

**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 a MOTION FOR LEAVE TO FILE RESPONDENT'S POST-HEARING BRIEF *INSTANTER* with the Illinois Pollution Control Board, a copy of which is served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY,

Respondent,

Dated: June 25, 2015

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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ILLINOIS ENVIRONMENTAL	)	
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	)	
Respondent.	)	

**MOTION FOR LEAVE TO FILE**  
**RESPONDENT'S POST-HEARING BRIEF *INSTANTER***

NOW COMES the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, by and through its attorney, Special Assistant Attorney General Scott B. Sievers, and moves for leave to file Respondent's Post-Hearing Brief *instanter*. In support, the Respondent states the following:

1. Final hearing in the instant action was held on May 27, 2015, and the transcript of said hearing was filed on June 2, 2015.
2. Also on May 27, 2015, the Petitioner was given until June 16, 2015 to file its post-hearing brief, which was two weeks after filing of the transcript. The Respondent was given until June 23, 2015 to file its post-hearing brief.
3. While the Petitioner's Post-Hearing Brief was timely filed, the Respondent did not receive a copy until June 17, giving it less than a week to respond to it.
4. Due to obligations to other Illinois EPA matters, including those pending before the Circuit Court, the undersigned was not able to complete the Respondent's Post-Hearing Brief and file it by the 4:30 p.m. electronic filing deadline on June 23, 2015. At that time, the undersigned was aware that he would be unable to return to work on the Respondent's Post-Hearing Brief

until June 25, 2015 due to a previous obligation in another matter pending before the Circuit Court.

5. As a result, the undersigned conferred with counsel for the Petitioner about an extension of time until June 25, 2015 to file the Respondent's Post-Hearing Brief, and the Petitioner had no objection to Petitioner's motion for leave to file its Post-Hearing Brief *instanter* on June 25, 2015.

6. Consequently, the Respondent now moves for leave to file *instanter* Respondent's Post-Hearing Brief, which is attached hereto.

WHEREFORE, the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, prays that this honorable Board ALLOW the Respondent's MOTION FOR LEAVE TO FILE RESPONDENT'S POST-HEARING BRIEF *INSTANTER*.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY,

Respondent,

Dated: June 25, 2015

Scott B. Sievers  
Attorney Registration No. 6275924  
1021 North Grand Avenue East  
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ILLINOIS ENVIRONMENTAL	)	
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	)	
Respondent.	)	

**RESPONDENT'S POST-HEARING BRIEF**

NOW COMES the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, by and through its attorney, Special Assistant Attorney General Scott B. Sievers, and for the Respondent's Post-Hearing Brief states the following:

**I. INTRODUCTION**

In this action, the Petitioner, Chatham BP, LLC ("Chatham BP") complains of the February 25, 2015 letter issued by the Respondent, Illinois Environmental Protection Agency ("Illinois EPA"), which repeated grounds Illinois EPA had previously asserted in denying a Chatham BP plan and budget but which were fully reversed by this Board in *Chatham BP, LLC v. Illinois EPA*, PCB No. 14-1.

Illinois EPA subsequently determined it had erred in issuing the February 25, 2015 letter and sent out a March 27, 2015 letter fully remedying those errors. Nonetheless, Chatham BP has continued to pursue this action despite obtaining, before ever bringing this action, all substantive relief it sought in its Petition for Review. This action now apparently exists solely as what is effectively a separate and independent cause of action to obtain attorney's fees and costs for litigation to obtain attorney's fees and costs.

For the reasons set forth below, this action should be dismissed or denied due to lack of subject matter jurisdiction, as barred by *res judicata*, and as moot.

## II. STANDARD OF REVIEW

Section 57.3 of the Environmental Protection Act, 415 ILCS 5/1 *et seq.*, provides for the establishment of the Illinois Leaking Underground Storage Tank Program, which is to be administered by the Office of the State Fire Marshal and Illinois EPA. 415 ILCS 5/57.3. Illinois EPA is charged by Board regulation with conducting a financial review of submitted plans and budgets. 35 Ill. Adm. Code 734.510(b). Section 57.7(c)(4) of the Act provides, in pertinent part, that “[a]ny action by the Agency to disapprove or modify a plan or report ... shall be subject to appeal to the [Pollution Control] Board in accordance with the procedures of Section 40.” 415 ILCS 5/57.7(c)(4).

