

ILLINOIS POLLUTION CONTROL BOARD
November 4, 2021

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

OPINION AND ORDER OF THE BOARD (by A. Palivos):

Petitioner, Shree Kuber, Inc. (Kuber), is the current owner or operator of the underground storage tanks (USTs) located at 1406 North Prospect Avenue, Champaign, Champaign County (Site) assigned LPC #0190105433. Kuber seeks review of a decision by the Illinois Environmental Protection Agency (IEPA or Illinois EPA or Agency) that determined the Leaking UST Incident 20200005 is a re-reporting of Leaking UST Incident 20080255 that occurred in 2008, and that the soil samples do not indicate a new release occurred. In 2008, Freedom Oil Company was the owner or operator of USTs located at the Site.

Kuber filed a motion for partial summary judgment. For the reasons below, the Board denies Kuber's motion for partial summary judgment on the single issue of whether the 2020 release Kuber reported is a re-reporting of the 2008 release at the same site.

This opinion first summarizes the procedural history of the case and provides the factual background. After addressing summary judgment and the applicable standard for review and burden of proof, the Board discusses and decides the issue on appeal before issuing its order.

PROCEDURAL HISTORY

On July 23, 2020, Kuber filed a request for an extension of the appeal period for the IEPA's determination. On August 13, 2020, the Board granted the requests and extended the appeal period in both cases until November 4, 2020. On November 4, 2020, Kuber filed a Petition for Review of Agency Determination. On November 19, 2020, the Board accepted the petition for hearing. On January 5, 2021, IEPA filed the administrative record in PCB 21-5 (PCB 21-5 R. at _). On January 6, 2021, the IEPA submitted the administrative record of its determination in PCB 21-3 (PCB 21-3 R. at _). On April 1, 2021, the Board granted Kuber's Motion to Supplement the record and Motion to consolidate the petitions.

On July 15, 2021, Kuber filed a Motion for Partial Summary Judgment (Pet. Mot. SJ). On July 28, 2021, the Agency filed its response to Kuber's motion, also captioned as a cross-motion for summary judgment (IEPA Resp.). On August 9, 2021, Kuber filed its response to

IEPA's cross-motion for summary judgment. (Pet. Reply). On August 18, 2021, the IEPA filed a Leave to File Reply, stating that the IEPA mis-captioned its Response and did not file a cross motion for summary judgment, but rather a response due to its position that there is a material issue of fact (IEPA Reply). The Board grants the motion for leave to file the reply.

FACTUAL BACKGROUND

Kuber currently owns the Site, but in 2008, Freedom Oil Company was the owner or operator of USTs located at the Site. 2008 45-Day Report, PCB 21-03 R. at 0009. Pet. Mot. SJ at 1.

The 2008 Incident

In 2008, there were eight USTs at the Site. PCB 21-03 R. at 0016. Tank 1 was a 6,000-gallon diesel fuel UST located in the center of the Site, Tanks 2 through 5 were gasoline USTs varying in size located in the southwest portion of the Site, Tank 6 was a 10,000-gallon diesel fuel UST located in the northeast portion of the Site, and Tank 7 and Tank 8, an 8,000-gallon gasoline tank and 12,000-gallon gasoline tank, respectively, were also located at the site. *Id.* On February 25, 2008, a suspected release of diesel fuel from the Site was reported to the Illinois Emergency Management Agency (IEMA) and was assigned Incident No. 20080255 (2008 Incident). *Id.* at 0011. On June 3, 2008, Freedom Oil submitted its 45-Day Report/Report of Early Action to the Agency (2008 45-Day Report). *Id.* at 0001-0064.

As set forth in the 2008 45-Day Report, a preliminary inspection of the site revealed the presence of contamination near the UST system. PCB 21-03 R. at 0012. In April 2008, personnel and equipment were mobilized to the Site for UST removal activities. *Id.* at 0016. On April 1, 2008, Tank 1 was removed, and four gasoline USTs (Tanks 2, 3, 4, and 5) were emptied and abandoned in place. *Id.* at 0012, 0016, 0029, 0054-60. The USTs were decommissioned under the supervision of an Office of the State Fire Marshal (OSFM) representative. *Id.* at 0016. The Permit for Removal of UST issued by OSFM indicated that Tank 1 was the diesel tank that was leaking. *Id.* at 0053. No samples were taken around Tank 6 during the removal of Tank 1 in April 2008, so it cannot be determined whether Tank 6 had a release at that time. *Id.* 0024-25.

