

ILLINOIS POLLUTION CONTROL BOARD

January 9, 2014

CHATHAM BP, LLC,)	
)	
Petitioner,)	
)	
v.)	PCB 14-1
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

OPINION AND ORDER OF THE BOARD (by J.D. O’Leary):

Petitioner Chatham BP, LLC (Chatham BP) appeals a May 28, 2013 determination of the Illinois Environmental Protection Agency (Agency or IEPA or Illinois EPA). The Agency rejected a Stage 2 site investigation plan and budget, modified costs for a Stage 1 site investigation, and required submission of a Stage 3 site investigation plan regarding Chatham BP’s underground storage tank (UST) site at 300 North Main Street, Chatham, Sangamon County (site). The parties have filed cross-motions for summary judgment.

For the reasons stated below, the Board today, on the issue of Chatham BP’s proposed Stage 2 site investigation plan, grants Chatham BP’s motion for summary judgment, denies the Agency’s cross-motion for summary judgment, and reverses the Agency’s rejection of Chatham BP’s proposed Stage 2 site investigation plan. On the issue of Chatham BP’s drum disposal costs, the Board finds that there exists an issue of material fact. The Board therefore denies the parties’ motions for summary judgment and directs the parties to proceed to hearing on that issue.

The Board’s opinion and order begins with discussion of the procedural history, a preliminary matter, and the factual background of this case. The Board then summarizes Chatham BP’s petition for review. Next, the Board summarizes the motions for summary judgment filed by Chatham BP and the Agency before summarizing the responses to them. The Board then provides the legal and statutory background before discussing the issues presented, reaching its conclusion, and issuing its order.

PROCEDURAL HISTORY

On July 1, 2013, Chatham BP filed its petition for review (Pet.). In an order dated July 11, 2013, the Board accepted the petition for hearing and directed the Agency to file the administrative record by July 31, 2013. On August 19, 2013, the Agency filed a motion for leave to file the administrative record *instanter* (Mot. Leave) accompanied by the administrative record (R.). In the following section of this opinion, the Board grants the motion and accepts the administrative record.

On August 20, 2013, Chatham BP filed a motion for summary judgment (Pet. Mot.). On August 27, 2013, the Agency filed a cross motion for summary judgment (Agency Mot.) accompanied by a memorandum of law in support of its motion (Agency Memo.) The Agency's memorandum included a single attachment, an affidavit of Eric Kuhlman, an Environmental Protection Engineer in the Leaking Underground Storage Tank Section of the Agency (Att. A).

On September 3, 2013, the Agency filed its response to Chatham BP's motion for summary judgment (Agency Resp.). On September 10, 2013, Chatham BP filed its response to the Agency's motion for summary judgment (Pet. Resp.).

PRELIMINARY MATTER

On August 19, 2013, the Agency filed a motion for leave to file the administrative record *instanter*. The 184-page administrative record accompanied the motion.

In the motion, the Agency stated that its attorney did not receive written appointment as Special Assistant Attorney General until after the July 31, 2013 filing deadline set by the Board. Mot. Leave at 1. The motion further stated that, until receiving that appointment, the attorney lacked authority to file documents with the Board on behalf of the Agency. *Id.* The motion indicated that the Agency's attorney filed an appearance soon after receiving that appointment. *Id.* The motion added that Chatham BP's counsel did not object to the Board's granting the motion. *Id.* at 2.

Section 101.500(d) of the Board's procedural rules provides that, "[w]ithin 14 days after service of a motion, a party may file a response to the motion. If no response is filed, the party will be deemed to have waived objection to the granting of the motion, but the waiver of objection does not bind the Board or the hearing officer in its disposition of the motion." 35 Ill. Adm. Code 101.500(d). Under the circumstances described by the Agency's motion and in the absence of any objection to it, the Board grants the motion for leave to file *instanter* and accepts the administrative record filed by the Agency on August 19, 2013.

FACTUAL BACKGROUND

Release at Site

The site is known as Chatham Gas and is an active gas station surrounded by commercial properties. R. at 6, 10; *see id.* at 26 (Site Map). The site has been assigned Agency identification number LPC 1670305023. *E.g.*, R. at 1, 3, 179. The site includes four USTs, three of which are 10,000-gallon gasoline tanks, and one of which is a 4,000-gallon diesel tank. *Id.* at 7 (Table 1-1. Underground Tank Summary). Chatham BP is the owner of the USTs. *Id.* at 16, 21. Two 10,000-gallon gasoline tanks were removed from the site on June 1, 1988. *Id.* at 7.

On September 25, 2007, the Office of the State Fire Marshal (OSFM) investigated vapors in a storm sewer and a petroleum sheen in a creek in the vicinity of Main Street in Chatham. R. at 7. The investigator reviewed automatic tank gauge reports with the former owner of the USTs

and concluded that approximately 342 gallons of fuel could not be accounted for. *Id.* Inspection revealed that the northwestern tank bed monitoring well contained approximately three inches of “fresh” gasoline. *Id.* Inspection also showed that “the southeastern tank bed monitoring well was clear of product.” *Id.* OSFM indicated that the release appeared to have been caused “by an overflow of the tank by the fuel delivery driver.” *Id.* at 8. The former owner of the site retained W.J. Scott Company to recover free product and contaminated water from the well. W.J. Scott Company recovered approximately 275 gallons of free product and 2,475 gallons of contaminated water from the tank bed monitoring well. *Id.*

Also on September 25, 2007, the former owner of the USTs reported a release to the Illinois Emergency Management Agency (IEMA), which assigned Incident Number 2007-1289.¹ R. at 6.

On November 27, 2007, the 20-Day Certification was submitted to the Agency.² R. at 6; *see id.* at 12. On November 25, 2008, a Free Product Report was submitted to the Agency, which approved it on January 12, 2009.³ *Id.*; *see id.* at 12. The 45-Day Report was submitted on December 3, 2008.⁴ *Id.*; *see id.* at 12.

On November 14, 2011, OSFM received a Reimbursement Eligibility and Deductible Application regarding Incident Number 2007-1292 at the site. R. at 69. On December 31, 2011, OSFM determined that Chatham BP was eligible to seek reimbursement from the UST Fund, subject to a deductible of \$15,000, for the release from one 10,000-gallon tank. *Id.* at 69-70.

In April 2009, “AES [Adept Environmental Solutions, Inc.] was on-site to conduct Pre Stage 1 samples from around the active tank bed and piping trench. Soil analytical results indicated the Clean-Up Objectives for the site have been exceeded for several of the gasoline indicator contaminants.” R. at 8; *see id.* at 85-88, 124-27 (soil assessment data dated 4-22-09); *see also id.* at 27 (Pre Stage 1 Sample Location Map), 110-23 (Logs of Boring), 131-72 (Analytical Reports). Specifically, soil samples A1, A2, A3, and A5 in the vicinity of the tank bed each showed concentration of at least one parameter exceeding remediation objectives. *Id.* at 34-35 (soil contamination value maps) 85-88 (soil assessment data dated 4-22-09). Soil samples A4, A8, and A9 along the piping run at the site also showed concentration of at least one parameter exceeding remediation objectives. *Id.*

On April 5, 2012, CW³M personnel completed Stage 1 investigation activities at the site. R. at 8, 11. “Five monitoring wells (MW), four with soil samples and two soil borings (SB) were

¹ The Administrative Record filed with the Board does not include this report. Chatham BP’s motion for summary judgment states that this September 25, 2007 report resulted in assignment of Incident Number 2007-1292. Pet. Mot. at 2. Elements of the record variously refer to Incident Number 2007-1289 (*e.g.*, R. at 74-78, 99, 178), Incident Number 2007-1292 (*e.g.*, R. at 19, 38, 69, 107), or both (*e.g.*, R. at 1, 3, 109). The Board has not located in the Administrative Record filed with it any explanation for the apparent assignment of separate incident numbers to the release at the site.

² The Administrative Record filed with the Board does not include this certification.

³ The Administrative Record filed with the Board does not include this report.

⁴ The Administrative Record filed with the Board does not include this report.

advanced as part of the plume delineation activities. Soil samples were collected from each drilling location and were analyzed for benzene, ethylbenzene, toluene and total xylenes (BETX) and methyl tert-butyl ether (MTBE).” R. at 11; *see id.* at 28 (Soil Boring Location Map), 30 (Monitoring Well Location Map), 72-78 (Drilling Borehole Log), 79-83 (Well Completion Report).

On April 6, 2012, CW³M personnel returned to the site to survey and sample the five monitoring wells. R. at 8, 11. Source well MW-5 just north of the tank bed revealed benzene, ethylbenzene, toluene, total xylenes, and MTBE in excess of the most stringent Tier 1 remediation objectives. R. at 90. Samples from MW-1, near the western boundary of the site, revealed benzene, ethylbenzene, and toluene in excess of the most stringent Tier 1 remediation objectives. *Id.* Samples did not detect levels in excess of these objectives from the three other monitoring wells: MW-2, near the southern boundary of the property; MW-3 near the eastern boundary; and MW-4, near the northern boundary. *Id.* Soil samples from MW-1 detected levels of benzene in excess of remediation objectives, although soil samples taken from MW-2, MW-3, and MW-4 did not detect levels in excess of those objectives. *Id.* at 89; *see id.* at 34-35 (Soil Contamination Value Maps). SB-1, to the east of MW-5, showed benzene, ethylbenzene, toluene, and total xylenes in excess of those objectives. *Id.* SB-2, to the north of MW-5, showed benzene and ethylbenzene in excess of them. R. at 89; *see id.* at 34-35.

