BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PIASA MOTOR FUELS, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	PCB No. 14-131
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 Post-Hearing Reply Brief of Piasa Motor Fuels, Inc. Copies of these documents are hereby served upon you.

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Dated: November 3, 2014

Respectfully submitted,

PIASA MOTOR FUELS, INC.

By: /s/William D. Ingersoll
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ILLINOIS ENVIRONMENTAL	)	(UST Appeal)
PROTECTION AGENCY,	)	
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PETITIONER'S POST-HEARING REPLY BRIEF

NOW COMES Petitioner, PIASA MOTOR FUELS, INC. ("Petitioner" or "Piasa"), by and through its attorneys, BROWN HAY & STEPHENS, LLP, and pursuant to the briefing schedule in the Hearing Officer's Order of October 16, 2014, hereby submits is Post-Hearing Reply Brief in this matter. Petitioner respectfully offers its comment and argument as follows:

I. BACKGROUND

1. This matter is an appeal of an Illinois Environmental Protection Agency ("IEPA" or "Agency") final decision of April 8, 2014 (Administrative Record, pp. 356 – 358; hereinafter referred to as "A.R. pp. __) that modified a Stage 2 Site Investigation Plan and Budget (A.R. pp. 232 – 352), submitted on March 13, 2014, as related to certain soil samples. Specifically, the IEPA asserted that "lllinois EPA does not approve of the soil sampling that was performed below the water table." And, "(i)t has not been demonstrated that such samples were warranted as part of Stage I." A summary of Stage 1 sampling and results may be found at A.R. pp. 240 – 243.

The IEPA further advised that all costs of sampling below the groundwater table should be removed from the budgets and actual costs (Stage 1 and Stage 2) when submitted.

2. This appeal was then filed on May 16, 2014. A hearing was held before Hearing Officer Webb on September 10, 2014. Petitioner filed its Post-Hearing Brief on October 6, 2014. Respondent filed its Post-Hearing Brief on October 27, 2014 and Hearing Officer Webb authorized filing of this Post-Hearing Reply Brief.

3. Petitioner notes that Respondent's Post-Hearing Brief does not discuss the issue relating to soil samples taken below the water table in borings for monitoring wells. *See* Section 734.315(a)(2)(C). Specifically, Petitioner contended that the limitation on soil sampling below the water table does not apply to the five monitoring well borings. This was raised, without contradictory testimony or evidence, at hearing. *See* Transcript of September 10, 2014 at pp. 66 – 67 (hereinafter Tr. at p. __"). Further, Petitioner discussed this contention in its Post-Hearing Brief at page 2, paragraph 3. It appears that Respondent intended to concede this point. Therefore, no matter what the Board decides as to the other samples, all soil samples from the monitoring well borings (B-4, B-5, B-10, B-12 and B-14, Table 1.0, A.R. pp. 240 – 241) should be approved, reversing the IEPA's modification as to those samples.

II. GROUNDWATER TABLE

4. Respondent was critical of Petitioner's definition of "groundwater table" by using the regulatory definition of "water table" and by using the terms interchangeably. While not proposing its meanings for the terms, Respondent contends that "different terms presumably have different meanings." Petitioner respectfully contends that in the context of a site

investigation of subsurface contamination, it is acceptable to use them interchangeably. Consider the following statutory and regulatory definitions:

> "Capillary Fringe" means the zone above the water table in which water is held by surface tension. Water in the capillary fringe is under a pressure less than atmospheric. 35 Ill. Adm. Code 742.200.
>
> "Saturated Zone" means a subsurface zone in which all the interstices or voids are filled with water under pressure greater than that of the atmosphere. 35 Ill. Adm. Code 742.200.
>
> "Water Table" means the top water surface of an unconfined aquifer at atmospheric pressure. 35 Ill. Adm. Code 742.200.
>
> "Aquifer" means saturated (with groundwater) soils and geologic materials which are sufficiently permeable to readily yield economically useful quantities of water to wells, springs, or streams under ordinary hydraulic gradients and whose boundaries can be identified and mapped from hydrogeologic data. Section 3 of the Illinois Groundwater Protection Act [415 ILCS 55/3].
>
> "Groundwater" means underground water which occurs within the saturated zone and geologic materials where the fluid pressure in the pore space is equal to or greater than atmospheric pressure. 415 ILCS 5/3.64.

