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 Petitioner's Response to Agency's Motion for Summary Judgment of CHATHAM BP LLC. Copies of these documents are hereby served upon you.

To: Pollution Control Board, Attn: Clerk
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Dated: September 10, 2013

Respectfully submitted,

CHATHAM BP, LLC

By: ___/s/William D. Ingersoll_____
Its Attorney

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	)	PCB No. 14-01
ILLINOIS ENVIRONMENTAL	)	(UST Appeal)
PROTECTION AGENCY,	)	
Respondent.	)	

PETITIONER'S RESPONSE TO AGENCY'S CROSS MOTION FOR SUMMARY JUDGMENT

Petitioner, CHATHAM BP, LLC, by William D. Ingersoll, one of its attorneys, pursuant to 35 Ill. Adm. Code 101.516,[1] hereby responds to the Illinois EPA's Cross Motion for Summary Judgment and related Memorandum in Support filed on August 27, 2013. In support of its response, Petitioner says the following:

I. BACKGROUND

1. The motion of the Illinois Environmental Protection Agency ("Agency" or "IEPA") primarily claims that: Petitioner had completed the definition of contamination at the site; and, that Agency calculations showed the requested number of drums of solid waste to be disposed was excessive. Neither of these points were supported in the Administrative Record.

II. AGENCY DECISION ITSELF CONTRADICTS ITS CONTENTION THAT STAGE 2 INVESTIGATION WAS COMPLETE

2. Petitioner again points to the language of the decision letter itself:

[1] Hereinafter citations to the Board regulations will be made by section number only – *e.g.*, Section 101.516.

> *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.* (Emphasis added.) Administrative Record, page 181.[2]

3. Now the Agency attempts to modify the express language of the decision letter by adding an affidavit of a reviewer in the Leaking Underground Storage Tank ("LUST") Program. Now it seems the Agency wants the letter to state that the owner has "failed to define the extent of the soil contamination *farther* to the west – *i.e.*, off-site." *See* Kuhlman Affidavit, ¶ 9; Agency Cross-Motion Memorandum, page 10, 4th line. Unfortunately for the Agency, it is bound by the decision it rendered, not one that it rewrites approximately three months after the decision and better suits its needs after an appeal is filed. As the Pollution Control Board ("Board") has previously recognized, the Agency's decision letter frames the issues in the appeal. *Pulitzer Community Newspapers, Inc. v. IEPA,* PCB 90-142 (December 20, 1990). This is also consistent with the requirements of Section 57.7(c)(4) of the Act and Section 734.505(b) of the Board's regulations, which specify the required information in the decision notification to the owner or operator.

4. Please look to the Administrative Record to see what Mr. Kuhlman's analysis on this point may have been before the decision maker on May 28, 2013. The only place in the Record where it could possibly exist would be in the reviewer notes. *See* A.R. p. 178. There is absolutely no reference to any consideration of, or rationale for, rejecting the Stage 2 plan and requiring Petitioner to move directly to Stage 3. However, if one looks again at the Kuhlman Affidavit ¶¶ 9, 10, 11, 14, it says that Mr. Kuhlman made several conclusions and recommendations that were adopted by the Agency. If there were any such analyses or

[2] Hereinafter citations to the Administrative Record will be made as "A.R. p. ___" or with "pp" for multiple pages.

recommendations, it would appear that such were not before Mr. Chappel when he decided to issue the May 28, 2013 letter because there are none in the Administrative Record.

5. The Agency argues that Section 724.310 supports its contention that Stage 2 may be skipped and requires the owner or operator to proceed to Stage 3. This is a mischaracterization of Section 734.310, which provides, in relevant part that once "the release has been defined, the owner or operator must cease investigation and proceed with the submission of a site investigation completion report." It does not say skip to another stage of investigation. Even in the Agency's position, the release has not been defined – the Agency demands additional investigation not a site investigation completion report.

6. 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, this Section provides, in pertinent 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. (emphasis added).

The Agency has offered nothing to change a simple interpretation of the word "and" here. Only if both conditions are present must the owner or operator proceed to Stage 3. Petitioner did propose Stage 2 site investigation. Also, Petitioner continues to contend that such is quite reasonable given the limited additional work proposed in the January 17, 2013 proposal. Two

additional monitoring wells were proposed north and south of the MW-1 (A.R. p. 031) to better define contamination in the western part of the site. And, additional soil borings were proposed outside of the area known to be contaminated and inside the outer wells done earlier. While it is clear the Agency does not think these are necessary, there is nothing in the Administrative Record to support such a conclusion, and it ignores the well placed word "and" in the applicable language of Section 734.320(c).

