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 MEMORANDUM OF LAW IN SUPPORT OF ILLINOIS EPA'S CROSS 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: August 27, 2013

BY: _____
Scott B. Sievers
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	)	
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MEMORANDUM OF LAW IN SUPPORT OF ILLINOIS EPA'S CROSS 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 memorandum of law in support of Illinois EPA's Cross Motion for Summary Judgment states the following:

I. FACTS

The site at issue in this action is an active gas station known as Chatham Gas and located at 300 North Main Street in Chatham, Illinois. (R. 006, 010.) A rectangular property, the site lies upon the northeast corner of the intersection of North Main Street and East Walnut Street. (R. 026.) The site currently has four (4) underground storage tanks ("USTs") in use, three of which are 10,000 gallon gasoline tanks and one of which is a 4,000 gallon diesel fuel tank. (R. 007.) Two 10,000 gallon gasoline tanks previously were removed in 1988. (*Id.*) The USTs are owned by the Petitioner, Chatham BP, LLC, of which Shamsher Amer[1] is a representative. (R. 016, 021,

[1] The Chatham BP, LLC representative's last name is alternatively spelled "Amar" and "Amer" in the CW^{3}M submittals. *See, e.g.*, R. 001, 016, 021, 038.

038, 040; *but see* R. 001 & 109 ("On behalf of Mr. Shamsher Singh Amar, owner of the USTs at the above referenced site ... .")

On September 25, 2007, the former owner of the USTs reported a release to the Illinois Emergency Management Agency. (R. 006.) Incident No. 2007-1289 was assigned. (*Id.*) That same day, the Office of the State Fire Marshal ("OSFM") investigated vapors in a storm sewer and a petroleum sheen in the creek in the area of Chatham Main Street and determined that approximately 342 gallons of fuel was not accounted for. (R. 007.) The OSFM noted that the gasoline leak appeared to "'to lean toward the incident being caused by an overfill of the tank by the fuel delivery driver. '" (R. 007-008.)

The former tank owner subsequently hired W.J. Scott Company to recover what ultimately amounted to 275 gallons of free product and 2,475 gallons of contaminated water. (R. 008.)

On November 29, 2007, the 20-Day Certification was submitted to the Respondent, Illinois EPA. (R. 006.)

On November 25, 2008, a Free Product Report was submitted to Illinois EPA, which approved it on January 12, 2009. (R. 006.)

On December 3, 2008, the 45-Day Report was submitted. (R. 006.)

On April 5, 2012, personnel from environmental consultant CW^3M visited the site to complete the Stage 1 investigation activities. (R. 011.) Five monitoring wells, four with soil samples, and two soil borings were advanced as part of the plume delineation activities. (*Id.*) Collected soil samples were analyzed for benzene, ethylbenzene, toluene, total xylenes (BETX), and methyl tert-butyl ether (MTBE). (*Id.*)

On April 6, 2012, CW^{3}M personnel returned to the site to survey and sample the monitoring wells. (*Id.*) The source well, MW-5, detected benzene, ethylbenzene, toluene, total xylenes, and MTBE in groundwater in excess of the most stringent Tier 1 remediation objectives. (R. 090; *also* Ex. A at ¶ 8 (Kuhlman Aff.).) The monitoring well along the western property line, MW-1, also detected levels in excess of the most stringent Tier 1 remediation objectives. (*Id.*) However, the other three monitoring wells—MW-2 along the southern property line, MW-3 along the eastern property line, and MW-4 along the northern property line—did not detect levels in groundwater exceeding the most stringent Tier 1 remediation objectives. (*Id.*) Soil samples taken from those three monitoring wells also did not detect such excessive levels, whereas soil samples from the western property line well, MW-1, did. (R. 089.)

On or about January 22, 2013, Illinois EPA received a proposed Stage II Site Investigation Plan ("SIP") and Budget dated January 17, 2013 from CW^{3}M on behalf of its client, Chatham BP, LLC. (R. 001.) "This includes the results of the Stage I Site Investigation activities," CW^{3}M wrote. (*Id.*) The submittal included analytical results as well as a summary. (R. 011.) The plan reported that, "[b]ased on activities completed to date, it appears that the groundwater flow direction is toward the west across the site." (*Id.*; *see also* R. 033.)