CW³M personnel measured static water levels for each well in order “to determine relative groundwater elevations and the groundwater flow direction.” R. at 11. CW³M concluded based on its activities at the site that “it appears that the groundwater flow direction is toward the west across the site.” *Id.*; *see id.* at 33 (Groundwater Elevation Map April 2012).

Proposed Site Investigation Plan

By letter dated January 17, 2013, CW³M submitted to the Agency a Stage II Site Investigation Plan and Budget for the site regarding Incident Numbers 2007-1289 and 2007-1292. R. at 1-2. The Agency received the submission on January 22, 2013. *Id.* at 3. The plan proposed “two monitoring wells each with soil samples, and four soil borings . . . to determine the horizontal and vertical extent of contamination on-site.” *Id.* at 14. The plan also proposed “[o]ne additional boring . . . for collection of a Tiered Approach to Corrective Action Objectives (TACO) sample.” *Id.*

The plan included a budget summary itemizing actual Pre Stage 1 costs to include \$4,422.60 in drilling and monitoring well costs (R. at 41, 42), \$4,726.80 in analytical costs (*id.* at 41, 44), \$584.98 in remediation and disposal costs (*id.* at 41, 46), \$2,784.58 in consulting personnel costs (*id.* at 41, 47), and \$801.50 in consultant materials costs (*id.* at 41, 48), for total costs of \$13,320.48 (*id.* at 41).

The plan included a budget summary itemizing actual Stage 1 Site Investigation costs to include \$3,807.85 in drilling and monitoring well costs (R. at 41, 49), \$2,172.63 in analytical costs (*id.* at 41, 51), \$2,291.84 in remediation and disposal costs (*id.* at 41, 53), \$12,249.54 in consulting personnel costs (*id.* at 41, 55), and \$554.88 in consultant materials costs (*id.* at 41, 57), for total costs of \$21,076.74 (*id.* at 41).

In addition, the plan included a Stage 2 Site Investigation plan proposing monitoring wells with soil samples along the western boundary of the site, one to the north of MW-1 and one to the south. *Id.* at 31 (Proposed Monitoring Well Location Map). The plan also proposed one soil boring between MW-2 and MW-3 in the southeastern section of the site. *Id.* at 29 (Proposed Soil Boring Location Map). It proposed two soil borings between MW-3 and MW-4 in the northeastern section of the site. *Id.* A fourth soil boring was proposed between SB-2 and MW-4. *Id.* The plan also proposed a soil boring for TACO purposes just west of MW-4 along the northern boundary of the site. *Id.*; *see id.* at 14.

In addition, the plan included a Stage 2 Site Investigation budget itemized to include \$2,439.60 in drilling and monitoring well costs (R. at 41, 58), \$2,287.87 in analytical costs (*id.* at 41, 60), \$1,170.00 in remediation and disposal costs (*id.* at 41, 62), \$19,690.76 in consulting personnel costs (*id.* at 41, 65), and \$618.00 in consultant materials costs (*id.* at 41, 67), for a total budget of \$26,206.23 (*id.* at 41).

By letter dated May 8, 2013, CW³M submitted information requested by the Agency regarding the Stage 2 Site Investigation Plan the Agency had received in January 22, 2013. R. at 109. The submission included “boring logs, analytical results and update lab log tables for the drilling event on April 22, 2009.” *Id.*; *see id.* at 110-77.

Agency Determination Letter

By letter dated May 28, 2013, the Agency stated that it “reviewed the Stage 2 Site Investigation Plan (plan) submitted” for Incident Number 2007-1292 and issued its determinations. R. at 179. The Agency first rejected the proposed stage 2 site investigation plan. *Id.* at 179, 181, citing 415 ILCS 5/57.7(a)(1), 57.7(c) (2012), 35 Ill. Adm. Code 734.505(b), 734.510(a). As reasons for rejection, the Agency stated that

[t]he 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. *Id.* at 181, citing 415 ILCS 5/57.1(a) (2012), 35 Ill. Adm. Code 734.320(c), 734.325.

Second, the determination letter rejected the budget associated with that plan. R. at 179, 183. As the basis for that rejection, the Agency stated that

[t]he Illinois EPA has not approved the plan with which the budget is associated. Until such time as the plan is approved, a determination regarding the associated budget – *i.e.*, a determination as to whether costs associated with materials, activities, and services are reasonable; whether costs are consistent with the associated technical plan; whether costs will be incurred in the performance of corrective action activities in excess of those necessary to meet the minimum requirements of the Act and regulations, and whether costs exceed the maximum

payment amounts set forth in Subpart H of 35 Ill. Adm. Code 734 – cannot be made. *Id.* at 183, citing 415 ILCS 5/57.7(c)(3) (2012); 35 Ill. Adm. Code 734.510(b).

Third, the Agency’s determination modified actual costs for Stage 1 activities by reducing remediation and disposal costs in the amount of \$1,145.92 for drum disposal. R. at 179, 182. The letter stated that, “[a]ccording 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.” *Id.* at 182, citing 415 ILCS 5/57.7(c)(3), 35 Ill. Adm. Code 734.630(o); *see* R. at 178 (explaining deduction in LUST Technical File).

Fourth, the determination letter required Chatham BP to submit to the Agency “a Stage 3 Site Investigation Plan, and budget if applicable, or Site Investigation Completion Report within 30 days after completing the site investigation.” R. at 179, citing 415 ILCS 5/57.7(a)(5), 57.12(c, d) (2012), 35 Ill. Adm. Code 734.100, 734.125.

SUMMARY OF CHATHAM BP’S PETITION FOR REVIEW

Chatham BP argues that the Agency’s May 28, 2013 decision letter appears to rely upon Section 57.1(a) of the Act and Section 734.320(c) of the Board’s UST rules as the bases to reject the site investigation plan, reduce drum disposal costs, and require the submission of a Stage 3 Site Investigation Plan. Pet. at 2-3, citing 415 ILCS 5/57.1(a) (2012), 35 Ill. Adm. Code 734.320(c). Chatham BP also argues that this rejection of the proposed plan led the Agency to reject the associated budget. Pet. at 3. Chatham BP suggests that, because Section 57.1(a) in general language simply requires following UST program requirements, it requires little analysis in this case. *Id.* Chatham BP claims that “[t]he remaining issue is then to analyze the application of Section 734.320(c) to the facts in the record and whether the Agency correctly applied it in the decision letter.” Pet. at 3, citing 35 Ill. Adm. Code 734.320(c).

Rejection of Plan

Chatham BP states that the Agency cites the second sentence of Section 734.320(c) as the requirement that would be violated by approval of the proposed plan. Pet. at 4, citing 35 Ill. Adm. Code 734.320(c); *see* R. at 181. However, Chatham BP argues that the Agency’s decision letter misapplies this authority. Pet. at 4. Chatham BP claims that Stage 2 completes “identification of the extent of soil and groundwater contamination *at the site*” and that Stage 3 investigates off-site contamination. Pet. at 4 (emphasis in original), citing 35 Ill. Adm. Code 734.320(c). Chatham BP argues that the Agency’s own determination letter acknowledges that the extent of soil contamination along the western boundary of the site has not been determined. Pet. at 4, citing R. at 181. Chatham BP suggests that its plan proposes to determine this extent. Chatham BP also argues that Section 734.320(c) provides that a Stage 3 Site Investigation Plan is submitted to the Agency for review after a Stage 2 plan has been submitted. Pet. at 4.

Chatham BP argues that the second sentence of Section 734.320(c) requires a Stage 3 investigation only if no additional on-site investigation is proposed and if contamination extends

beyond the boundary of the site. Pet. at 4. Chatham BP states that its plan proposes additional on-site investigation to determine the extent of contamination at the western boundary. *Id.* Chatham BP claims that, “[i]f that then shows the extent also extends beyond the property boundary to the west, only then will the Stage 2 investigation be complete and justify moving to Stage 3.” *Id.* at 4-5. Chatham BP argues that it is sensible first to determine whether contamination extends to adjoining property before beginning to drill or sample there. *Id.* at 5.

Chatham BP argues that the Agency’s rejection of its proposed plan on the basis of Section 734.320(c) is a misinterpretation of that provision. Pet. at 5, citing 35 Ill. Adm. Code 734.320(c). Chatham BP characterizes Section 734.320(c) as establishing a procedure to follow after an owner or operator submits a Stage 2 plan. Pet. at 5. Chatham BP indicates that the procedure is for the owner or operator to submit either a Site Investigation Completion Report or a Stage 3 Plan. *Id.* Chatham BP suggests that Section 734.320(c) does not provide a substantive basis on which to reject a Stage 2 plan. *See id.*

In addition, Chatham BP cites Section 734.315(c) of the Board’s UST regulations, which states that,

[i]f 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. Pet. at 5 (emphasis in original), citing 35 Ill. Adm. Code 734.315(c).

