

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CHATHAM BP, LLC)	
)	
Petitioner,)	
)	
v.)	
)	PCB No. 14-
ILLINOIS ENVIRONMENTAL)	(UST Appeal)
PROTECTION AGENCY,)	
Respondent.)	

NOTICE OF FILING

PLEASE TAKE NOTICE that today I have filed with the Office of the Clerk of the Pollution Control Board the Appearance of William D. Ingersoll on behalf of CHATHAM BP LLC and Petition for Review in the above matter. Copies of these documents are hereby served upon you.

To:	Pollution Control Board, Attn: Clerk	Division of Legal Counsel
	100 West Randolph Street	Illinois Environmental Protection Agency
	James R. Thompson Center, Suite 11-500	1021 North Grand Avenue, East
	Chicago, Illinois 60601-3218	P.O. Box 19276
		Springfield, Illinois 62794-9276

Respectfully submitted,

CHATHAM BP, LLC

Dated: July 1, 2013

By: /s/William D. Ingersoll
Its Attorney

BROWN, HAY & STEPHENS, LLP

William D. Ingersoll
Registration No. 6186363
wingersoll@bhslaw.com
205 S. Fifth Street, Suite 700
P.O. Box 2459
Springfield, IL 62705-2459
(217) 544-8491

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CHATHAM BP, LLC,)	
)	
)	
Petitioner,)	
)	
v.)	PCB No. 13-
)	(UST Appeal)
)	
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
Respondent.)	

APPEARANCE

I hereby file my appearance in this proceeding, on behalf of CHATHAM BP, LLC in the above-captioned matter.

Respectfully submitted,

Dated: June 28, 2013

By: /s/William D. Ingersoll
William D. Ingersoll

BROWN, HAY & STEPHENS, LLP
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Registration No. 6186363
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CHATHAM BP, LLC)	
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Petitioner,)	
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v.)	
)	PCB No. 14-
ILLINOIS ENVIRONMENTAL)	(UST Appeal)
PROTECTION AGENCY,)	
Respondent.)	

PETITION FOR REVIEW

NOW COMES Petitioner, CHATHAM BP, LLC (“Petitioner”), by and through its attorneys, BROWN HAY & STEPHENS, LLP, and pursuant to Section 40 and Section 57.8(i) of the Illinois Environmental Protection Act (“Act”), 415 ILCS 5/40 and 40, 57.8(i) and 35 Ill. Adm. Code Part 105¹, hereby requests review of the decision by the Illinois Environmental Protection Agency (“Agency” or “IEPA”) regarding Petitioner’s Stage II Site Investigation Plan and Budget and the requirements of the Leaking Underground Storage Tank (“LUST”) Program. In support of its Petition, Petitioner states as follows:

1. Petitioner is the owner of a 10,000 gallon gasoline underground storage tank (“UST”) located at 300 North Main Street, Chatham, Illinois. The site has been assigned IEPA Bureau of Land Identification Number 1670305023. The UST is still in operation.

2. A notification of release at the UST was made to the Illinois Emergency Management Agency (“IEMA”) on September 25, 2007 (Incident No. 07-1292). The Office of the Illinois State Fire Marshal (“OSFM”) issued an Eligibility and Deductibility Determination on December 31, 2011 that the incident was eligible for reimbursement from the LUST Fund, with a \$15,000 deductible.

¹¹ Hereinafter citations to the Board regulations will be made by section number only.

3. On January 17, 2013, Petitioner submitted a Stage II Site Investigation Plan and Budget to the Agency for its approval.

4. By letter dated May 28, 2013, the Agency issued its decision on the January 17, 2013 submittal. *See* Exhibit A. The Agency's decision rejected the plan, modified some Stage I costs, rejected the budget and required Petitioner to submit a Stage 3 Site Investigation Plan and Budget or a Site Investigation Completion Report.

5. This Petition for Review is filed within 35 days of the Agency's final decision and is timely in accordance with Section 40 of the Act and the Pollution Control Board procedural rule at Section 105.104.

6. The decisions within the letter that are challenged by this Petition are:

The plan is rejected for the reason(s) listed in Attachment A (Sections 57.7(a)(1) and 57.7(c) of the Act and 35 Ill. Adm. Code 734.505(b) and 734.510(a)).

