attorney, Special Assistant Attorney General Scott B. Sievers, and objects to the Motion for Authorization of Payment of Legal Fees Pursuant to Section 57.8(1) ("Fees Motion") made on behalf of the Petitioner Chatham BP, LLC ("Chatham BP"). The Respondent states the following in support of its objection:

I. THE BOARD SHOULD DENY CHATHAM BP'S MOTION, AS NO REASONABLE CONNECTION EXISTS BETWEEN THE LEGAL FEES CHARGED AND THE LITIGATION.

On July 23, 2015, the Board directed Chatham BP in the instant action "to file a statement of legal fees that may be eligible for reimbursement and its arguments why the Board should exercise its discretion to direct the Agency to reimburse those fees from the UST Fund." Interim Op. & Order at 19. Chatham BP subsequently filed its Motion for Authorization of Payment of Legal Fees Pursuant to Section 57.8(1).

That "subsection of the Act provides for the reimbursement of legal fees incurred in prevailing before the Board, and thus it constitutes a 'fee-shifting' statute." *L. Keller Oil Properties/Farina v. Illinois EPA*, PCB 06-189 & 06-190, slip op. at 4 (July 25, 2013). Fee-shifting statutes must be strictly construed, "and the amount of fees to be awarded lies within the

broad discretionary powers of the Board.” *Id.*

The party seeking legal fees and costs bears the burden of presenting sufficient evidence for the Board to decide as to their reasonableness. *Evergreen FS, Inc. v. Illinois EPA*, PCB 11-51 & 12-61, slip op. at 4 (Sept. 6, 2012). However, the Board also may consider the entire record and its experience and knowledge of the case in assessing the reasonableness of charges. *Id.* Facts the Board may take in determining reasonableness include 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.**” *Id.* (citing *Prime Location*, PCB 09-67, slip op. at 4) (internal quotations omitted; emphasis added).

In the case at bar, Chatham BP was charged attorney’s fees and costs for which there was no reasonable connection with the litigation, as the litigation came after the underlying dispute was already resolved.

The decision that is the subject of this appeal was issued on February 25, 2015. (Pet. for Rev. Ex. A.) According to their billing records, Chatham BP’s attorneys reported receiving that decision on February 27, 2015. (Fees Mot. Ex. 1. at 1.) Pursuant to Section 40 of the Environmental Protection Act, they then had 35 days—or five entire weeks—before facing a deadline to appeal the decision. Nonetheless, Chatham BP ’s counsel didn’t waste any time generating billable hours: Only five days after receiving the February 25, 2015 decision, 1.2 hours were billed to “BEGIN DRAFTING PETITION FOR REVIEW AND RELATED PLEADINGS.” Another 1.3 hours were billed the next day to “CONTINUE DRAFTING PETITION PLEADINGS FOR FEBRUARY 25, 2015 IEPA DECISION.” (*Id.*)

At the same time as fees were being generated by drafting a petition for review that did not need to be filed for weeks, communications with Illinois EPA counsel also were being billed. Billables for communications with Illinois EPA were generated on February 27, March 4, March 5, and March 19, 2015. (Fees Mot. Ex. 1 at 1-2.) It is unclear what the purpose of those communications would have been if not to try to resolve this dispute over Illinois EPA's February 25, 2015 letter short of litigation; after all, no claim has been made in this action that Illinois EPA refused to remedy its error. Nonetheless, Chatham BP's counsel apparently abandoned any attempt at such resolution in the 11 days prior to filing his client's Petition for Review, as billing records reflect no communications with Illinois EPA during this period. (Fees Mot. Ex. 1 at 1-2.) Notably, Chatham BP's attorneys also did not seek a 90-day extension of time to file Chatham BP's Petition for Review, and the petition itself actually was filed four days before the 35-day window for an appeal would have closed on April 3. Rather than suggesting a reluctance to litigate, billing records show Chatham BP's counsel eagerly rushing to capitalize on Illinois EPA's mistake.

Chatham BP contends it was unaware at the time of filing of its Petition for Review on March 30, 2015 that Illinois EPA issued its March 27, 2015 letter fully remedying the errors in its February 25, 2015 letter. Illinois EPA has no reason to doubt this contention. While Chatham BP received notice on March 30, 2015 of the Certified Mail letter and it was available for pickup on April 3, Illinois EPA's letter was not delivered until April 7, 2015.¹

That said, Chatham BP's counsel repeatedly had contacted Illinois EPA after issuance of the erroneous February 25, 2015 letter, (Fee Mot. Ex. 1 at 1-2.) and Chatham BP makes no claim that Illinois EPA refused to remedy it. Nonetheless, Chatham BP's counsel apparently chose not

¹ The Respondent moves the Board to take judicial notice of these facts, which are set forth upon the U.S. Postal Service website for the tracking number on the March 27, 2015 letter.

to inquire further of Illinois EPA on the status of that remedy during the 11 days prior to filing the Petition for Review. (*See* Fee Mot. Ex. 1 at 1-2.)

Further, while Chatham BP did not seek a 90-day filing extension; wait later in the 35-day window to file Chatham BP's Petition for Review; or apparently contact Illinois EPA in the 11 days before filing it to see if Illinois EPA would be remedying its error and if this litigation could be avoided, Chatham BP knew of Illinois EPA's March 27, 2015 letter fixing its mistake by the time Hearing Officer Carol Webb contacted the parties on April 13, 2015 to arrange a status call.² Rather than withdraw litigation filed over a dispute that had since been resolved, Chatham BP elected to proceed. At minimum, this Board should deny recovery of all attorney's fees and costs incurred by Chatham BP from this point forward.

² See footnote 1.

II. CONCLUSION

WHEREFORE, this honorable Board should exercise its discretion to DENY Chatham BP's Motion for Authorization of Payment of Legal Fees Pursuant to Section 57.8(l), as no reasonable connection exists between the attorney's fees and costs charged to Chatham BP and the litigation, as the litigation came after the underlying dispute was already resolved.

Alternatively, the Board should exercise its discretion and DENY Chatham BP's Motion for Authorization of Payment of Legal Fees Pursuant to Section 57.8(l) for all attorney's fees and costs incurred on and after April 13, 2015, when the Hearing Officer contacted the parties and Chatham BP chose to proceed with this litigation despite having already received Illinois EPA's March 27, 2015 letter fully remedying its error.

Respectfully submitted,


ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

Respondent,

Dated: August 18, 2015

Scott B. Sievers
Attorney Registration No. 6275924
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(217) 782-5544

BY:



Scott B. Sievers
Special Assistant Attorney General

Chatham BP, LLC v. Illinois Environmental Protection Agency
Pollution Control Board No. 2015-173

CERTIFICATE OF SERVICE

Scott B. Sievers, Special Assistant Attorney General, herein certifies that he has served a copy of the foregoing OBJECTION TO CHATHAM BP'S MOTION FOR LEGAL FEES upon:

John T. Therriault
Clerk of the Board
Illinois Pollution Control Board
100 West Randolph Street, Suite
11-500
Chicago, IL 60601-3218

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, IL 62794-9274

William D. Ingersoll
Brown, Hay & Stephens, LLP
205 S. Fifth Street, Suite 700
P.O. Box 2459
Springfield, IL 62705-2459

by mailing true copies thereof to the addresses referred to above in envelopes duly addressed bearing proper first class postage and deposited in the United States mail at Springfield, Illinois, on the afternoon of August 18, 2015.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

Dated: August 18, 2015

Scott B. Sievers
Attorney Registration No. 6275924
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