The standard of review under Section 40 of the Act is whether the application, as submitted to the Agency, would not violate the Act and Board regulations. *Freedom Oil Co. v. Illinois EPA*, PCB No. 10-46, slip op. at 13 (Aug. 9, 2012). In appeals of final Agency determinations, the burden of proof rests upon the petitioner. *Id.* The standard of proof in LUST appeals is the preponderance of the evidence, meaning that a proposition is proved by a preponderance when it is more probably true than not. *Id.*

The Board has held that Section 57.8(1) authorizes it to use discretion in awarding attorney’s fees and costs where appropriate. *See, e.g., Evergreen FS, Inc. v. Illinois EPA* (Sept. 6, 2012), PCB Nos. 11-51 & 12-61, slip op. at 5. However, awarding attorney’s fees and costs is a separate inquiry from the underlying question of compliance with the Act or Board regulations. *See People v. Stein Steel Mills Servs., Inc.* (April 18, 2002), PCB No. 02-1, slip op. at 3.

### III. STATEMENT OF FACTS

CW<sup>3</sup>M Company ("CW<sup>3</sup>M") is an environmental processing/consulting firm. (Tr. 42-43.) Chatham BP is CW<sup>3</sup>M's client, and Chatham BP contracted with CW<sup>3</sup>M for work at the Chatham BP site. (Tr. 43.)

On January 22, 2013, Carol L. Rowe, president of CW<sup>3</sup>M, submitted a Stage 2 Site Investigation Plan and Budget to Illinois EPA. (R. 001-111; Tr. 43.)

On December 18, 2014, the Illinois Pollution Control Board entered an Order in a UST appeal concerning the Chatham BP site captioned *Chatham BP, LLC v. Illinois EPA*, PCB No. 14-1 (hereafter "*Chatham BP I*"). (R. 112-115.)

Eric Kuhlman is an Environmental Protection Engineer III employed in the Leaking Underground Storage Tank, or LUST, Section of Illinois EPA. (Tr. 30, 36.) He is the project manager for the Chatham BP site. (Tr. 36.) His responsibility relative to the Chatham BP site is reviewing technical documentation submitted for the site. (Tr. 30-31.)

Kuhlman testified that the Board's December 18, 2014 Order essentially prompted Illinois EPA's February 25, 2015 letter. (Tr. 40.) In January 2015, Illinois EPA staff discussed the December 18, 2014 *Chatham BP I* decision as well as the drafting of a letter. (R. 116-126.) Harry Chappel recognized the December 18, 2014 Order in the previous Chatham BP litigation, and testified that it was the subject of e-mail discussion with Kuhlman. (Tr. 22-23.) Kuhlman identified documents in the record as e-mails concerning what to do about the Board's December 18, 2014 Order. (Tr. 37-38; R. 116-126.) Kuhlman inquired by e-mail on January 28, 2015 of an example of how a response or decision letter to Chatham BP would look. (Tr. 31; R. 116, 120.) Brian Bauer subsequently provided Kuhlman with a letter drafted for payment that Bauer said would need to be changed to fit the budget. (Tr. 31-32; R. 116, 120.)

A LUST Section Unit Manager within Illinois EPA's Bureau of Land, Harry Chappel managed nine people involved in reviewing and approving or denying for compliance with the Illinois Underground Storage Tank regulations. (Tr. 20-21; *see* Tr. 16.) Chappel supervised employees Bauer and Kuhlman. (Tr. 21.) As his supervisor, Chappel gave Kuhlman instructions and directions at times, and when he did, Kuhlman was supposed to follow them. (Tr. 37.) Kuhlman is the project reviewer, and he provided his recommendation to Chappel, who signed the letters. (Tr. 31.)

