

ILLINOIS POLLUTION CONTROL BOARD  
December 18, 2014

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

ORDER OF THE BOARD (by J.D. O’Leary):

Petitioner Chatham BP, LLC (Chatham BP) appealed a May 28, 2013 determination of the Illinois Environmental Protection Agency (Agency). The Agency rejected a Stage 2 site investigation plan and budget and required submission of a Stage 3 site investigation plan. The Agency also modified drum disposal costs for a Stage 1 site investigation. The appeal concerns Chatham BP’s underground storage tank (UST) site at 300 North Main Street, Chatham, Sangamon County.

For the reasons stated below, the Board today grants Chatham BP’s unopposed motion for reconsideration. The Board’s order begins with an abbreviated procedural history and then summarizes Chatham BP’s motion for reconsideration. After providing legal background, the Board then decides the motion and issues its order.

**ABBREVIATED PROCEDURAL HISTORY**

On July 1, 2013, Chatham BP filed its petition for review (Pet.). On August 20, 2013, Chatham BP filed a motion for summary judgment. On August 27, 2013, the Agency filed a cross motion for summary judgment accompanied by a memorandum of law in support of its motion. On September 3, 2013, the Agency filed its response to Chatham BP’s motion for summary judgment. On September 10, 2013, Chatham BP filed its response to the Agency’s motion for summary judgment.

On January 9, 2014, the Board adopted an opinion and order granting Chatham BP’s motion for summary judgment and denying the Agency’s cross-motion for summary judgment on the issue of Chatham BP’s proposed Stage 2 site investigation plan, reversing the Agency’s rejection of that plan. On the issue of Chatham BP’s drum disposal costs, the Board found that an issue of material fact existed. The Board denied the parties’ cross-motions for summary judgment and directed them to proceed to hearing on that issue. The hearing took place on July 29, 2014, in Springfield.

On September 4, 2014, the Board adopted an opinion and order finding that Chatham BP has met its burden of proving that the disputed drum disposal costs would not violate the Act or the Board’s regulations and directing the Agency to reimburse those costs. On October 7,

2014, Chatham BP filed a motion for reconsideration of the Board's September 4, 2014 order (Mot.). The Agency has not responded to the motion.

### **SUMMARY OF CHATHAM BP'S MOTION FOR RECONSIDERATION**

Chatham BP noted that the Board's January 9, 2014 opinion and order granted its motion for summary judgment on the issue of its Stage 2 site investigation plan. Mot. at 1. The order stated that, at the conclusion of the case, the Board would remand to the Agency for review of the proposed Stage 2 site investigation budget. Chatham BP, LLC v. IEPA, PCB 14-1, slip op. at 28 (Jan. 9, 2014). Chatham BP also noted that the Board's September 4, 2014 opinion and order reversed the Agency's reduction in drum disposal costs. *Id.* at 2. The order stated that, pursuant to its January 9, 2014 order, the Board remanded the proposed Stage 2 site investigation budget to the Agency for its review. *Id.* Chatham BP, LLC v. IEPA, PCB 14-1, slip op. at 9 (Sept. 4, 2014).

Chatham BP states that its petition for review requested reasonable attorneys' fees. Mot. at 2; *see Pet. at 7*. Chatham BP notes that the Board's January 9, 2014 order contemplated additional proceedings because it directed the parties to hearing on the issue of drum disposal costs. Mot. at 2; *see Chatham BP, LLC v. IEPA*, PCB 14-1, slip op. at 28 (Jan. 9, 2014). While the Board's September 4, 2014 order addressed those costs and directed the Agency to reimburse them, the order did not address the issue of attorney fees. Mot. at 3. Chatham BP claims that, in similar cases, the Board would typically adopt an interim order. *Id.* at 3, citing Wheeling/GWA Auto Shop v. IEPA, PCB 10-70, slip op. at 9 (July 7, 2011).

