BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CHATHAM BP, LLC,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 14-01
	)	(UST Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
	)	
Respondent.	)	

NOTICE

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PLEASE TAKE NOTICE that I have today caused to be filed a RESPONSE TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT with the Illinois Pollution Control Board, a copy of which is served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

Dated: September 3, 2013

BY: _____
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Respondent.	)	

RESPONSE TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT

NOW COMES the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA"), by and through its attorney, Special Assistant Attorney General Scott B. Sievers, and for its Response to Petitioner's Motion for Summary Judgment states the following:

I. TO PREVAIL IN ITS MOTION FOR SUMMARY JUDGMENT, THE PETITIONER MUST MEET ITS BURDEN TO PROVE 'CLEAR AND FREE FROM DOUBT' THAT ITS SUBMITTAL WOULD NOT VIOLATE THE ENVIRONMENTAL PROTECTION ACT AND REGULATIONS.

Section 57.7(c)(4) of the Illinois Environmental Protection Act, 415 ILCS 5/1 *et seq.*, provides, in pertinent part, that "[a]ny action by the Agency to disapprove or modify a plan or report … shall be subject to appeal to the [Pollution Control] Board in accordance with the procedures of Section 40." 415 ILCS 5/57.7(c)(4). The standard of review under Section 40 of the Act is whether the application, as submitted to the Agency, would not violate the Act and Board regulations. *Freedom Oil Co. v. Illinois EPA*, PCB No. 10-46, slip op. at 13 (Aug. 9, 2012).

In appeals of final Agency determinations, the burden of proof rests upon the petitioner. *Id.* The standard of proof in Leaking Underground Storage Tank (LUST) appeals is the

preponderance of the evidence, meaning that a proposition is proved by a preponderance when it is more probably true than not. *Id.*

The Pollution Control Board' review generally is limited to the record before the Agency at the time of its determination. *Evergreen FS, Inc. v. Illinois EPA*, PCB No. 11-51, op. at 14 (June 21, 2012). The Agency's denial letter frames the issue. *Id.*

This Board's rules provide for summary judgment, which it defines as "the disposition of an adjudicatory proceeding without hearing when the record, including pleadings, depositions and admissions on file, together with any affidavits, shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law." 35 Ill. Adm. Code 101.202. The Board will enter summary judgment "[i]f the record, including pleadings, depositions and admissions on file, together with any affidavits, shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law." 35 Ill. Adm. Code 101.516(b). In ruling upon a summary judgment motion, the Board "'must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party.'" *People v. Intra-Plant Maintenance Corp. et al.* PCB No. 12-21 at 5 (July 25, 2013) (quoting *Dowd v. Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 483 (1998)). "Summary judgment 'is a drastic means of disposing of litigation,' and therefore it should be granted only when the movant's right to relief 'is clear and free from doubt.'"

II. THE PETITIONER CANNOT MEET ITS BURDEN BECAUSE ITS STAGE II SITE INVESTIGATION PLAN AND ASSOCIATED BUDGET VIOLATED THE ACT AND BOARD REGULATIONS BY PROPOSING ON-SITE ACTIVITIES IN EXCESS OF THE MINIMUM NECESSARY.

This Board's regulations for petroleum underground storage tanks ("USTs") provide that investigations of releases proceed in three stages: Stage 1 to collect initial information on the extent of on-site soil and groundwater contamination, Stage 2 to complete identification of the on-site contamination, and Stage 3 to identify the extent of off-site contamination. 35 Ill. Adm. Code 734.310 to 734.325. However, if the extent of contamination has been defined after the completion of any stage, "the owner or operator **must cease investigation** and proceed with the submission of a site investigation completion report." 35 Ill. Adm. Code 734.310 (emphasis added).

In the instant case, the Petitioner's Stage 1 activities had completed the identification of on-site contamination. *See* R. 011, 089-090; Mem. of Law in Supp. of Illinois EPA's Cross Mot. for Summ. J. Ex. A at ¶¶ 9, 14 (Kuhlman Aff.).) Having done so, Section 734.310 of the regulations required the Petitioner to cease its on-site investigation. To continue on with further on-site investigation would violate the Act and Board regulations prohibiting activities in excess of those required or necessary to meet minimum requirements. *See, e.g.*, 415 ILCS 5/57.7(c) (cited by Illinois EPA in its decision letter at R. 179). Consequently, Illinois EPA properly rejected the Petitioner's Stage II Site Investigation Plan and Budget, and the Petitioner cannot meet its burden to prove that its plan and budget would not violate the Act and Board regulations. *See Freedom Oil Co., supra.* Therefore, this Board should deny the Petitioner's motion for summary judgment.

