

ILLINOIS POLLUTION CONTROL BOARD  
July 23, 2015

CHATHAM BP, LLC,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 15-173
	)	(UST Appeal)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

WILLIAM D. INGERSOLL; BROWN, HAY & STEPHENS, LLP; APPEARED ON BEHALF OF PETITIONER, and

SCOTT B. SIEVERS, SPECIAL ASSISTANT ATTORNEY GENERAL, APPEARED ON BEHALF OF RESPONDENT.

INTERIM OPINION AND ORDER OF THE BOARD (by J.D. O’Leary):

On March 30, 2015, Chatham BP, LLC (Chatham BP) filed a petition requesting that the Board review a February 25, 2015 determination by the Illinois Environmental Protection Agency (Agency or Illinois EPA or IEPA). *See* 415 ILCS 5/40(a)(1) (2014); 35 Ill. Adm. Code 101.300(b), 105.402, 105.404, 105.406. That determination rejected a Stage 2 site investigation plan and budget and required submission of a Stage 3 site investigation plan and any applicable budget. The Agency’s determination concerns petitioner’s leaking underground storage tank (UST) site located at 300 North Main Street, Chatham, Sangamon County (site).

For the reasons stated below, the Board today finds that Chatham BP has met its burden of proving that its proposed Stage 2 Site Investigation plan would not violate the Act and Board regulations and reverses the Agency’s February 25, 2015 rejection of that plan. Having reversed the rejection of the plan, and in the absence of an Agency determination on the associated proposed Stage 2 Site Investigation budget, the Board at the conclusion of this case will remand the budget to the Agency for its review. The Board sets a deadline for Chatham BP to file a statement of legal fees that may be eligible for reimbursement and its arguments why the Board should exercise its discretion to direct the Agency to reimburse those fees from the UST Fund. The Board also provides for an Agency response to any statement filed by Chatham BP.

The Board’s opinion first provides the procedural history of this case before addressing a preliminary matter. Next, the Board reviews the factual background. The Board then summarizes Chatham BP’s petition for review and the post-hearing briefs filed by the parties. After providing the statutory and legal background, including the standard of review and burden of proof, the Board discusses the issues presented, reaches its conclusion, and issues its order.

## **PROCEDURAL HISTORY**

Chatham BP has appealed two Agency determinations concerning the same site and UST incident number 20071292, and both determinations rejected a proposed Stage 2 site investigation plan and budget received by the Agency on January 22, 2013. *Compare Chatham BP, LLC v. IEPA*, PCB 14-1 (July 1, 2013) *and* R. at 130-35. Below, the Board first provides an abbreviated procedural history of PCB 14-1, the first of the two appeals, before providing the procedural history of this case.

### **Abbreviated Procedural History of PCB 14-1**

In a May 28, 2013 determination, the Agency rejected Chatham BP's proposed Stage 2 site investigation plan because

[t]he 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. *Chatham BP, LLC v. IEPA*, PCB 14-1 (July 1, 2013) (Exhibit A to petition).

The Agency also rejected Chatham BP's proposed Stage 2 site investigation budget because the Agency "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 . . . cannot be made." *Id.* On July 1, 2013, Chatham BP filed a petition requesting that the Board review the Agency's May 28, 2013 determination. *Id.*

On January 9, 2014, Board granted Chatham BP's motion for summary judgment on the issue of the proposed plan and reversed the Agency's rejection of it. *Chatham BP, LLC v. IEPA*, PCB 14-1, slip op. at 26 (Jan. 9, 2014). The Board found that "Chatham BP's proposed Stage 2 site investigation plan is necessary to define the extent of on-site contamination exceeding the most stringent Tier 1 remediation objectives at 35 Ill. Adm. Code 742. The Board therefore finds that the proposed plan does not exceed the minimum requirements of the Act and the Board's regulations." *Id.* The Board noted that the Agency had rejected Chatham BP's corresponding budget because it had not approved the associated plan. *Id.* The Board stated that, at the conclusion of the case, it would "remand to the Agency for its review of Chatham BP's proposed Stage 2 site investigation budget." *Id.*

On February 5, 2015, the Board directed the Agency to reimburse Chatham BP \$21,314.70 in legal fees. Having concluded consideration of the appeal, the Board remanded Chatham BP's proposed Stage 2 site investigation budget to the Agency for its review.

### **Procedural History of PCB 15-173**

On March 30, 2015, Chatham BP filed this petition for review (Pet.). On April 2, 2015, the Board accepted the petition for hearing and directed the Agency to file the entire record of its

determination by May 4, 2015. On April 14, 2015, the hearing officer issued a notice of hearing on May 27, 2015, in Springfield.

On May 4, 2015, the Agency filed a motion for a three-day extension of the time to file the administrative record. On May 11, 2015, the Agency filed the administrative record (R.), accompanied by a motion for leave to file *instanter*.

On May 14, 2015, the Agency filed notice pursuant to Supreme Court Rule 237(b) for Mr. Shamsheer Singh Amar to appear at hearing. *See* ILCS S. Ct. Rule 237(b) (Compelling Appearances of Witnesses at Trial). On May 18, 2015, Chatham BP filed notice to appear requesting that two Agency employees, Mr. Harry Chappell and Mr. Eric Kuhlman, be made available to testify at hearing. On May 19, 2015, Chatham BP filed a motion to quash the Agency's notice for Mr. Amar to appear at hearing. On May 22, 2015, the Agency filed its response to Chatham BP's motion to quash. The response withdrew the Agency's notice for Mr. Amar to appear.

The hearing took place as scheduled on May 27, 2015, and the Board received the transcript (Tr.) on June 2, 2015. Chatham BP called two witnesses to testify: Mr. Harry Chappell, Unit Manager of the Leaking Underground Storage Tank Section in the Agency's Bureau of Land (Tr. at 20-21); and Mr. Eric Kuhlman, an Agency Environmental Protection Engineer who was project reviewer for the site (*Id.* at 30-31, 36). The Agency called one witness to testify, Ms. Carol Rowe, the President of CW<sup>3</sup>M, an environmental consulting firm that contracted with Chatham BP for work at the site. *Id.* at 42-43. Ms. Rowe represented Chatham BP at the hearing. *Id.* at 53.

No public comment on this matter has been filed with the Board. On June 16, 2015, Chatham BP filed its post-hearing brief (Pet. Brief). On June 25, 2015, the Agency filed its post-hearing brief (Agency Brief) accompanied by a motion for leave to file *instanter* (Mot. Leave).