Chatham BP claims that this provision requires it to submit a Stage 2 site investigation plan to the Agency. Pet. at 5, citing 35 Ill. Adm. Code 734.315(c). Chatham BP argues that it has complied with this requirement “in full.” Pet. at 5. Chatham BP claims that the extent of contamination on the western boundary of the site is not known and that the site will require submission of a Stage 3 plan. Pet. at 5-6. Chatham BP further claims that it is not known whether a Stage 3 plan would need to investigate the northwest and southwest sections of the site or if investigation of those sections is necessary.” Pet. at 5-6. Chatham BP suggests that it addressed this issue in the plan it proposed to the Agency. *Id.* at 6.

Reduction of Disposal Costs

Chatham BP notes the Agency’s conclusion that the number of solid waste disposal drums exceeded the minimum requirements of the Act “[a]ccording to the IEPA’s calculations.” Pet. at 6, citing R. at 182. Chatham BP states that “[s]ome description of the inputs to the ‘calculations’ would be very helpful in understanding the factual basis for the decision.” Pet. at 6. Chatham BP argues that this determination “does not come close to” satisfying Section 734.505(b)(3), which requires that the Agency’s written rejection of a plan must contain information including “[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.” Pet. at 6, citing 35 Ill. Adm. Code 734.505(b)(3).

Chatham BP also stressed that it had proposed a budget for drum disposal. Chatham BP argued that “[s]ite-specific circumstances could easily support the difference between four drums and eight drums at this budgeting stage. Besides, the ultimate disposal reimbursement will be supported by documentation of the actual number of drums disposed.” Pet. at 6-7.

Relief Requested

Chatham BP requested that the Board find that the Agency’s determination issued on May 28, 2013, “is arbitrary, capricious and not supported by statutory or regulatory authority.” Pet. at 7. Chatham BP also sought to have the Board “[r]everse the Agency’s determination and require approval of Petitioner’s proposal.” *Id.* Chatham BP also requested that the Board award “reasonable attorney’s fees and expenses related to bringing this action” in addition to other relief deemed appropriate by the Board. *Id.*

SUMMARY OF CHATHAM BP’S MOTION FOR SUMMARY JUDGMENT

Chatham BP claims that there are no issues of material fact and that it is entitled to judgment as a matter of law. Pet. Mot. at 1. Chatham BP requests that the Board grant its motion for summary judgment, reverse the Agency’s May 28, 2013 determination, and order the Agency to approve its amended Stage 2 Site Investigation Plan and to reinstate the budget reductions made in that determination. *Id.* at 9.

Rejection of Stage 2 Site Investigation Plan

Chatham BP argued that the Agency’s determination to reject its Stage 2 plan and require a Stage 3 plan “is contrary to the express language of Section 734.315(c).” Pet. Mot. at 6, citing 35 Ill. Adm. Code 734.315(c). Chatham BP claimed that “[s]kipping from Stage 1 to Stage 3 is not contemplated . . . when as here the Stage 1 investigation shows on-site contamination in excess of remediation objectives.” Pet. Mot. at 6. Chatham BP further argued that this contamination requires submission of a Stage 2 site investigation within 30 days. *Id.*

Chatham BP stated that its proposed Stage 2 site investigation plan seeks to define the extent of contamination on-site. Pet. Mot. at 6. Chatham BP argued that, if that investigation defines the extent of contamination at and likely beyond the boundaries of the site, “only then will the Stage 2 investigation be complete and justify moving to Stage 3.” *Id.* Chatham BP claimed that Section 734.320(c) “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.” *Id.* (emphasis in original).

Chatham BP stressed that the Agency’s determination letter recognizes that the extent of soil contamination to the west has not been defined. Pet. Mot. at 6; *see* R. at 181. Chatham BP argued that this recognition by the Agency acknowledges that Stage 2 site investigation is not complete. Pet. Mot. at 6. Chatham BP claimed that submission of a Stage 3 plan is required only when the owner or operator proposed no site investigation activities and applicable indicator contaminants exceeding the most stringent Tier 1 remediation objectives as a result of the release extend beyond the boundaries of the site. *Id.*, *see* 35 Ill. Adm. Code 734.320(c).

Chatham BP argued that, because its submission to the Agency proposed additional Stage 2 investigation, it does not meet one of the two conditions for moving to Stage 3. Pet. Mot. at 7. Chatham BP added that it is not sensible to proceed to Stage 3 investigation of adjacent properties when it is not clear whether contamination extends off-site or, if it extends off-site, where it does. *Id.*

Reduction of Reimbursement for Drum Disposal

Chatham BP claimed that the Agency modified the cost of Stage 1 drum disposal because, “[a]ccording 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.” R. at 182. Chatham BP argued that “[t]here is no limitation in the rules for how many drums of solid waste that may be generated in the site investigation progress. Nor is there any regulatory basis for making some calculation.” Pet. Mot. at 7. Chatham BP added that Stage 1 activities actually generated eight drums that required disposal. *Id.* Chatham BP argued that “[i]t was not necessary or appropriate to apply some extra-regulatory ‘calculation’ to determine the number.” *Id.*

In addition, Chatham BP claimed that the basis provided by the Agency for its determination was “impermissibly vague.” Pet. Mot. at 7; *see* R. at 182. Chatham BP argued that, in Dickerson Petroleum, Inc. v. IEPA, PCB 9-87, 10-5 (cons.) (Feb. 4, 2010), the Agency had used similar language in its decision. In that case, Chatham BP claimed that the Board found that the Agency’s language was insufficient to satisfy the requirement that written notification of rejection must include “[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.” Pet. Mot. at 8, citing 35 Ill. Adm. Code 734.505(b). Chatham BP noted that the record includes a document that appears to be the notes of an Agency reviewer. Pet. Mot. at 8, citing R. at 178. Chatham BP claimed that this document refers to deduction of costs for disposal of four drums of solid waste but provides no “further specificity as to what calculations were conducted, or that any calculations were performed at all.” Pet. Mot. at 8, *see* R. at 178. Although Chatham BP notes that the Board remanded Dickerson Petroleum to the Agency to correct deficiencies in its notification, it requests a different result in this case. Chatham BP argues that that Agency’s failure to specify the reasons for its decision “should justify the approval of the budget item” and reinstatement of the budget reductions. Pet. Mot. at 8, 9.

SUMMARY OF AGENCY’S MOTION FOR SUMMARY JUDGMENT

The Agency claimed that there is no genuine issue of material fact with regard to the issues raised in the petition for review and that it is entitled to summary judgment as a matter of law. Agency Mot. at 1-2; *see* Agency Memo. at 13, 14, 17. The Agency requested that the Board find that no genuine issue of material fact exists and that the Agency is entitled to summary judgment as a matter of law. Agency Mot. at 2; Agency Memo. at 17.

Rejection of Stage 2 Plan

Site Investigation Procedures

The Agency stated that the Board's UST regulations "provide that investigations of releases proceed in three stages." Agency Memo. at 7, citing 35 Ill. Adm. Code 734.310. The Agency further stated that "[a] Stage 1 site investigation must be designed to collect initial information regarding the extent of on-site soil and groundwater contamination resulting from a release." Agency Memo. at 7, citing 35 Ill. Adm. Code 734.315. The Agency added that Stage 2 site investigations "must be designed to *complete* the identification of soil and groundwater contamination at the site." Agency Memo. at 7 (emphasis in original), citing 35 Ill. Adm. Code 734.320. The Agency also stated that Stage 3 site investigations "must be designed to identify the extent of off-site soil and groundwater contamination" exceeding remediation objectives that results from the release. Agency Memo. at 7-8, *see* 35 Ill. Adm. Code 734.325. The Agency clarified that, while the Board's regulations establish a general three-step process of site investigation, "the regulations actually prohibit further site investigation once the extent of the contamination has been defined." Agency Memo. at 8, citing 35 Ill. Adm. Code 734.310.

In addition, the Agency stated that "the Act and Board regulations repeatedly prohibit reimbursement to tank owners or operators of costs for activities exceeding the minimum requirements of the LUST Program." Agency Memo. at 8, citing 415 ILCS 5/57.5(a), 57.5(h), 57.7(c)(3) (2012); 35 Ill. Adm. Code 734.510(b), 734.630(o). The Agency concluded that, because the extent of on-site investigation had been defined and because further investigation would exceed the minimum requirements of the Act, on-site investigation under Stage 2 must end. *See* Agency Memo. at 9.

Stage 1 Site Investigation Results

The Agency stated that Chatham BP's Stage 2 plan included the results of Stage 1 activities. Agency Memo. at 9, citing R. at 1. The Agency claimed that "[t]hose results showed that the north, east, and south monitoring wells placed along the site property lines and soil samples from those locations did not detect levels of benzene, ethylbenzene, toluene, total xylenes, and MTBE in excess of the most stringent Tier 1 remediation objectives." Agency Memo. at 9, citing R. at 89-90. The Agency further claimed that only MW-1 at the western boundary of the property and MW-5 adjacent to the USTs detected excessive levels of any of these contaminants. Agency Memo. at 9, citing R. at 89-90. The Agency added that "not all of the other soil borings taken around the underground storage tanks and the fuel pump islands under the canopy detected levels of substances in excess of the most stringent Tier 1 remediation objectives." Agency Memo. at 9, citing R. at 87. The Agency also cited Chatham BP's statement that, "[b]ased on activities completed to date, it appears that the groundwater flow direction is toward the west across the site." Agency Memo. at 9, citing R. at 11, 33.