Chatham BP surmises that "the Board may have overlooked this issue because the case was partially decided through summary judgment and partially after certain issues were developed through hearing." Mot. at 3. Chatham BP states that, "[n]o matter the cause, there is plenty of time to deal with the attorney fee issue since the time for this motion for reconsideration has not yet expired. . . ." *Id.* Chatham BP noted that its motion was accompanied by a motion for authorization of payment of legal fees and an affidavit and exhibit summarizing fees and costs. *Id.*

Chatham BP requests that the Board reconsider its September 4, 2014 order by re-characterizing it as an interim order "so as to indicate that further proceedings were expected and allowed." Mot. at 4. Chatham BP further requests that the Board modify that order "to include authorization for Petitioner to provide a statement of its legal fees that may be eligible for reimbursement and arguments why the Board should direct reimbursement of those fees from the UST Fund." *Id.*

### **LEGAL BACKGROUND**

#### **Statutory and Regulatory Provisions**

Section 57.8(l) of the Act provides in its entirety that "[c]orrective action does not include legal defense costs. Legal defense costs include legal costs for seeking payment under this Title unless the owner or operator prevails before the Board in which case the Board may authorize payment of legal fees." 415 ILCS 5/57.8(l) (2012).

Section 734.630(g) of the Board's UST regulations provides that costs ineligible for payment from the UST Fund include, but are not limited to, "[l]egal fees or costs, including but not limited to legal fees or costs for seeking payment under this Part [734] unless the owner or operator prevails before the Board and the Board authorizes payment of such costs." 35 Ill. Adm. Code 734.630(g).

### **Motions to Reconsider**

A motion to reconsider may be filed in order "to bring to the [Board's] attention newly discovered evidence which was not available at the time of the hearing, changes in the law or errors in the [Board's] previous application of existing law." Citizens Against Regional Landfill v. County Board of Whiteside County, PCB 92-156, slip op. at 2 (Mar. 11, 1993), citing Korogluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1991); see 35 Ill. Adm. Code 101.902. A motion to reconsider may also specify "facts in the record which were overlooked." Wei Enterprises v. IEPA, PCB 04-23, slip op. at 3 (Feb. 19, 2004).

### **BOARD DISCUSSION**

The Board's procedural rules provide 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). As noted above, the Agency has filed no response to Chatham BP's motion for reconsideration. Although the Agency is deemed to have waived objection to granting the motion, the Board briefly discusses it below.

Chatham BP's petition for review specifically requested that the Board award it relief including "reasonable attorney's fees and expenses related to bringing this action." Pet. at 7. On September 4, 2014, the Board's order directed the Agency to reimburse drum disposal costs without referring to the issue of requested legal fees. Chatham BP persuasively suggests that the Board overlooked this request in proceeding through the stages of its consideration of this case.

The Board grants the unopposed motion for reconsideration. On reconsideration, the Board re-characterizes its September 4, 2014 order as an "interim opinion and order." Chatham BP specifically seeks additional proceedings to allow consideration of requested attorney fees and has submitted its motion for authorization of payment of those fees. The Board amends its order as provided below.

### **CONCLUSION**

The Board grants Chatham BP's unopposed motion to reconsider. Upon reconsideration, the Board re-characterizes its September 4, 2014 opinion and order as "interim opinion and order" and below modifies its order.

**ORDER**

- 1) The Board reverses the Agency's May 28, 2013 determination to reduce Chatham BP's reimbursement of drum disposal costs by \$1,145.92.
- 2) The Board directs the Agency to reimburse Chatham BP \$1,145.92 in drum disposal cost from the UST Fund for a total reimbursement of Stage 1 disposal costs of \$2,291.84.
- 3) The Board accepts Chatham BP's October 7, 2014 motion for authorization of payment of legal fees and accompanying affidavit and exhibit. The Agency may file a response to this motion by Tuesday, January 20, 2015, the first business day after 30 days from the date of this order. The Board reserves ruling on whether to exercise its discretion under Section 57.8(l) of the Act to award legal fees.
- 4) At the conclusion of this case and pursuant to its January 9, 2014 order, the Board will remand Chatham BP's proposed Stage 2 site investigation budget to the Agency for its review.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on December 18, 2014, by a vote of 4-0.



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John T. Therriault, Clerk  
Illinois Pollution Control Board