### **PRELIMINARY MATTER**

On June 25, 2015, the Agency filed its post-hearing brief accompanied by a motion for leave to file the brief *instanter*. The motion states that, because of obligations to other matters, counsel for the Agency was not able file the post-hearing brief by the June 23, 2015 deadline. Mot. Leave at 1. The motion further states that counsel was aware of another matter pending in Circuit Court that would prevent returning to work on the brief until June 25, 2015. *Id.* at 1-2. The motion adds that the Agency conferred with Chatham BP regarding a two-day extension of the filing deadline and that Chatham BP did not object to the motion for leave to file *instanter* on June 25, 2015. *Id.* at 2. The Agency requests that the Board grant leave to file *instanter*. *Id.* The Board has reviewed the substance of the Agency's motion and notes that it was filed two days after the deadline established by the hearing officer. Tr. at 61. The Board also notes the absence of any objection to the motion by Chatham BP. *See* 35 Ill. Adm. Code 101.500(d). Accordingly, the Board grants the motion for leave to file *instanter*, accepts the Agency's motion, and summarizes it below.

## **FACTUAL BACKGROUND**

### **Release at Site and Stage 1 Investigation**

The site is known as Chatham Gas and is an active gas station surrounded by commercial properties. R. at 6, 10; *see id.* at 24-25 (location maps), 26 (Site Map). The site includes four USTs owned by Chatham BP, which are currently in use. *Id.* at 7, 16, 21. Three of the USTs are 10,000-gallon gasoline tanks, and one is a 4,000-gallon diesel tank. *Id.* at 7 (Table 1-1. Underground Tank Summary).

On September 25, 2007, the Office of the State Fire Marshal (OSFM) investigated vapors in a storm sewer and a petroleum sheen in a creek in the vicinity of Main Street in Chatham. R. at 7. The investigator concluded that he could not account for approximately 342 gallons of fuel. *Id.* An OSFM safety specialist indicated that the release appeared to have been caused “by an overflow of the tank by the fuel delivery driver.” *Id.* at 8. Also on September 25, 2007, the former owner of the USTs reported a release to the Illinois Emergency Management Agency (IEMA). *Id.* at 7.

In April 2009, “AES [Adept Environmental Solutions, Inc.] was on-site to conduct Pre Stage 1 samples from around the active tank bed and piping trench. Soil analytical results indicated the Clean-Up Objectives for the site have been exceeded for several of the gasoline indicator contaminants.” R. at 8; *see id.* at 88-91 (soil assessment data dated 4-22-09); *see also id.* at 27 (Pre Stage 1 Sample Location Map).

On December 31, 2011, OSFM determined that Chatham BP was eligible to seek reimbursement from the UST Fund, subject to a deductible of \$15,000, for the release from one 10,000-gallon tank. R. at 72-73.

On April 5, 2012, CW<sup>3</sup>M personnel completed Stage 1 investigation activities at the site. R. at 8, 11. “Five monitoring wells (MW), four with soil samples[,] and two soil borings (SB) were advanced as part of the plume delineation activities. Soil samples were collected from each drilling location and were analyzed for benzene, ethylbenzene, toluene and total xylenes (BETX) and methyl tert-butyl ether (MTBE).” R. at 11; *see id.* at 28 (Soil Boring Location Map), 30 (Monitoring Well Location Map), 75-81 (Drilling Borehole Logs), 82-86 (Well Completion Reports). On April 6, 2012, CW<sup>3</sup>M personnel returned to the site to survey and sample the five monitoring wells. R. at 8, 11. Monitoring wells 1 and 5 and soil borings 1 and 2 showed that clean-up objectives had been exceeded for one or more contaminants. *Id.* at 92-93; *see id.* at 34-35 (Soil Contamination Value Maps).

### **Proposed Stage 2 Site Investigation Plan**

By a letter dated January 17, 2013, on behalf of Mr. Shamsher Singh Amar, the owner of USTs at the site, CW<sup>3</sup>M submitted to the Agency a proposed Stage 2 site investigation plan and budget. R. at 1-2. The proposed Stage 2 site investigation 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. at 14. The plan also proposed “[o]ne additional boring . . . for collection of a Tiered Approach to Corrective Action Objectives (TACO) sample.” *Id.*

The proposed plan includes monitoring wells with soil samples along the western boundary of the site, one to the north of MW-1 and one to the south. R. at 31 (Proposed Monitoring Well Location Map). The plan also proposes one soil boring between MW-2 and MW-3 in the southeastern section of the site. *Id.* at 29 (Proposed Soil Boring Location Map). It proposed two soil borings between MW-3 and MW-4 in the northeastern section of the site. *Id.* A fourth soil boring was proposed between SB-2 and MW-4 in the northern section of the site. *Id.* The plan also proposed a soil boring for TACO purposes just west of MW-4 along the northern boundary of the site. *Id.*; *see id.* at 14.

The plan included a Stage 2 Site Investigation budget itemized to include \$2,439.60 in drilling and monitoring well costs (R. at 41, 61), \$2,287.87 in analytical costs (*id.* at 41, 62-63), \$1,170.00 in remediation and disposal costs (*id.* at 41, 64-65), \$19,690.76 in consulting personnel costs (*id.* at 41, 66-68), and \$618.00 in consultant materials costs (*id.* at 41, 69-70), for a total proposed Stage 2 budget of \$26,206.23. *Id.* at 41.

### **January 20, 2015 Agency Draft Letter**

The Agency’s administrative record includes a “[c]orrected” letter regarding the site addressed to Chatham BP with an “original date” of May 28, 2013. R. at 127-29; *see Chatham BP, LLC v. IEPA*, PCB 14-1 (July 1, 2013) (petition for review and exhibits). The Agency’s certificate of record on appeal refers to this document as “January 20, 2015 Illinois EPA draft letter.” *Chatham BP, LLC v. IEPA*, PCB 15-73 (May 11, 2015). Mr. Kuhlman testified that he prepared this document. Tr. at 32-33.

### **Site Investigation Plan**

The letter states that the Agency received a Stage 2 Site Investigation Plan for the site on January 22, 2013. The letter further states that “[t]he Illinois EPA has determined that the activities proposed in the plan are appropriate to demonstrate compliance with Title XVI of the Act [Petroleum Underground Storage Tanks] and 35 Ill. Adm. Code 734 [Petroleum Underground Storage Tanks]. . . . Therefore, the plan is approved.” R. at 127, citing 415 ILCS 5/57.7(a)(1), (c) (2014), 35 Ill. Adm. Code 734.505(b), 734.510(a).

