

ILLINOIS POLLUTION CONTROL BOARD
May 1, 2014

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| 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). In that determination, 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) at 300 North Main Street, Chatham, Sangamon County.

The parties filed cross-motions for summary judgment, which the Board decided in an opinion and order dated January 9, 2014 (Board Order). The Board reversed the Agency’s rejection of Chatham BP’s proposed Stage 2 site investigation plan. The order states that, “[a]t the conclusion of this case, the Board will remand to the Agency for review of Chatham BP’s proposed Stage 2 site investigation budget.” Board Order at 28. On the issue of Chatham BP’s costs, the Board found that a genuine issue of material fact existed and directed the parties to proceed to hearing.

On April 4, 2014, the parties filed a joint motion for entry of judgment. Below, the Board provides the procedural history before summarizing the motion. The Board then discusses the issues presented before reaching its conclusion.

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* accompanied by the administrative record (R.). In its January 9, 2014 order, the Board granted the motion for leave to file *instanter* and accepted the administrative record.

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. 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.

In its January 9, 2014 opinion and order, the Board first addressed the issue of Chatham BP's proposed Stage 2 site investigation plan. The Board granted Chatham BP's motion for summary judgment, denied the Agency's cross-motion for summary judgment, and reversed the Agency's rejection of Chatham BP's proposed plan. The Board's order stated that "[a]t the conclusion of this case, the Board will remand to the Agency for review of Chatham BP's proposed Stage 2 site investigation budget." Board Order at 28. On the issue of Chatham BP's drum disposal costs, the Board found that there existed an issue of material fact. The Board denied the parties' motions for summary judgment and directed the parties to proceed to hearing on that issue.

On January 16, 2014, a hearing officer order scheduled a hearing on February 11, 2014. In an order dated February 10, 2014, the hearing officer reported that "[t]he parties have reached an agreement on the final outstanding issue. . . . The parties are discussing how to resolve this matter before the Board." The order cancelled the hearing scheduled on February 11, 2014.

On April 4, 2014, the parties filed a joint motion for entry of judgment (Mot.).

SUMMARY OF JOINT MOTION

The joint motion noted that the Board's January 9, 2014 opinion and order found that a material issue of fact existed as to Chatham BP's drum disposal costs and directed the parties to hearing on that issue. Mot. at 2, citing Board Order at 27. The motion states that "[t]he drum disposal cost issue concerns \$1,145.92 in disputed costs." Mot. at 2, citing Pet. at 6; Pet., Exhibit A.

The joint motion reports that "counsel for the Respondent has determined and stipulates that if this matter were to proceed to hearing, sufficient facts exist for the Board to find against the Respondent and in favor of Petitioner by a preponderance of the evidence on the issue of the \$1,145.92 in drum disposal costs." Mot. at 2. In the motion, the parties state that they wish to avoid the further expense of time and effort in this matter and add that Chatham BP seeks to avoid additional fees and costs. *Id.* The parties jointly moved the Board "to enter judgment against the Respondent and in favor of the Petitioner as to the \$1,145.92 in drum disposal costs at issue in this matter." *Id.*

In addition, the joint motion referred to the Board's January 9, 2014 order granting Chatham BP's motion for summary judgment on the issue of a proposed Stage 2 site investigation plan. Mot. at 1, citing Board Order at 27. The motion noted that the Board intended at the conclusion of this case to remand to the Agency for review of Chatham BP's proposed Stage 2 site investigation budget. Mot. at 1, citing Board Order at 27.

DISCUSSION

Section 57.8 of the Act provides in pertinent part that,

[i]f an owner or operator is eligible to access the Underground Storage Tank Fund . . . the owner or operator may submit a complete application for final or partial payment to the Agency for activities taken in response to a confirmed release.

* * *

- (i) If 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 the Act. 415 ILCS 5/57.8 (2012).

Section 40 of the Act provides in pertinent part that, within 35 days after the date on which the Agency served its determination, payment applicants such as Chatham BP may “petition for a hearing before the Board to contest the decision of the Agency.” 415 ILCS 5/40(a)(1) (2012). Once Chatham BP filed its timely petition for review, the Board was obligated to review the Agency’s reduction in drum disposal costs. *See Reichhold Chemicals, Inc. v. PCB*, 204 Ill.App3d 674, 678, 561 N.E.2d 1343, 1346 (1990).

Section 26 of the Act provides in pertinent part that, “notwithstanding any requirement that hearings be held in actions brought pursuant to Titles VIII [Enforcement] and X [Permits] of the Act, the Board may adopt procedural rules for resolution of such actions by summary judgment prior to hearing upon motion by either party except as otherwise required by federal law.” 415 ILCS 5/26 (2012). The Board has adopted procedural rules governing motions for summary judgment. *See* 35 Ill. Adm. Code 101.516. As noted above, the Board has decided the parties’ cross-motions for summary judgment in its January 9, 2014 opinion and order. In doing so, the Board determined that the issue of drum disposal costs presented an issue of material fact.

The Board recognizes the joint motion’s statement that Agency counsel “has determined and stipulates that if this matter were to proceed to hearing, sufficient facts exist for the Board to find against Respondent and in favor of the Petitioner by a preponderance of the evidence on the issue of the \$1,145.92 in drum disposal costs.” Mot. at 2. However, the parties’ motion includes no stipulated facts supporting this determination. In a previous permit appeal in which the parties sought to effectuate a proposed settlement, the Board emphasized a record “setting out sufficient technical facts and legal assertions to allow the Board to exercise its independent judgment and to make proper findings of fact and conclusions of law.” Caterpillar Tractor Co. v. IEPA, PCB 79-180, slip op. at 1-2 (June 2, 1983) (interim order). The Board has distinguished stipulated settlement of enforcement cases from those proceeding under the permit appeal provisions. *See Electric Energy, Inc. v. IEPA*, PCB 85-14, slip op. at 1 (June 13, 1985) (interim order).

In another UST appeal, the Board granted a petitioner’s motion to dismiss its appeal voluntarily. In Freedom Oil Co. v. IEPA, PCB 03-54, 03-56, 03-105, 03-179, 04-2 (cons.), slip op at 1 (May 3, 2007), the petitioner reported that it had resolved all remaining issues. The petitioner added that it had “received the full settlement amount agreed to between the parties, and no outstanding issues remain to be argued in these appeals.” *Id.*

Finally, the Board notes that the parties' joint motion cites no statutory, regulatory, or case law authority in support of its request that the Board enter judgment against the Agency as to the \$1,145.92 in contested costs for drum disposal.

CONCLUSION

For the reasons stated above, the Board denies the parties' joint motion for entry of judgment. As it did in denying the parties' cross-motions for summary judgment on the issue of Chatham BP's drum disposal costs, the Board directs the parties to proceed to hearing on that issue.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on May 1, 2014, by a vote of 4-0.



John T. Therriault, Clerk
Illinois Pollution Control Board