Upon removal of Tank 1, soil samples were collected from the UST excavation and sent to a laboratory for analysis. PCB 21-03 R. at 0012, 00016-17. The 2008 45-Day Report indicated that contamination in the UST system pit was likely due to UST and piping leaks and spills or overfills. *Id.* The soil discoloration and odor of the backfill in the UST excavation indicated contamination, and field screening of the samples indicated volatile organics present in the soil. *Id.* at 0016. Petroleum impact of the UST excavation soil samples was confirmed by screening samples using a portable photoionization detector (PID). *Id.*

On August 7, 2008, OSFM made its Reimbursement Eligibility and Deductible determination concerning the 2008 Incident. PCB 21-03 R. at 0178-179. OSFM determined that Freedom Oil was eligible to seek payment and that costs must be in response to the 2008 Incident and associated with Tanks 1 – 5. *Id.* On July 1, 2013, a Corrective Action Work Plan and Budget for the 2008 Incident (2008 CAP) was submitted to the Agency by Freedom Oil. *Id.*

at 0065-0180. A Site Investigation and Tiered Approach to Cleanup Objectives (TACO) evaluation was conducted. *Id.* at 0075. It was determined from the high levels of benzene, toluene, ethylbenzene, and xylenes (BTEX) and polynuclear aromatics (PNA) in the vicinity of the fueling islands that the gasoline tanks (Tanks 2-5) and Tank 1 had a release. *Id.*

The soil samples taken in the vicinity of Tanks 1 and 6 on August 19, 2008 were located at MW-2, MW-4, MW-5, and MW-9. PCB 21-03 R. at 0095-96. The sample location at MW-2 was closest to Tank 1, and the sample location at MW-9 was closest to Tank 6. Pet. Mot. SJ at 3. Analysis of the August 2008 sample results indicated no detections of pyrene in the soil samples taken in the area around both Tank 1 and Tank 6. *Id.* at 0082-88. However, pyrene was detected in 2008 in samples from MW-1 which was located farther from Tank 6. *Id.* at 0083, 0084, and 0098.

The soil sample results around Tank 1 (MW-2) showed concentrations of benzene, toluene, ethylbenzene, total xylenes, and MTBE at levels exceeding applicable detection limits, and no detections of PNA compounds. *Id.* By contrast, the soil sample results from MW-9, the sample location closest to Tank 6, were below applicable detection limits for benzene, ethylbenzene, total xylenes and MTBE and all of the PNA compounds. *Id.* The results of the sampling for the 2008 Incident confirmed that there had been a release from Tank 1, but no samples were taken from Tank 6, a diesel tank, and it was kept in service. PCB 21-3 R. at 0029.

Per Figures 4 and 6 of the 2008 CAP, the extent of the soil contamination encompassed Tanks 1-5 but not Tank 6. PCB 21-03 R. at 0098, 0102. The soil contamination plume boundaries were based on concentrations below Tier 1 objectives, and IEPA argues no contaminated samples were collected close to Tank 6. IEPA Resp. at 5. IEPA therefore argues that Tank 6 was included in the plume based on the technical data submitted at the time, even if it was not shown on the map. *Id.* The 2008 CAP was approved by the Agency in a letter dated August 22, 2013. *Id.* at 0327-330. The approved CAP indicated that the soil contaminant plume width was approximately 267 feet and approximately 8 feet thick. *Id.* at 0077.

