BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CHATHAM BP, LLC,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	PCB No. 14-01
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	(UST Appeal)
	)	
Respondent.	)	

NOTICE OF FILING

PLEASE TAKE NOTICE that today I have filed with the Office of the Clerk of the Pollution Control Board the Motion for Summary Judgment of CHATHAM BP LLC in the above matter. Copies of these documents are hereby served upon you.

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

Scott B. Seivers
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276

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

Respectfully submitted,
CHATHAM BP, LLC

Dated: August 20, 2013

By: /s/William D. Ingersoll
Its Attorney

BROWN, HAY & STEPHENS, LLP
William D. Ingersoll
Registration No. 6186363
wingersoll@bhslaw.com
205 S. Fifth Street, Suite 700
P.O. Box 2459
Springfield, IL 62705-2459
(217) 544-8491

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PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Petitioner, CHATHAM BP, LLC, by William D. Ingersoll, one of its attorneys, pursuant to 35 Ill. Adm. Code 100.516[1], hereby moves the Pollution Control Board ("Board") to enter summary judgment in favor of CHATHAM BP, LLC. Petitioner contends that there are no genuine issues of material fact and that Petition is entitled to judgment as a matter of law. In support of its motion, Petitioner says the following:

I. BACKGROUND

1. Petitioner, by its consultant, on January 17, 2013 submitted a "Stage 2 Site Investigation Plan and Budget" (Administrative Record, pages 001 - 108[2]) to the Illinois Environmental Protection Agency ("Agency" or "IEPA") for review and approval. The Agency reports to have received this submittal on January 22, 2013. Petitioner on May 13, 2013 also provided certain data relating to an April 22, 2009 drilling event (A.R., pp. 109 – 177). On May 28, 2013, the Agency rendered its final decision on the submittal (A.R., pp. 179 - 184). The Petition herein was timely filed on July 1, 2013 and the Board accepted the Petition for hearing on July 11, 2013.

[1] Hereinafter citations to the Board regulations will be made by section number only – *e.g.,* Section 100.516.
[2] Hereinafter citations to the Administrative Record will be made as "A.R. p. ___" or with "pp" for multiple pages.

II. FACTS

2. Petitioner owns a retail gasoline station located at 300 North Main Street, Chatham, Illinois that has been assigned IEPA identification number LPC #1670305023. A release at the facility was reported to the Illinois Emergency Management Agency on September 25, 2007, which assigned the Incident Number 2007-1292. On December 31, 2011, the Office of the Illinois State Fire Marshal determined the incident to be eligible, subject to standard eligibility requirements, to access the Underground Storage Tank Fund ("Fund") with a $15,000 deductible (A.R., p. 69 – 70).

3. Petitioner's January 17, 2013 submittal included: a proposal for a Stage 2 Site Investigation Plan and its related budget; the results of Stage 1 Site Investigation; and certain Stage 1 costs. The Agency's May 28, 2013 decision rejected the Stage 2 plan, which also caused the rejection of the related budget, and reduced Stage 1 costs by $1,145.92.

4. Citing to Section 57.1(a) of the Act and Section 734.320(c) of the regulations, the Agency provided the following rationale and conclusion for rejecting the Stage 2 plan:

> *The activities performed have defined the extent of soil contamination along the property boundary lines to the north, east, and south. However, the owner has failed to define the extent of the soil contamination to the west. Therefore, the owner must submit a Stage 3 Site Investigation Plan for the Illinois EPA to review, which proposes to define the extent of soil contamination to the west.* A.R., p. 181.

The brief version of the reason for rejecting the budget was "(t)he Illinois EPA has not approved the plan with which the budget is associated." A.R., p. 183.

5. In reducing the drum removal costs as "exceeding the minimum requirements necessary" the Agency said:

> *According to the IEPA's calculations, four of the eight drums listed for solid waste disposal exceed the minimum requirements necessary to comply with the Act. As such, these drums are not eligible for payment from the Fund.* A.R., p. 182.

III. SUMMARY JUDGMENT STANDARD OF REVIEW

6. As stated by the Board in prior cases, summary judgment is appropriate when the pleadings, depositions, admissions, affidavits, and other items in the record, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *See* Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358 (1998); *see also* 35 Ill. Adm. Code 101.516(b). When ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party." Dowd & Dowd, 181 Ill. 2d at 483. Summary judgment "is a drastic means of disposing of litigation," and therefore the Board should grant it only when the movant's right to the relief "is clear and free from doubt." *Id*.

IV. APPLICABLE LAW

7. Section 57.1(a) of the Act, in pertinent part as used in the Agency's decision letter, requires that site investigation activities be conducted "in accordance with the requirements of the Leaking Underground Storage Tank Program."

