

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CHATHAM BP, LLC,)	
)	
Petitioner,)	
)	
v.)	PCB 2015-173
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

NOTICE

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

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

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

PLEASE TAKE NOTICE that I have today caused to be filed a MOTION FOR RECONSIDERATION with the Illinois Pollution Control Board, a copy of which is served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

Respondent,

Dated: October 13, 2015

Scott B. Sievers
Attorney Registration No. 6275924
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
(217) 782-5544

BY:



Scott B. Sievers
Special Assistant Attorney General

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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Petitioner,)	
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ILLINOIS ENVIRONMENTAL)	
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MOTION FOR RECONSIDERATION

NOW COMES the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY (“Illinois EPA” or “Agency”), by and through its attorney, Special Assistant Attorney General Scott B. Sievers, and, pursuant to 35 Ill. Adm. Code 101.520, moves this honorable Board to reconsider the September 3, 2015 Opinion And Order of The Board, including the Interim Opinion And Order of The Board incorporated in the Board’s September 3 decision. In support, the Respondent states the following:

I. A MOTION TO RECONSIDER MAY BRING ATTENTION TO ERRORS IN THE APPLICATION OF EXISTING LAW.

Section 101.520 of the Board’s rules provides, in pertinent part, that “[a]ny motion for reconsideration or modification of a final Board order must be filed within 35 days after the receipt of the order.” 35 Ill. Adm. Code 101.520. This motion is timely, as it filed within 35 days of the receipt by Illinois EPA on or after September 8, 2015 of the September 3, 2015 Opinion And Order of The Board for which the Respondent seeks reconsideration. *See Ex. A.*

Section 101.902 of the Board’s rules provides that, “[i]n ruling upon a motion for reconsideration, the Board will consider factors including new evidence, or a change in the law, to conclude that the Board’s decision was in error.” Ill. Adm. Code 101.902. A motion to

reconsider may be brought to bring attention to errors in the Board's previous application of existing law, or for reconsideration of evidence in the record that was overlooked. *Estate of Gerald D. Slightom v. Illinois EPA*, PCB 11-25, slip op. at 3 (Jan. 23, 2014).

II. IN ITS UNDERLYING DECISION, THIS BOARD ERRED IN APPLYING EXISTING LAW BY CONFUSING MOOTNESS WITH AUTHORITY.

If an automobile dealer failed to provide a car to a buyer who had paid for it, the buyer could sue the dealer for breach of contract. But if the dealer provided the car to the buyer before the lawsuit was filed, that cause of action would be mooted. The fact that the dealer might not have had a current business license authorizing it to sell the car in the first place would be of no matter. Illinois courts would not allow the buyer to continue on with a lawsuit for breach of the contract despite the dealer's failure to be properly licensed because the action would be moot. And Illinois judges would never dream of allowing such a litigant to bootstrap attorney's fees and costs on top of such a mooted lawsuit.

But that is essentially what this Board has done.

In its July 23, 2015 decision, the Board devotes most of its analysis of Illinois EPA's mootness argument not by considering the contours of the mootness doctrine, but instead by discussing the Agency's authority to reconsider decisions. In doing so, this Board erred in its application of law by confusing mootness with authority.

A claim is moot when no actual controversy exists or events occur which make it impossible for a tribunal to grant effectual relief. *See, e.g., Keefe-Shea Joint Venture v. City of Evanston*, 364 Ill. App. 3d 48, 60 (2005). "A case is moot when plaintiffs have secured what they basically sought and a resolution of the issues could not have any practical effect on the existing controversy." *Baker v. Forest Pres. Dist. of Cook Cnty.*, 2015 IL App (1st) 141157, ¶ 35. Where a defendant tenders the requested relief to a plaintiff, the case or controversy concerning the

plaintiff is nullified. *See Gelb v. Air Con Refrigeration & Heating, Inc.*, 356 Ill. App. 3d 686, 699-700 (2005). “Plaintiffs should not be allowed to perpetuate controversies by merely refusing defendants’ tenders.” *Id.*

As a general rule, Illinois tribunals do not decide moot questions or render advisory opinions. *See In re Torry G.*, 2014 IL App (1st) 130709, ¶ 26. If an issue is moot, the tribunal lacks jurisdiction to resolve the claim. *See DuPage Cnty. Election Comm’n v. State Bd. of Elections*, 345 Ill. App. 3d 200, 205 (2003).