The 2020 Incident

During a limited subsurface investigation at the Site in January 2020, hydrocarbon impacted soil was found surrounding the 10,000-gallon diesel tank system (Tank 6). PCB 21-3 R. at 0184. The investigation indicated a petroleum release around Tank 6 - which was last in use on December 19, 2018 - through soil sampling. *Id.*; *see also* A.R. 0280. On January 3, 2020, Kuber reported a release from Tank 6, and it was assigned Incident No. 20200005 (“2020 Incident”). *Id.*

On January 21-22, 2020, Tank 6 was removed, cleaned, and disposed of under supervision of an OSFM representative. PCB 21-03 R. at 0189. During the removal activities, the OSFM representative confirmed visual and olfactory indications of a release with contaminated soils in the excavation for Tank 6. *Id.* The 2020 45-Day Report stated that the OSFM representative observed obvious signs of hydrocarbon contaminated soils in the Tank 6 excavation associated with the 2020 Incident. *Id.* After removal of the impacted backfill materials, soil samples were taken from the sidewalls, floor and piping trench of the Tank 6 soil excavation area. *Id.* at 0186.

The 2020 45-Day Report indicated that the soil collected from the Tank 6 excavation had areas of obvious odor and staining and the samples had screening results on the PID above 1 parts per million (ppm). *Id.* The soil samples were sent to a laboratory and analyzed for BTEX and PNAs. *Id.*

Soil samples around Tank 6 were taken at CS-5 through CS-12. PCB 21-3 R. at 0193. Soil samples collected from the piping running the extent of excavation for the Tank 6 UST system indicated levels of pyrene at the following five locations: CS-1: 219 parts per billion (ppb), CS-2: 551 ppb, CS-3: 1,360 ppb, CS-7: 265 ppb, and CS-11: 195 ppb. *Id.* at 0198-199. Soil samples collected from the location of the piping for the Tank 6 UST system also indicated levels of ethylbenzene at the following: CS-1: 66 ppb, CS-2: 21 ppb, and CS-3: 194 ppb. *Id.* The greatest concentrations of pyrene in 2020 were in samples CS-2 and CS-3, which were collected beneath the piping/pump islands that were jointly served by Tanks 1 and 6. PCB 21-3 R. at 0198. No samples were collected close to this piping or these pump islands during the investigation of the 2008 Incident. *Id.* at 0025.

On March 4, 2020, OSFM issued an eligibility determination for Tank 6 and determined that the release from Tank 6 was eligible for reimbursement from the UST Fund. PCB 21-5 R. at 0001-0002. On March 16, 2020, Kuber submitted its 2020 45-Day Report for the 2020 Incident. *Id.* at 0181-0278. Also on March 16, 2020, Kuber applied to the Agency for reimbursement of early action costs for the 2020 Incident, requesting \$46,809.00. *Id.* at 0007-0044.

On June 30, 2020, the Agency issued two final decision letters. Pet. Mot. SJ at 5. One letter concerned Kuber's application for reimbursement of early action costs, in which the Agency stated that the costs were ineligible for payments from the UST Fund. PCB 21-5 R. at 0045-0048. The Agency stated that, "[b]ased on the information currently in the IEPA's possession, incident 20200005 is a re-reporting of incident 20080255." *Id.* at 0047. The other reasons for the Agency's denial include that the early action costs were inconsistent with the associated technical plan, the costs lacked supporting documentation, and the costs were not reasonable as submitted. *Id.*

The other letter concerned Kuber's 45-Day/Corrective Action Completion Report. The Agency stated that "it has been determined that the above-referenced incident is a re-reporting of Leaking UST Incident 20080255" and that the "concentrations of contaminants in the soil after removal of the [USTs] do not indicate that a new release occurred." PCB 21-03 R. at 0313-314.

LEGAL BACKGROUND

Standards for Ruling on Summary Judgment Motions

Summary judgment is appropriate when the pleadings, depositions, admissions, affidavits, and other items in the record show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Adames v. Sheahan*, 233 Ill. 2d 276, 295, 909 N.E.2d 742, 753 (2009); *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998); 35 Ill. Adm. Code 101.516(b). A genuine issue of material fact precluding summary judgment exists when "the material facts are disputed, or, if the material

facts are undisputed, reasonable persons might draw different inferences from the undisputed facts.” Adames v. Sheahan, 233 Ill. 2d at 296, 909 N.E.2d at 753; Adams v. Northern Illinois Gas Co., 211 Ill. 2d 32, 43, 809 N.E.2d 1248, 1256 (2004). “[T]he 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, slip op. at 258 (Dec. 19, 1991).