The submitted Stage 2 plan proposed "two monitoring wells each with soil samples, and four soil borings … to determine the horizontal and vertical extent of contamination on-site." (R. 014.) The plan also proposed an additional boring for collection of a Tiered Approach to Corrective Action Objectives (TACO) sample. (*Id.*) The submitted plan contemplated placing the two proposed monitoring wells with soil samples along the western property line north and south of the monitoring well that detected excessive contamination during the Stage 1 investigation. (R. 031.) In addition to those soil borings, the Stage 2 plan proposed a soil boring between

monitoring wells MW-2 and MW-3 on the southern and eastern property lines, respectively. (R. 029.) The Stage 2 plan also proposed two (2) soil borings between monitoring wells MW-4 and MW-3 on the northern and eastern property lines, respectively. (*Id.*). The Stage 2 plan also proposed a soil boring north of SB-2 but south of MW-4. (*Id.*) Finally, the Stage 2 plan proposed a soil boring for TACO purposes just west of MW-4. (*Id.*)

On May 8, 2013, CW^{3}M submitted additional information for the previously submitted Stage II Site Investigation Plan that included boring logs and analytical results. (R. 109.)

Illinois EPA reviewed the Stage 2 Site Investigation Plan and Budget as well as the materials subsequently provided by CW^{3}M on May 8, 2013. (Ex. A at ¶ 6 (Kuhlman Aff.).) Based upon the monitoring wells and soil borings data provided by the Petitioner through its consultant, Illinois EPA determined that the extent of the contamination on-site had been defined, leaving only the need for investigation of any off-site contamination. (Ex. A at ¶¶ 9, 14 (Kuhlman Aff.).)

On May 28, 2013, Illinois EPA rejected the Stage 2 Site Investigation Plan and Budget submitted by the Petitioner and approved modified Stage 1 costs. (R. 179.) In explaining its rejection of the plan, Illinois EPA cited several statutory and regulatory provisions, including 35 Ill. Adm. Code 734.320(c), and stated the following:

> *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.*

(R. 181 (emphasis in original).) In turn, Illinois EPA explained its rejection of the Petitioner's budget:

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 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)).

(R. 183.) Further, Illinois EPA explained its modification of drum disposal costs:

> 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). Finally, Illinois EPA required the Petitioner to submit a Stage 3 Site Investigation Plan, and budget if applicable, or a Site Investigation Completion Report. (R. 179.)

On July 1, 2013, the Petitioner filed its Petition for Review in the instant action.

II. ARGUMENT

Section 57.3 of the Environmental Protection Act, 415 ILCS 5/1 *et seq.*, provides for the establishment of the Illinois Leaking Underground Storage Tank Program, which is to be administered by the Office of the State Fire Marshal and the Respondent, the Illinois Environmental Protection Agency. 415 ILCS 5/57.3. Section 57.7(c)(4) of the Act 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 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).

A. BECAUSE ILLINOIS EPA RELIED UPON PETITIONER'S OWN DATA, NO GENUINE ISSUE EXISTS THAT THE EXTENT OF ON-SITE CONTAMINATION HAD BEEN DEFINED; AS SUCH, PETITIONER'S STAGE 2 PLAN EXCEEDED THE MINIMUM REQUIREMENTS IN VIOLATION OF THE ACT AND BOARD RULES, AND ILLINOIS EPA IS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW.

1. Once the extent of on-site contamination has been defined, on-site investigation must cease, as further investigation would offend the requirements of the Act and Board regulations not to undertake activities or costs in excess of the minimum requirements.