The actual costs for Stage 1 are modified pursuant to Sections 57.7(a)(2) and 57.7(c) of the Act and 35 Ill. Adm. Code 734.505(b) and 734.510(b).

In addition, the budget is rejected for the reason(s) listed in Attachment C (Sections 57.7(a)(2) and 57.7(c) of the Act and 35 Ill. Adm. Code 734.505(b) and 734.510(b)).

Pursuant to Sections 57.7(a)(5) and 57.12(c) and (d) of the Act and 35 Ill. Adm. Code 734.100 and 734.125, the Illinois EPA requires submittal of a Stage 3 Site Investigation Plan, and budget if applicable, or Site Investigation Completion Report within 30 days after completing the site investigation to:

7. The apparent rationale for the first, third and fourth of these decisions is found in the Attachment A to the Agency's May 28, 2013 letter, which reads:

1. 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 Illinois

EPA for review a Stage 3 site investigation plan in accordance with 35 Ill. Adm. Code 734.325. (Section 57.1(a) of the Act and 35 Ill. Adm. Code 734.320(c))

The activities performed have defined the extent of soil contamination along the property boundary lines to the north, east, and south. However, the owner has failed to define the extent of the soil contamination to the west. Therefore, the owner must submit a Stage 3 Site Investigation Plan for the Illinois EPA to review, which proposes to define the extent of soil contamination to the west.

8. This apparent basis for rejection of the plan, led to decide to reject the budget related to that plan, and to the decision to require the initiation of the Stage 3 process. The reference to Section 57.1(a) needs little analysis since this subsection just generically requires following the requirements of the LUST Program. The 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. Section 734.320(c) reads:

Section 734.320 Stage 2 Site Investigation

The 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 none of the 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, upon submission of the Stage 2 site investigation plan the owner or operator must cease site investigation and proceed with the submission of a site investigation completion report in accordance with Section 734.330 of this Part. If the owner or operator proposes no site investigation activities in the Stage 2 site investigation plan and applicable indicator contaminants that exceed the most stringent Tier 1 remediation objectives of 35 Ill. Adm. Code 742 as a result of the release extend beyond the site's

property boundaries, within 30 days after the submission of the Stage 2 site investigation plan the owner or operator must submit to the Agency for review a Stage 3 site investigation plan in accordance with Section 734.325 of this Part.

9. The Agency used the second sentence of subsection c as its statement of the regulation which could be violated by approval of the plan. However, the statement of the factual determination in the Attachment A to the decision letter clearly shows that the Agency's decision misapplies Section 734.320(c). The statement itself shows that the extent of contamination to the west has not been defined and the subsection c cited by the Agency itself states that a stage 2 plan be submitted before a stage 3 plan is reviewed by the Agency. The Agency's own citation says a Stage 2 plan must be submitted first.

10. Stage 2 is supposed to "complete the identification of the extent of soil and groundwater contamination *at the site*." (Emphasis added.) Off-site is to be investigated in Stage 3. But, here, even the Agency's factual statement of the decision basis shows that the extent of contamination has not been defined to the west. Maybe the Agency contends that the extent has been defined all the way to the property boundary to the north, east and south, but clearly not to the west. The plan submitted by Petitioner includes just that – to appropriately define the extent to the west.

11. The Agency's decision fails to give meaning to an important word in subsection c. The Agency seems to have ignored the little word "*and*" in its decision. The quoted part of the regulation 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. Here, Petitioner has proposed further Stage 2 on-site investigation so as to define the extent to the west – the purpose behind the January 17, 2013 submittal. If 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. It would make no sense to start drilling, sampling, etc. on another's property when Petitioner does not yet even know that the contamination extends onto that property.

12. The Agency use of Section 734.320 (c) as a reason for denial of the Stage 2 seems to be a misinterpretation since the section is defining the procedure of after a Stage 2 plan has been submitted and what the next step should be taken, if a stage 3 plan or a Site Investigation Completion Report ("SICR") be submitted. Section 734.315(c) defines the procedure after a stage 1 plan has been implemented and if a stage two plan or a SICR be submitted.

13. Section 734.315(c) provides:

Section 734.315 Stage 1 Site Investigation

The Stage 1 site investigation must be designed to gather 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.