In UST appeals, the Agency’s 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 Environmental Protection Act (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, slip op. at 10 (May 20, 2010). The applicable standard of proof is preponderance of the evidence. Freedom Oil Co. v. IEPA, PCB 03-54, slip op. at 59 (Feb. 2, 2006); *see e.g.*, McHenry County Landfill, Inc. v. County Bd. of McHenry County, PCB 85-61 (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.”).

To decide Kuber’s motion for partial summary judgment, the Board must consider whether the 2020 incident, Incident No. 20200005, is a new release or whether it is a re-reporting of the 2008 incident, Incident No. 20080255.

Relevant Law

Under Illinois law, both the Agency and OSFM have regulatory authority for USTs. Under the Act, 415 ILCS 5, OSFM determines whether USTs may be registered, and the registration is a prerequisite for LUST Fund eligibility. 415 ILCS 5/57.9 (2020). OSFM also determines whether an UST owner or operator is eligible for reimbursement from the LUST Fund in connection with a reported release and, if so, what deductible applies. *Id.* OSFM also oversees the removal and abandonment of USTs. *See* 41 Ill. Adm. Code 170. Under Title XVI of the Act, the Agency determines whether to approve proposed cleanup plans and budgets for LUST sites and determines requests for cleanup cost reimbursement from the LUST Fund. 415 ILCS 5/57.7, 57.8 (2020).

The Act and Board regulations define a “release” as “any spilling, leaking, emitting, discharging, escaping, leaching or disposing of petroleum from an underground storage tank into groundwater, surface water or subsurface soils.” 415 ILCS 5/57.2 (2020); 35 Ill. Adm. Code 734.115.

The Board’s regulations also include the following definitions concerning confirming releases:

“Confirmation of a release” means the confirmation of a release of petroleum in accordance with regulations promulgated by the Office of the State Fire Marshal at 41 Ill. Adm. Code 170.

“Confirmed Release” means a release of petroleum that has been confirmed in accordance with regulations promulgated by the Office of the State Fire Marshal at 41 Ill. Adm. Code 170. 35 Ill. Adm. Code 734.115.

Section 57.6 of the Act provides requirements for early action at a UST site, stating in part:

Notwithstanding any other corrective action taken, an owner or operator may, at a minimum, and prior to submission of any plans to the Agency, remove the tank system or abandon the underground storage tank in place, in accordance with the regulations promulgated by the Office of the State Fire Marshal. The owner or operator may also remove visibly contaminated fill material and any groundwater in the excavation which exhibits a sheen 415 ILCS 5/57.6(b) (2020).

Section 734.210 of the Board’s regulations sets forth the requirements for early action, providing:

Upon confirmation of a release of petroleum from an UST system in accordance with regulations promulgated by the OSFM, the owner or operator, or both, must perform the following initial response actions within 24 hours after the release: 1) Report the release to IEMA (e.g., by telephone or electronic mail); 2) Take immediate action to prevent any further release of the regulated substance to the environment; and 3) Identify and mitigate fire, explosion and vapor hazards. 35 Ill. Adm. Code 734.210(a).

Section 57.9(a) of the Act sets forth the eligibility requirements for an owner to receive reimbursement for a leaking UST, which include:

- 1) Neither the owner nor the operator is the United States Government.
- 2) The tank does not contain fuel which is exempt from the Motor Fuel Tax Law.
- 3) The costs were incurred as a result of a confirmed release of fuel.
- 4) The owner or operator registered the tank and paid all fees in accordance with the statutory and regulatory requirements of the Gasoline Storage Act.
- 5) The owner or operator notified the IEMA of a confirmed release, the costs were incurred after the notification and the costs were a result of a release of a substance listed in this Section.
- 6) The costs have not already been paid to the owner or operator under a private insurance policy, other written agreement, or court order.
- 7) The costs were associated with corrective action. 415 ILCS 5/57/9(a)(1)-(7) (2020).