Title XVI of the Environmental Protection Act sets forth the Illinois Leaking Underground Storage Tank Program ("LUST Program"). 415 ILCS 5/57. The purpose of the program is to set procedures for remediation of LUST sites and requirements for reimbursement. *See* 415 ILCS 5/57. Section 57.7 of the Act provides for site investigations. 415 ILCS 5/57.7. That section states in pertinent part that,

> [f]or any site investigation activities required by statute or rule, the owner or operator shall submit to the Agency for approval a site investigation plan designed to determine the nature, concentration, direction of movement, rate of movement, and **extent of the contamination** as well as the significant physical features of the site and surrounding area that may affect contaminant transport and risk to human health and safety and the environment.

415 ILCS 57.7(a)(1) (emphasis added).

This Board's regulations for petroleum underground storage tanks ("USTs") provide that investigations of releases proceed in three stages. 35 Ill. Adm. Code 734.310. A Stage 1 site investigation must be designed to collect initial information regarding the extent of on-site soil and groundwater contamination resulting from a release. 35 Ill. Adm. Code. 734.315. A Stage 2 site investigation "must be designed to **complete** the identification of soil and groundwater contamination at the site." 35 Ill. Adm. code 734.320 (emphasis added). Finally, a Stage 3 site

investigation must be designed to identify the extent of off-site soil and groundwater contamination resulting from the release that exceeds the objectives.

However, despite the fact that the regulations provide for a three-step site investigation process, they do not require every site investigation to proceed through all three of those steps. In fact, the regulations actually prohibit further site investigation once the extent of the contamination has been defined:

> If, after the completion of any stage, **the extent of the soil and groundwater contamination** exceeding the most stringent Tier 1 remediation objections of 35 Ill. Adm. Code 742 for the applicable indicator contaminates as a result of the release **has been defined**, the owner or operator **must cease investigation** and proceed with the submission of a site investigation completion report in accordance with Section 734. 330 of this Part.

35 Ill. Adm. Code 734.310 (emphasis added). Thus, while Section 734.310 generally provides for a three-step investigation process, it also prohibits further investigation once the extent of contamination from the UST release has been defined.

Furthermore, the Act and Board 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 the instant case, those two requirements—to cease site investigation once the extent of contamination had been defined and to not exceed the minimum requirements of the Act and regulations—came together.

2. The Petitioner's contention that additional Stage 2 site investigation is warranted to further define the plume was rejected by the Board in the case of *L. Keller Oil Properties, Inc./Farina* as in excess of the minimum necessary under the Act and regulations.

As part of its Stage II Site Investigation Plan and Budget, the Petitioner submitted the results from its Stage 1 site investigation activities. (R. 001.) Those results showed that the north, east, and south monitoring wells placed along the site property lines and soil samples from those locations did not detect levels of benzene, ethylbenzene, toluene, total xylenes, and MTBE in excess of the most stringent Tier 1 remediation objectives. (R. 089-90; Ex. A at ¶ 8 (Kuhlman Aff.).) Only the monitoring well adjacent to the USTs themselves, MW-5, and the monitoring well along the western property line, MW-1, detected excessive levels. *Id.* Further, not all of the other soil borings taken around the underground storage tanks and the fuel pump islands under the canopy detected levels of substances in excess of the most stringent Tier 1 remediation objectives: Samples from soil boring A-6 under the pump canopy had no excessive levels. (R. 087.) In addition, the Petitioner's submittal reported that, "[b]ased on activities completed to date, it appears that the groundwater flow direction is toward the west across the site." (R. 011, 033.)