The Agency claimed that, based on information submitted by Chatham BP, "the extent of soil contamination had been defined along the property lines to the north, east, and south of the rectangular property site, but not the west." Agency Memo. at 10, citing Att. A (¶9); *see* R. at 181. The Agency argued that Chatham BP had determined the extent of on-site contamination

but not off-site contamination to the west of the site. Agency Memo. at 10. The Agency claimed that Chatham BP had satisfied the requirements of Stage 2 and was required to end on-site investigation. Agency Memo. at 10, citing 35 Ill. Adm. Code 734.310, 734.320.

The Agency stated that, instead of proceeding to Stage 3, Chatham BP proposed additional on-site investigation under Stage 2. Agency Memo. at 10, citing R. at 8. The Agency argued that proposing any further Stage 2 activities would violate the Board's UST regulations. Agency Memo. at 10, citing 35 Ill. Adm. Code 734.310, 734.320. The Agency further argued that investigation of off-site contamination must be performed under Stage 3. Agency Memo. at 10, citing 35 Ill. Adm. Code 734.320. In addition, the Agency claimed that it must ensure that "costs associated with a plan will not be used for site investigation activities in excess of those required to meet the minimum requirements" of the UST program. Agency Memo. at 10, citing 415 ILCS 5/57.7(c)(3) (2012). On these grounds, the Agency rejected Chatham BP's Stage 2 Site Investigation Plan and directed Chatham BP to submit a Stage 3 Site Investigation Plan to determine the extent of soil contamination to the west of the site. Agency Memo. at 10, citing R, at 179, 181; Att. A at ¶10.

The Agency argued that, although Chatham BP proposed a Stage 2 plan "in an attempt to complete and more narrowly define the on-site plume, where possible," the Board addressed a similar claim in L. Keller Oil Properties, Inc./Farina v. IEPA, PCB 07-147 (Dec. 6, 2007) (Keller). Agency Memo. at 10-11. The Agency claimed that the petitioner in that case proposed a Stage 2 plan including soil borings "between the gasoline tank fields and a monitoring well already known to have contamination exceeding remediation objectives." *Id.*, citing Keller at 45. The Agency stated that it found that those proposed borings exceeded the minimum requirements of the Act and Board regulations. Agency Memo. at 11, citing Keller at 42. Although the petitioner argued that the proposed soil borings "would be useful in terms of reducing the area of the plume that needs remediation and reducing corrective action costs," the Agency argued that contamination was known to extend beyond them. Agency Memo. at 11, citing Keller at 46. The Agency stressed that the Board agreed that the proposed additional Stage 2 soil sampling exceeded the minimum requirements of the Act. Agency Memo. at 11, citing Keller at 46.

The Agency stated that Chatham BP's proposed Stage 2 plan included "a soil boring between monitoring wells MW-2 and MW-3 on the southern and eastern property lines, respectively." Agency Memo. at 11, citing R. at 29. The Agency added that Chatham BP also proposed two "soil borings between monitoring wells MW-3 and MW-4 on the northern and eastern property lines, respectively." Agency Memo. at 11, citing R. at 29. The Agency argued that "[n]one of those wells indicated excessive contamination, however." Agency Memo. at 11-12. The Agency also stated that Chatham BP "proposed a soil boring north of SB-2, which was just north of the USTs, but south of the northern property boundary where MW-4 had not indicated excess contamination." *Id.* at 12. The Agency added that the proposed plan also included a monitoring well "with soil samples along the western property line north and south of MW-1, the monitoring well that already had detected excessive contamination during the Stage 1 investigation." *Id.*, citing R. at 31.

The Agency argued that these proposed soil borings and monitoring wells exceed the requirements of the Act and regulations, as Chatham BP's "Stage 1 activities had defined the

extent of the on-site contamination.” Agency Memo. at 12. Although acknowledging that Chatham BP apparently sought further definition of the contamination plume, the Agency argued that Chatham BP was required to end on-site investigation and “could not propose any further Stage 2 site investigation activities without violating Sections 734.310 and 734.320.” *Id.*, citing 35 Ill. Adm. Code 734.310, 734.320. The Agency further argued that MW-1 had detected excessive contamination, “indicating the release likely extends beyond the site’s western boundary.” Agency Memo. at 12. Accordingly, the Agency claimed Section 734.320(c) required Chatham BP to submit a Stage 3 site investigation plan. *Id.*, citing 35 Ill. Adm. Code 734.320(c).

The Agency stated that it had reached its conclusions on the issues based upon data Chatham BP had submitted. Agency Memo. at 13. The Agency argued that “no genuine issue of material fact exists that the extent of the on-site contamination has been defined.” *Id.*; *see* Agency Mot. at 1. The Agency claimed that the Act and the Board’s rules require Chatham BP to end Stage 2 investigation and submit a Stage 3 plan for off-site investigation. Agency Memo. at 13; *see* Agency Mot. at 1. The Agency concluded that it correctly rejected Chatham BP’s Stage 2 plan and is entitled to summary judgment on the issue as a matter of law. *Id.*

Rejection of Stage 2 Budget

The Agency argued that, under its authority to examine budgets, it performs a detailed financial review. Agency Memo. at 13, citing 35 Ill. Adm. Code 734.505(b). The Agency cited the Board’s UST regulations, which provides that

[t]he overall goal of the financial review must be to assure that the costs associated with materials, activities, and services must be reasonable, must be consistent with the associated technical plan, must be incurred in the performance of corrective action activities, must not be used for corrective action activities *in excess of those necessary to meet the minimum requirements of the Act and regulations*, and must not exceed the maximum payment amounts set forth in Subpart H of this Part. Agency Memo. at 13 (emphasis in original), citing 35 Ill. Adm. Code 734.510(b).

The Agency stated that, having rejected Chatham BP’s proposed Stage 2 Site Investigation Plan, it also rejected the budget for the plan. Agency Memo. at 14, citing R. at 183.

The Agency argued that, in the absence of an approved plan, it could not reach any determination regarding an associated budget. The Agency further argued that, having rejected Chatham BP’s Stage 2 site investigation plan, it “could not review the associated budget in keeping with the requirements of Section 734.510(b).” Agency Memo. at 14, citing 35 Ill. Adm. Code 734.510(b); *see* Agency Mot. at 2. The Agency concluded that it correctly rejected that budget and “is thus entitled to summary judgment as a matter of law.” Agency Memo. at 14; *see* Agency Mot. at 2.

Reduction of Reimbursement for Drum Disposal

The Agency acknowledged that it reduced Stage 1 drum disposal costs submitted by Chatham BP after determining that “four of the eight drums listed for solid waste disposal exceed the minimum requirements necessary to comply with the Act.” R. at 182; *see* Agency Memo. at 15.

The Agency stated that Eric Kuhlman, an Agency engineer and project manager, reviewed the plan and budget submitted by Chatham BP. Agency Memo. at 15, citing Att. A. at ¶5. The Agency noted that Chatham BP’s drilling costs reported seven borings and that its remediation costs listed disposal of eight drums of solid waste. Agency Memo. at 15, citing R. at 49; Att. A at ¶¶7, 12; *see* R. at 53. The Agency claimed that, because these disposal costs seemed excessive to Mr. Kuhlman, he examined the matter “by making several calculations.” Agency Memo. at 15. Specifically, he employed a computer spreadsheet and “used the diameters and heights of the borings as reported in the submitted materials to calculate the volume of the borings.” Agency Memo. at 15, citing Att. A at ¶13. After applying a safety factor of 50 percent, dividing that volume by the 55-gallon volume of a single drum, and rounding the number up, he determined that four 55-gallon drums were sufficient for disposal of seven borings. Agency Memo. at 15-16, citing Att. A at ¶13. He concluded that eight drums exceeded “the minimum requirements necessary to comply with the Act and regulations.” Agency Memo. at 16, citing Att. A at ¶13.

The Agency argued that, because Mr. Kuhlman’s calculations are mathematical in nature and relied on data submitted by Chatham BP, there is no genuine issue of material fact that no more than four 55-gallon drums were necessary to dispose of materials extracted from borings at the site. Agency Memo. at 16; *see* Agency Mot. at 2. The Agency claimed that, because Chatham BP’s costs exceeded those necessary to meet the minimum requirements, it properly exercised its authority to reduce the number of approved drums from eight to four. Agency Memo. at 16-17, citing 35 Ill. Adm. Code 734.505(b). The Agency concluded that, because its modification was correct, it is entitled to summary judgment as a matter of law. Agency Memo. at 17; Agency Mot. at 2.

