

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SHREE KUBER INC.,)	
)	
Petitioner,)	
)	
v.)	PCB 21-03
)	PCB 21-05
ILLINOIS ENVIRONMENTAL)	(UST Appeal)
PROTECTION AGENCY,)	(Consolidated)
)	
Respondent.)	

NOTICE OF FILING

TO: Don Brown	Carol Webb
Clerk of the Board	Hearing Officer
Illinois Pollution Control Board	Illinois Pollution Control Board
James R. Thompson Center	1021 North Grand Avenue East
100 West Randolph, Suite 11-500	Post Office Box 19274
Chicago, Illinois 60601	Springfield, Illinois 62794-9274
(VIA ELECTRONIC MAIL)	(VIA ELECTRONIC MAIL)

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board a **PETITIONER’S RESPONSE TO RESPONDENT’S CROSS MOTION FOR SUMMARY JUDGMENT**, a copy of which is herewith served upon you.

Respectfully submitted,

Shree Kuber, Inc.
Petitioner,

DATE: August 10, 2021

By: /s/ Melissa S. Brown
One of Its Attorneys

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CERTIFICATE OF SERVICE

I, Melissa S. Brown, the undersigned, hereby certify that I have served the attached

PETITIONER'S RESPONSE TO RESPONDENT'S CROSS MOTION FOR SUMMARY

JUDGMENT on:

Don Brown
Clerk of the Board
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James R. Thompson Center
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That my email address is Melissa.Brown@heplerbroom.com.

That the number of pages in the email transmittal is 7 pages.

That the email transmission took place before 5:00 p.m. on the date of August 10, 2021.

/s/ Melissa S. Brown

Melissa S. Brown

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**PETITIONER’S RESPONSE TO
RESPONDENT’S CROSS MOTION FOR SUMMARY JUDGMENT**

Petitioner, Shree Kuber, Inc., by its attorneys, pursuant to Section 101.516 and 101.500 of the Illinois Pollution Control Board’s (“Board”) procedural regulations, 35 Ill. Adm. Code 101.516 and 101.500, hereby submits Petitioner’s Response to Respondent’s Cross Motion for Summary Judgment (“Cross Motion”).

I. STANDARD OF REVIEW

“Summary judgment is appropriate in Board adjudications when the record shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *City of Benton Fire Dep’t v. IEPA*, PCB 17-01, at 1 (Ill.Pol.Control.Bd. 2017); 35 Ill. Adm. Code 101.516. The movant has the initial burden of production on a summary judgment motion. *Mashal v. City of Chicago*, 2012 IL 112341, 49. “[I]f the movant satisfies its initial burden of production . . . the burden shift[s] to the respondent to present some factual basis that would arguably entitle it to a favorable judgment.” *Pecora v. County of Cook*, 323 Ill. App. 3d 917, 933 (1st Dist. 2001). Summary judgment may be particularly appropriate “[i]f what is contained in the papers on file would constitute all of the evidence before a court.” *Pyne v. Witmer*, 129 Ill. 2d 351, 358 (1989).

In underground storage tank (“UST”) appeals, “the burden of proof is on the petitioner to prove that the Agency’s denial reason was insufficient to warrant affirmation.” *Rosman v. IEPA*, PCB 91-80, (Ill.Pol.Control.Bd. 1991). The Illinois Environmental Protection Agency’s (“Agency”) final decision denial letter frames the issues on appeal and the burden of proof is on the tank owner or operator to prove whether its submittal to the Agency demonstrated compliance with the Act and Board regulations. 35 Ill. Adm. Code 105.112; *see Karlock v. IEPA*, PCB 05-127, slip op. at 7 (July 21, 2005); *Illinois Ayers Oil Co. v. IEPA*, PCB 03-214, slip op. at 8 (April 1, 2004). “The Board’s review is generally limited to the record before the Agency at the time of its determination.” *Weeke Oil Company v. IEPA*, PCB 10-1, at 10 (Ill.Pol.Control.Bd. May 20, 2010).

II. ISSUE

The issue here is whether Incident No. 20200005 (“2020 release”) is a new release or whether it is a re-reporting of Incident No. 20080255 (“2008 release”). Petitioner and Respondent agree that this is the issue at the crux of Petitioner’s Motion for Partial Summary Judgment and Respondent’s Cross Motion for Summary Judgment. *See* Cross Motion at 2.

III. ARGUMENT

A. No Genuine Issues of Material Fact Exist and Petitioner Has Met its Burden of Proof

There are no genuine issues of material fact in this proceeding. Instead, Respondent draws different conclusions from the undisputed facts. Additionally, Petitioner does not dispute the additional facts asserted in Respondent’s Cross Motion (i.e., additional facts concerning results of sampling) but disagrees with the conclusions drawn by Respondent.

