

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

CHATHAM BP, LLC,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	PCB No. 14-01
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 Motion *In Limine* of CHATHAM BP LLC. Copies of these documents are hereby served upon you.

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

Scott Seivers  
Division of Legal Counsel  
Illinois Environmental Protection Agency  
1021 North Grand Avenue, East  
P.O. Box 19276  
Springfield, Illinois 62794-9276

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

Dated: July 10, 2014

Respectfully submitted,

CHATHAM BP, LLC

**BROWN, HAY & STEPHENS, LLP**

William D. Ingersoll  
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wingersoll@bhslaw.com  
205 S. Fifth Street, Suite 700  
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By:     /s/William D. Ingersoll      
Its Attorney

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Petitioner,	)	
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**PETITIONER’S MOTION IN LIMINE TO BAR EVIDENCE REGARDING ANY CALCULATIONS PERFORMED BY ILLINOIS EPA REFERENCED IN THE DECISION UNDER REVIEW IN THIS MATTER**

Petitioner, CHATHAM BP, LLC, by William D. Ingersoll, one of its attorneys, pursuant to 35 Ill. Adm. Code 100.500, 100.502 and 100.504<sup>1</sup>, hereby moves the Hearing Officer to enter an order precluding the Illinois Environmental Protection Agency (“IEPA”) from presenting any evidence, testimony or argument relating to “the IEPA’s calculations” that were referenced in the IEPA May 28, 2013 decision letter that is the subject of this appeal. *See* Exhibit A, Attachment B, Section 2 attached to the July 1, 2013 petition, also found in the Administrative Record, page 182<sup>2</sup>. In support of its motion, Petitioner says the following:

1. In its May 28, 2013 decision letter, IEPA denied “\$1,145.92 for costs for drum disposal” using the following rationale:

*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.*

<sup>1</sup> Hereinafter citations to the Board regulations will be made by section number only – e.g., Section 100.500.

<sup>2</sup> Hereinafter citations to the Administrative Record will be made as “A.R. p. \_\_\_” or with “pp” for multiple pages.

2. No such calculations appear anywhere in the Administrative Record filed by the IEPA in this matter. Further, the IEPA project manager's reviewer notes (A.R., p. 178) does not mention any such calculations. Nonetheless, the project manager, Mr. Eric Kuhlman, describes the alleged calculations in an August 23, 2013 affidavit that was attached to Respondent's August 27, 2013 Memorandum of Law in Support of Illinois EPA's Cross Motion for Summary Judgment. In paragraph 13 of the affidavit, Mr. Kuhlman claims that he used a computer spreadsheet and then goes into some length describing how he went through the process of making the calculations.

3. On February 11, 2014, the IEPA provided Petitioner's counsel the Microsoft Excel file that was referenced in Mr. Kuhlman's affidavit. Attached herewith as Exhibit A is a printout of the spreadsheet and the file properties. Despite the inputs to Mr. Kuhlman's "calculations" being at issue since the initial filing of the Petition in this matter, all of the inputs in the spreadsheet are zeroes, and the file properties show it was last modified by Mr. Kuhlman on September 18, 2013.

4. A review of the dates of the significant events relative to the "calculations" is very telling:

- May 28, 2013 – decision letter issued.
- July 1, 2013 – Petition filed (inputs mentioned in paragraph 16).
- August 20, 2013 – Petitioner's Motion for Summary Judgment.
- August 27, 2013 – Respondent's Cross Motion for Summary Judgment (included the August 23, 2014 Kuhlman affidavit).
- September 3, 2013 – IEPA response to Petitioner's Motion for Summary Judgment.
- September 10, 2013 – Respondent's response to IEPA Motion for Summary Judgment.
- September 18, 2013 – Modification to Excel spreadsheet made by Eric Kuhlman.

5. Petitioner began trying to attack the inputs to the "calculations" since the beginning of this case. At first, there was no mention of any calculations in the reviewer notes.

Then, after IEPA argued that the calculations were based on inputs from the Petitioner's own submittal, Petitioner contended that such information was not present in Petitioner's submittal, so there would have been no proper source for the calculations in the record. Finally, after the affidavit, Petitioner attacked the calculations again because Mr. Kuhlman claimed to have used boring diameters as one of the inputs, but no such diameters were provided by Petitioner, or were otherwise in the record. Only after numerous pleadings attacking the inputs to the "calculations" and including the argument about an input that Mr. Kuhlman claimed to have used, there was a modification to the Excel spreadsheet and now there are no inputs at all in the spreadsheet.

6. The accuracy and validity of any "calculations" done by IEPA were significant in the Board's consideration of the motions for summary judgment. The Board discussed both Mr. Kuhlman's calculations from his affidavit and Petitioner's attack on the alleged inputs to the calculations. Then, the Board determined that there remained an issue of material fact, saying: "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." Board Opinion and Order, PCB 14-01, January 9, 2014, page 27. Unfortunately, the Petitioner will not have the data available to make the arguments about the inputs to the calculation.