SUMMARY OF AGENCY’S RESPONSE TO CHATHAM BP’S MOTION FOR SUMMARY JUDGMENT

Rejection of Stage Site Investigation Plan

The Agency argued that, because Chatham BP’s Stage 1 activities completed identification of on-site contamination, the UST regulations required it “to cease its on-site investigation.” Agency Resp. at 3, citing 35 Ill. Adm. Code 734.310; R. at 11, 89-90; Att. A at ¶¶9, 14. The Agency claimed that approving additional site investigation would violate authorities “prohibiting activities in excess of those required or necessary to meet minimum requirements.” Agency Resp. at 3, citing 415 ILCS 5/57.7(c) (2012). The Agency argued that Chatham BP cannot prove that its Stage 2 plan and budget would not violate the Act and Board regulations. Agency Resp. at 3. The Agency further argued that the Board should deny Chatham BP’s motion for summary judgment. *Id.*

Section 734.315(c)

The Agency stated that Chatham BP's petition and motion for summary judgment claim that the Agency's rejection of the Stage 2 plan was contrary to Section 734.315(c). Agency Resp. at 4; *see* 35 Ill. Adm. Code 734.315(c); Pet. at 5-6; Pet. Mot. at 4-5. The Agency summarized these claims as arguing that Chatham BP's "Stage 1 site investigation collected contaminated samples, and thus it had no choice but to submit a Stage 2 site investigation plan pursuant to the last sentence of subsection 734.315(c)." Agency Resp. at 4. The Agency claimed that Chatham BP had viewed this subsection in isolation and overlooked the overall scheme of the UST program. *Id.* (citation omitted). The Agency argued that the Act and regulations "repeatedly prohibit reimbursement to tank owners or operators for activities exceeding the minimum requirements of the LUST Program." *Id.*, citing 415 ILCS 5/57.5(a), 57.5(h), 57.7(c)(3); 35 Ill. Adm. Code 734.510(b), 734.630(o). The Agency added that "Section 734.310 requires that investigation cease once the extent of contamination has been defined." Agency Resp. at 5, citing 35 Ill. Adm. Code 734.310. The Agency concluded that, although samples at the site detected excessive contamination, Section 734.315(c) did not apply. Agency Resp. at 5. The Agency claimed that Chatham BP could not submit a Stage 2 site investigation plan under that subsection without violating prohibitions against activities exceeding minimum requirements of the UST program. *Id.*

Submission of Stage 3 Site Investigation Plan

The Agency noted Chatham BP's argument that Section 734.320(c) does not apply to the site because it had proposed Stage 2 investigation activities. Agency Resp. at 6, citing Pet. at 6, Pet. Mot. at 6. The Agency restated Chatham BP's argument as a claim that, because it had proposed Stage 2 site investigation activities, it should not yet move to Stage 3. Agency Resp. at 6.

The Agency argued that the record shows "the monitoring well along the western property line, MW-1, as well as a soil sample taken from that well detected excessive contamination, while the monitoring wells along the northern, eastern, and southern property lines as well as soil samples taken from those wells did not detect excessive levels." Agency Resp. at 6, citing R. at 89-90; Att. A at ¶8. The Agency argued that Chatham BP had defined the extent of on-site contamination during Stage 1 investigation and could no longer properly propose Stage 2 investigation activities. Agency Resp. at 7. The Agency added that Chatham BP "has solid information in hand that off-site contamination may exist west across the property line from that monitoring well [MW-1]. Further on-site investigation will not change that fact, and under the LUST Program, the Petitioner should now be investigating off-site contamination and not the on-site contamination that already has been defined." *Id.*

The Agency claimed that additional on-site investigation would violate Section 734.310 and various authorities prohibiting activities exceeding minimum requirements. Agency Resp. at 7, citing 415 ILCS 5/57.7(c) (2012); 35 Ill. Adm. Code 734.310. The Agency concluded that Chatham BP cannot meet its burden of proving that its plan would not violate the Act and Board

regulations. Agency Resp. at 7. The Agency argued that the Board should deny Chatham BP's motion for summary judgment. *Id.*

Reduction of Reimbursement for Drum Disposal

The Agency claimed that it determined the volume of material for disposal from the site by calculating the volume of the monitoring well and soil borings and applying a safety factor to it. Agency Resp. at 8, citing Agency Mot. at 14-17; Att. A at ¶¶12-13. Based on this calculation, the Agency determined that materials at the site required no more than four 55-gallon drums for disposal. Agency Resp. at 8. The Agency argued that reimbursement for the eight drums sought by Chatham BP exceeded the minimum requirements of the Act. *Id.*, citing 415 ILCS 5/57.7(c)(3) (2012); 35 Ill. Adm. Code 734.510(b), 734.630(o).

The Agency noted that Chatham BP relied upon 35 Ill. Adm. Code 734.505(b) and Dickerson Petroleum, Inc. v. IEPA, PCB 9-87, 10-5 (cons.) (Feb. 4, 2010), to argue that this determination was "impermissibly vague." Agency Resp. at 8, citing Pet. Mot. at 7. The Agency claimed that its decision letter in Dickerson "failed to cite any sections of the Act or regulations that may be violated if the plan, budget, or report were approved; failed to provide a statement of specific reasons why such a provision may be violated; and contained a conclusory statement that an incident was not subject to the UST program." Agency Resp. at 8-9, citing Dickerson Petroleum, slip op. at 27-28. In this case, that Agency argued that its decision letter named sections of the Act and regulations that would be violated if it approved Chatham BP's submission and explained that they would be violated "because costs exceeding the minimum requirements are not eligible for payment from the fund." Agency Resp. at 8, citing R. at 182.

The Agency also noted Chatham BP's suggestion that the decision letter should have included the Agency's calculations and inputs to them. Agency Resp. at 9; *see* Pet. Mot. at 8. The Agency argued that, although Section 734.505(b) obligates it to provide a "statement of specific reasons" why approval of the submission would violate cited authorities, "it does not require the formulas and calculations behind the reasons." Agency Resp. at 9; *see* 35 Ill. Adm. Code 734.505(b). The Agency concluded that Chatham BP's request violated the Act and UST regulations by seeking reimbursement for disposal of a volume of materials greater than the volume excavated by monitoring well and soil borings, which exceeded the minimum requirements of the UST program. Agency Resp. at 10. The Agency argued that Chatham BP "cannot meet its burden to prove that its submitted drum disposal costs would not violate the Act and Board regulations, and therefore, this Board should deny the Petitioner's motion for summary judgment." *Id.*

In addition, the Agency referred to Chatham BP's request that the Board not remand the case to the Agency for correction of alleged deficiencies in the decision letter. Agency Resp. at 10; *see* Pet. Mot. at 8. Chatham BP specifically requested that the Board reinstate budget reductions made by the Agency. Pet. Mot. at 9. The Agency responded that, if the Board found its decision letter deficient under Section 734.505(b), "the appropriate remedy is not the 'different outcome' from Dickerson that the Petitioner seeks but the same remedy: a remand to cure the deficiencies by reissuing the decision letter." Agency Resp. at 10.

**SUMMARY OF CHATHAM BP'S RESPONSE TO
AGENCY'S MOTION FOR SUMMARY JUDGMENT**

Kuhlman Affidavit and Agency Decision Letter

Chatham BP stated that, although the administrative record includes Mr. Kuhlman's reviewer notes, those notes do not refer to "any consideration of, or rationale for, rejecting the Stage 2 plan and requiring Petitioner to move directly to Stage 3." Pet. Resp. at 2, citing R. at 178 (reviewer notes dated May 8, 2013). Chatham BP argues that Mr. Kuhlman's affidavit includes recommendations adopted by the Agency in its decision letter. Pet. Resp. at 2, citing Att. A at ¶¶9, 10, 11, 14. Chatham BP claims that these recommendations are not reflected in the administrative record and do not appear to have been before the Agency at the time it issued its decision letter. Pet. Resp. at 2-3; *see id.* at 6.

Chatham BP noted that the Agency's decision letter stated that "[t]he 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.*" Pet. Resp. at 2 (emphasis in original), citing R. at 181. Chatham BP also referred to Mr. Kuhlman's affidavit, which stated in part that "I concluded that the extent of soil contamination had been defined along the property boundaries lines to the north, east, and south, but not to the west. Therefore, a Stage 3 Site Investigation Plan was necessary to define the extent of soil contamination farther to the west." Att. A at ¶9; *see* Pet. Resp. at 2. Chatham BP argued that the affidavit sought to amend the Agency's decision letter to state that Chatham BP had "failed to define the extent of the soil contamination *farther* to the west – *i.e.*, off-site." Pet. Resp. at 2 (emphasis in original), citing Agency Memo. at 10; Att. A at ¶9.

Chatham BP stated that the Agency "is bound by the decision it rendered" and that "the Agency's decision letter frames the issues in the appeal." Pet. Resp. at 2, citing Pulitzer Community Newspapers, Inc. v. IEPA, PCB 90-142 (Dec. 20, 1990).

Site Investigation Requirements

Chatham BP noted that the Agency relied on 35 Ill. Adm. Code 734.310 to direct it to proceed to Stage 3 site investigation. Pet. Resp. at 3. Chatham BP claimed that the Agency had mischaracterized this provision, which provides in pertinent part that

[t]he investigation of the release must proceed in three stages as set forth in this Part. If, after the completion of any stage, the extent of the soil and groundwater contamination exceeding the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants as a result of the release has been defined, the owner or operator must cease investigation and proceed with the submission of a site investigation completion report in accordance with Section 734.330 of this Part. 35 Ill. Adm. Code 734.310.