In its Cross Motion, Respondent does not dispute that the soil contamination plume contained in the Corrective Action Plan (“CAP”) for the 2008 release did not include Tank 6.

Cross Motion at 4. Instead, Respondent argues that, based on the data, Tank 6 would have been in the soil contamination plume even if it was not reflected in the map. *See id.* at 4-5. The soil contamination plume map was attached to the CAP for the 2008 release submitted to the Agency. R0065-180. The 2008 CAP was approved by the Agency in a letter dated August 22, 2013. PCB 21-05 R0327-330. The Agency cannot now assert that the maps included with the 2008 CAP were incorrect. Doing so would be an attempt to reverse the Agency's approval of the 2008 CAP, which was a final agency decision. *See* August 22, 2013 approval letter at PCB 21-05 R0330 ("An underground storage tank owner or operator may appeal this final decision to the Illinois Pollution Control Board . . .").

The Agency also asserts in its Cross Motion that, as to the 2008 release, Tank 6 remained in service and there was no open excavation surrounding Tank 6 at that time. Cross Motion at 4. Petitioner does not dispute that fact. However, Respondent has provided no evidence of a release from Tank 6 prior to the 2020 release.

Petitioner has met its initial burden of proof. As discussed in detail in Petitioner's Motion for Partial Summary Judgment, Petitioner followed all applicable requirements under the Act and regulations as to the submission of the 45-Day report and eligibility and application for reimbursement for the early action costs for the 2020 release. Motion for Partial Summary Judgment at 10-12. Petitioners' Motion for Partial Summary Judgment was supported by the administrative record filed by the Agency, with the administrative record demonstrating that there was a release in 2020 from Tank 6 and that there was no evidence of a release from Tank 6 prior to 2020. The Agency's Cross Motion, or in the alternative its response to Petitioner's Motion for Partial Summary Judgment, failed to provide any "factual basis that would arguably

entitle it to a favorable judgment” which would be necessary to preclude summary judgment. *See Pecora*, 323 Ill. App. 3d at 933.

Furthermore, notwithstanding the Agency’s unsupported assertions concerning the role of the Office of the State Fire Marshal (“OSFM”) (Cross Motion at 6-7), the fact remains that OSFM saw evidence of a release during the removal of Tank 6. As the Agency asserts, when a release is reported to the Illinois Emergency Management Agency (“IEMA”), steps need to be taken per the Act and associated regulations. Cross Motion at 6; *see* Motion for Partial Summary Judgment at 10-11. While the Agency asserts that OSFM does not confirm releases, here the OSFM inspector did observe evidence of a release from Tank 6 as part of his oversight of the removal of Tank 6 in 2020.¹ Per the Agency’s own notes concerning the 2020 release, the Agency summarized OSFM’s confirmation as follows: “Mr. Bruce Billman (OSFM Storage Tank Safety Specialist) confirmed indications of release with visual and olfactory indication of contaminated soils during removal of the UST and associated piping.” R0280. Based on the samples required to be taken per OSFM regulations around Tank 6, OSFM determined a release had occurred from Tank 6 and determined that activities as a result of the release are eligible for reimbursement from the LUST Fund.

Petitioner’s 45-day report and application for reimbursement of early action costs for the 2020 release demonstrated compliance with the Act and regulations. Petitioner has met its burden on proof. *See* 35 Ill. Adm. Code 105.112; *see Karlock v. IEPA*, PCB 05-127, slip op. at 7 (July 21, 2005); *Illinois Ayers Oil Co. v. IEPA*, PCB 03-214, slip op. at 8 (April 1, 2004).

¹ In its Cross Motion, the Agency states that “[o]ne could opine” the purpose of the subsurface investigation that led to the discovery of the 2020 release. Cross Motion at 7. This statement is unsubstantiated and should be stricken from the Cross Motion.

IV. CONCLUSION

The Agency's June 30, 2020 final decisions were based on the Agency's erroneous conclusion that that the 2020 release is a re-reporting of the 2008 release. Respondent has presented no evidence in its Cross Motion for Summary Judgment that demonstrates the 2020 release was a re-reporting of the 2008 release. The Board should find that the Agency's June 30, 2020 final decisions were arbitrary, capricious, and not supported by statutory or regulatory authority. Petitioner's 45-Day Report and reimbursement application submittals to the Agency were in compliance with the Act and Board regulations. For the reasons stated above, Shree Kuber, Inc. prays for an order from the Board granting summary judgment in its favor and denying Respondent's Cross Motion for Summary Judgment, and respectfully requests that the Board enter an order reversing the Agency's June 30, 2020 final decisions concerning re-reporting, and awarding Petitioner reasonable attorneys' fees and expenses, and for such other and further relief as the Board deems just.

Respectfully submitted,

SHREE KUBER, INC.,
Petitioner,

DATE: August 10, 2021

By: /s/ Melissa S. Brown
One of Its Attorneys

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