DISCUSSION

Overview

The Board denies Kuber's motion for partial summary judgment concerning the re-reporting of the 2008 Incident. In determining whether a genuine issue of material fact exists, precluding summary judgment in favor of Kuber, the Board construes the record strictly against Kuber and liberally in favor of IEPA. A genuine issue of material fact precluding summary judgment exists when "the material facts are disputed, or, if the material facts are undisputed, reasonable persons might draw different inferences from the undisputed facts." Adames v. Sheahan, 233 Ill. 2d at 296, 909 N.E.2d at 753; Adams v. Northern Illinois Gas Co., 211 Ill. 2d 32, 43, 809 N.E.2d 1248, 1256 (2004).

In its response to Kuber's motion, IEPA states that "[t]here exists a genuine issue of material fact." IEPA Resp. at 2. IEPA suggests that the parties do not agree on the basic facts set forth in Kuber's motion. *Id.* at 6. The Agency argues that the release occurred in 2008, not in 2020, while Kuber argues that a release occurred in both 2008 and 2020. *Id.*

Kuber argues that "[t]he facts are not in dispute in this matter," but rather that the parties draw different conclusions from the facts. Pet. Motion SJ at 1. Kuber requests that the Board find the Agency's June 30, 2020, final decisions erroneously determined that the 2020 incident was a re-reporting of the 2008 Incident. *Id.* at 16.

As detailed below, the Board finds that the record includes genuine issues of material fact, namely whether: (1) pyrene can be used as a basis to justify a new release since it has been associated with background contamination; (2) it can be determined if Tank 6 had a release prior to 2008 sampling events; (3) Tank 6 was within the contamination plume; and (4) the level of ethylbenzene in 2020 had a maximum concentration triple the amount sampled in 2008.

Thus, Kuber failed to meet its burden of persuasion to show that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law, and the Board denies its motion for partial summary judgment.

Analysis

Kuber states that this Motion for Partial Summary Judgment only concerns the re-reporting portion of the IEPA's denial of reimbursement of the early action costs. Kuber is not moving for summary judgment on the IEPA's two other reasons for denying reimbursement but reserves the right to do so later.

Pyrene

Kuber argues that OSFM determined that the tanks eligible for reimbursement for the 2008 Incident were Tanks 1-5 and the reports submitted indicated that no release had been observed from Tank 6. Pet. Mot. SJ at 12; *see* PCB 21-03 R. at 0053; 0075, 0178-179. Kuber

states that OSFM later determined that the tank eligible for reimbursement for the 2020 Incident was Tank 6. *Id.*; see PCB 21-5 R. at 0001-2.

Kuber argues that analysis of the results of soil samples taken in the vicinity of Tank 1 and Tank 6 for the 2008 Incident (MW-2, MW-4, MW-5, MW-9) indicated no detection of pyrene. *Id.*; see PCB 21-03 R. at 0082-88. Kuber further argues that, in contrast, early action soil samples taken around Tank 6 during the investigation of the 2020 Incident indicated levels of pyrene contamination, whereas no pyrene was detected in sampling for the 2008 Incident around Tank 1. *Id.*

The IEPA argues that Kuber uses pyrene to bolster its claim that a new release occurred, because pyrene was not detected in 2008 in samples around Tank 1 and Tank 6; however, pyrene was detected in 2008 in samples from MW-1 and MW-3 which were located far away from Tank 1 and Tank 6 which are diesel tanks. IEPA Resp. at 8, *citing* PCB 21-3 R. at 0083, 0084 and 0098. Therefore, IEPA asserts that pyrene cannot be used to show a new release since it may be associated with background contamination. *Id.* Further, the IEPA argues that pyrene was detected in 2017 in samples from B-3 and B-6, which were located near MW-1 and MW-3, all of which were collected south or west of the gasoline operations portion of the site and away from the diesel fuel operations portion of the site. *Id.* The IEPA states that the concentrations of pyrene in 2008 in samples from MW-1 were greater than the concentrations of pyrene in 2020 in samples CS-1, CS-2, CS-7, and CS-11. *Id.* The IEPA further states that the concentrations of pyrene in 2017 in samples from B-6 were greater than the concentrations of pyrene in 2020 in samples CS-1, CS-7, and CS-11. *Id.* The IEPA argues that the greatest concentrations of pyrene in 2020 were in samples CS-2 and CS-3, which were collected beneath the piping/pump islands that were jointly served by Tanks 1 and 6, and no samples were collected close to this piping or these pump islands during investigation of the 2008 incident. *Id.*, *citing* PCB 21-3 R. at 0025.