8. Section 57.7(c)(3) of the Act, in pertinent part as used in the Agency's decision letter, vaguely directs the Agency to determine that "the costs associated with the plan are reasonable, will be incurred in the performance of site investigation or corrective action, and will not be used for … activities in excess of those required to meet the minimum requirements …"

9. Section 57.7(c)(4) of the Act, addressing the Agency's review and approval of plans or reports submitted under the UST Program provides, in pertinent part, that [f]or any plan or report received after June 24, 2002, any action by the Agency to disapprove or modify a plan

submitted pursuant to this Title [XVI] shall be provided to the owner or operator in writing within 120 days of the receipt by the Agency . . . and shall be accompanied by:

(A) an explanation of the Sections of the Act which may be violated if the plans were approved;
(B) an explanation of the provisions of the regulations, promulgated under this Act, which may be violated if the plan were approved;
(C) an explanation of the specific type of information, if any, which the Agency deems the applicant did not provide the Agency; and
(D) a statement of specific reasons why the Act and the regulations might not be met if the plan were approved. 415 ILCS 5/57.7(c)(4)(A-D) (2008).

10. Section 734.310 outlines the general site investigation requirements and basically requires that the investigation "must proceed in three stages" unless and until "the extent of the soil and groundwater contamination … as a result of the release has been defined."

11. Section 734.315(c) provides, in pertinent part:

> If one or more of the samples collected as part of the Stage 1 site investigation exceed the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants, within 30 days after completing the Stage 1 site investigation the owner or operator must submit to the Agency for review a Stage 2 site investigation plan in accordance with Section 734.320 of this Part.

12. Section 734.320(c) was cited in the Agency's decision letter as support for rejecting the Stage 2 proposal by Petitioner and requiring it to skip directly to Stage 3. This Section provides that the "Stage 2 site investigation must be designed to complete the identification of the extent of soil and groundwater contamination at the site …. and investigation of any off-site contamination must be conducted as part of the Stage 3 site investigation. Then, at subsection c:

> c) If the owner or operator proposes no site investigation activities in the Stage 2 site investigation plan and none of the applicable indicator contaminants that exceed the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 as a result of the release extend beyond the site's property boundaries, upon submission of the Stage 2 site investigation plan the owner or

> operator must cease site investigation and proceed with the submission of a site investigation completion report in accordance with Section 734.330 of this Part. *If the owner or operator proposes no site investigation activities in the Stage 2 site investigation plan and applicable indicator contaminants that exceed the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 as a result of the release extend beyond the site's property boundaries, within 30 days after the submission of the Stage 2 site investigation plan the owner or operator must submit to the Agency for review a Stage 3 site investigation plan in accordance with Section 734.325 of this Part.*
> (Italics indicate the portion referenced by the Agency.)

13. Section 734.505(b) of the Board's regulations, addressing the Agency's review of plans, budgets, or reports submitted with regard to releases from USTs provides, in pertinent part, that:

> [t]he Agency has the authority to approve, reject, or require modification of any plan, budget, or report it reviews. The Agency must notify the owner or operator in writing of its final action on any such plan, budget, or report, …" If the Agency rejects a plan, budget, or report or requires modifications, the written notification must contain the following information, as applicable:
>
> 1) An explanation of the specific type of information, if any, that the Agency needs to complete its review;
>
> 2) An explanation of the Sections of the Act or regulations that may be violated if the plan, budget, or report is approved; and
>
> 3) A statement of specific reasons why the cited Sections of the Act or regulations may be violated if the plan, budget, or report is approved. 35 Ill. Adm. Code 734.505(b)(1-3).

14. Section 734.630 provides a list of costs that are ineligible for payment from the Fund, and includes, at subsection o, the vague catchall language, similar to Section 57.7(c)(3) of the Act – *i.e.*, "(c)osts for corrective action activities and associated materials or services exceeding the minimum requirements necessary to comply with the Act.."

V. ARGUMENT

A. Agency Rejection of Stage 2 Investigation Plan and Demand to Move to Stage 3 Was Improper When Stage 2 Investigation Was Not Complete.

15. The Agency's decision to reject the Stage 2 plan and require Petitioner to skip directly to Stage 3 was improper at two levels: 1) it is contrary to the express language of Sections 734.315(c) and 734.320(c); and, 2) the Agency's factual statement of its reason is internally consistent in a way that shows Stage 2 not to be finished.

16. Skipping from Stage 1 to Stage 3 is not contemplated, as can be seen in Section 734.315(c), when as here the Stage 1 investigation shows on-site contamination in excess of remediation objectives. In fact, a Stage 2 Site Investigation is required within 30 days.

17. The part of Section 734.320(c) quoted by the Agency in its decision letter requires moving on to Stage 3 only if ***no*** further Stage 2 (*i.e.,* on-site) investigation is proposed ***and*** contamination extends beyond the property boundary. Here, Petitioner has proposed Stage 2 on-site investigation so as to define the extent of onsite contamination – the purpose behind the January 17, 2013 submittal. If that then better defines the extent of contamination up to and likely beyond property boundaries, only then will the Stage 2 investigation be complete and justify moving to Stage 3.