There is no statutory or regulatory definition of "groundwater table" for our use in a LUST site investigation context. But, considering the above definitions and the terms they have in common, especially "aquifer" it should be acceptable to use the terms "water table" and "groundwater table" interchangeably.

5. Despite its criticism of Petitioner's use of the terms, the IEPA also appears to use the terms interchangeably in the context of this case. At hearing and in its brief, Respondent made great effort to always refer to the undefined term "groundwater table" instead of ever calling it the "water table." However, Respondent should have noticed that the IEPA decision letter itself calls it the "water table" in three places as seen from the record (A.R. pp. 356 – 357) and as directly quoted in Respondent's brief at pages 5 – 6. Given all of this, Respondent's

criticism of Petitioner's use of the terms was not appropriate and seems to have been an attempt to distract rather than inform.

6. Petitioner believes that Respondent has overstated the Board's finding in the case of *Brimfield Auto & Truck. IEPA*, PCB 12-134 (Opinion and Order of September 4, 2014). Respondent contended that the Board's finding that "the depth to groundwater was no greater than nine feet" supported the proposition that the level of the groundwater table for the purposes of the limitations on soil sampling was determined by drilling. The Board actually looked at all of the available information from drilling and from monitoring wells, and then without determining an exact depth, decided that none of the data showed anything greater than nine feet, and therefore it was reasonable to use that depth.

7. Petitioner agrees that it drilled and took soil samples below the "water table." However, it strongly disagrees that the level of the water table can be discerned by looking at soil cores pulled from the ground and laid horizontally for field screening evaluation. Further, it is not proper to give an IEPA policy consideration (*i.e.*, for the IEPA LUST Section, the water table is the depth of contact with water while drilling only) equivalence to a regulatory definition. *See* Tr. at p. 138 – 139. The depth of contact with groundwater during drilling may be informative in looking for the level of the water table at atmospheric pressure – *i.e.*, at what level to have wells screened. But, water observed during drilling could also be representative of the capillary fringe (see definition above). The drilling information cannot be definitive, and it is improper for the IEPA to make it so through interpretive convenience.

III. SITE-SPECIFIC CONDITIONS JUSTIFY DRILLING BELOW WATER TABLE

A. IEPA HAS IMPROPERLY CREATED AN INTERPRETIVE REQUIREMENT THAT A CLAIM OF SITE-SPECIFIC CONDITIONS MUST BE SEPARATELY SET FORTH AND JUSTIFIED.

8. The IEPA contends, and as project manager, Karl Kaiser, testified that a submittal with soil samples below the water table is required to specifically claim that justifying site-specific conditions existed and describe the extenuating circumstances, and further that such would be required by the regulations. Tr. p. 160, Respondent's Post-Hearing Brief, pp. 21 – 24. The regulations do not have such a requirement, and the regulated community should reasonably expect that the IEPA will review the information provided without placing unpromulgated procedural hurdles in the way. The IEPA seems not to even know what kind of site-specific circumstances would justify drilling below the water table. And, a very experienced LUST Section project manager has never seen them. It is surely much more likely that the project manager will never see such circumstances if the only place he is supposed to look is in a stand-alone statement and justification that are not specifically required by the regulations.

B. PIASA'S SUBMITTAL INCLUDES FACTS THAT DEMONSTRATE SITE-SPECIFIC CONDITIONS WARRANTING DRILLING BELOW THE WATER TABLE.

9. Petitioner's submittal provided facts that a reasonable IEPA review could have considered relative to the site-specific conditions for drilling below the water table. For instance, Mr. Truesdale testified:

> *Normal contaminant fate and transport processes for any fine grain soil would almost always necessitate drilling below the water table and evaluation of the distribution of soil phase contaminants absorbed to the solids within the water bearing unit.*
> Tr. pp. 68 – 69.