The letter further states that “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. . . .” R. at 128, citing 415 ILCS 5/57.7(a)(5), 57.12(c), (d) (2014), 35 Ill. Adm. Code 734.100, 734.125.

### **Site Investigation Budget**

The letter also states that “the proposed budget for Stage(s) 2 is approved for amounts determined in accordance with Subpart H [Maximum Payment Amounts], Appendix D [Sample

Handling and Analysis], and Appendix E [Personnel Titles and Rates] of 35 Ill. Adm. Code 734. R. at 127, citing 35 Ill. Adm. Code 734.310(b) (Site Investigation - General).

### **February 25, 2015 Agency Determination Letter**

#### **Background**

Mr. Chappel supervises nine employees, including Mr. Kuhlman. Tr. at 21, 37. Mr. Chappel testified that the responsibilities of his unit include the approval of budgets but not the approval of requests for reimbursement or actual payment. Tr. at 18. Mr. Chappel further testified that his unit had authority only “to approve the budget in accordance with the Board order that was issued.” *Id.* at 18, 19-20. Mr. Chappel indicated that he had not testified in or been involved with PCB 14-1. *Id.* at 21-22.

In electronic mail dated January 28, 2015, on the subject of “Chatham BP, LLC v. Illinois EPA (PCB No. 14-1),” Mr. Kuhlman asked Mr. Chappel whether he had “an example of how an Appeal letter should look.” R. at 116, 120. Mr. Kuhlman testified that he was “writing a response or decision letter for Chatham BP.” Tr. at 31. He further testified that he “did not review the entirety of the record for the previous Chatham BP litigation.” *Id.* at 40. Mr. Chappel responded to Mr. Kuhlman’s electronic mail by stating that

I don’t think we should be sending a payment approval letter. I would take your May 28, 2013 letter and modify it to not deduct the drum costs. A copy of the original decision letter is at the back of the attached initial filing in the case. Attachment B would be modified to add in the drum costs (Actual costs approved) and delete the denial of \$1145.92. Other than a new date on the letter, I believe these are the only changes needed. R. at 116, 120; *see* Tr. at 23-24, 38.

Mr. Chappel testified that, when he provided this direction, he was not “aware that the Board had fully reversed Illinois EPA’s May 28, 2013 decision letter.” Tr. at 24. Mr. Kuhlman testified that, when he received this direction, he believed that Mr. Chappel was aware of the reversal. *Id.* at 38-39. Mr. Chappel testified that, as a result of his direction, Mr. Kuhlman wrote the Agency’s February 25, 2015 letter. Tr. at 24, 37, *see* R. at 130-35. Mr. Kuhlman agreed that the February 25, 2015 letter stems mainly from the Board’s December 18, 2014 order in PCB 14-1. Tr. at 40.; *see* R. at 112-15 (Board order granting Chatham BP’s unopposed motion for reconsideration). Mr. Chappel testified that, if he had been aware that the Board had fully reversed the Agency’s May 28, 2013 determination, he would have provided different directions to Mr. Kuhlman for drafting the letter. Tr. at 24. Mr. Chappel stated that the final version of the Agency’s February 25, 2015 letter “was a mistake.” *Id.* at 20; *see also id.* at 24.

#### **Site Investigation Plan**

The Agency’s February 25, 2015 decision letter states that, pursuant to the Board’s order in PCB 14-1, Chatham BP, LLC v. IEPA, the Agency “has re-characterized its determination for the Stage 2 Site Investigation Plan. . . .” R. at 130. The letter states that “[t]he plan is rejected

for the reason(s) listed in Attachment A.” R. at 130, citing 415 ILCS 5/57.7(a)(1), (c) (2014), 35 Ill. Adm. Code 734.505(b), 734.510(a). Attachment A states in pertinent part that,

[i]f 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 [Tiered Approach to Corrective Action Objectives] 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. R. at 132, citing 415 ILCS 5/57.1(a) (2014), 35 Ill. Adm. Code 734.320(c).

Attachment A continues that

[t]he 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 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. at 132.

### **Site Investigation Budget**

The Agency’s determination letter further states that “the budget is rejected for the reason(s) listed in Attachment C.” R. at 130, citing 415 ILCS 5/57.7(a)(1), (c) (2014), 35 Ill. Adm. Code 734.505(b), 734.510(a). Attachment C states in pertinent part that

[t]he 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. R. at 134, citing 415 ILCS 5/57.7(c)(3) (2014); 35 Ill. Adm. Code 734.510(b).

### **Appeal Rights**

The February 25, 2015 letter states that “[a]n underground storage tank owner or operator may appeal this decision to the Illinois Pollution Control Board. Appeal rights are attached.” R. at 131. Under “Appeal Rights,” the letter states that “[a]n 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 issuance of the final decision.” *Id.* at 135.

### **Response to February 25, 2015 Letter**

Ms. Rowe testified that, when she received the February 25, 2015 letter, “initially I didn’t know what it was, but we assumed something was wrong or didn’t really understand what it was initially.” Tr. at 46-47. After receiving the letter, Chatham BP or CW<sup>3</sup>M contacted the Agency through legal counsel. *Id.* at 54. Ms. Rowe testified that Chatham BP decided to file a petition for review. *Id.* at 47. She suggested that the 35-day appeal deadline was approaching. She also stated her understanding that the Agency could not reverse its final decision without a resubmission of the budget. *Id.* at 47-48.

### **March 27, 2015 Agency Revised Determination Letter**

#### **Background**

Mr. Chappel testified that, when the error in the Agency’s February 25, 2015 letter came to his attention, he sought to fix that mistake. Tr. at 24-25. The Agency’s administrative record includes a letter from the Agency to Chatham BP dated March 27, 2015. R. at 136-38. The Agency’s certificate of record on appeal refers to this document as “March 27, 2015 Illinois EPA revised decision letter.” Chatham BP, LLC v. IEPA, PCB 15-73 (May 11, 2015). Mr. Chappel testified that the March 27, 2015 letter “fixed the mistake of the February 25, 2015 letter.” Tr. at 25. He further testified that the letter dated March 27, 2015 was mailed “on or about that date.” *Id.* Ms. Rowe testified that CW<sup>3</sup>M received this letter after the filing of the petition for review. Tr. at 50. She further testified that the letter “takes care of the Board issues and the budget issues that we were looking for. *Id.* at 53.