Chatham BP argues that this language requires submission of a site investigation completion report and not proceeding to a subsequent stage of the site investigation. Pet. Resp. at 3.

Chatham BP also argues that Agency itself recognizes that the extent of the release has not been defined, which requires additional site investigation. *Id.*

Chatham BP also noted that the Agency had relied on 35 Ill. Adm. Code 734.320(c) to direct it to proceed to Stage 3. Pet. Resp. at 3. That subsection provides in pertinent part that,

[i]f 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. Pet. Resp. at 3 (emphasis in original), citing 35 Ill. Adm. Code 734.320(c).

Chatham BP argued that the Agency overlooked the word “and,” which requires that two conditions must be met in order to proceed to Stage 3. Chatham BP stated that its submission to the Agency proposed Stage 2 site investigation activities. Pet. Resp. at 3; *see id.* at 6.

Addressing the substance of the plan it submitted to the Agency, Chatham BP argued that it “is quite reasonable given the limited additional work proposed. . . .” Pet. Resp. at 3. Chatham BP stated that it proposed additional monitoring wells north and south of MW-1 “to better determine contamination in the western part of the site.” *Id.* at 4, citing R. at 31 (Proposed Monitoring Well Location Map). Chatham BP also stated that it proposed additional soil borings “outside of the area known to be contaminated and inside the outer wells done earlier.” Pet. Resp. at 4; *see* R. at 29 (Proposed Soil Boring Location Map). Chatham BP argued that, “[w]hile it is clear the Agency does not think these are necessary, there is nothing in the Administrative Record to support such a conclusion. . . .” Pet. Resp. at 4.

Chatham BP noted the Agency’s argument that the Board had rejected a “contention that additional Stage 2 site investigation is warranted to further define the plume . . .” but characterized that argument as “disingenuous” and a “ridiculous claim.” Pet. Resp. at 4, citing L. Keller Oil Properties, Inc./Farina v. IEPA, PCB 07-147 (Dec. 6, 2007). Chatham BP argued that “[t]his 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.” Pet. Resp. at 4. Chatham BP stated that the Board partially affirmed and partially reversed the Agency’s determinations in Keller. *Id.* Chatham BP argued that, because the Board directed Keller to submit an amended Stage 2 plan, “[t]his directly contradicts the Agency’s assertion that Keller rejected the contention that additional Stage 2 investigation was necessary.” *Id.*, citing Keller, slip op. at 49.

Chatham BP added that, “[a]s 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.” Pet. Resp. at 6.

Reduction of Reimbursement for Drum Disposal

Chatham BP stated that Section 105.410(b)(4) of the Board’s procedural rules requires that the record of the Agency’s decision must include specific items and “[a]ny other information the Agency relied upon in making its determination. “ 35 Ill. Adm. Code 105.410(b)(4). Chatham BP noted that Mr. Kuhlman’s affidavit explains calculations he performed regarding appropriate waste disposal volumes. Pet. Resp. at 5. Chatham BP argued that, because these calculations are not reflected in the Agency’s administrative record, they were apparently not before the Agency when it reached its determination and issued its decision letter. *Id.*; *see id.* at 6. Chatham BP claimed that the Agency’s reduction of these disposal costs “is not based in reality nor supported by any rationale. . . .” *Id.* at 6, citing 35 Ill. Adm. Code 734.505(b).

Although Chatham BP claimed that these calculations must be ignored, it argued that they “could not be accurate.” Pet. Resp. at 5. Chatham BP stated that, although Mr. Kuhlman claimed to have relied on the dimensions of reported borings, the record does not include a diameter for SB-1, SB-2, MW-1, MW-2, MW-3, MW-4, or MW-5. *Id.*; *see id.* at 6-7. Although Chatham BP acknowledged that it identified the diameter of five monitoring wells to be two inches, “the diameter of the wells may not be assumed to be the same as the boring auger that was used.” *Id.*, citing R. at 49. Chatham BP stated that, although the record includes boring logs for five monitoring wells and two soil borings, those do not report the size of the bore holes. Pet. Resp. at 5-6. Chatham BP added that “these borings are not the same as the geo-probe drillings [A1-A9] that were in fact 2.00 inches in diameter.” *Id.* at 6, citing R. at 110-23; *see* R. at 27, 29, 34-35. Chatham BP concluded that, “[s]ince 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.” Pet. Resp. at 6.

Summary

Chatham BP renews its request that the Board grants its motion for summary judgment, deny the Agency’s cross-motion for summary judgment, and reverse the Agency’s May 28, 2013 determination and order the Agency “to approve Petitioner’s Amended Stage 2 Site Investigation Plan and its related budget and reinstate all budget reductions made in that decision.” Pet. Resp. at 6.

STATUTORY AND LEGAL BACKGROUND

Title XVI of the Act and Part 734 of the Board’s Regulations

Title XVI of the Act provides for administration and oversight of the Leaking Underground Storage Tank Program, which includes the UST Fund and requirements for reimbursement from it. 415 ILCS 5/57-57.18 (2012).

Section 57.1(a) of the Act provides in its entirety that “[a]n owner or operator of an underground storage tank who meets the definition of this Title [XVI] shall be required to conduct tank removal, abandonment and repair, site investigation, and corrective action in

accordance with the requirements of the Leaking Underground Storage Tank Program.” 415 ILCS 5/57.1(a) (2012).

Section 57.7 of the Act addresses site investigation. Subsection (a)(1) provides in its entirety that,

[f]or any site investigation activities required by statute or rule, the owner or operator shall submit to the Agency for approval a site investigation plan designed to determine the nature, concentration, direction of movement, rate of movement, and extent of the contamination as well as the significant physical features of the site and surrounding area that may affect contaminant transport and risk to human health and safety and the environment. 415 ILCS 5/57.7(a)(1) (2012).

Subsection (a)(2) provides in its entirety that “[a]ny owner or operator intending to seek payment from the Fund shall submit to the Agency for approval a site investigation budget that includes, but is not limited to, an accounting of all costs associated with the implementation and completion of the site investigation plan.” 415 ILCS 5/57.7(a)(2) (2012). Subsection (a)(5) provides in pertinent part that, “[w]ithin 30 days after completing the site investigation, the owner or operator shall submit to the Agency for approval a site investigation completion report” including at a minimum seven specified elements. 415 ILCS 5/57.7(a)(5) (2012); *see* 35 Ill. Adm. Code 734.330. Subsection (c)(3) provides in pertinent part that,

[i]n approving any plan submitted pursuant to subsection (a) [Site Investigation] or (b) [Corrective Action] of this Section, the Agency shall 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 site investigation or corrective action activities in excess of those required to meet the minimum requirements of this Title [XVI]. 415 ILCS 5/57.7(c)(3) (2012); *see* 35 Ill. Adm. Code 734.630(o).

Sections 57.12(c) and (d) of the Act provide in pertinent part that

- (c) The Agency has the authority to do either of the following:
- (1) Provide notice to the owner or operator, or both, of an underground storage tank whenever there is a release or substantial threat of a release of petroleum from such tank. Such notice shall include the identified investigation or response action and an opportunity for the owner or operator, or both, to perform the response action.
* * *
- (d) If notice has been provided under this Section, the Agency has the authority to require the owner or operator, or both, of an underground storage tank to undertake preventive or corrective action whenever there is a release or substantial threat of a release of petroleum from such tank. 415 ILCS 57.12(c), (d) (2012); *see* 35 Ill. Adm. Code 734.100, 734.125.

Section 734.310 of the Board's UST rules addresses site investigation generally and provides in pertinent part that

The investigation of the release must proceed in three stages as set forth in this Part. If, after the completion of any stage, the extent of the soil and groundwater contamination exceeding the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants as a result of the release has been defined, the owner or operator must cease investigation and proceed with the submission of a site investigation completion report in accordance with Section 734.330 of this Part.

* * *

- (b) Any owner or operator intending to seek payment from the Fund must, prior to conducting any site investigation activities, submit to the Agency a site investigation budget with the corresponding site investigation plan. . . . Site investigation budgets should be consistent with the eligible and ineligible costs listed at Sections 734.625 and 734.630 of this Part and the maximum payment amounts set forth in Subpart H of this Part. . . . 35 Ill. Adm. Code 734.310.

Section 734.315(c) of the Board's UST rules provides in pertinent part that,

[i]f 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. 35 Ill. Adm. Code 734.315(c).

Section 734.320 of the Board's UST rules provides in pertinent part that

[t]he Stage 2 site investigation must be designed to complete the identification of the extent of soil and groundwater contamination at the site that, as a result of the release, exceeds the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants. The investigation of any off-site contamination must be conducted as part of the Stage 3 site investigation.

* * *

- c) . . . 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. 35 Ill. Adm. Code 734.320.

Section 734.325 of the Board's UST regulations provides in pertinent part that "[t]he Stage 3 site investigation must be designed to identify the extent of off-site soil and groundwater contamination that, as a result of the release, exceeds the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants." 35 Ill. Adm. Code 734.325.