This then clearly relates to facts in the record before the IEPA:

> *These geologic publications/maps indicate that subsurface geology in the area generally consists of predominantly fine-grained glacial deposits of Illinoisan and Wisconsinan ages. More specifically, the geology is described as fifteen (15) to twenty (20) feet of Wisconsinan age loess deposits (Peoria Loess and/or Roxana Silt) underlain by Illinoian age diamicton of the Glasford Formation (Fort Russell Till), which is in turn underlain by Pennslyvanian bedrock.*
>
> *Subsurface stratigraphy determined from site specific borings indicates that the combined thickness of the Peoria Loess and Roxana Silt extends to a depth of twenty (20) feet below ground surface, which correlates to the maximum boring depth to date. However, it appears that a couple of the borings may have encountered the Fort Russell Till near their termination depth, as the transition is not always readily distinguishable in the field.*
> A.R. pp. 239 – 240.

The IEPA did not include any discussion of these geological factual assertions in the record in either its review notes (A.R. pp. 353 – 355) or in any testimony at hearing.

10. Facts are also included regarding site-specific conditions as to contamination in the borings "based upon field observations and field screening for organic vapors" as contemplated in Section 734.315(a)(1)(A) and (B). Petitioner directs attention to boring logs in the record. A.R. pp. 144 – 167. Mr. Truesdale testified that drilling would have advanced to the extent of contamination where the migration ceased or began to cease. Tr. p. 73. Mr. Hargrave, the on-scene geologist during the drilling discussed this in more detail. Tr. pp. 103 – 108. He even mentioned how site-specific the drilling becomes and basically that he would drill until it is clean. IEPA contends that the fact that Mr. Hargrave stopped drilling at 20 feet in B-13 has some meaning contradictory to his testimony. However, it would really seem that he made a decision that 20 feet was adequate based upon his observations and using his best professional judgment that contamination was beginning to cease. Also, please note that as quoted above in paragraph 9 (from A.R. p. 240), Petitioner's discussion of the geology of the site showed that the top layers of glacial deposits extended to a depth of 20 feet. So, like the geologic facts, the IEPA

provided no assessment of these observations of contamination in the borings in its review, nor did it disagree with them at hearing.

11. The IEPA relies solely on an absence of a separately set forth claim of site-specific conditions to reject these samples, with no apparent analysis of the relevant facts in the record before it. Petitioner will grant that this is easier on the IEPA. It would only have to look for a special section in the report, and if not present, reject it out of hand. Notably, this separate section of the report is not in the regulations, nor is it in the IEPA reporting forms.

12. Petitioner could not conclude its reply without contesting IEPA's implications regarding Mr. Truesdale's testimony about the "typical" LUST site. IEPA wants the Board to believe that Mr. Truesdale ignores the limitation found in the regulations. That is not accurate. Rather, he just knows from his experience and education that most of Illinois was glaciated, which produces the fine grained layer that has the contaminant transport qualities that will justify drilling below the water table.

V. CONCLUSION

13. Petitioner has shown that the IEPA decision as to Stage 1 site investigation soil samples below the water table was in error because: 1) IEPA has failed to properly review facts provided in Petitioner's submittal relating to site-specific conditions; 2) has improperly required a separate explanation or justification of those site-specific conditions not required by the regulations or otherwise provided on required reporting forms; and 3) has also implemented an incorrect definitional interpretation of the term "groundwater table" or "water table."

WHEREFORE, for the above reasons, Petitioner respectfully requests that the Pollution Control Board reverse the IEPA's April 8, 2014 final decision as to Stage 1 soil sampling activities and the budget rejection that flowed from that flawed logic; and, further award Petitioner reasonable attorney's fees and expenses related to bringing this action;

Respectfully submitted,

PIASA MOTOR FUELS, INC.

By: /s/William D. Ingersoll
Its Attorney

Dated: November 3, 2014

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CERTIFICATE OF SERVICE

I, William D. Ingersoll, certify that I have this date served the attached Notice of Filing and Petitioner's Post-Hearing Reply Brief, by means described below, upon the following persons:

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