* * *

c) If none 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, the owner or operator must cease site investigation and proceed with the submission of a site investigation completion report in accordance with Section 734.330 of this Part. *If 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.* (Emphasis added.)

14. Subsection 734.315 (c) states if a site has a result from Stage 1 investigation that exceed the most stringent Tier 1 (which this site does) the owner and operator "**MUST**" submit a Stage 2 plan in accordance with Section 734.320. The petitioner complied in full with this requirement. There is known contamination on the western property boundary, but the extent is

not adequately determined, therefore a stage 3 plan will need to be submitted in the future. What is not known at this time is whether or not that plan needs to investigate the northwest and southwest direction or if those directions are even necessary. This is what was proposed in the Stage 2 plan.

15. The second challenged decision listed above relates to a reduction for drum disposal costs and is identified in Attachment B, Section 2 of the Agency's May 28, 2013 decision letter as follows:

STAGE 1 Modifications

1. \$1,145.92 for costs for drum disposal, which exceed the minimum requirements necessary to comply with the Act. Costs associated with site investigation and corrective action activities and associated materials or services exceeding the minimum requirements necessary to comply with the Act are not eligible for payment from the Fund pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.630(0).

According 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.

16. "According to the IEPA's calculations" does not come close to meeting the specificity required by Section 734.505(b)(3) – *i.e.*, "statement of specific reasons why the cited Sections of the Act or regulations may be violated if the plan, budget, or report is approved." There is no regulatory limit regarding the number of drums of waste to be disposed that may be necessary. Some description of the inputs to the "calculations" would be very helpful in understanding the factual basis for the decision. The regulated community deserves to be told such a basis for decisions, so as to anticipate an outcome and gauge future proposals accordingly.

17. Further, this proposal is for a budget, which should be a reasonable prediction of the activities and costs for specified tasks. Site-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.

WHEREFORE, for the above reasons, Petitioner respectfully requests that the Pollution Control Board grant the following:

- a. Find that the Agency's May 28, 2013 final decision is arbitrary, capricious and not supported by statutory or regulatory authority;
- b. Reverse the Agency's determination and require approval of Petitioner's proposal.
- c. Award Petitioner reasonable attorney's fees and expenses related to bringing this action;
- d. Other relief as the Pollution Control Board deems appropriate.

Respectfully submitted,

CHATHAM BP, LLC

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

Dated: July 1, 2013

BROWN, HAY & STEPHENS, LLP

William D. Ingersoll
Registration No. 6186363
205 S. Fifth Street, Suite 700
P.O. Box 2459
Springfield, IL 62705-2459
(217) 544-8491
wingersoll@bhslaw.com

CERTIFICATE OF SERVICE

I, William D. Ingersoll, certify that I have this date served the attached Notice of Filing, Appearance of William D. Ingersoll and Petition for Review, by means described below, upon the following persons:

To: Pollution Control Board, Attn: Clerk
100 West Randolph Street
James R. Thompson Center, Suite 11-500
Chicago, Illinois 60601-3218
(Via Electronic Filing)

Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
(Via Certified Mail and Email)

Dated: July 1, 2013

By: /s/William D. Ingersoll
William D. Ingersoll

BROWN, HAY & STEPHENS, LLP

William D. Ingersoll
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wingersoll@bhslaw.com
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Springfield, IL 62705-2459
(217) 544-8491

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Illinois Environmental Protection Agency
Bureau of Land - #24
Leaking Underground Storage Tank Section
1021 North Grand Avenue East
Post Office Box 19276
Springfield, IL 62794-9276

Please submit all correspondence in duplicate and include the Re: block shown at the beginning of this letter.

An underground storage tank system owner or operator may appeal this decision to the Illinois Pollution Control Board. Appeal rights are attached.

If you have any questions or need further assistance, please contact the Illinois EPA project manager, Eric Kuhlman, at 217-785-5715.