A. Because on-site contamination has been defined and on-site investigation must cease, Subsection 734.315(c) is inapplicable, as the Petitioner could not submit a Stage 2 site investigation plan without violating LUST Program prohibitions against exceeding minimum requirements.

In its summary judgment motion, as in its Petition for Review, the Petitioner argues that Illinois EPA's decision was contrary to the language of Sections 734.315(c). Subsection 734.315(c) provides as follows:

> 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.

35 Ill. Adm. Code 734.315(c). The Petitioner blocks out the rest of this section and title and focuses on the last sentence of this provision to contend that it was required to submit a Stage 2 site investigation plan. (Pet. for Review at 5-6; Pet'r's Mot. for Summ. J. at 6.) After all, Petitioner argues, its 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).

The Petitioner's argument, however, takes this provision in isolation, ignoring the overall regulatory scheme of the LUST Program. *See* 415 ILCS 5/57.3. The LUST Program and its regulations repeatedly prohibit reimbursement to tank owners or operators of costs for activities exceeding the minimum requirements of the LUST Program. *See* subsection 57.5(a) ("In no event will an owner or operator be reimbursed for any costs which exceed the minimum requirements necessary to comply with this Title."); subsection 57.5(h) ("[I]n no case shall the owner or

operator be reimbursed for costs exceeding the minimum requirements of this Act and its rules."); subsection 57.7(c)(3) ("[T]he Agency shall determine ... that the costs associated with the plan ... will not be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of this Title."); 35 Ill. Adm. Code 734.510(b) ("The overall goal of the financial review must be to assure that costs associated with materials, activities, and services ... must not be used for corrective action activities in excess of those necessary to meet the minimum requirements of the Act and regulations."); and 35 Ill. Adm. Code 734.630 ("Costs ineligible for payment from the Fund include, but are not limited to: (o) Costs for corrective action activities and associated materials or services exceeding the minimum requirements necessary to comply with the Act."). In light of this as well as the fact that Section 734.310 requires that investigation cease once the extent of contamination has been defined, Subsection 734.315(c) is inapplicable in the action at bar because, while samples detected excessive contamination, the Petitioner could not submit a Stage 2 site investigation plan pursuant to that subsection when the on-site contamination had been defined without violating the LUST Program's prohibitions against activities exceeding the minimum requirements.

B. Because the Petitioner could propose no proper Stage 2 activities when on-site contamination had been defined and thus on-site investigation must cease, Illinois EPA properly directed the Petitioner to submit a Stage 3 plan pursuant to Subsection 734.320(c) to define off-site contamination.

The Petitioner contends that Illinois EPA's citation of subsection 734.320(c) in its decision letter was inappropriate. That subsection provides as follows:

> 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.

35 Ill. Adm. Code 734.320(c). The Petitioner argues this provision is inapplicable, as it proposed site investigation activities in its Stage II Site Investigation Plan and therefore the Petitioner should not move to Stage 3 yet. (Pet. for Review at 6; Pet'r's Mot. for Summ. J. at 6.)

In making its argument, the Petitioner appears to confuse the facts. In its Motion for Summary Judgment, the Petitioner argues that "even if one accepted that the contamination has reached the property boundary in three directions, no such conclusion can be made as to the west." (Pet'r's Mot. for Summ. J. at 6.) However, in its Petition for Review, the Petitioner correctly stated that "[t]here is known contamination on the western property boundary … ." (Pet. for Review at 5.) The fact is, 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. (R. 089-090; *also* Mem. of Law in Support of Illinois EPA's Cross Mot. for Summ. J. Ex. A at ¶ 8 (Kuhlman Aff.).)

The Petitioner argues that the purpose of on-site investigation is to define the location of contamination with enough specificity to show where along property boundaries contamination extends off-site. (Pet'r's Mot. for Summ. J. at 6-7.) "It makes no sense to start drilling, sampling, etc. on another's property when Petitioner does not know yet for sure that the contamination extends onto that property, and exactly where." (*Id.* at 7.) However, while one may be able to

infer from the results of an on-site investigation that off-site contamination is likely, on-site investigation can only detect contamination on-site. In the case at bar, a monitoring well and soil samples from that well detected contamination along the western property boundary, whereas the monitoring wells and soil samples from the other property lines did not. Right now the Petitioner has solid information in hand that off-site contamination may exist west across the property line from that monitoring well. 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.

Because the Petitioner defined the on-site contamination in the course of its Stage 1 activities and because further on-site investigation would violate Section 734.310 (investigation ceases when contamination defined) as well as the various LUST Program prohibitions against activities in excess of the minimum requirements, *see, e.g.*, 415 ILCS 5/57.7(c) (cited by Illinois EPA in its decision letter at R. 179), the Petitioner could propose no proper Stage 2 site investigation activities. Thus, under the LUST Program regulatory scheme set forth in the Act and regulations, Illinois EPA properly directed the Petitioner to submit a Stage 3 site investigation plan for review pursuant to Subsection 734.320(c).