From the data submitted by the Petitioner, Illinois EPA concluded that the extent of soil contamination had been defined along the property lines to the north, east, and south of the rectangular property site, but not to the west. (Ex. . A at ¶ 9 (Kuhlman Aff.).) Having defined the extent of contamination on-site but not off-site to the west, the Petitioner's activities effectively satisfied the requirements of a Stage 2 site investigation—"to complete the identification of the extent of soil and groundwater contamination at the site"—during its Stage 1 activities. *See* 35 Ill. Adm. Code 734.320. Therefore, the Petitioner was required to cease its on-site investigation. *See* 35 Ill. Adm. Code 734.310. The Petitioner instead submitted its Stage II Site Investigation Plan that proposed further on-site investigation. (*E.g.*, R. 008.) However, as the Petitioner could not propose any further Stage 2 site investigation activities without violating Sections 734.310 and 734.320 of the regulations and as "[t]he investigation of any off-site contamination must be conducted as part of the Stage 3 site investigation," 35 Ill. Adm. Code 734.320, Illinois EPA advised the Petitioner that pursuant to 35 Ill. Adm. Code 734.320(c), it must submit a Stage 3 Site Investigation Plan for review that proposes to define the extent of soil contamination to the west. In addition, because Illinois EPA is charged with determining whether costs associated with a plan will not be used for site investigation activities in excess of those required to meet the minimum requirements of the LUST Program, *see, e.g.*, 415 ILCS 57.7(c)(3), and as the Petitioner had effectively satisfied the Stage 2 site investigation requirements through its Stage 1 activities by defining the excessive on-site contamination, Illinois EPA rejected the Petitioner's Stage II Site Investigation Plan. (R. 179, 181; Ex. A at ¶ 10 (Kuhlman Aff.).) In its appeal, however, the Petitioner contends that its needs to conduct additional on-site investigation. (Pet. at 4 ¶ 11.) In its submittal, the Petitioner's consultant, CW^3M, wrote that its Stage II Site Investigation Plan proposed boring locations and monitoring well locations "in an attempt to

complete and more narrowly define the on-site plume, where possible." (R. 008.) This Board has gone down this path before with this consultant in the case of *L. Keller Oil Properties, Inc./Farina v. Illinois EPA*, PCB 07-147 (Dec. 6, 2007).

In *Farina*, as in the instant case, Illinois EPA had rejected a Stage 2 Site Investigation Plan. *Id.* at 1. Illinois EPA found that proposed soil borings exceeded the minimum requirements of the Act and Board regulations. *Id.* at 42. The petitioner in *Farina* disagreed, however, arguing that "the data from the proposed samples would be useful in terms of reducing the area of the plume that needs remediation and reducing corrective action costs." *Id.* at 45-46. However, some borings were proposed between the gasoline tank fields and a monitoring well already known to have contamination exceeding remediation objectives. *Id.* at 45. Because the petitioner had already established that soil contamination extended beyond the proposed borings, "the Board [agreed] with the Agency that additional soil sampling between the gasoline tank field and [the monitoring well] exceeds the minimum requirement of the Act." *Id.* at 46.

The petitioner in *Farina* also ran afoul with Stage 1 soil borings. *Id.* at 42-44. The petitioner had taken one soil boring that was at the midpoint of an excavation wall from which clean samples had been taken, and another soil boring in the vicinity of an excavation sample that indicated no contamination. *Id.* at 43-44. In both cases, the Board found that Illinois EPA was correct that the soil borings exceeded the minimum requirements of the Act and Board regulations. *Id.*

In the instant case, the Petitioner's Stage II Site Investigation Plan proposed a soil boring between monitoring wells MW-2 and MW-3 on the southern and eastern property lines, respectively. (R. 029.) The Petitioner also proposed two (2) soil borings between monitoring wells MW-3 and MW-4 on the northern and eastern property lines, respectively. (*Id.*) None of

those wells indicated excessive contamination, however. In addition, the Petitioner proposed a soil boring north of SB-2, which was just north of the USTs, but south of the northern property line where MW-4 had not indicated excess contamination. (*Id.*) Further, the Petitioner's plan proposed placing two (2) monitoring wells with soil samples along the western property line north and south of MW-1, the monitoring well that already had detected excessive contamination during the Stage 1 investigation. (R. 031.)