In its Petition for Review filed in the instant action, Chatham BP, LLC (“Chatham BP”) asked this Board as relief to “[r]everse the Agency’s rejection of both the Petitioner’s Stage 2 Site Investigation Plan and the corresponding budget and approve Petitioner’s proposals.” Pet. for Review at 8. However, Illinois EPA in its letter dated March 27, 2015 stated that it was “approving the Stage 2 Site Investigation Plan (plan) and Stage 1 Actual cost budget” and that “[t]he proposed budget for Stage(s) 2 is approved for amounts determined in accordance with Subpart H” of the Leaking UST regulations. (R. 136.) Thus, Chatham BP’s claim concerning its Stage 2 Site Investigation Plan and budget was mooted when Illinois EPA approved them in its March 27, 2015 letter.

That the Agency’s March 27, 2015 letter provided Chatham BP with what it sought did not matter to this Board, though. Despite the Petitioner having “secured what they basically sought,” *see Baker, supra*, the Board nonetheless found the action was not moot.

This Board cited *Reichhold Chemicals, Inc. v. Illinois Pollution Control Board* for the apparent premise that Illinois EPA lacked authority to reconsider the erroneous February 25, 2015 Agency letter upon which Chatham BP based its Petition for Review. 204 Ill. App. 3d 674 (3d Dist. 1990). But just as the fact that an automobile dealer was not licensed to sell cars would

not salvage a buyer's breach of contract case from mootness if the dealer produced the car at issue to the buyer, neither does the Agency's purported lack of authority to reconsider all decisions allow Chatham BP to evade the fact that its claim for approval of its Stage 2 Site Investigation Plan and budget were mooted when Illinois EPA gave that very approval in its March 27, 2015 letter. Therefore, Illinois EPA respectfully requests that this Board reconsider its July 23, 2015 decision incorporated in its September 3, 2015 decision, as the Board erred in its application of existing law.

III. A CLAIM FOR ATTORNEY'S FEES DOES NOT SAVE THE UNDERLYING MATTER FROM MOOTNESS.

In finding that this action was not moot, this Board in its July 23, 2015 decision considered Chatham BP's request for attorney's fees and expenses, noting that Illinois EPA's March 27, 2015 letter did not address the issue.

Of course it did not.

A petitioner in a UST action may only obtain payment of legal fees if they prevail before the Board. *See, e.g.*, 415 ILCS 5/57.8(1). At the time of the March 27, 2015 letter, Chatham BP had nothing even pending before the Board, let alone anything concerning the underlying and erroneous February 25, 2015 letter. Naturally, then, the March 27 letter would not address fees and expenses for prevailing before the Board in an action that did not yet exist. Nonetheless, this Board cited the absence of this subject in Illinois EPA's March 27 letter in denying Illinois EPA's mootness argument. However, even if Chatham BP had filed its action beforehand, Illinois EPA's March 27 letter would have mooted the matter, and the fact that a dispute over attorney's fees and expenses remained would not have rendered it any less moot.

Consider instances in which the interplay between mootness and attorney's fees and expenses commonly arises: Freedom of Information Act cases. In FOIA actions, the statute

provides for recovery of attorney's fees and costs, and public bodies often disclose the requested records after the lawsuit is filed.

That was the case in *Duncan Publishing, Inc. v. City of Chicago*, 304 Ill. App. 3d 778 (1st Dist. 1999). In *Duncan*, the plaintiffs filed suit after the city failed to comply with their FOIA request, but the city ultimately produced the requested records while the litigation was pending. The parties filed cross motions for summary judgment, and the trial court granted the city's motion and denied the plaintiffs' request for attorney's fees and costs. The plaintiffs appealed, contending that, although the city had produced the requested records, the issue of attorney's fees and costs remained unresolved and therefore their action was not moot.

The Appellate Court rejected the plaintiffs' argument, finding that "[o]nce an agency produces all the records related to a plaintiff's request, the merits of a plaintiff's claim for relief, in the form of production of information, becomes moot." *Duncan* at 782. The plaintiffs' "request for an award of attorney's fees contained in the complaint does not rescue the moot claims[.]" *Id.* at 782-83.

However, while the records-access cause of action was mooted by the city's production of the requested records, the request for attorney's fee and costs was not. Consequently, the court in *Duncan* considered whether the plaintiffs' had substantially prevailed so as to be eligible for an award of fees and costs:

[T]he inquiry is whether the filing of suit was **reasonably necessary** to obtain the information and a **causal nexus** exists between the action and the agency's surrender of the information. A plaintiff will not be eligible for an award of fees if the production of records was **independent of the lawsuit** or if it was due to routine administrative proceeding.

