

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CHATHAM BP, LLC,)	
)	
Petitioner,)	
)	
v.)	PCB No. 15 – 173
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION)	
AGENCY,)	
Respondent.)	

NOTICE OF FILING

PLEASE TAKE NOTICE that today I have filed with the Office of the Clerk of the Pollution Control Board Petitioner's Post-Hearing Brief of CHATHAM BP LLC in the above matter. Copies of these documents are hereby served upon you.

To: Pollution Control Board, Attn: Clerk	Scott B. Sievers
100 West Randolph Street	Division of Legal Counsel
James R. Thompson Center, Suite 11-500	Illinois Environmental Protection Agency
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Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
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(Via first-class mail)

Respectfully submitted,
CHATHAM BP, LLC

Dated: June 16, 2015

By: /s/William D. Ingersoll
Its Attorney

BROWN, HAY & STEPHENS, LLP
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PETITIONER’S POST-HEARING BRIEF

NOW COMES Petitioner, CHATHAM BP, LLC, by and through its attorneys, BROWN HAY & STEPHENS, LLP, and pursuant to the briefing schedule in the Hearing Officer’s Hearing Report of May 27, 2015, hereby submits is Post-Hearing Brief following the hearing held by the Pollution Control Board (“Board”) on May 27, 2015. Petitioner respectfully offers its post-hearing comment and argument as follows:

I. BACKGROUND

1. This matter is an appeal of an Illinois Environmental Protection Agency (“IEPA” or “Agency”) final decision of February 25, 2015 (Administrative Record, pp. 130 – 135; hereinafter referred to as “A.R. pp. ___) that rejected a Stage 2 Site Investigation Plan and Budget (A.R. pp. 001 – 111), submitted on January 17, 2013.

2. The same Stage 2 Site Investigation Plan and Budget was also the subject of an appeal of a nearly identical IEPA decision made on May 28, 2013. That appeal was *Chatham BP, LLC v. IEPA*, PCB 14-1 and resulted in relevant Board Orders of January 9, 2014,

September 4, 2014, December 18, 2014 and February 5, 2015. A brief description of the outcome of those decisions is: a reversal of the IEPA rejection of the plan; a reversal of certain deductions made for Stage 1 drum disposal costs; awarded attorney fees to Petitioner; and, remanded the Stage 2 budget to the IEPA for a determination. The remand was to have an IEPA analysis of the budget – it had not previously reviewed the budget in that it was only rejected because of the rejection of the corresponding plan.

3. The IEPA's decision of February 25, 2015 corrected the drum disposal cost issue, but again rejected both the plan and budget using the same reasons as in the May 28, 2013 decision, which was litigated extensively in PCB 14-1. Except for the drum disposal costs, the February 25, 2015 decision seemed to have completely avoided addressing or implementing the Board's decisions in PCB 14-1.

II. IEPA DECISION OF FEBRUARY 25, 2015 WAS IN ERROR

4. The IEPA, by counsel (*e.g.* Transcript of May 27, 2015 at page 12:4-11 (hereinafter Tr., p. __")) and by witnesses (Chappel, *e.g.*, Tr., p. 20:9; Kuhlman, *e.g.*, Tr., p. 39:8) at hearing, showed that the decision was in error. It is clear that the decision did not follow the Board's directives in PCB 14-1.

III. THE IEPA ATTEMPT TO "FIX" THE ERROR BY ISSUING A NEW DECISION LETTER WAS OF NO LEGAL EFFECT

5. It has long been settled that the IEPA lacks the legal authority to reconsider its final decisions. *See Reichhold Chemicals, Inc. v. IPCB*, 204 Ill.App.3d 674 (3rd Dist. 1990); *Clinton County Oil Co., Inc. v. IEPA*, PCB 91-163 (March 26, 1992); *Tolles Realty Company v. IEPA*, PCB 93-124 (June 5, 1997). Further, the Board quoted from *Reichhold* in *Estate of*

Slightom v. IEPA, PCB 11-25 (January 23, 2014) that “hardships resulting from this arrangement should be redressed by the Illinois Legislature.”

6. Counsel for the IEPA contended at hearing contended, among many other things, that the matter here was mooted by the second decision letter. A reading of the Board’s November 7, 2013 Order in *Slightom* would indicate otherwise. The IEPA issuing a different letter subsequent to a final decision does not moot the error of the final decision and there is no authority to try to change a final decision.

**IV. EVEN IF IT HAD BEEN AUTHORIZED BY LAW
THE SUBSEQUENT LETTER HAD NO PRACTICAL EFFECT**

7. IEPA counsel made a number of pretty negative implications about Petitioner’s motives in bringing this action. Basically, the suspicions appear to have grown from a belief that the IEPA sent a letter that “fixed” the problem, but the Petitioner filed anyway. It was implied that the Petitioner already had the relief it needed, but may have had a personal ax to grind or just wanted to generate attorney fees. Such allegations were made in the opening statement, but no evidence was provided to support the implications.

8. The IEPA would have everyone believe that Petitioner filed the petition in spite of the “fix-it” letter. However, if the IEPA had wanted the Petitioner to have the resolution to avoid filing an appeal, it may have helped everyone’s understanding of the issues facing them if the letter had been provided sometime before 30 days (March 27, 2015) following the original decision and mailed in such a manner that would have assured it was received before 33 or more days (Monday, March 30, 2015 – petition filing date) following the decision. Actually, the only evidence regarding the timing of the appeal relative to the Petitioner or its representatives receiving the March 27, 2015 letter contradicts counsel’s implications. In response to inquiry by

IEPA counsel, Ms. Carol Rowe testified that the letter was received after the filing. Tr., p. 50:22-23. So, even if the *Reichhold* line of cases was not a bar to “fixing” mistaken final decisions, the contents of the March 27, 2015 letter were not known to Petitioner at the moment the petition was filed.

WHEREFORE, CHATHAM BP, LLC respectfully requests that the Board reverse the IEPA’s February 25, 2015 rejection of Petitioner’s January 17, 2013 Stage 2 site investigation plan and the rejection of the related budget. Further, CHATHAM BP, LLC requests that the Board find that it prevailed in this matter for purposes of Section 57.8(l) of the Act and authorize the Petitioner to file a statement of its legal costs that may be reimbursable.

Respectfully submitted,

CHATHAM BP, LLC

By: /s/William D. Ingersoll
One of Its Attorneys

Dated: June 16, 2015

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CERTIFICATE OF SERVICE

I, William D. Ingersoll, certify that I have this date served the attached Notice of Filing and Petitioner's Post-Hearing Brief, by means described below, upon the following persons:

To: Pollution Control Board, Attn: Clerk
100 West Randolph Street
James R. Thompson Center, Suite 11-500
Chicago, Illinois 60601-3218
(Via electronic filing)

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