Sincerely,

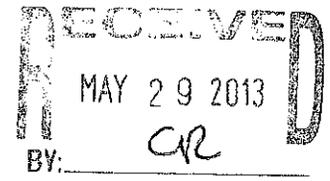


Harry A. Chappel, P.E.
Unit Manager
Leaking Underground Storage Tank Section
Division of Remediation Management
Bureau of Land

HAC:EK:P\

Attachment: A, B, C, Appeal Rights

c: CW³M Company, Inc.
BOL File



Attachment A

Re: LPC #1670305023 -- Sangamon County
Chatham / Chatham BP
300 North Main Street
Leaking UST Incident No. #20071292
Leaking UST Technical File

Citations in this attachment are from the Environmental Protection Act (Act) as amended by Public Act 92-0554 on June 24, 2002, and Public Act 96-0908 on June 8, 2010, and 35 Illinois Administrative Code (35 Ill. Adm. Code).

1. 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 Illinois EPA for review a Stage 3 site investigation plan in accordance with 35 Ill. Adm. Code 734.325. (Section 57.1(a) of the Act and 35 Ill. Adm. Code 734.320(c))

The activities performed have defined the extent of soil contamination along the property boundary lines to the north, east, and south. However, the owner has failed to define the extent of the soil contamination to the west. Therefore, the owner must submit a Stage 3 Site Investigation Plan for the Illinois EPA to review, which proposes to define the extent of soil contamination to the west.

EK:P

Attachment B

Re: LPC #1670305023 -- Sangamon County
Chatham / Chatham BP
300 North Main Street
Leaking UST Incident No. #20071292
Leaking UST Technical File

SECTION 1

STAGE 1 Actual Costs

As a result of the Illinois EPA's modifications in Section 2 of this Attachment B, the following amounts are approved:

\$8,230.45	Drilling and Monitoring Well Costs
\$6,899.43	Analytical Costs
\$1,730.90	Remediation and Disposal Costs
\$0.00	UST Removal and Abandonment Costs
\$0.00	Paving, Demolition, and Well Abandonment Costs
\$15,034.12	Consulting Personnel Costs
\$1,356.38	Consultant's Materials Costs

Handling charges will be determined at the time a billing package is reviewed by the Illinois EPA. The amount of allowable handling charges will be determined in accordance with Section 57.1(a) of the Environmental Protection Act (Act) and 35 Illinois Administrative Code (35 Ill. Adm. Code) 734.635.

SECTION 2

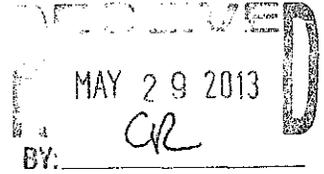
STAGE 1 Modifications

1. \$1,145.92 for costs for drum disposal, which exceed the minimum requirements necessary to comply with the Act. Costs associated with site investigation and corrective action activities and associated materials or services exceeding the minimum requirements necessary to comply with the Act are not eligible for payment from the Fund pursuant to Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.630(o).

According 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.

EK:PV

Attachment C



Re: LPC #1670305023 -- Sangamon County
Chatham / Chatham BP
300 North Main Street
Leaking UST Incident No. #20071292
Leaking UST Technical File

Citations in this attachment are from the Environmental Protection Act (Act), as amended by Public Act 92-0554 on June 24, 2002, and Public Act 96-0908 on June 8, 2010, and 35 Illinois Administrative Code (35 Ill. Adm. Code).

1. Pursuant to Sections 57.7(c) of the Act and 35 Ill. Adm. Code 734.505(b), the associated budget is rejected for the following reason:

The 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; whether costs will not be used for 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 (Section 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.510(b)).

EK:PA

Appeal Rights

An underground storage tank owner or operator may appeal this final decision to the Illinois Pollution Control Board pursuant to Sections 40 and 57.7(c)(4) of the Act by filing a petition for a hearing within 35 days after the date of issuance of the final decision. However, the 35-day period may be extended for a period of time not to exceed 90 days by written notice from the owner or operator and the Illinois EPA within the initial 35-day appeal period. If the owner or operator wishes to receive a 90-day extension, a written request that includes a statement of the date the final decision was received, along with a copy of this decision, must be sent to the Illinois EPA as soon as possible.

For information regarding the filing of an appeal, please contact:

Dorothy Gunn, Clerk
Illinois Pollution Control Board
State of Illinois Center
100 West Randolph, Suite 11-500
Chicago, IL 60601
312/814-3620

For information regarding the filing of an extension, please contact:

Illinois Environmental Protection Agency
Division of Legal Counsel
1021 North Grand Avenue East
Post Office Box 19276
Springfield, IL 62794-9276
217/782-5544