Like the soil borings in *Farina*, the soil borings and monitoring wells proposed by the Petitioner in its Stage II Site Investigation Plan exceeded the minimum requirements of the Act and Board regulations, as the Petitioner's Stage 1 activities already had defined the extent of the on-site contamination. Despite the Petitioner's desire to further define the plume, the extent of contamination had been defined, and the Petitioner was required to cease its on-site investigation. *See* 35 Ill. Adm. Code 734.310. The Petitioner therefore could not propose any further Stage 2 site investigation activities without violating Sections 734.310 and 734.320. Furthermore, as the Petitioner's Stage 1 results found indicator contaminants exceeding the most stringent Tier 1 remediation objectives from a monitoring well on the site's western property line, thereby indicating the release likely extends beyond the site's western property boundary, Section 734.320(c) required the Petitioner to submit a Stage 3 site investigation plan, as Illinois EPA advised. Finally, because Illinois EPA is charged with determining that plan costs will not be used for site investigation activities in excess of the minimum requirements of the LUST Program, *see* 415 ILCS 5/57.7(c)(3), Illinois EPA rejected the Petitioner's Stage II Site Investigation Plan because it would violate the Act and Board regulations as it proposed soil borings and monitoring wells that exceeded these minimum requirements where the on-site contamination had been defined and on-site investigation was required to cease.

Illinois EPA reached its conclusion that the extent of on-site contamination had been defined based upon the data submitted by the Petitioner. Consequently, no genuine issue of material fact exists that the extent of the on-site contamination had been defined. Therefore, under the Act and Board regulations, the on-site investigation must cease and a Stage 3 off-site investigation plan be submitted; Illinois EPA properly rejected the Petitioner's Stage II Site Investigation Plan because it violated Act and Board requirements by proposing to exceed the minimum requirements necessary. Consequently, Illinois EPA is entitled to summary judgment as a matter of law.

B. NO GENUINE ISSUE EXISTS THAT ILLINOIS EPA REJECTED THE PETITIONER'S STAGE 2 PLAN; BECAUSE IT COULD NOT PROPERLY REVIEW THE STAGE 2 BUDGET WITHOUT THE PLAN, ILLINOIS EPA PROPERLY REJECTED THE BUDGET AND IS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW.

Under this Board's regulations, the Respondent "has the authority to approve, reject, or require modification of any plan, budget, or report it reviews." 35 Ill. Adm. Code 734.505(b). A financial review of a proposed budget requires a detailed review of the costs associated with each element necessary to accomplish the plan's goals, including the costs associated with any materials, activities, or services in the budget. 35 Ill. Adm. Code 734.510(b). This regulation specifies that

> [t]he overall goal of the financial review must be to assure that the costs associated with materials, activities, and services must be reasonable, must be consistent with the associated technical plan, must be incurred in the performance of corrective action activities, must not be used for corrective action activities **in excess of those necessary to meet the minimum requirements of the Act and regulations**, and must not exceed the maximum payment amounts set forth in Subpart H of this Part.

35 Ill. Adm. Code 734.510(b) (emphasis added).

In the instant action, the Respondent, having rejected the Petitioner's Stage II Site Investigation Plan, likewise rejected Petitioner's budget for the investigation. (R. 179, 183.) The Respondent explained:

> 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)).

(R. 183.)

No genuine issue of material fact exists that Illinois EPA rejected the Petitioner's Stage II Site Investigation Plan. Having done so, Illinois EPA could not review the associated budget in keeping with the requirements of Section 734.510(b). Therefore, pursuant to its authority under Section 734.505(b), Illinois EPA correctly rejected the Petitioner's budget for its Stage II Site Investigation Plan and is thus entitled to summary judgment as a matter of law.

C. BECAUSE CALCULATIONS ON PETITIONER'S DATA SHOW NO GENUINE ISSUE EXISTS THAT IT SOUGHT DISPOSAL OF DRUMS IN EXCESS OF THE MINIMUM REQUIREMENTS AND IN VIOLATION OF THE ACT AND BOARD RULES, ILLINOIS EPA IS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW.

As previously noted, the Respondent is charged by Board regulation with conducting a financial review of submitted plans and budgets, and that review includes assuring 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." 35 Ill. Adm. Code 734.510(b).

In the instant action, the Respondent modified the Stage I costs submitted for approval by the Petitioner by cutting costs for drum disposal. (R. 182.) The Respondent explained the modification 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) (emphasis added).