#### **Proposed Site Investigation Plan**

The revised letter states that, based on Board orders in PCB 14-1, the Agency “is approving the Stage 2 Site Investigation Plan.” R. at 136, citing Chatham BP, LLC v. IEPA, PCB 14-1 (Jan. 9, 2014; Feb. 5, 2015). The letter adds that the Board “has determined that the activities proposed in the plan are appropriate to demonstrate compliance with Title XVI of the Act [Petroleum Underground Storage Tanks] and 35 Ill. Adm. Code 734 [Petroleum Underground Storage Tanks]. . . . Therefore, the Stage 2 Plan is approved.” R. at 136, citing 415 ILCS 5/57.7(a)(1), (c) (2014), 35 Ill. Adm. Code 734.505(b), 734.510(a).

#### **Proposed Site Investigation Budget**

The revised letter also states that “[t]he proposed budget for Stage(s) 2 is approved for amounts determined in accordance with Subpart H [Maximum Payment Amounts], Appendix D [Sample Handling and Analysis], and Appendix E [Personnel Titles and Rates] of 35 Ill. Adm. Code 734. Costs must be incurred in accordance with the approved plan.” R. at 127, citing 35 Ill. Adm. Code 734.310(b) (Site Investigation - General).



### **SUMMARY OF PETITION FOR REVIEW**

The petition states that, on May 28, 2013, the Agency rejected the Stage 2 plan and budget and required Chatham BP to submit a Stage 3 Site Investigation Plan and Budget or a Site Investigation Completion Report. Pet. at 4 (¶11). Chatham BP filed a petition for review of this determination. *Id.*; see Chatham BP, LLC v. IEPA, PCB 14-1 (July 1, 2013). On review, the Board granted Chatham BP's motion for summary judgment regarding the proposed Stage 2 plan and reversed the Agency's rejection of the plan. Pet. at 4 (¶12); see Chatham BP, LLC v. IEPA, PCB 14-1 (Jan. 9, 2014). The Board stated that, at the conclusion of the case, it would remand to the Agency to review the proposed Stage 2 budget. Pet. at 5 (¶12); see Chatham BP, LLC v. IEPA, PCB 14-1, slip op. at 28 (Jan. 9, 2014). The petition states that the Board's final opinion and order remanded the case to the Agency for review of the proposed budget. Pet. at 5-6 (¶14); see Chatham BP, LLC v. IEPA, PCB 14-1, slip op. at 6 (Feb. 5, 2015).

The petition states that, on remand, the Agency reviewed the proposed plan it had received on January 22, 2013. Pet. at 6 (¶15); see R. at 130. The petition further states that, on February 25, 2015, the Agency rejected the proposed Stage 2 plan and budget and required Chatham BP to submit a Stage 3 Site Investigation Plan and Budget or a Site Investigation Completion Report. Pet. at 2 (¶4).

The petition argues that the reason for the Agency's February 25, 2015 rejection of the proposed Stage 2 plan is "identical" to the reason in its May 28, 2013 determination. Pet. at 3 (¶8); compare R. at 132 (2015 determination) with Pet., Exh. B at 3 (2013 determination). The petition further argues that the reason for the Agency's February 25, 2015 rejection of the proposed Stage 2 budget is "identical" to the reason in its May 28, 2013 determination. Pet. at 3-4 (¶9); compare R. at 134 (2015 determination) with Pet., Exh. B. at 5 (2013 determination).

The petition cites the Agency's February 25, 2015 determination, which states that the Agency "has re-characterized its determination for the Stage 2 Site Investigation Plan" received January 22, 2013. Pet. at 4 (¶10), citing R. at 130. The petition argues that the Board reversed the Agency's rejection of that plan and did not remand it to the Agency for re-characterization. Pet. at 6 (¶16). The petition argues that the Agency "apparently declines to review the budget" and that it declines to do so for the same reason stated in its May 28, 2013 determination. Pet. at 7 (¶¶18-19). Chatham BP asserts that "the only reasonable path here is that the Board reverse the rejection of the budget and thereby approve it." *Id.* (¶19).

The petition requests that the Board find that the Agency's February 25, 2015 determination "is arbitrary, capricious and not supported by statutory or regulatory authority." Pet. at 8. The petition further requests that the Board reverse rejection of the proposed Stage 2 Site Investigation Plan and budget and approve both proposals. *Id.* The petition also requests that the Board reimburse reasonable attorney fees and expenses. *Id.*, citing 415 ICLS 5/57.8(1) (2014). Finally, the petition seeks other relief as the Board deems appropriate. Pet. at 8.

### **SUMMARY OF CHATHAM BP'S POST-HEARING BRIEF**

Chatham BP argues that the Board reversed the Agency's May 28, 2013 rejection of the Stage 2 site investigation plan. Pet. Brief at 1-2; *see Chatham BP v. IEPA*, PCB 14-1 (Jan. 9, 2014). Chatham BP states that, because the Agency had rejected the plan, it had not reviewed the corresponding budget. *Id.* Chatham BP asserts that the Board remanded the budget to the Agency for review. Pet. Brief at 2. Chatham BP argues that, on remand, the Agency's February 25, 2015 determination "rejected both the plan and the budget using the same reasons as in the May 28, 2013 decision." *Id.* Chatham BP further argues that "the February 25, 2015 decision seemed to have completely avoided addressing or implementing the Board's decision in PCB 14-1." *Id.* Chatham BP states that Agency counsel and witnesses acknowledged that the decision erred and failed to follow the Board's direction. *Id.*, citing Tr. at 12, 20, 39. Chatham BP argues that "[i]t is clear that the decision did not follow the Board's directives in PCB 14-1." Pet. Brief at 2.

Chatham BP discounts the Agency's position that a revised March 27, 2015 letter corrects or moots the February 25, 2015 decision. Pet. Brief at 3. Chatham BP argues that "[i]t has long been settled that the IEPA lacks the legal authority to reconsider its final decisions." *Id.* at 2, citing *Reichhold Chemicals, Inc. v. PCB*, 204 Ill. App. 3d 674 (3rd Dist. 1990); *Tolles Realty Co. v. IEPA*, PCB 93-124 (June 5, 1997); *Clinton Co. Oil Co. v. IEPA*, PCB 91-163 (Mar. 26, 1992). Chatham BP argues that, in the absence of authority to change a final decision, the Agency's revised letter "does not moot the error of the final decision." Pet. Brief at 3.