III. THE AGENCY'S CONTENTIONS REGARDING THE KELLER OIL/FARINA CASE ARE A DISINGENUOUS AS TO THE HOLDINGS OF THAT CASE.

7. In heading number II.A.2 of the Agency's Cross Motion Memorandum, it makes the ridiculous claim that "[t]he Petitioner's contention that additional Stage 2 site investigation is warranted to further define the plume was rejected by the Board in the case of *L. Keller Oil Properties, Inc./Farina." See L. Keller Oil Properties, Inc./Farina v. IEPA*, PCB 07-147 (December 6, 2007). This misrepresentation of the outcome of that case is stunning and disappointing, and wastes all of our time in now having to reanalyze that case, if for no other reason than to rebut the ridiculous claim. The outcome of the *Keller/Farina* case was a mixed bag in which some of the Agency's positions were supported and some were not – *i.e.*, some of the budget items were found to be excessive and some not. This resulted in the Board partially affirming and partially reversing the Agency's determination regarding Keller's proposed plan and budget. Further, the Board directed Keller to submit an amended Stage 2 Site Investigation Plan, and if needed an associated budget. *Id.* at 49. This directly contradicts the Agency's assertion that *Keller* rejected the contention that additional Stage 2 investigation was necessary.

IV. THERE IS NOTHING IN THE ADMINISTRATIVE RECORD TO SUPPORT ANY CONCLUSION REGARDING THE NUMBER OF DRUMS OF WASTE FOR DISPOSAL AS EXCESSIVE.

8. In Mr. Kuhlman's affidavit, he explains at some length some calculations that he performed to determine the appropriate amount of solid waste that should have been necessary to dispose of the material resulting from the soil boring and well drilling. Mr. Kuhlman even said he used a spreadsheet. One must assume that the spreadsheet program would have had a print function, but apparently the results were not printed. Further, directing our attention back to the only page in the Administrative Record showing any reviewer notes (A.R. p. 178), there is no mention made of any calculation. The Administrative Record is required to include all "information the Agency relied upon in making its determination." *See* Section 105.410(b)(4). We must assume the Administrative Record as filed was compiled in good faith, and therefore, it would appear that none of the calculations were before Mr. Chappel when he signed the decision letter.

9. Since no calculations are in the Administrative Record filed on August 15, 2013, we must ignore their existence. Nonetheless, Petitioner contends the calculations as described in the Kuhlman Affidavit, ¶ 13 could not be accurate as one of the apparent inputs is not in the Administrative Record. Mr. Kuhlman claims to have "used the diameters and heights of the borings as reported in the submitted materials." There were no diameters listed in the Administrative Record for the borings done for SB-1, SB-2 and MW1-MW5. These are the borings at issue here (Kuhlman Affidavit ¶ 12). Petitioner did identify the diameter of the wells to be 2.00 inches. A.R., p. 049. However, the diameter of the wells may not be assumed to be the same as the boring auger that was used. The boring logs for the two soil borings and five monitoring wells were provided to the Agency and were placed in the Administrative Record.

See A.R., pp. 072 – 083. The size of the bore holes was not listed. Since we have none of Mr. Kuhlman's calculations in the Administrative Record, and only a qualitative description of the inputs (*i.e.*, diameter and height), we can only guess that he used an assumed diameter from some unidentified source. Please note that these borings are not the same as the geo-probe drillings that were in fact 2.00 inches in diameter. A.R. pp. 110 – 123.

V. SUMMARY

10. The Agency's rejection of the Stage 2 Site Investigation Plan was erroneous in its misinterpretation of Section 734.320(c), the regulatory provision cited in support of the rejection. In addition, if there was some analysis of the definition of the contamination made by the Agency, it did not appear in Administrative Record, so it must be ignored. It may not be created after the fact through affidavit, nor can it be created in some "off the record" manner. All things relied upon by the Agency are required in the Administrative Record. As the only basis for rejection of the Stage 2 Site Investigation Budget was the rejection of the related Plan, the Budget rejection was similarly erroneous.

11. 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 contains no specifics as to any such calculations behind the decision. Further, one of the inputs that Mr. Kuhlman claims to have used (and obtained from the records provided by Petitioner) was not present anywhere in the record – *i.e.,* boring diameter. It would be impossible to calculate the

volume of a cylindrical hole in the ground without the diameter. Once again, since there is nothing in the Administrative Record as to the calculations described by Mr. Kuhlman, there must not have been anything on the issue before Mr. Chappel when he signed the decision letter.

VI. CONCLUSION

For the reasons stated above, CHATHAM BP, LLC requests that the Board deny the Agency's Cross Motion for Summary Judgment and grant Petitioner's Motion for Summary Judgment, reverse the IEPA's decision of May 28, 2013 and order IEPA to approve Petitioner's Amended Stage 2 Site Investigation Plan and its related budget and reinstate all budget reductions made in that decision.

Respectfully submitted,

CHATHAM BP, LLC

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

Dated: September 10, 2013

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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 Response to Agency's Cross Motion for Summary Judgment, by means described below, upon the following persons:

To: Pollution Control Board, Attn: Clerk
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