Environmental Protection Engineer Eric Kuhlman, the Illinois EPA project manager for the site, reviewed the Stage II Site Investigation Plan and Budget and supporting materials submitted by the Petitioner. (Ex. A at ¶¶ 7, 12 (Kuhlman Aff.).) In the course of his review, Kuhlman observed that the submitted Drilling and Monitoring Well Costs Form (R. 049) listed two (2) soil borings and five (5) monitoring wells, yet the Remediation and Disposal Costs Form reported that eight (8) drums of solid waste had been disposed. (Ex. A at ¶ 12 (Kuhlman Aff.).) The disposal of eight drums for seven borings seemed excess to Kuhlman, prompting him to look into the matter further by making several calculations. *Id.*

Using a computer spreadsheet, Kuhlman used the diameters and heights of the borings as reported in the submitted materials to calculate the volume of the borings. *Id.* at ¶ 13. Through his education and training, Kuhlman was aware that a "fluff" or safety factor commonly is used in most engineering calculations. *Id.* For example, Kuhlman was aware that Section 734.825(a)(1) of

the regulations call for such a factor of 1.05, or five percent. *Id.*; 35 Ill. Adm. Code 734.825(a)(1). Knowing this, Kuhlman applied a "fluff" or safety factor of 1.50, or fifty (50) percent, to determine the volume of the borings, which was generous. (Ex. A at ¶ 13 (Kuhlman Aff.).) Kuhlman then divided that volume by the volume of a fifty-five (55) gallon drum to determine how many drums would be necessary to dispose of the seven borings. *Id.* Kuhlman determined that 2.3578 drums would be needed. Kuhlman then rounded that figure up to whole drums and then added an additional drum "for good measure." *Id.* Kuhlman thus determined that four (4) fifty-five (55) gallon drums would be sufficient for disposal of the seven (7) borings, and that eight (8) such drums would exceed the minimum requirements necessary to comply with the Act and regulations. *Id.*

The amount of boring material disposed clearly must bear relation to the amount of material extracted during the boring process. Illinois EPA relied upon the diameters and heights of the borings provided by the Petitioner itself to calculate the volume of extracted material and, in turn, the number of fifty-five (55) gallon drums necessary to dispose of that material. Because the analysis was essentially mathematic and based upon the Petitioner's own data, no genuine issue of material fact exists that no more than four (4) fifty-five (55) gallon drums were necessary to dispose of the material extracted from the borings. The Petitioner, though, sought costs not for four (4) such drums but eight (8). The Petitioner's drum disposal costs violated the Act and Board regulations, as they were for activities in excess of those necessary to meet the minimum requirements. *See* 415 ILCS 5/57.7(c)(3); 35 Ill. Adm. Code 734.510(b); 35 Ill. Adm. Code 734.630(o). Because of this violation, Illinois EPA exercised its authority "to approve, reject, or require modification of any plan, budget, or report it reviews," *see* 35 Ill. Adm. Code 734.505(b), and modified the Petitioner's budget by reducing the number of disposal drums approved to four

(4) from eight (8). As the Petitioner's drum disposal costs violated the Act and Board regulations and as Illinois EPA correctly modified those costs, Illinois EPA is entitled to summary judgment as a matter of law.

III. CONCLUSION

WHEREFORE, the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, prays that this honorable Board find that no genuine issue of material fact exists and the Illinois EPA is entitled to summary judgment in its favor as a matter of law.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

Dated: August 27, 2013

BY: _____
Scott B. Sievers
Special Assistant Attorney General

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STATE OF ILLINOIS	)	***Chatham BP, LLC v. Illinois EPA***
	) **SS**	**Illinois Pollution Control Board**
COUNTY OF SANGAMON	)	**Case No. PCB 14-01 (UST Appeal)**

AFFIDAVIT

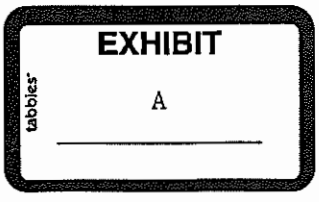
I, ERIC KUHLMAN, under oath, state that I have personal knowledge of the statements contained in this affidavit, that I am over 21 years of age and of sound mind and body, and if called to testify, I would testify as follows:

1. I am employed as an Environmental Protection Engineer within the Leaking Underground Storage Tank Section within the Illinois Environmental Protection Agency ("Illinois EPA") and have been so employed for more than fifteen (15) years. I work at Illinois EPA Headquarters, 1021 North Grand Avenue East, Springfield, Illinois.