Chatham BP notes that the Agency's revised letter is dated March 27, 2015, 30 days after the original February 25, 2015 determination. Pet. Brief at 3. Chatham BP suggests that the Agency did not ensure that it would receive the revised letter before the 35-day appeal deadline. *Id.* Chatham BP states that Ms. Rowe "testified that the letter was received after the filing." *Id.* at 4, citing Tr. at 50. Chatham BP argues that, even if the Agency had authority to reconsider its February 25, 2015 determination, Chatham BP was not aware of the Agency's revised letter when it filed its petition for review. Pet. Brief at 4. While Chatham BP suggests that the Agency doubts its motives for filing this appeal, it counters that the Agency provided no evidence to support these doubts. *Id.* at 3.

Chatham BP requests that the Board reverse the Agency's February 25, 2015 rejection of its Stage 2 site investigation plan and budget. Pet. Brief at 4. Chatham BP also requests that the Board find that it has prevailed and authorize it to file a statement of legal costs that may be reimbursable. *Id.*, citing 415 ILCS 5/57.8(1) (2014).

### **SUMMARY OF AGENCY'S POST-HEARING BRIEF**

The Agency states that Chatham BP appeals a February 25, 2015 determination rejecting a plan and budget on grounds that the Board had fully reversed in PCB 14-1. Agency Brief at 1. The Agency further states that it recognized its error in that determination "and sent out a March 27, 2015 letter fully remedying those errors." *Id.* The Agency argues that "Chatham BP has continued to pursue this action despite obtaining, before ever bringing this action, all substantive relief it sought in its Petition for Review." *Id.* The Agency suggests that Chatham BP treats this action as a separate action "to obtain attorney's fees and costs for litigation to obtain attorney's

fees and costs.” *Id.* The Agency argues that this case should be dismissed on various grounds, which the Board summarizes separately below.

### **Lack of Jurisdiction**

The Agency cites Section 5 of the Act, which “authorizes this Board to conduct proceedings upon petitions to review certain of Illinois EPA’s ‘final determinations.’” Agency Brief at 9, citing 415 ILCS 5/5(d) (2014). The Agency states that its February 25, 2015 letter was not a “final determination.” Agency Brief at 9. The Agency argues that the Act gives it no discretion whether to comply with the Board decisions. *Id.* The Agency further argues that “it lacked any authority to second-guess this Board’s decisions.” *Id.*; *see id.* at 13. The Agency asserts that, without this authority, it had no discretion to exercise or decision to make in this case other than to comply with the Board’s remand order in PCB 14-1. *Id.* The Agency states that “[i]t erred in doing so,” but the Agency asserts that its error does not make the letter a final determination because it had authority only to effectuate the Board’s orders in PCB 14-1. *Id.* The Agency concludes that, because the February 25, 2015 letter was not a final determination under the Act, the Board “should dismiss or deny this action, as the Board lacks subject matter jurisdiction to review an erroneous but insignificant letter.” *Id.* at 10.

### **Res Judicata**

The Agency argues that PCB 14-1 litigated and reversed the rejection of Chatham BP’s proposed Stage 2 budget. Agency Brief at 10. The Agency acknowledges that its February 25, 2015 letter “erroneously reasserted” the grounds for rejection and mischaracterized the Board’s orders. *Id.* The Agency further argues that it “cannot relitigate prior cases by issuing letters mischaracterizing PCB Orders, nor can Chatham BP relitigate a case based upon such erroneous letters. *Id.*

The Agency states that the application of *res judicata* requires three elements: “(1) an identity of parties or their privities; (2) an identity of cause of action; and (3) a final judgment on the merits rendered by an entity with competent jurisdiction.” Agency Brief at 10, citing Kean Oil Co. v. IEPA, PCB 97-146, slip op. at 8 (May 1, 1997). The Agency states that PCB 14-1 involved the same parties before the Board, which issued a final judgement on the merits. *Id.* The Agency argues that *res judicata* bars relitigation of the reversed denial. *Id.* The Agency concludes that the Board bar Chatham BP from using the February 25, 2015 letter to relitigate PCB 14-1 and to generate and recover additional attorney fees. *Id.*

### **Mootness**

The Agency states that Chatham BP’s petition for review requests reversal of the proposed Stage 2 plan and budget. Agency Brief at 11, citing Pet. at 8. The Agency argues that its March 27, 2015 letter provides this relief by approving the plan and budget. Agency Brief at 11. The Agency asserts that “[a]n appeal is moot if no controversy exists or if events have occurred which foreclose the reviewing court from granting effectual relief to the complaining party.” *Id.*, citing In re Shelby R., 2013 IL 114994, ¶ 15, 995 N.E.2d 990, 993. The Agency notes Ms. Rowe’s testimony that, other than attorney’s fees and costs, the March 27, 2015 letter

“takes care of the Board issues and the budget issues that we were looking for.” Agency Brief at 11, citing Tr. at 52. The Agency argues that Chatham BP cannot receive any additional substantive relief. Agency Brief at 11.

The Agency discounts Chatham BP’s citation to Reichhold and the contention that the Agency “lacks the legal authority to reconsider its final decisions.” Agency Brief at 12. The Agency summarizes Reichhold as holding that “the Board’s dismissal of a petition based on a pending reconsideration was erroneous.” *Id.* The Agency suggests that the Board has recognized an opportunity for the Agency to reconsider a permitting decision during a 90-day extension of the appeal period. *Id.* at 12-13, citing KCBX Terminals Co. v. IEPA, PCB 14-110, slip op. at 2 (Apr. 3, 2014); *see* 415 ILCS 5/40(a)(1) (2014). In addition, the Agency notes Ms. Rowe’s testimony that UST appeals are often settled with the Agency after the filing of a petition for review. *Id.*, citing Tr. at 49. The Agency asserts that these settlements “effectively involve the reconsiderations this Board has come to believe were altogether outlawed by Reichhold.” Agency Brief at 12. The Agency argues that finding “an action is not moot and may be litigated despite the absence of a controversy and despite the inability of the Board to provide substantive relief beyond what Illinois EPA has already provided to Chatham BP” would stretch Reichhold beyond the Appellate Court’s holding. *Id.* The Agency further argues that this finding would convert the action “to a new, separate cause of action for attorney’s fees and costs to be generated and recovered at the slightest Agency misstep.” *Id.* The Agency adds that “no separate cause of action exists merely for the awarding of attorney’s fees, which are considered after the underlying questions of compliance with the Act or the Board’s regulations have been answered.” *Id.*, citing People v. Stein Steel Mills Servs., Inc., PCB 02-1, slip op. at 3 (Apr. 18, 2002).