On January 29, 2015, Chappel instructed Kuhlman what to do, and Chappel's instructions or directions resulted in the February 25, 2015 letter that is the subject of the instant appeal. (Tr. 36-38; R. 130-35.) Chappel testified that, "from my and Eric's standpoint, all we had authority to do was to approve the budget in accordance with the Board order that was issued." (Tr. 18.)

Chappel explained:

It looked, as best I can recall, and most of it is from the e-mail, it looked like someone was asking Eric to issue a payment approval letter.

That is not Eric's job. It's not my job.

So my only comment in this e-mail was, we can't issue a reimbursement approval letter. We can only issue a letter revising our original decision in accordance with the Board's decision on the drum cost.

(Tr. 19-20.)

In e-mails concerning implementation of the Board's Order, Chappel instructed Kuhlman to take the May 28, 2013 Illinois EPA letter that was the subject of the previous Chatham BP litigation and revise it. (Tr. 23; R. 116, 120.) At Chappel's direction, Kuhlman took the May 28, 2013 decision letter and changed only the drum disposal costs and the date in issuing the February 25, 2015 letter. (Tr. 38.) At hearing, Chappel was asked if he suggested just revising that letter to include or to change the way it addressed the drum disposal costs, to which

Chappel answered, "Right, the subject of the Board order I saw." (Tr. 23-24.)

At that time, Kuhlman was aware the Board had fully reversed the Agency in the previous Chatham BP litigation, and Kuhlman believed Chappel was aware of that as well. (Tr. 38-39.) However, Chappel was not aware at that time—January 29, 2015—that the Board had fully reversed Illinois EPA's May 28, 2013 decision letter. (Tr. 24.) As a result, Chappel signed the February 25, 2015 letter that is the subject of the instant appeal and which only changed or approved the drum disposal costs based upon the Board's prior Order. (*See* Tr. 24; R. 130-35.)

Kuhlman later learned Chappel had not been aware that the Board had fully reversed Illinois EPA in the *Chatham BP I* litigation, and Kuhlman learned that the February 25, 2015 letter was a mistake. (Tr. 39.) Chappel admitted that the letter was mistaken. (Tr. 24.) Asked whether he believed the final version of the February 25, 2015 letter was a mistake, Chappel testified, "Yes, it was an error." (Tr. 20.) Had he been aware that the Board had fully reversed Illinois EPA's May 28, 2013 decision letter, Chappel testified that his instructions would have been different. (Tr. 24.)

The mistake in the February 25, 2015 letter subsequently was brought to Chappel's attention. (Tr. 24-25.) Chappel and Kuhlman then worked to fix the mistake, and understood that the mistake had been fixed, identifying a March 27, 2015 Illinois EPA letter Chappel signed that would have been sent out on or about that date. (Tr. 25, 39; R. 136-38.) The letter was written by Kuhlman's colleague, Bauer, who works in LUST claims. (Tr. 37, 39.) Chatham BP received notice on March 30, 2015 of the Certified Mail letter, which was available for pickup on April 3 but not delivered until April 7, 2015.<sup>1</sup>

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<sup>1</sup> 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.



Rowe received Illinois EPA's February 25, 2015 letter. (Tr. 46; R. 130-35.) Rowe testified that she understood that in previous litigation brought by Chatham BP that the Pollution Control Board had fully reversed the Agency on its decision letter. (Tr. 46.) Rowe acknowledged that, with the exception of the drum disposal costs, the February 25, 2015 letter at issue in the instant appeal directly contradicts the Board's decision reversing Illinois EPA's May 28, 2013 letter. (Tr. 46.) Rowe testified that she read the letter and initially "we assumed something was wrong." (Tr. 46-47.) Asked what she thought it might be if not a mistake, Rowe testified, "A review of something else. But the very first line, by order of the Board we assumed, after looking at it for a while, well, this should be related to review of the budget." (Tr. 47.) It appeared to Rowe to be at least kind of screwed up. (Tr. 47.) Rowe testified that, following the February 25, 2015 letter, Chatham BP or CW<sup>3</sup>M contacted the Agency through legal counsel about the grounds for that letter. (Tr. 54.)