18. The Agency's own statement shows its apparent conclusion that the on-site investigation has not been completed. Here, the Agency apparently claims to have concluded that contamination extends beyond, well actually along, the property boundaries in three directions, but that extent of soil contamination to the west has not been defined. So, even if one accepted that the contamination has reached the property boundary in three directions, no such conclusion can be made as to the west. The Agency's conclusion as to the main compass directions would still not demonstrate that Stage 2 is complete. The purpose of the on-site

investigation is to adequately define the location of contamination with enough specificity to show exactly where along property boundaries (not just in the four main directions) contamination extends off-site. It would make no sense to start drilling, sampling, etc. on another's property when Petitioner does not yet know for sure that the contamination extends onto that property, and exactly where. How could Petitioner initiate requests to neighboring property owners for access without having pretty specific knowledge of where drilling, sampling, etc. needs done? Respect for those neighbors would necessitate Petitioner being able to limit the inconvenience of the investigation as much as possible.

19. Petitioner is proposing additional Stage 2 investigation, so at least one of the conditions for moving to Stage 3 – once again we emphasize they are connected by the word "***and"*** – is not present. That word requires the existence of both precedent elements to require skipping to Stage 3.

B. Improper Reduction in Drum Disposal Costs

20. The Agency's rationale for reducing the costs of drum disposal from that for eight drums to that for four drums was that "(a)ccording to IEPA's calculations" only four drums should have been necessary. There is no limitation in the regulations for how many drums of solid waste that may be generated in the site investigation process. Nor is there any regulatory basis for making some calculation. Petitioner points out here that the Stage 1 drum disposal costs may have been in a budget, but it was an actual budget. This was the actual number of drums that were generated and required disposal. It was not necessary or appropriate to apply some extra-regulatory "calculation" to determine the number.

21. Additionally, the Agency's statement of its basis is impermissibly vague. In *Dickerson Petroleum, Inc. v. Illinois Environmental Protection Agency*, PCB 9-87, PCB 10-5

(February 4, 2010), the Agency used the similarly vague language "(b)ased on the information currently in the Illinois EPA's possession" as the apparent factual support for its decision. The Board found that to be woefully inadequate in satisfying the notification requirements of Section 734.505(b). A "statement of specific reasons" must be more than some unsupported allegations about some unidentified calculations using some further unidentified factual inputs to those calculations. In what appears to be the "Reviewer Notes" (A.R., p. 178) by the assigned LUST Section Project Manager, we are not offered any further specificity as to what calculations were conducted, or that any calculations were performed at all. All we are provided is a bare factual conclusion that only four drums were needed, and then the legal conclusion that flows from it that claims that minimum requirements under the Act would be exceeded.

22. The Board in *Dickerson* found the decision letters deficient and chose to remand the proceedings to the Agency to correct those deficiencies. The Agency did not correct the deficiencies, but rather issued a "No Further Remediation Letter" that closed out the site and mooted the dispute (except as to fees). Petitioner here requests a different outcome than a remand. The Agency failed its obligation to make an objectively clear decision and give adequate notice of it and its rationale. Further, it was even overdue. This failure could and should justify the approval of the budget item. Those in the Leaking Underground Storage Tank regulated community should not have to file an appeal to flush out the facts and rationale that should have been provided in the decision letter. And, in this case, filing the appeal did not even provide us more background information since the only page we newly obtained as a result of the appeal was the "Reviewer Notes" page, which actually does not mention "calculation" as did the decision letter.

VI. SUMMARY

23. The Agency decision to reject Petitioner's Stage 2 Site Investigation and Budget was based upon its own inconsistent and inaccurate factual conclusions, which then led to the misapplication of the language of Section 734.230(c).

24. The Agency's reduction in budget amount for drum disposal relating to investigative drilling activities is not based in reality nor supported by any rationale as would be required to be provided to Petitioner pursuant to Section 734.505(b). No factual background was provided for the claim that there were calculations made by the IEPA regarding amounts of materials requiring drum disposal. Further, the Administrative Record filed herein demonstrates that there were no such calculations behind the decision.

VII. CONCLUSION

For the reasons stated above, CHATHAM BP, LLC requests that the Board grand summary judgment in its favor, reverse the IEPA's decision of May 28, 2013 and order IEPA to approve Petitioner's Amended Stage 2 Site Investigation Plan and reinstate all budget reductions made in that decision.

Respectfully submitted,
CHATHAM BP, LLC

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

Dated: August 20, 2013

BROWN, HAY & STEPHENS, LLP
William D. Ingersoll
Registration No. 6186363
205 S. Fifth Street, Suite 700
P.O. Box 2459
Springfield, IL 62705-2459
(217) 544-8491
wingersoll@bhslaw.com

CERTIFICATE OF SERVICE

I, William D. Ingersoll, certify that I have this date served the attached Notice of Filing and Petitioner's Motion for Summary Judgment, 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)

Scott B. Seivers
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
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Dated: August 20, 2013

By: /s/William D. Ingersoll
William D. Ingersoll

BROWN, HAY & STEPHENS, LLP
William D. Ingersoll
Registration No. 6186363
wingersoll@bhslaw.com
205 S. Fifth Street, Suite 700
P.O. Box 2459
Springfield, IL 62705-2459
(217) 544-8491