The Agency argues that, even if the Board concludes the February 25, 2015 letter is a final determination, the subsequent letter “eliminated any substantive controversy.” Agency Brief at 13. The Agency acknowledges that the March 27, 2015 letter and Chatham BP’s petition for review “might have crossed in the mail.” *Id.* However, the Agency argues that by the time the hearing officer scheduled a hearing and by the time the hearing took place, there no longer existed any controversy about the substance of Chatham BP’s petition. *Id.* The Agency further argues that the Board is now unable to provide Chatham BP with relief that it did not already have before it filed the petition. *Id.* The Agency concludes that “this Board should not enter what would essentially be an advisory Order but should instead dismiss or deny this appeal as moot.” *Id.* at 14.

## **LEGAL BACKGROUND**

### **Title XVI of the Act and Part 734 of the Board’s Regulations**

Section 57.7(c)(3) of the Act addresses Agency review and approval and provides in pertinent part that,

[i]n approving any plan submitted pursuant to subsection (a) [Site investigation] or (b) [Corrective action] of this Section, the Agency shall determine . . . that the costs associated with the plan are reasonable, will be incurred in the performance

of site investigation or corrective action, and will not be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of this Title. . . . 415 ILCS 5/57.7(c)(3) (2014).

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 Board in accordance with the procedures of Section 40.” 415 ILCS 5/57.7(c)(4) (2014). Section 57.7(c)(5) of the Act defines “plan” for the purposes of Title XVI, Petroleum Underground Storage Tanks, to include “[a]ny site investigation plan” or “[a]ny site investigation budget” submitted pursuant to Section 57.7(a). 415 ILCS 5/57.7(c)(5).

Section 57.8(l) of the Act addresses reimbursement from the UST Fund for activities responding to a confirmed release and provides that “[c]orrective action does not include legal defense costs. Legal defense costs include legal costs for seeking payment under this Title unless the owner or operator prevails before the Board in which case the Board may authorize payment of legal fees.” 415 ILCS 5/57.8(l) (2014).

Section 734.310(b) of the Board’s UST regulations addresses site investigation and provides in pertinent part that

[a]ny owner or operator intending to seek payment from the Fund must, prior to conducting any site investigation activities, submit to the Agency a site investigation budget with the corresponding site investigation plan. The budget must include, but not be limited to, a copy of the eligibility and deductibility determination of the OSFM and an estimate of all costs associated with the development, implementation, and completion of the site investigation plan, excluding handling charges and costs associated with monitoring well abandonment. Costs associated with monitoring well abandonment must be included in the corrective action budget. Site investigation budgets should be consistent with the eligible and ineligible costs listed at Sections 734.625 and 734.630 of this Part and the maximum payment amounts set forth in Subpart H of this Part. 35 Ill. Adm. Code 734.310(b).

Section 734.510(b) of the Board’s UST regulations addresses standards for review of plans and budget and provides in its entirety that

[a] financial review must consist of a detailed review of the costs associated with each element necessary to accomplish the goals of the plan as required pursuant to the Act and regulations. Items to be reviewed must include, but are not limited to, costs associated with any materials, activities, or services that are included in the budget. The overall goal of the financial review must be to assure that 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).

### **Standard of Review**

The standard of review under Section 40 of the Act (415 ILCS 5/40 (2014)) is whether Chatham BP's submissions to the Agency would not violate the Act and Board regulations. Ted Harrison Oil Co. v. IEPA, PCB 99-127, slip op. at 5 (July 24, 2003); citing Browning Ferris Indus. of Ill. v. PCB, 534 N.E.2d 616 (2nd Dist. 1989). The Board will not consider new information that was not before the Agency prior to its final determination regarding the issues on appeal. Kathe's Auto Serv. Ctr. v. IEPA, PCB 95-43, slip op. at 14 (May 18, 1995). The Agency's denial letter frames the issues on appeal. Pulitzer Cmty. Newspapers, Inc. v. IEPA, PCB 90-142 (Dec. 20, 1990).

### **Burden of Proof**

The Board's procedural rules provide that, in appeals of final Agency determinations, "[t]he burden of proof shall be on the petitioner. . . ." 35 Ill. Adm. Code 105.112(a), citing 415 ILCS 5/40(a)(1), 40(b), 40(e)(3), 40.2(a) (2014). The standard of proof in UST appeals is the "preponderance of the evidence." Freedom Oil Co. v. IEPA, PCB 03-54, 03-56, 03-105, 03-179, 04-04 (cons.), slip op. at 59 (Feb. 2, 2006), citing McHenry County Landfill, Inc. v. County Bd. of McHenry County, PCB 85-56, 85-61, 85-62, 85-63, 85-64, 85-65, 85-66 (consol.), slip op. at 3 (Sept. 20, 1985) ("A proposition is proved by a preponderance of the evidence when it is more probably true than not.").

## **BOARD DISCUSSION**

### **February 25, 2015 Agency Determination**

On February 25, 2015, the Agency addressed the Board's final opinion and order in PCB 14-1 and stated that it "re-characterized its determination for the Stage 2 Site Investigation Plan." R. at 130. The Agency rejected the plan because

[t]he 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. at 132.

As noted in Chatham BP's petition for review, this is the same reason for rejection of the plan that the Agency provided in its May 28, 2013 determination. Pet. at 3. Chatham BP's appeal of that determination resulted in reversing the Agency's rejection of the plan. Chatham BP, LLC v. IEPA, PCB 14-1, slip op. at 26 (Jan. 9, 2014). The February 25, 2015 determination also rejected the associated Stage 2 budget because the Agency "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 . . . cannot be made.” R. at 134. As Chatham BP noted in its petition for review, this is the same reason for rejection of the budget that the Agency provided in its May 28, 2013 determination. Pet. at 3.