Rowe testified that they made a decision to file the petition for review in this case:

Many times we're told a final decision cannot be reversed, like we have to make some other submittal, some other action in order to make that change.

Mr. Ingersoll was trying to work with you. He was getting ready to leave town. The clock was running out, so the petition was filed.

(Tr. 47-48.)

Rowe testified that she consulted with Chatham BP on decisions affecting the Chatham BP site, most commonly consulting with Shamser Amar, the owner of the underground storage tanks at the Chatham BP site. (R. 001; *see* Tr. 43.) While she said CW<sup>3</sup>M was not a party to this litigation, Rowe testified that she spoke on behalf of Chatham BP. (Tr. 53.) When asked whether she had consulted with Mr. Amar about filing the petition for review, Rowe testified:

This exact one, I'm not sure I was talking to him during that timeframe. He knew that we had this going on, and the other one being settled and trying to get Stage II done and get on with the Stage III, so I had conversations with him.

The filing of this one was a last minute, Bill is going out of town, what are we going to do. So it was pretty sudden.

I mean, honestly, we don't really like to file these, but **we settle quite often**, and this one was like, okay, I guess we've got to do something here.

(Tr. 48-49 (emphasis added).) Asked what she meant by "settle quite often," Rowe testified, "Oh, there's a lot of times that appeals get filed, you reach some kind of settlement, and you walk away from them. You reach some kind of mutual conclusion, and everybody kind of walks away." (*Id.*) Rowe testified such settlements with the Agency were common, then explained the motivation behind this appeal:

I mean, I would just like to say, in a lot of these cases, you know, **we incur huge legal expenses**, and you always have to make a decision. Do you take it to the Board? Do you settle it and you wipe away those **legal expenses**? What's the best course of action.

And when you have something small like this and all of a sudden you have a **big legal bill**, what do you do? And it's always a best judgment call of what to do with it.

And in this case, it was just we had to file.

You know, I understand mistakes happen, and it's nothing personal. It's nothing, I mean, there's no animosity here. It was just how do we fix this. And we didn't think that we could get a reversal. Then we get the letter in, but then we're knee deep in this thing. So how do we come to some conclusion.

And, like I said, often times we settle, **but in this case, we'd had a lot of dollars on the table already**, so this was the course of action that we took.

(Tr. 49-50 (emphasis added).)

Rowe testified that Illinois EPA's March 27, 2015 letter was received after the petition for review was filed. (Tr. 50.) Rowe understood the letter to effectuate the Board's Order in the previous Chatham BP litigation by fully reversing the Agency in its previous decision letter of May 28, 2013. (Tr. 51.) Rowe acknowledged that, setting aside the issue of attorney's fees and costs, the March 27, 2015 letter provided the full relief sought in the Petition for Review:

Q. Well, my question is, since the petition for review concerns the February 25, 2015 letter, is there anything that Chatham BP complains about of that letter that hasn't been remedied in the March 27, 2015 letter?

...

**THE WITNESS: No. I think it takes care of the Board issues and the budget issues that we were looking for.**

(Tr. 52-53 (emphasis added).)

Chappel testified that he had no personal bias or ax to grind against Chatham BP or CW<sup>3</sup>M, and that he had no reason to believe Kuhlman did, either. (Tr. 26.) Kuhlman likewise testified that he had no personal bias toward or ax to grind against Chatham BP or CW<sup>3</sup>M, and that he had no reason to believe Chappel did, either. (Tr. 39-40.)

Rowe, however, testified that she's familiar with both Bauer and Chappel, having worked with Chappel in the past. (Tr. 55.) Rowe understood Chappel signed the February 25, 2015 letter, and she had seen the e-mails in the record in which Agency staff discuss what to do as a result of it. (Tr. 55-56.) Rowe said she did not have a personal bias or ax to grind towards Chappel, but that she did not think Bauer liked CW<sup>3</sup>M too much. (Tr. 56.) Rowe was questioned further:

**Q. Isn't it correct that you have written that it is a priority in lobbying the Rauner administration for the removal of Brian Bauer and Harry Chappel to other programs or even other agencies?**

...