2. In 1997 I earned bachelor of science degrees in physics from Western Illinois University and in mechanical engineering from Southern Illinois University Carbondale with a minor in mathematics. I am a Licensed Professional Engineer Intern.

3. In the course of my employment as an Environmental Protection Engineer, I have taken numerous continuing education courses on such subjects as remediation; drilling and sampling; groundwater investigations; geology; and hydrogeology, mapping, among many others.

4. My duties as an Environmental Protection Engineer include reviewing and interpreting plans, budgets, and reports submitted to Illinois EPA and determining their compliance with the requirements of the Illinois Environmental Protection Act, 415 ILCS 5/1 *et seq.*, and the regulations promulgated under the Act by the Illinois Pollution Control Board.



5. I am the Illinois EPA project manager assigned to the Chatham BP, LLC Leaking Underground Storage Tank site located at located at 300 North Main Street in Chatham, Illinois.

6. On or about January 22, 2013, I received the Stage II Site Investigation Plan and Budget dated January 17, 2013 that is the subject of this litigation and is found within the administrative record at pages 001-108. On or about May 8, 2013, I received additional information from Chatham BP, LLC's consultant in support of this plan and budget that is found within the administrative record at pages 109-184.

7. In the course of my review of the submitted Stage II Site Investigation Plan and Budget and supporting materials, I observed the results reported from the monitoring wells and soil borings conducted in the course of the Petitioner's Stage I site investigation. The submitted materials reported that five monitoring wells, four with soil samples, and two soil borings were advanced as part of the plume delineation activities. (R. 011.) Collected samples were analyzed for benzene, ethylbenzene, toluene, total xylenes (BETX), and methyl tert-butyl ether (MTBE). (R. 011.) The monitoring wells also were analyzed for the same substances. (*E.g.*, R. 090.)

8. According to the submitted data, the source well near the underground storage tanks, MW-5, detected benzene, ethylbenzene, toluene, total xylenes, and MTBE in groundwater in excess of the most stringent Tier I remediation objectives. (R. 090.) The monitoring well along the western property line, MW-1, also detected levels in excess of the most stringent Tier 1 remediation objectives. (*Id.*) However, the other three monitoring wells—MW-2 along the southern property line, MW-3 along the

eastern property line, and MW-4 along the northern property line—did not detect levels in groundwater exceeding the most stringent Tier 1 remediation objectives. (*Id.*) Soil samples taken from those three monitoring wells also did not detect such excessive levels, whereas soil samples from the western property line well, MW-1, did. (R. 089.) Further, not all of the other soil borings taken around the underground storage tanks and the fuel pump islands under the canopy detected levels of substances in excess of the most stringent Tier 1 remediation objectives: Samples from soil boring A-6 under the pump canopy had no excessive levels. (R. 087).

9. From this submitted monitoring well and soil boring sampling data, I concluded that the extent of soil contamination had been defined along the property boundaries lines to the north, east, and south, but not to the west. Therefore, a Stage 3 Site Investigation Plan was necessary to define the extent of soil contamination farther to the west.

