

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CHATHAM BP, LLC,)	
)	
Petitioner,)	
)	
v.)	
)	PCB No. 15 – 173
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	(UST Appeal)
Respondent.)	

NOTICE OF FILING

PLEASE TAKE NOTICE that today I have filed with the Office of the Clerk of the Pollution Control Board the Response to Motion for Reconsideration. Copies of these documents are hereby served upon you.

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

Scott B. Sievers
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue, East
P.O. Box 19276
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Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
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Respectfully submitted,
CHATHAM BP, LLC

Dated: October 28, 2015

By: /s/William D. Ingersoll
Its Attorney

BROWN, HAY & STEPHENS, LLP
William D. Ingersoll
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CHATHAM BP, LLC)	
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Petitioner,)	
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v.)	PCB No. 15-173
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
Respondent.)	

RESPONSE TO MOTION FOR RECONSIDERATION

Petitioner, CHATHAM BP, LLC, by its undersigned attorney, pursuant to the Illinois Pollution Control Board's ("Board") procedural rules at 35 Ill. Adm. Code 101.520, hereby responds to the Respondent's Motion for Reconsideration, saying as follows:

1. The Board issued its Interim Opinion and Order in this matter on July 23, 2015. The Board found in Petitioner's favor on the substantive issues and authorized the Petitioner to file a statement of legal fees and arguments regarding authorizing the payment of legal fees pursuant to Section 57.8(l) of the Act (415 ILCS 5/57.8(l)). Petitioner's motion and IEPA's objection to it followed and the Board issued its final Opinion and Order on September 3, 2015 directing the IEPA to reimburse the full amount of Petitioner's requested legal fees and costs. The order also yet again, as required in the first Chatham BP case (*Chatham BP LLC v. IEPA*, PCB 14-1), remanded the issue of Stage 2 budget to the IEPA for review.

2. The IEPA electronically filed its Motion for Reconsideration on October 13, 2015, with paper copy to Petitioner's counsel received on October 15, 2015. IEPA's motion (at pages 1 – 2) points out that:

In 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. From Board Rule 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. Citing Estate of Slightom v. Illinois EPA, PCB 11-25, slip op. at 3 (Jan. 23, 2014).

None of these bases for reconsideration are properly provided in the IEPA's motion.

3. Respondent's motion does not indicate any new evidence or any change in the law. Nothing new has happened and there has been no new law made since the Board rendered its decisions on July 23, 2015 and September 3, 2015. The motion primarily continues to argue the mootness point, only with more words and more citations than before. A motion to reconsider is not merely for the purpose to continue the same arguments with a hope to do a better job than was done before the Board decision.

4. The IEPA made mootness claims in its Post-Hearing brief on June 25, 2015. The Board discussed and disposed of that in the July 23, 2015 Interim Opinion and Order saying at page 18, that "(t)he Board concludes that the Agency's argument provides no basis to dismiss this case on the basis of mootness." The IEPA made another run at mootness without using the word "mootness" in its August 18, 2015 Objection to Chatham BP's Motion for Legal Fees by contending that all of "the litigation came after the underlying dispute was already resolved." The Board then addressed the mootness claim again in its Opinion and Order of September 3, 2015, at page 7. The Board was not convinced by the IEPA's arguments. The IEPA now just brings up the same issue, but uses more pages to do it. Refashioning your arguments because you did not like the earlier decision is not something to support a motion for reconsideration.

5. The IEPA twice makes an argument about an unlicensed automobile dealer being sued in contract, but then by turning over the car, the case is mooted. Besides offering no legal

authority for this proposition, it is hard to connect such a situation with the one before us. This case is about the final decision of an administrative agency being challenged in a manner and forum that is prescribed by statute.

6. The IEPA attempts to shift the focus away from the authority issue by hammering on the mootness question. But, whether IEPA likes it or not, an analysis of authority is connected. The bottom line is that the IEPA issued a letter on March 27, 2015 in an apparent attempt to fix its February 25, 2015 mistake. This “redo” of a final decision that was eligible for an appeal was absolutely without legal authority. *Reichhold Chemicals v. PCB*, 204 Ill. App. 3d 674 (3d Dist. 1990). Since the letter was issued without any legal authority, it was a legal nullity.

7. The IEPA appears to contend that when a resolution is tendered, the underlying matter becomes moot. That presumes the tender was made under some legal authority. The IEPA cites the case of *Duncan Publishing, Inc. v. City of Chicago*, 304 Ill. App. 3d 778 (1st Dist. 1999) to support the mootness claim. That suit under FOIA brought by Duncan was deemed to have been mooted by the City providing the requested documents. That case does not apply to our situation. The City’s obligation to provide documents under the FOIA was continuing, and providing the requested items was not something the courts had already deemed to be unauthorized as was with *Reichhold*.

8. The Petitioner has incurred additional legal fees in researching and preparing this response. Since the IEPA’s motion forced the Petitioner to incur these fees, the same logic provided in the Board’s September 3, 2015 decision should apply these additional fees. A summary statement of those fees is found in the attached Exhibit 1.

WHEREFORE, CHATHAM BP, LLC respectfully requests that this Board DENY Respondent's Motion for Reconsideration and award the Petitioner the additional legal fees described in Exhibit 1.

Respectfully submitted,
CHATHAM BP, LLC

Dated: October 28, 2015

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

BROWN, HAY & STEPHENS, LLP

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EXHIBIT 1
SUMMARY OF FEES AND COSTS
Brown, Hay & Stephens, LLP
Chatham BP, LLC v. IEPA, PCB 15-173
Response to Motion for Reconsideration

10/15/2015	WDI	RECEIPT/REVIEW OF IEPA MOTION FOR RECONSIDERATION; TELECONFERENCE WITH CW3M REGARDING SAME	0.8	\$240.00
10/16/2015	WDI	RESEARCH CASES CITED IN IEPA MOTION FOR RECONSIDERATION	1.8	\$540.00
10/25/2015	WDI	REVIEW IEPA ARGUMENTS IN POST-HEARING BRIEF AND OBJECTION TO LEGAL FEES TO COMPARE WITH BOARD'S ANALYSIS OF THEM IN ORDERS OF 7/23 AND 09/03	1.3	\$390.00
10/25/2015	WDI	WORK ON DRAFT RESPONSE TO MOTION FOR RECONSIDERATION	0.8	\$240.00
10/28/2015	WDI	ADDITIONAL RESEARCH RELATING TO LEGAL ARGUMENTS (PARTICULARLY AS RELATE TO UNLICENSED SALE OF AUTOS) MADE IN IEPA'S MOTION FOR RECONSIDERATION	0.5	\$150.00
10/28/2015	WDI	FINISH DRAFTING RESPONSE TO MOTION FOR RECONSIDERATION AND RELATED PLEADINGS; FILE SAME.	2.1	\$630.00
			Total Hours	7.3
			Total Fees	\$2190.00

CERTIFICATE OF SERVICE

I, William D. Ingersoll, certify that I have this date served the attached Notice of Filing and Response to Motion for reconsideration, by means described below, upon the following persons:

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

Scott B. Sievers
Division of Legal Counsel
Illinois Environmental Protection Agency
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Dated: October 28, 2015

By: /s/William D. Ingersoll
William D. Ingersoll

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