**MR. SIEVERS: Isn't that correct?**

**THE WITNESS:** What I have to do day-to-day I deal with day-to-day. It doesn't bias what I have to do day-to-day.

What I think of a program's administration is entirely different.

Q. I'm handing you what has been previously marked as Illinois EPA Exhibit B.2 Take a moment to review that.

Who is Marvin Johnson?

A. He's with Chase Environmental.

Q. And who is Rus Goodiel (G-o-o-d-i-e-l)?

A. He's with Chase Environmental.

Q. Isn't it correct that in response to Mr. Goodiel's e-mail, **you wrote on January 13, 2015 of lobbying priorities on the LUST section staffing, [" removal of antagonistic and targeting staff (Bauer, Chappel, Weller) to other programs or agencies. Take cause of ruining consultants and owner operators personally.["]**

**Isn't that correct?**

A. Where are you reading?

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<sup>2</sup>The Respondent moved for admission of Exhibit B into evidence, but the Hearing Officer only accepted it as an offer of proof. (Tr. 59-60.)

Q. Page 3 of Exhibit B

(Pause)

A. It doesn't mean that day-to-day we don't –

Q. That's not my question.

**Didn't you write that?**

A. **Yeah.**

(Tr. 58 (emphasis added).)

#### **IV. ARGUMENT**

##### **A. ILLINOIS EPA'S ERRONEOUS LETTER DID NOT CONSTITUTE A FINAL DETERMINATION SUBJECT TO REVIEW, AND THUS THIS ACTION SHOULD BE DISMISSED FOR LACK OF JURISDICTION.**

Section 5 of the Act authorizes this Board to conduct proceedings upon petitions to review certain of Illinois EPA's "final determinations." 415 ILCS 5/5(d) (West 2015).

Despite its assertion to the contrary, the February 25, 2015 letter attached as Exhibit B to the Petition for Review did not constitute a "final determination" of Illinois EPA. Rather, it was an attempt by Illinois EPA to incorporate this Board's December 18, 2014 Order in *Chatham BP I*. This is apparent from the opening sentence of the letter: "By Order of the Board for UST Appeal PCB 14-1, the Illinois Environmental Protection Agency (Illinois EPA) has re-characterized its determination for the Stage 2 Site Investigation Plan (plan) submitted for the above-referenced incident." (R. 130.)

Nowhere in the Act is Illinois EPA granted discretion whether to comply with this Board's decisions. As it lacked such discretion, Illinois EPA had no decision or determination to make, final or otherwise, other than to comply with the Board's decisions in *Chatham BP I*. Consequently, the February 25, 2015 letter merely attempted to effectuate and carry out this Board's Order of December 18, 2014. It erred in doing so, but that does not alter the fact that the letter did not constitute a final determination of Illinois EPA because it lacked any authority to second-guess this Board's decisions in *Chatham BP I*. As Illinois EPA's February 25, 2015 letter

did not constitute a “final determination” under the Act, this Board should dismiss or deny this action, as the Board lacks subject matter jurisdiction to review an erroneous but insignificant letter.

**B. ALTERNATIVELY, THE BOARD SHOULD FIND *RES JUDICATA* BARS THE PETITIONER FROM USING ILLINOIS EPA’S MISTAKEN FEBRUARY 25, 2015 LETTER AS A VEHICLE TO RELITIGATE *CHATHAM BP I* AND GENERATE ATTORNEY’S FEES AND COSTS.**

Three elements must exist for *res judicata* to apply: (1) an identity of parties or their privies; (2) an identity of cause of action; and (3) a final judgment on the merits rendered by an entity with competent jurisdiction. *See Kean Oil Co. v. Illinois EPA* (May 1, 1997), PCB 97-146, slip op. at 8. The grounds erroneously reasserted in Illinois EPA’s February 25, 2015 letter were fully litigated in *Chatham BP I* by the same parties to the instant litigation and before this same body, which rendered a final judgment on the merits. Thus *res judicata* applies to bar both parties from relitigating the reversed denial of Chatham BP’s Stage 2 Site Investigation Plan and Budget that was the subject of *Chatham BP I* and resulted in the December 18, 2014 Board Order that was mischaracterized by Illinois EPA in its February 25, 2015 letter.