While the Agency’s February 25, 2015 determination reflected the Board’s decision on the issue of disputed costs (*see* Tr. at 23-24), it did not reflect the Board’s decision regarding the proposed Stage 2 site investigation plan or budget (*see id.* at 24). The Agency has characterized its February 25, 2015 determination on the plan and budget as “mistaken” (*id.* at 24) and “in error” (*id.* at 20). The record indicates that the determination was prepared at the direction of an Agency employee who had not been involved in any way in PCB 14-1 (*id.* at 22) and who was not at the time aware that the Agency had been fully reversed in that case (*id.* at 24).

The Agency’s February 25, 2015 determination states that a UST owner or operator “may appeal this decision” to the Board. R. at 131. Attached appeal rights state that “[a]n 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.” *Id.* at 135. Section 57.7(c) of the Act provides in pertinent part that rejection of a site investigation plan or budget “shall be subject to appeal to the Board” according to the procedures of Section 40. 415 ILCS 5/57.7(c)(4)(D), (c)(5) (2014). While Section 40(a)(1) generally provides a 35-day appeal period, it also provides that “the 35-day period for petitioning for a hearing may be extended for an additional period of time not to exceed 90 days by written notice provided to the Board from the applicant and the Agency within the initial appeal period.” 415 ILCS 5/40(a)(1) (2014). The Act does not require either Chatham BP or the Agency to initiate this request for an extended appeal period, and the Board did not receive such a request. The Board finds that the Agency’s February 25, 2015 decision letter constitutes a final and appealable Agency determination.

The Agency’s February 25, 2015 determination generated uncertainty on the part of Chatham BP. Ms. Rowe testified that, after receiving the determination, “I didn’t know what it was, but we assumed something was wrong or didn’t really understand what it was initially.” Tr. at 46-47. She also testified that she thought the determination might be “[a] review of something else,” because Chatham BP “had also submitted another plan at that time too, so we didn’t know if there was some mix-up between that plan and a review of the budget for the Board reversal plan.” *Id.* at 47. Ms. Rowe testified that, “[t]hrough legal counsel,” the Agency and Chatham BP or CW<sup>3</sup>M discussed the grounds for the February 25, 2015 letter. *Id.* at 54. Her testimony indicates that, as the 35-day appeal deadline approached, Chatham BP decided to file a petition for review to preserve its appeal rights and to provide an opportunity to “reach some kind of settlement.” *Id.* at 48-49.

Chatham BP timely filed its appeal of the Agency’s February 25, 2015 determination. Once Chatham BP filed that timely petition, the Board was obligated to review that determination to reject the proposed plan and budget. *Chatham BP, LLC v. IEPA*, PCB 14-1, slip op. at 3 (May 1, 2014), citing *Reichhold Chemicals, Inc. v. PCB*, 204 Ill. App.3d 674, 678, 561 N.E.2d 1343, 1346 (1990). It is well-settled that the Agency’s decision letter frames the issues on appeal. *Pulitzer Cmty. Newspapers, Inc. v. IEPA*, PCB 90-142, slip op. at 6 (Dec. 20, 1990). This focus on the Agency’s letter “is necessary to satisfy principles of fundamental

fairness because it is the applicant who has the burden of proof” to demonstrate that the reasons for denial are inadequate. *Id.*, citing Technical Svcs. Co. v. IEPA, PCB 81-105, slip op. at 2 (Nov. 5, 1981).

### **Agency Arguments**

In its response brief, the Agency argued that the Board should deny or dismiss Chatham BP’s appeal on various grounds. Agency Brief at 9-14. In the following subsections of the opinion, the Board addresses each of these grounds.

#### **Lack of Jurisdiction**

The Agency argues that the February 25, 2015 letter was not a “final determination.” The Agency further argues that the Board should dismiss this action because it lacks subject matter jurisdiction to review “an erroneous but insignificant letter.” Agency Brief at 9-10. The Agency’s letter itself refutes this position. The letter states that an owner or operator “may appeal this decision to the Board” and refers to attached appeal rights. R. at 131. The attached “Appeal Rights” state that “[a]n underground storage tank owner or operator may appeal *this final decision* to the Illinois Pollution Control Board . . . by filing a petition for a hearing within 35 days after the date of issuance of *the final decision*.” R. at 135 (emphases added).

Furthermore, the Board cannot agree that its February 5, 2015 order remanded the Stage 2 budget for an “insignificant letter.” Agency Brief at 9-10. The Board did not direct the Agency simply to approve the proposed budget but remanded the budget to the Agency “for its review.” The Board recognizes the Agency’s candor in recognizing that the February 25, 2015 determination erred. However, acknowledging the error does not render the letter insignificant or transform it into something other than a final determination. The Board concludes that this argument provides no basis to dismiss this case for lack of subject matter jurisdiction.

#### **Res Judicata**

The Agency argues that *res judicata* bars the parties “from relitigating the reversed denial of Chatham BP’s Stage 2 Site Investigation Plan and Budget. . . .” Agency Brief at 10. However, the Board has not reversed an Agency determination on the proposed budget because the Agency has not made one. The Agency’s May 28, 2013 determination rejected Chatham BP’s proposed Stage 2 site investigation plan and stated that, until it approved a plan, “a determination regarding the associated budget . . . cannot be made.” In PCB 14-1, the Board reversed rejection of the plan. Because the Agency had not made a determination regarding the budget, the Board did not reverse a determination but remanded to the Agency to make one. In its February 25, 2015 determination, the Agency restated that “a determination regarding the associated budget . . . cannot be made.” The Board concludes that this argument provides no basis to dismiss this case on the basis of *res judicata*.



## Mootness

The Agency argues that an Agency letter dated March 27, 2015, provided Chatham BP with the substantive relief it had requested and that this action should be dismissed as moot. Agency Brief at 11-14. The Board considers caselaw instructive on this argument. For example, in Reichhold the Court explained that, “[w]hen the Agency denies an application, the applicant’s only options are to start over with a new application or file a petition for review.” Reichhold, 204 Ill. App. 3d at 676. Even if “a later Agency project reviewer believes prior Agency action was wrong, the Agency is not allowed to reconsider prior final Agency determinations.” A&H Implement Co. v. IEPA, PCB 12-53, slip op. at 7-8, citing Tolles Realty Co. v. IEPA, PCB 93-124, slip op. at 4-5 (June 5, 1997). The Board has acknowledged that “it is undeniably true that in some instances, the application of the Reichhold principle will deprive the IEPA of the opportunity to correct mistakes.” Tolles, PCB 93-124, slip op. at 8 (June 5, 1997). Nonetheless, the Agency has not persuasively cited authority allowing it to reconsider or reverse its February 25, 2015 determination. *See* Tolles, slip op. at 8 (“The legislature can grant the IEPA that power; the Board cannot.”).