10. The submitted Stage II Site Investigation Plan and Budget proposed placing two monitoring wells with soil samples along the western property line north and south of the monitoring well that detected substances in excess of the most stringent Tier 1 remediation objectives during the Stage 1 investigation. (R. 031.) In addition to those soil borings, the Stage 2 plan proposed a soil boring between monitoring wells MW-2 and MW-3 on the southern and eastern property lines, respectively. (R. 029.) The Stage 2 plan also proposed two (2) soil borings between monitoring wells MW-4 and MW-3 on the northern and eastern property lines, respectively. (R. 029.) The Stage 2 plan further proposed a soil boring north of SB-2 but south of MW-4. (R. 029.) Finally, the Stage 2 plan proposed a soil boring for TACO purposes just west of MW-4. (R. 029.) Having concluded that the extent of on-site

contamination had been defined, I further concluded that the proposed additional monitoring wells and soil borings were in excess of the minimum requirements necessary for compliance with the Act and its regulations. Therefore, I recommended that Illinois EPA reject the Stage II Site Investigation Plan and call upon the Petitioner to submit a Stage 3 site investigation plan and budget to define the off-site contamination.

11. As I recommended rejecting the Stage II Site Investigation Plan, I also recommended that Illinois EPA reject the budget that accompanied that plan, as I could not review the budget and determine whether it complied with the Act and regulations apart from, and without the existence of, an approved underlying plan.

12. In the course of my review of the submitted Stage II Site Investigation Plan and Budget and supporting materials, I observed that the submitted Drilling and Monitoring Well Costs Form (R. 049) listed two (2) soil borings and five (5) monitoring wells, yet the Remediation and Disposal Costs Form reported that eight (8) drums of solid waste had been disposed. The disposal of eight drums for seven borings seemed excessive, prompting me to look into the matter further by making several calculations.

13. Using a computer spreadsheet, I used the diameters and heights of the borings as reported in the submitted materials to calculate the volume of the borings. Through my education and training, I am aware that a "fluff" or safety factor commonly is used in most engineering calculations. For example Section 734.825(a)(1) of the LUST regulations calls for such a factor of 1.05, or five percent. 35 Ill. Adm. Code 734.825(a)(1). Knowing this, I applied a "fluff" or safety factor of 1.50, or fifty (50) percent, to determine the volume of the borings, which was generous. I then

divided that volume by the volume of a fifty-five (55) gallon drum to determine how many drums would be necessary to dispose of the seven borings. I determined that 2.3578 drums would be needed. I then rounded that figure up to whole drums and then added an additional drum for good measure. Thus, I determined that four (4) fifty-five (55) gallon drums would be sufficient for disposal of the seven (7) borings, and that eight (8) such drums would exceed the minimum requirements necessary to comply with the Act and regulations. Therefore, I recommended that Illinois EPA modify the actual costs for Stage I to deduct $1,145.92, the cost of the four (4) disposal drums in excess of the minimum necessary for compliance.

14. Illinois EPA subsequently adopted my recommendations to reject the Stage II Site Investigation Plan and Budget and to modified the actual Stage I costs. Illinois EPA advised the Petition of its decision by letter dated May 28, 2013. (R. 179-84.)

I have read the foregoing and affirm that the facts contained herein are true and correct to the best of my knowledge and belief.

FURTHER AFFIANT SAYETH NOT.

Eric Kuhlman

ERIC KUHLMAN
Environmental Protection Engineer III
Leaking Underground Storage Tank Section
Illinois Environmental Protection Agency

Subscribed and sworn to before me
this 23rd day of August, 2013.

Dawn A. Hollis
Notary Public

(SEAL)
OFFICIAL SEAL
DAWN A. HOLLIS
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 8-19-2016

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 **MEMORANDUM OF LAW IN SUPPORT OF ILLINOIS EPA'S CROSS MOTION FOR SUMMARY JUDGMENT** upon:

John T. Therriault
Assistant Clerk
Illinois Pollution Control Board
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601-3218

William D. Ingersoll
Brown, Hay & Stephens, LLP
205 S. Fifth Street, Suite 700
P.O. Box 2459
Springfield, IL 62705-2459

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

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 August 27, 2013.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

Dated: August 27, 2013

Scott B. Sievers
Attorney Registration No. 6275924
1021 North Grand Avenue East
P.O. Box 19276
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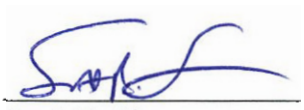
BY: 

Scott B. Sievers
Special Assistant Attorney General