If Illinois EPA were not to comply with the Board’s Orders in *Chatham BP I*, then Chatham BP’s recourse is a writ of mandamus before the Circuit Court. But that is not the case here; Illinois EPA fully recognizes the Board’s authority and, after misstating it in its February 25, 2015 letter, properly characterized the Board’s decision in the March 27, 2015 letter. Illinois EPA cannot relitigate prior cases by issuing letters mischaracterizing PCB Orders, nor can Chatham BP relitigate cases based upon such erroneous letters.

Consequently, this Board should find that *res judicata* bars Chatham BP from using the mistaken February 25, 2015 letter as a vehicle to relitigate *Chatham BP I* and, ultimately, both generate and recover still more attorney’s fees and costs.

**C. ALTERNATIVELY, THIS ACTION SHOULD BE DISMISSED AS MOOT, AS NO CONTROVERSY EXISTS AND NO SUBSTANTIVE RELIEF CAN BE GRANTED THAT CHATHAM BP HAS NOT ALREADY RECEIVED.**

The Supreme Court of Illinois has held that “[a]n appeal is moot if no controversy exists or if events have occurred which foreclose the reviewing court from granting effectual relief to the complaining party.” *In re Shelby R.*, 2013 IL 114994, ¶ 15, 995 N.E.2d 990, 993.

In its Petition for Review, Chatham BP seeks as substantive relief the reversal of Illinois EPA’s rejection of both the Petitioner’s Stage 2 Site Investigation Plan and the corresponding budget and the approval of those proposed by Chatham BP. (Pet. at 8.) However, in its March 27, 2015 letter, Illinois EPA provided the very substantive relief Chatham BP’s Petition for Review requested: It stated that, based upon this Board’s Orders, Chatham BP’s Stage 2 Site Investigation Plan and corresponding budget were approved.

In the instant case, CW<sup>3</sup>M President Carol Rowe spoke at the hearing on behalf of Chatham BP. (Tr. 53.) Rowe herself testified that she understood the letter to effectuate the Board’s Order in the previous Chatham BP litigation by fully reversing the Agency in its previous decision letter of May 28, 2013. (Tr. 51.) She further acknowledged that, other than the issue of attorney’s fees and costs, the March 27, 2015 letter provided the full relief sought in Chatham BP’s Petition for Review:

Q. Well, my question is, since the petition for review concerns the February 25, 2015 letter, is there anything that Chatham BP complains about of that letter that hasn’t been remedied in the March 27, 2015 letter?

...

**THE WITNESS: No. I think it takes care of the Board issues and the budget issues that we were looking for.**

(Tr. 52-53 (emphasis added).) Thus, this Board cannot grant any substantive relief to Chatham BP that Chatham BP did not already receive without filing its Petition for Review or perpetuating this litigation.

The Petitioner cites *Reichhold Chemicals, Inc. v. IPCB* to contend that Illinois EPA's March 27, 2015 letter has no legal effect because Illinois EPA lacks the legal authority to reconsider its final decisions. Despite this contention, Illinois EPA does resolve disputes before and after they reach the Board, a fact which Carol Rowe acknowledged when speaking on behalf of Chatham BP at hearing: "[W]e settle quite often." (Tr. 49.) Rowe testified further, "Oh, there's a lot of times that appeals get filed, you reach some kind of settlement, and you walk away from them. You reach some kind of mutual conclusion, and everybody kind of walks away." (*Id.*)