Id. at 786. (emphasis added; citations omitted). The Appellate Court reversed the trial court and remanded the plaintiffs' request for attorney's fees for hearing.

In the instant action, Illinois EPA's March 27, 2015 letter provided Chatham BP with the relief it sought on its Stage 2 Site Investigation Plan and corresponding budget, thereby rendering that matter moot. Chatham BP's request for attorney's fees and expenses no more rescued its case from mootness than did the plaintiff's request in *Duncan*. That the underlying matter became moot did not necessarily mean that Chatham BP's attorney's fees and expenses request had also been mooted, however.

For this Board to authorize payment of legal fees, an owner or operator must prevail before the Board. If, by filing its Petition for Review and litigating this action, Chatham BP had obtained the approval of its Stage 2 Site Investigation Plan and corresponding budget, then Chatham BP would have prevailed before the Board and would be eligible for payment of its legal fees. However, unlike in *Duncan*, no argument can be made in the case at bar that it was reasonably necessary for Chatham BP to file and litigate this action to obtain that approval, as Illinois EPA had approved the Stage 2 Site Investigation Plan and corresponding budget before this action was ever filed. Illinois EPA had acted independently of this lawsuit, and thus there was no causal nexus between this action and the relief Chatham BP obtained. This Board's decision effectively rewarded an attorney and his client with fees and costs for fully litigating a matter that was moot at the outset.

As no reasonable connection existed between this litigation and the attorney's fees and costs Chatham BP sought, this Board erred in awarding Chatham BP its fees and costs. Therefore, Illinois EPA respectfully requests that this Board reconsider its September 3, 2015 decision, as the Board erred in its application of existing law.

IV. CONCLUSION

WHEREFORE, for the reasons set forth above, in Respondent's Post-Hearing Brief, and in its Objection to Chatham BP's Motion for Legal Fees, Illinois EPA prays that this honorable Board reconsider its September 3, 2015 Opinion And Order of The Board, including the Interim Opinion And Order of The Board incorporated in the Board's September 3 decision, and DISMISS the instant action as moot and DENY Chatham BP its attorney's fees and costs.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

Respondent,

Dated: October 13, 2015

Scott B. Sievers
Attorney Registration No. 6275924
1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
(217) 782-5544

BY:



Scott B. Sievers
Special Assistant Attorney General

Sievers, Scott

From: Sievers, Scott
Sent: Thursday, October 08, 2015 9:31 AM
To: Therriault, John
Cc: William D. Ingersoll (wingersoll@bhslaw.com)
Subject: RE: Chatham BP, LLC v. IEPA (PCB No. 15-173)

Thank you so much for the information,

Scott

From: Therriault, John
Sent: Wednesday, October 07, 2015 1:18 PM
To: Sievers, Scott
Cc: William D. Ingersoll (wingersoll@bhslaw.com)
Subject: RE: Chatham BP, LLC v. IEPA (PCB No. 15-173)

Scott,

When final Board Orders are mailed Certified, Return Receipt Requested, the IEPA copy/copies are mailed via Messenger Mail. Yours was put in Messenger Mail on September 4, 2015. I estimate you received your copies on September 8 or 9 due to the holiday on September 7.

John

From: Sievers, Scott
Sent: Wednesday, October 07, 2015 1:11 PM
To: Therriault, John
Cc: William D. Ingersoll (wingersoll@bhslaw.com)
Subject: Chatham BP, LLC v. IEPA (PCB No. 15-173)

Dear Clerk Therriault:

The Pollution Control Board's website reports that the September 3, 2015 Board Order was delivered to Petitioner on September 9, 2015, but does not state when that Order was delivered to Illinois EPA. Does the Board have a record showing when Illinois EPA received the Order? I received two copies of it, but neither is date-stamped so the date of their receipt is unclear. Thanks,

Scott



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 Please consider the environment before printing this email.



Chatham BP, LLC v. Illinois Environmental Protection Agency
Pollution Control Board No. 2015-173

CERTIFICATE OF SERVICE

Scott B. Sievers, Special Assistant Attorney General, herein certifies that he has served a copy of the foregoing **MOTION FOR RECONSIDERATION** upon:

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

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

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
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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 the afternoon of October 13, 2015.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

Dated: October 13, 2015

Scott B. Sievers
Attorney Registration No. 6275924
1021 North Grand Avenue East
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Respondent,

BY:



Scott B. Sievers
Special Assistant Attorney General