The Agency cites KCBX Terminals Co. v. IEPA, PCB 14-110, slip op. at 2 (Apr. 3, 2014), as authority “to reconsider some decisions *before the filing of a petition for review*.” Agency Brief at 12 (emphasis added). In this case, of course, Chatham BP timely filed a petition for review on March 30, 2015. Furthermore, the language in KCBX cited by the Agency hinges on the opportunity for the parties to request an extension of the 35-day appeal period. *See* 415 ILCS 5/40(a)(1) (2014). The parties did not file such a request.

The Board does not dispute the Agency’s view that applicants may settle UST cases after filing a petition for review. *See* Agency Brief at 12. In Freedom Oil Co. v. IEPA, PCB 03-54, 03-56, 03-105, 03-179, 04-2 (cons.), slip op. at 1 (May 3, 2007), for example, the petitioner reported that it met with the Agency and resolved all pending issues. The Board granted petitioner’s voluntary motion to dismiss its consolidated appeals. *Id.* In this case, however, Chatham BP has filed no motion for voluntary dismissal of its appeal, and its petition for review remains pending before the Board.

Finally, even if the Board could consider the March 27, 2015 letter (R. at 136-38) as a permissible reconsideration of the February 25, 2015 determination, it could not find that the subsequent letter moots this appeal. While the Agency’s Certificate of Record on Appeal refers to the March 27, 2015 letter as a “revised decision letter,” the letter itself is not clearly a final determination. The letter refers to Board orders in PCB 14-1, but it does not explicitly reconsider, replace, or supersede the February 25, 2015 determination. The March 27, 2015 letter does not indicate whether it is final and appealable and makes no reference to appeal rights. *Compare* R. at 135 (Appeal Rights in February 25, 2015 letter) *with* R. at 136-38 (March 27, 2015 letter). Furthermore, while Chatham BP’s petition for review specifically requests that the Board reimburse “its reasonable attorney’s fees and expenses” (Pet. at 8), the March 27, 2015 letter makes does not address this issue. *See* R. at 136-38. The Board cannot agree that the Agency’s March 27, 2015 letter – even if considered as a permissible reconsideration – would grant the full relief sought by Chatham BP or would preclude the Board from granting relief to

Chatham BP. The Board concludes that the Agency's argument provides no basis to dismiss this case on the basis of mootness.

### **Board Findings**

In PCB 14-1, the Board addressed the reason provided by the Agency in its February 25, 2015 rejection of Chatham BP's proposed Stage 2 site investigation plan. The Board granted Chatham BP's motion for summary judgment on that issue and reversed the Agency. The Board found that the plan "is necessary to define the extent of on-site contamination exceeding the most stringent Tier 1 remediation objectives at 35 Ill. Adm. Code 742. The Board therefore finds that the proposed plan does not exceed the minimum requirements of the Act and the Board's regulations." Chatham BP, LLC v. IEPA, PCB 14-1, slip op. at 26 (Jan. 9, 2014). The Board again finds that Chatham BP has met its burden of proving that its proposed plan would not violate the Act and Board regulations. Accordingly, the Board reverses the Agency's February 25, 2015 rejection of that plan.

In PCB 14-1, the Board also addressed the reason provided by the Agency in its February 25, 2015 rejection of Chatham BP's proposed Stage 2 site investigation budget. By reversing the Agency's rejection of the plan, the Board provided a basis for the Agency to review the associated budget and make a determination on it. The Board stated that, at the conclusion of PCB 14-1, it would "remand to the Agency for its review of Chatham BP's proposed Stage 2 site investigation budget." Chatham BP, LLC v. IEPA, PCB 14-1, slip op. at 26 (Jan. 9, 2014). On remand, the Agency restated that it could not make a determination on the budget without an approved plan. Above, the Board again reversed the Agency's rejection of the plan. In the absence of an Agency determination on the budget, however, the Board at the conclusion of this case will remand Chatham BP's proposed budget to the Agency for its review.

### **Legal Fees**

In its petition for review, Chatham BP requested relief including "reimbursement of its reasonable attorney's fees and expenses related to bringing this action pursuant to Section 57.8(l) of the Act." Pet. at 8; *see* 415 ILCS 5/57.8(l) (2014). The record does not now include the amount of these fees or Chatham BP's argument that they are reimbursable under Section 57.8(l). In its order below, the Board will direct Chatham BP to file a statement of legal fees that may be eligible for reimbursement and its arguments why the Board should exercise its discretion to direct the Agency to reimburse those fees from the UST Fund. Chatham BP must file its statement by Monday, August 24, 2015, which is the first business day following the 30th day after the date of this order. The Agency may file a response within 14 days after being served with Chatham BP's statement.

### **CONCLUSION**

For the reasons above, the Board finds that Chatham BP has met its burden of proving that its proposed Stage 2 site investigation plan would not violate the Act and Board regulations. Accordingly, the Board reverses the Agency's February 25, 2015 rejection of that plan. Having reversed the Agency's rejection of the plan, and in the absence of an Agency determination on

the associated proposed Stage 2 site investigation budget, the Board in its final opinion and order will remand the proposed budget to the Agency for its review. In addition, the Board directs Chatham BP to file a statement of legal fees that may be eligible for reimbursement and its arguments why the Board should exercise its discretion to direct the Agency to reimburse those fees from the UST Fund and provides for the Agency to file its response.

This interim opinion and order constitutes the Board's findings of fact and conclusions of law.

### **ORDER**

1. The Board reverses the Agency February 25, 2015 rejection of Chatham BP's proposed Stage 2 site investigation plan.
2. Having reversed the rejection of the plan, and in the absence of an Agency determination on the associated proposed Stage 2 site investigation budget, the Board at the conclusion of this case will remand the proposed budget to the Agency for its review.
3. Chatham BP is directed to file a statement of legal fees that may be eligible for reimbursement and its arguments why the Board should exercise its discretion to direct the Agency to reimburse those fees from the UST Fund. Chatham BP must file its statement by Monday, August 24, 2015, which is the first business day following the 30th day after the date of this order. The Agency may file a response within 14 days after being served with Chatham BP's statement.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above interim opinion and order on July 23, 2015, by a vote of 5-0.



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John T. Therriault, Clerk  
Illinois Pollution Control Board