Rowe and her client clearly have benefitted from such settlements, which effectively involve the reconsiderations this Board has come to believe were altogether outlawed by *Reichhold*. That case and others like it have involved the question of whether Illinois EPA has authority to reconsider various decisions; finding that it did not, the *Reichhold* court held this Board's dismissal of a petition based upon a pending reconsideration was erroneous. To find that an action is not moot and may be litigated despite the absence of a controversy and despite the inability of the Board to provide substantive relief beyond what Illinois EPA has already provided to Chatham BP would be to stretch *Reichhold* beyond the scope addressed by the Third District Appellate Court and convert it into a new, separate cause of action for attorney's fees and costs to be generated and recovered at the slightest Agency misstep. However, no separate cause of action exists merely for the awarding of attorney's fees, which are considered after the underlying questions of compliance with the Act or the Board's regulations have been answered. *See People v. Stein Steel Mills Servs., Inc.* (April 18, 2002), PCB No. 02-1, slip op. at 3.

Further, this Board recently suggested Illinois EPA may be authorized to reconsider some decisions before the filing of a petition for review:

Section 40(a)(1) of the Act allows an extension of the appeal period for as long as 90 days if the permit applicant and the Agency provide written notice of the extension to the Board within the initial 35-day appeal period. *See* 415 ILCS 5/40(a)(1) (2012). While such an extension suggests that **there is some opportunity for the Agency to reconsider a permitting decision**, the parties did not provide the Board notice of any extension under Section 40(a)(1), and KCBX filed a petition within the statutory 35-day period.

*KCBX Terminals Co. v. Illinois EPA* (April 3, 2014), PCB No. 14-110, slip op. at 2 (emphasis added). In the instant case, Illinois EPA issued its letter on March 27, 2015 remedying the errors in its February 25, 2015 prior to the filing of Chatham BP's Petition for Review on March 30, 2015, and thus arguably with the authority to reconsider its mistaken February 25, 2015 letter.

As noted in Section IV(A) above, Illinois EPA's February 25, 2015 letter was not a final determination subject to appeal because Illinois EPA lacks the authority to second-guess this Board's decisions. However, even if this Board were to find this letter to be a final determination, and regardless whether Illinois EPA's March 27, 2015 letter constitutes an authorized or unauthorized reconsideration of that erroneous letter, the fact remains that the March 27, 2015 letter eliminated any substantive controversy and that this Board cannot provide substantive relief to Chatham BP that Chatham BP did not already have before it ever filed its Petition for Review.

No controversy existed at the time the Petition for Review was filed, and while Illinois EPA's March 27, 2015 letter and Chatham BP's Petition for Review might have crossed in the mail, no controversy existed at the time the Petition for Review was filed, by the time the Hearing Officer conferred with counsel for the parties on April 14, 2015 about setting hearing, and certainly by the time of the hearing itself. No controversy over the substance of the Petition for Review now exists either, as an event occurred—Illinois EPA's March 27, 2015 letter—which foreclose this Board from granting effectual relief to Chatham BP. *See In re Shelby R.*,



*supra*. If any doubt exists that this matter is moot, then the Board need merely consider what its Order would provide as relief if it were to rule in Chatham BP's favor: It would provide exactly the same substantive relief Chatham BP already has received from Illinois EPA through its March 27, 2015 letter before this action was ever filed. Consequently, this Board should not enter what would essentially be an advisory Order but should instead dismiss or deny this appeal as moot.

**V. CONCLUSION**

WHEREFORE, the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, prays that this honorable Board DISMISS or DENY the instant action due to lack of subject matter jurisdiction, as barred by *res judicata*, and as moot.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY,

Respondent,

Dated: June 25, 2015

Scott B. Sievers  
Attorney Registration No. 6275924  
1021 North Grand Avenue East  
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Springfield, Illinois 62794-9276  
(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 MOTION FOR LEAVE TO FILE RESPONDENT'S POST-HEARING BRIEF *INSTANTER* upon:

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

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

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

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 June 25, 2015.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY,

Dated: June 25, 2015

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Respondent,

BY:

  
\_\_\_\_\_  
Scott B. Sievers  
Special Assistant Attorney General