7. Pursuant to Rule 1002 of the Illinois Rules of Evidence ("IRE") generally require the original as proof of content.

*To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute.*

8. However, Rule 1004 authorizes admissibility of other evidence of contents, but attaches conditions, as follows:

*The original is not required and other evidence of the contents of a writing, recording, or photograph is admissible if—*

*(1) **Originals Lost or Destroyed.** All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or*

*(2) **Original Not Obtainable.** No original can be obtained by any available judicial process or procedure; or*

*(3) **Original in Possession of Opponent.** At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing; or*

*(4) **Collateral Matters.** The writing, recording, or photograph is not closely related to a controlling issue.*

9. Petitioner acknowledges that the civil practice rules and rules of evidence are not strictly applied in Board matters. *See* Section 100.100(b). However, Petitioner believes the facts surrounding the IEPA handling of a record known since the beginning of the case to be relevant and important warrant a fairly strict application of IRE Rules 1002 and 1004. One of two scenarios occurred here: 1) there never was an original of the spreadsheet described in the Kuhlman affidavit; or, most likely 2) the original was modified by the IEPA to destroy its value as evidence against the May 28, 2013 decision. Assuming the second scenario, such modification clearly occurred long after the IEPA knew the contents of the spreadsheet were at issue in this case, and even several weeks after the individual involved testified about his use of the spreadsheet, and after Petitioner attacked the data inputs he claimed to have used.

10. Since the Petitioner has been effectively prevented from using the spreadsheet to challenge the “calculations” purportedly made by the IEPA and referenced in its May 28, 2013 decision, IEPA should be precluded from otherwise trying to prove the contents of the spreadsheet. Nor should the IEPA be allowed to present evidence to provide the “clarification regarding data used to calculate the volume of borings . . . .” This likely would, and should, force the IEPA to stand on the Administrative Record it provided herein, which was supposed to have included everything relied upon by the IEPA in making its decision.

WHEREFORE, for the reasons stated above, CHATHAM BP, LLC requests that the Hearing Officer grant this Motion *In Limine* and enter an order precluding the IEPA from presenting any evidence, testimony or argument relating to “the IEPA’s calculations” that were referenced in the IEPA May 28, 2013 decision letter that is the subject of this appeal.

Respectfully submitted,

**CHATHAM BP, LLC**

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

Dated: July 10, 2014

**BROWN, HAY & STEPHENS, LLP**

William D. Ingersoll

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RE: LPC#1670305023 -- Sangamon County  
 Chatham / Chatham Gas  
 300 North Main Street  
 Site Technical File

Plan/Report/Budget/Billing Title: \_\_\_\_\_

Document Date: \_\_\_\_\_

Calculations of Solid Waste for Proposed Soil Borings by Volume  
 and the Estimated Number of Drums Required for Disposal

Line#	# Borings	Diam "	Height Ft	Estimated Vol./Boring	Est. Vol./Line	Tot # Drums
1	0	0	0	0.0000	0.0000	0.0000
2	0	0	0	0.0000	0.0000	0.0000
3	0	0	0	0.0000	0.0000	0.0000
4	0	0	0	0.0000	0.0000	0.0000
5	0	0	0	0.0000	0.0000	0.0000
6	0	0	0	0.0000	0.0000	0.0000
7	0	0	0	0.0000	0.0000	0.0000
8	0	0	0	0.0000	0.0000	0.0000
Total # Drums Needed:						<b>0.0000</b>

jfg:Calculating Boring Waste.xls

- Save
- Save As
- Save as Adobe PDF
- Open
- Close
- Info**
- Recent
- New
- Print
- Save & Send
- Help
- Options
- Exit

# Information about Calculating Boring Waste Volumes

E-mail attachment: C:\Users\wingersoll\AppData\Local\Microsoft\Windows\Temporary Internet ...

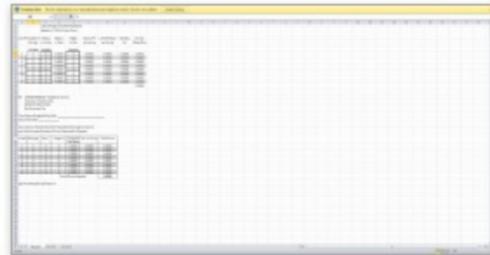


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### Related Dates

Last Modified	9/18/2013 8:47 AM
Created	8/3/2012 9:29 AM
Last Printed	7/18/2013 3:48 PM

### Related People

Manager	None
Author	jay.gaydosh
Last Modified By	Eric Kuhlman

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CERTIFICATION

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

1. I am the counsel of record for Chatham BP, LLC in the matter docketed before the Pollution Control Board as PCB 14-01.

2. On February 11, 2014, the Illinois Environmental Protection Agency ("IEPA") provided me a Microsoft Excel file that was responsive to my request for "records of 'the IEPA calculations' identified in the IEPA decision letter dated May 28, 2013, and the computer spreadsheet alleged by Eric Kuhlman that was used to make the calculation as Mr. Kuhlman stated in paragraph 13 of his August 23, 2013 Affidavit filed in the matter of Chatham BP v. IEPA, PCB 14-01."

3. Without any modification to the Excel file after receiving it, a printed to "pdf" version was made, and the file properties for that file were also printed to a "pdf" file. Those are included, without modification to the original Excel file, as the Exhibit A of the Petitioner's Motion *In Limine* to which this Certification is attached.

Dated: July 10, 2014

\_\_\_\_\_  
/s/ William D. Ingersoll

William D. Ingersoll

CERTIFICATE OF SERVICE

I, William D. Ingersoll, certify that I have this date served the attached Notice of Filing and Petitioner's Motion *In Limine*, 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)

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

Carol Webb  
Hearing Officer  
Illinois Pollution Control Board  
1021 North Grand Avenue East  
P.O. Box 19274  
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