Section 734.505(b) of the Board's UST regulations addresses the Agency's review of plans and budgets and provides in pertinent part that

- b) The 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)

Section 734.510 of the Board's UST regulations addresses standards for the Agency's review of plans and budget and provides in pertinent part that

- (a) A technical review must consist of a detailed review of the steps proposed or completed to accomplish the goals of the plan and to achieve compliance with the Act and regulations. Items to be reviewed, if applicable, must include, but not be limited to, number and placement of wells and borings, number and types of samples and analysis, results of sample analysis, and protocols to be followed in making determinations. The overall goal of the technical review for plans must be to determine if the plan is sufficient to satisfy the requirements of the Act and regulations. . . .
- (b) A financial review must consist of a detailed review of the costs associated with each element necessary to accomplish the goals of the plan as required pursuant to the Act and regulations. Items to be reviewed must include, but are not limited to, costs associated with any materials, activities, or services that are included in the budget. The overall goal of the financial review must be to assure that costs associated with materials, activities, and services must be reasonable, must be consistent with the

associated technical plan, must be incurred in the performance of corrective action activities, must not be used for corrective action activities in excess of those necessary to meet the minimum requirements of the Act and regulations. . . . 35 Ill. Adm. Code 734.510.

Section 57.7(c)(4) of the Act provides that “[a]ny action by the Agency to disapprove or modify a plan or report . . . shall be subject to appeal to the Board in accordance with the procedures of Section 40.” 415 ILCS 5/57.7(c)(4) (2012); *see* 415 ILCS 5/40 (2012). For the purposes of Title XVI, “plan” includes any site investigation plan or budget submitted pursuant to Section 57.7(a). 415 ILCS 5/57.7(c)(5)(A, B) (2012). Section 57.8(i) of the Act provides in its entirety that, “[i]f the Agency refuses to pay or authorizes only a partial payment, the affected owner or operator may petition the Board for a hearing in the manner provided for the review of permit decisions in Section 40 of this Act.” 415 ILCS 5/57.8(i) (2012). Section 734.505(f) of the Board’s UST rules provides in its entirety that “[a]ny action by the Agency to reject or require modifications, or rejection by failure to act, of a plan, budget, or report must be subject to appeal to the Board within 35 days after the Agency’s final action in the manner provided for the review of permit decisions in Section 40 of the Act.” 35 Ill. Adm. Code 734.505(f); *see* 415 ILCS 5/40 (2012).

Summary Judgment

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) (Motions for Summary Judgment). 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.* However, a party opposing a motion for summary judgment may not rest on its pleadings but must “present a factual basis which would arguably entitle [it] to judgment.” *Gauthier v. Westfall*, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

Where the parties file cross-motions for summary judgment, “they agree that no issues of material fact exist and invite the court to decide the issues presented as questions of law.” *Village of Oak Lawn v. Faber*, 378 Ill. App. 3d 458, 462, 885 N.E.2d 386 (1st Dist. 2007). “However, the mere filing of cross-motions for summary judgment does not preclude a determination that triable issues of fact remain.” *Id.*

In determining whether to grant a motion for summary judgment, the Board must look to the burden of proof in this UST appeal and the arguments presented by the parties.

Standard of Review and Burden of Proof

The standard of review under Section 40 of the Act (415 ILCS 5/40 (2012)) is whether Chatham BP's submissions to the Agency would not violate the Act and Board regulations. Ted Harrison Oil Co. v. IEPA, PCB 99-127, slip op. at 5 (July 24, 2003); citing Browning Ferris Indus. of Ill. v. PCB, 534 N.E.2d 616 (2nd Dist. 1989). The Board will not consider new information that was not before the Agency prior to its final determination regarding the issues on appeal. Kathe's Auto Serv. Ctr. v. IEPA, PCB 95-43, slip op. at 14 (May 18, 1995). The Agency's denial letter frames the issues on appeal. Pulitzer Cmty. Newspapers, Inc. v. IEPA, PCB 90-142 (Dec. 20, 1990).

The Board's procedural rules provide that, in appeals of final Agency determinations, "[t]he burden of proof shall be on the petitioner. . . ." 35 Ill. Adm. Code 105.112(a), citing 415 ILCS 5/40(a)(1), 40(b), 40(e)(3), 40.2(a).

BOARD DISCUSSION

Rejection of Stage 2 Site Investigation Plan and Budget and Requiring Submission of Stage 3 Site Investigation Plan

The parties have filed cross motions for summary judgment and argued that there are no issues of material fact in this matter. Pet. Mot at 1; Agency Mot. at 1-2. The Board has reviewed the record and agrees that there are no issues of material fact regarding these matters and that summary judgment is appropriate. *See Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998).

The Board first notes that pre-Stage 1 samples A-1, A-2, A-3, A-4, A-5, A-7, A-8, and A-9, all in the immediate vicinity of the tank bed, exceeded Tier 1 remediation objectives for one or more indicator contaminants. R. at 34-35, 85-87. This triggered further investigation of the site under the Board's UST regulations, which provide that site investigation proceeds in three stages. 35 Ill. Adm. Code 734.310.

At Stage 1, this investigation gathers "initial information regarding the extent of on-site soil and groundwater contamination that, as a result of the release, exceeds the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 for the applicable indicator contaminants." 35 Ill. Adm. Code 734.315. To complete Stage 1 investigation at its site, Chatham BP advanced five monitoring wells, four of which included soil samples, and two soil borings. R. at 6; *see* 35 Ill. Adm. Code 734.315(a), R. at 89-90 (results). While monitoring well MW-5 was installed near the tank bed, the remaining four wells were advanced along site boundaries to the west (MW-1), south (MW-2), east (MW-3), and north (MW-4). R. at 30. Soil boring SB-1 was located a short distance northeast of the tank field in the direction of the car wash, and SB-2 was located directly north of the tank field between the car wash and convenience store. *Id.* at 29.

As noted above under "Factual Background," analytical results of soil and groundwater samples from MW-1, MW-5, SB-1, and SB-2 showed concentrations of one or more indicator

contaminants exceeding the most stringent Tier 1 objectives. R. at 34-36, 89-90. Soil and groundwater samples from MW-2, MW-3, and MW-4 did not exceed Tier 1 objectives.

The Board's UST regulations require that, if one or more Stage 1 samples exceed the most stringent Tier 1 remediation objectives, then within 30 days the owner or operator must submit a Stage 2 site investigation plan to the Agency. 35 Ill. Adm. Code 734.315(c). Stage 2 investigations complete identification of the extent of soil and groundwater contamination at the site. 35 Ill. Adm. Code 734.320. The Board's UST regulations also establish that investigation of any off-site contamination must be conducted as part of a Stage 3 investigation. 35 Ill. Adm. Code 734.320.

Chatham BP submitted to the Agency a proposed Stage 2 site investigation plan and budget for the site. R. at 3-12. The plan includes additional monitoring wells and soil borings intended "to complete and more narrowly define the on-site plume, where possible." *Id.* at 8. The Agency's review of the proposed plan concluded that Chatham BP's Stage 1 activities had defined the extent of on-site contamination along the boundaries of the sites to the north, east, and south but failed to define the extent of soil contamination to the west. R. at 179-91; Agency Memo. at 10, 12. The Agency rejected the plan and directed Chatham BP to proceed to Stage 3 investigation of off-site contamination to the west. R. at 179, 181; *see* 35 Ill. Adm. Code 734.320(c).

The parties disagree about what is required to define the extent of on-site contamination. The Agency maintains that Chatham BP's Stage 1 activities defined that extent. Agency Memo. at 11-12. The Agency thus argued that any additional on-site investigation would exceed the minimum requirements of the Act. *Id.* at 12. The Agency also argued that, because MW-1 along the western boundary showed contamination exceeding Tier 1 objectives, further investigation must define the extent of off-site contamination under Stage 3. R. at 181. Chatham BP, on the other hand, argues that the proposed on-site investigation under Stage 2 is necessary to define the extent of contamination specifically enough to show exactly where it may extend off-site. Pet. Mot. at 7-8.

The Board agrees with the Agency that, if any stage of site investigation completes definition of the extent of contamination (on-site and off-site), then the owner or operator must skip any remaining stages and submit a site investigation completion report. *See* 35 Ill. Adm. Code 734.310, 734.330. In this case, however, the Agency's denial letter states that Chatham BP "has failed to define the extent of soil contamination to the west." R. at 181. Also, as discussed below, the Board finds that additional on-site investigation is necessary to complete identification of the extent of contamination in other areas of the site. The Board addresses the elements of Chatham BP's proposed Stage 2 plan separately in the following subsections.

Monitoring Wells along Western Boundary of Site

At Stage 1, MW-1, located directly to the west of the tank field, showed soil and groundwater contamination above Tier 1 remediation objectives for certain indicator contaminants. *Id.*, at 34, 36, 89. Chatham BP proposed two monitoring wells with soil samples along the western boundary of the site, one to the north of MW-1 and one to the south of it. R. at

31. However, other than MW-2 directly south of the tank field, the Stage 1 investigation did not address the area southwest from the tank field or determine the extent of contamination south from MW-1 along the western boundary. *See* R. at 30. Similarly, other than MW-4 and SB-2 directly north of the tank field, Stage 1 did not address the area northwest from the tank field or determine the extent of contamination north from MW-1 along the western boundary. *Id.* Consequently, the Board agrees with Chatham BP that the proposed monitoring wells along the western boundaries of the site are necessary to complete definition of the extent of on-site contamination. The Board finds that these two proposed wells do not exceed the minimum requirements of the Act and Board's regulations.