However, because the Petitioner's Stage II Site Investigation Plan proposed on-site investigation activities after the on-site contamination had already been defined and further investigation should have ceased, the Petitioner's plan violated Act and Board regulations prohibiting activities in excess of those required or necessary to meet minimum requirements. As such, the Petitioner cannot meet its burden to prove that its plan and associated budget would not violate the Act and Board regulations, and therefore, this Board should deny the Petitioner's motion for summary judgment.

III. THE PETITIONER CANNOT MEET ITS BURDEN BECAUSE THE DRUM DISPOSAL COSTS EXCEEDED THE MINIMUM NECESSARY AND THUS VIOLATED THE ACT AND BOARD REGULATIONS.

The Petitioner contends that Illinois EPA improperly reduced its drum disposal costs, claiming that "[t]here is no limitation in the regulations for how many drums of solid waste that may be generated in the site investigation process." (Pet'r's Mot. for Summ. J. at 7.) To the contrary, the Act and regulations repeatedly prohibit activities and costs in excess of those necessary or required to meet the minimum requirements. Therefore, any disposal of drums in excess of the minimum requirements would violate the Act and regulations.

In the case at bar, Illinois EPA looked at the minimum amount of material to be disposed: the volume of the monitoring well and soil borings. Illinois EPA calculated the volume of those borings, added a generous "fluff" or safety factor, and determined that no more than four (4) fifty-five (55) gallon drums would be needed. (Mem. of Law in Supp. of Illinois EPA's Cross Mot. for Summ. J. at 14-17 & Ex. A at ¶¶ 12-13 (Kuhlman Aff.).) Consequently, the costs for the additional four (4) drums the Petitioner sought, for a total of eight (8), exceeded the minimum requirements necessary to comply with the Act and regulations and thus violated them. *See* 415 ILCS 5/57.7(c)(3); 35 Ill. Adm. Code 734.510(b); 35 Ill. Adm. Code 734.630(o).

The Petitioner, though, contends that Illinois EPA's drum disposal decision was "impermissibly vague," citing Subsection 734.505(b) of the Board regulations as well as this Board's decision in *Dickerson Petroleum, Inc. v. Illinois EPA*, PCB Nos. 9-87 & 10-5 (Feb. 4, 2010). (Pet'r's Mot. for Summ. J. at 7.) The Petitioner cites *Dickerson* in arguing for reversal of Illinois EPA's drum disposal decision. (*Id.* at 8.)

In *Dickerson*, the respondent's decision letter 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. *Dickerson* at 27-28. However, compared to the threadbare assertions in *Dickerson*, in the case at bar Illinois EPA provided substantial detail. In its decision to modify the drum disposal costs, Illinois EPA wrote, "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)." (R. 179.) In an attachment to its decision letter, Illinois EPA further wrote 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(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.*

(R. 182.) Thus, unlike in *Dickerson*, Illinois EPA in the matter at bar cited sections of the Act and regulations that would be violated if the submittal were approved and provided specific reasons why they would be violated: because costs exceeding the minimum requirements are not eligible for payment from the fund, and because Illinois EPA's calculations determined that four of the eight drums listed for solid waste exceeded the minimum requirements. The Petitioner might wish that the decision letter detailed Illinois EPA's calculations, but Section 734.505(b) requires a "statement of specific reasons" why the cited provisions would be violated if the submittal were approved; it does not require the formulas and calculations behind the reasons.

That said, if the Board were to find Illinois EPA's 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.

Regardless of the sufficiency of Illinois EPA's decision letter, however, the Petitioner's submitted drum disposal costs violated the Act and regulations by seeking more than the volume of material excavated through monitor well and soil boring and thus in excess of the minimum requirements. As such, the Petitioner 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.

IV. CONCLUSION

WHEREFORE, the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, prays that this honorable Board find that the Petitioner has failed to meet its burden to prove that its submitted Stage II Site Investigation Plan and Budget, including drum disposal costs, would not violate the Act and Board regulations, and thus deny the Petitioner's motion for summary judgment.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

Dated: September 3, 2013

BY: _____
Scott B. Sievers
Special Assistant Attorney General

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Chatham BP, LLC v. Illinois Environmental Protection Agency
Pollution Control Board No. 14-01

CERTIFICATE OF SERVICE

Scott B. Sievers, Special Assistant Attorney General, herein certifies that he has served a copy of the foregoing **RESPONSE TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT** upon:

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Assistant Clerk
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by mailing true copies thereof to the addresses referred to above in envelopes duly addressed bearing proper first class postage and deposited in the United States mail at Springfield, Illinois, on September 3, 2013.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

Respondent,

Dated: September 3, 2013

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