Proposed Soil Borings to East of Tank Field

Chatham BP proposed two additional soil borings to the east of the tank field. The first is located directly east of SB-1 approximately halfway between the tank field and the eastern boundary of the site. R. at 29. The second is located southeast of the tank field approximately halfway between it and the eastern boundary. *Id.* The Board notes that SB-1 and pre-Stage 1 samples A-2 and A-3, all located just to the east of the tank field, each showed levels of one or more indicator contaminants exceeding remediation objectives. *Id.* at 34-35, 89.

Because MW-3 at the eastern boundary of the site did not show indicator contaminants exceeding those objectives, the Agency concluded that Chatham BP had identified the extent of soil contamination along the east boundary. R. at 181; Ag. Mot. at 9-10. The Agency cited L. Keller Oil Properties, Inc./Farina v. IEPA, PCB 07-147 (Dec. 6, 2007), in which "the petitioner had already established that soil contamination extended beyond the proposed borings. . . ." Ag. Mot. at 11, citing Keller, slip. op. at 45. In that case, the Agency argued, the Board agreed that additional sampling between the tank field and a monitoring well already known to be contaminated beyond remediation objectives exceeded the requirements of the Act. Agency Memo. at 11, citing Keller, slip op. at 46.

However, Chatham BP argues that these two soil borings are necessary to identify the extent of soil contamination up to the site's boundaries and meet the requirements of Stage 2. Pet. Mot. at 6. The Board agrees with Chatham BP that these two proposed borings are necessary to identify the extent to which contamination may extend from the tank field and SB-1, A-1, and A-2 to the east and southeast areas of the site. In reaching this position, the Board finds the Agency's citation to Keller unpersuasive. In this case, the record does not show that soil contamination extends beyond Chatham BP's proposed borings. Chatham BP proposed to determine the extent to which contamination extends from the tank field, where samples exceed remediation objectives, to the site boundaries, where those objectives are not exceeded. Accordingly, the Board finds that these two proposed borings do not exceed the minimum requirements of the Act and the Board's regulations.

Proposed Soil Borings to the North of the Tank Field

Chatham BP proposed three additional soil borings to the north of the tank field, one to the north of SB-2 approximately halfway between SB-2 and the northern boundary of the site, and a second northeast of the tank field approximately halfway to the northern boundary near the

north wall of the car wash. R. at 29. Chatham BP also proposed a boring to the west of MW-4 near the northern boundary. *Id.* The Board notes that SB-2 and A-1, both located to the north of the tank field, showed levels of one or more indicator contaminants exceeding remediation objectives. *Id.* at 34-35.

Because MW-4 at the northern boundary did not show indicator contaminants exceeding those objectives, the Agency concluded that Chatham BP had identified the extent of soil contamination along the north boundary. R. at 191; Agency Memo. at 9-10.

However, Chatham BP argues that these additional soil borings are necessary to identify the extent of soil contamination up to the site's boundaries and meet the requirements of Stage 2. Pet. Mot. at 6. In addition, the proposed Stage 2 plan states that the proposed boring to the west of MW-4 would be used to develop site-specific parameters necessary to determine remediation objectives. R. at 12-14. The Board agrees with Chatham BP that the first two of these three additional borings are necessary to identify the extent to which contamination may extend from the tank field and SB-2 and A-1 to the northern areas of the site. In addition, the Board agrees that the proposed boring to the west of MW-4 is necessary to obtain site-specific parameters and determine remediation objectives. As it did in addressing proposed borings to the east of the tank field, the Board finds the Agency's citation to Keller unpersuasive. Accordingly, the Board finds that these three proposed borings do not exceed the minimum requirements of the Act and the Board's regulations.

Summary

The Board finds that Chatham BP's Stage 1 site investigation has not completed identification of the extent of on-site soil and groundwater contamination. Based on its review of the record, the Board finds that Chatham BP's proposed Stage 2 site investigation plan is necessary to define the extent of on-site contamination exceeding the most stringent Tier 1 remediation objectives at 35 Ill. Adm. Code 742. The Board therefore finds that the proposed plan does not exceed the minimum requirements of the Act and the Board's regulations. On this issue, the Board grants Chatham BP's motion for summary judgment, denies the Agency's cross-motion for summary judgment, and reverses the Agency's rejection of Chatham BP's proposed Stage 2 site investigation plan.

However, the Agency's May 28, 2013 determination also rejected Chatham BP's proposed Stage 2 budget because it had "not approved the plan with which the budget is associated. Until such time as the plan is approved, a determination regarding the associated budget . . . cannot be made." R. at 183, citing 415 ILCS 5/57.7(c)(3); 35 Ill. Adm. Code 734.510(b). Having reversed the Agency's rejection of Chatham BP's proposed plan, the Board at the conclusion of this case will remand to the Agency for its review of Chatham BP's proposed Stage 2 site investigation budget.

Reduction of Reimbursement for Drum Disposal

The parties have filed cross-motions for summary judgment arguing that there is no genuine issue of material fact on the issue of reimbursement of drum disposal costs. Pet. Mot. at

1; Agency Mot. at 2. As discussed below, the Board finds that a genuine issue of material fact exists on this issue and directs the parties to hearing on it.

Chatham BP asserts that Stage 1 activities at the site actually generated eight drums of material that required disposal. Pet. Mot. at 7. Chatham BP argues that it was not necessary or appropriate for the Agency to calculate the number of drums that required disposal. *Id.* Chatham BP claims that the Board's regulations do not limit the number of drums of waste that may be generated during site investigation.

However, the Agency states that its reviewer, Mr. Kuhlman, calculated the number of drums necessary for disposal of materials from the site because Chatham BP's costs seemed excessive. Agency Memo. at 15. He determined that number by calculating the volume of the borings with the diameter and depth of the borings reported by Chatham BP and applying a 50 percent fluff factor. Agency Memo. at 15, citing Att. A at ¶13. By dividing this volume by the 55-gallon volume of a single drum and rounding that number up, Mr. Kuhlman determined that four 55-gallon drums were sufficient for disposal of materials from seven borings. Agency Memo. at 15-16, citing Att. A at ¶13.

Chatham BP claims that the Board should overlook Mr. Kuhlman's calculations because the affidavit explaining them is not reflected in the Agency's record and was therefore not before the Agency when it reached its decision. Pet. Resp. at 5-6. Chatham BP also questioned Mr. Kuhlman's accuracy, since the record does not include the diameter of borings SB-1, SB-2, MW-1, MW-2, MW-3, MW-4, or MW-5. *Id.* Chatham BP argues that the diameter of the monitoring wells cannot be assumed to be the same as the boring auger used to drill them. *Id.*, citing R. at 49. Chatham BP claimed that the boring logs for five monitoring wells and two soil borings do not report the size of the bore holes. Pet. Resp. at 5-6.

Although the Agency explains how it calculated a number of drums for disposal of materials from the site, the Board agrees with Chatham BP that the information used by the Agency's reviewer is not in the record for verification of the calculations. As noted by Chatham BP, the record does not include the diameter of various borings or the size of various bore holes. Pet. Resp. at 5-7. Without further clarification regarding data used to calculate the volume of borings, the Board cannot determine whether drum disposal costs exceed the minimum requirements of the Act and Board regulations. The Board finds that there exists an issue of material fact regarding reimbursement of drum disposal costs. The Board therefore denies the parties' cross-motions for summary judgment and directs the parties to hearing on the issue of drum disposal costs.

CONCLUSION

On the issue of Chatham BP's proposed Stage 2 site investigation plan, the Board for the reasons described above grants Chatham BP's motion for summary judgment, denies the Agency's cross-motion for summary judgment, and reverses the Agency's rejection of Chatham BP's proposed Stage 2 site investigation plan. Having reversed the Agency's rejection of that proposed plan, the Board at the conclusion of this case will remand to the Agency for its review of Chatham BP's proposed Stage 2 site investigation budget.

On the issue of Chatham BP's drum disposal costs, the Board for the reasons described above finds that there exists an issue of material fact. The Board therefore denies the parties' motions for summary judgment and directs the parties to proceed to hearing on that issue.

ORDER

- 1) On the issue of Chatham BP's proposed Stage 2 site investigation plan, the Board grants Chatham BP's motion for summary judgment, denies the Agency's cross-motion for summary judgment; and reverses the Agency's rejection of Chatham BP's proposed Stage 2 site investigation plan. At the conclusion of this case, the Board will remand to the Agency for review of Chatham BP's proposed Stage 2 site investigation budget.
- 2) On the issue of Chatham BP's drum disposal costs, the Board finds that there exists a genuine issue of material fact and directs the parties to proceed to hearing on that issue.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2012); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on January 9, 2014, by a vote of 4-0.



John T. Therriault, Clerk
Illinois Pollution Control Board