Accordingly, the IEPA claims that, while OSFM observations are used as evidence in determining whether a release has been confirmed, IEPA determines whether a release is new or a re-reporting of a prior release. IEPA Reply at 2. Thus, the IEPA argues that a determination cannot be made until the 45-day report is received and all evidence is looked at. *Id.*

Board Finding. The Board agrees with the IEPA that a determination cannot be made based on the record and arguments now before the Board. At summary judgment, the Board cannot weigh and resolve this conflicting evidence. Construing the record as it must at summary judgment, the Board finds a genuine issue of material fact as to whether pyrene levels can be used to justify that a new release has occurred. The Board believes that testimony will help resolve this issue and directs the parties to proceed to hearing.

Tank 6 Release

Kuber asserts that, upon confirmation of a release from a UST, the owner or operator must perform the following within 24 hours after the release: (1) report the release to IEMA, (2) take immediate action to prevent any further release, and (3) identify and mitigate fire, explosion, or vapor hazards. Pet. Mot. SJ at 10, *citing* 35 Ill. Adm. Code 734.210. Kuber states that hydrocarbon impacted soil was found surrounding Tank 6 during a limited subsurface

investigation at the Site. Pet. Mot. SJ at 10, citing PCB 21-03 R. at 0184. Kuber argues that the hydrocarbon impacted soil constituted a “release” as it was “any spilling, leaking, emitting, discharging, escaping, leaching, or disposing of petroleum from an underground storage tank into groundwater, surface water or subsurface soils.” Pet. Mot. SJ at 10, quoting 415 ILCS 5/57.2; *see also* 35 Ill. Adm. Code 734.115.

Kuber reported the release to IEMA on January 3, 2021, and it was assigned a new incident number (Incident No. 20200005). Pet. Mot. SJ at 10. On January 21-22, 2020, Kuber removed Tank 6. Kuber states that during the removal activities, an OSFM representative confirmed indications of a release. *Id.* at 11. Kuber argues that these early action activities were performed within 45 days after initial notification of IEMA for purposes of being eligible for reimbursement by the UST Fund. *Id.*, citing 35 Ill. Adm. Code 734.210(g); PCB 21-03 R. at 184.

Kuber subsequently requested an eligibility and deductible determination from OSFM. On March 4, 2020, OSFM determined that Tank 6 was eligible for reimbursement from the UST Fund. Pet. Mot. SJ at 11; *see* PCB 21-5 R. at 0001-0002. Because a release occurred, Kuber was required by the regulations to submit a 45-Day Report to the IEPA. *Id.* Kuber submitted its 45-Day Report to the IEPA on March 16, 2020. *Id.*, *citing* PCB 21-03 R. at 0181-278. Also on March 16, 2020, Kuber applied for reimbursement of the early action costs. *Id.*; *see* 35 Ill. Adm. Code 734.605

Additionally, Kuber claims that it followed all applicable requirements to submit a 45-Day Report and perform early action activities. Pet. Mot. SJ at 11. Kuber argues that the regulations strictly require a 45-Day Report to be submitted in the event of a release and that the 2020 Incident was a “release” as defined by the Act and Board regulations. *Id.*

Kuber argues that it also met the eligibility requirements for reimbursement of early action costs. Pet. Mot. SJ at 12. Early action costs were incurred because of a confirmed release of fuel, Kuber notified IEMA of the confirmed release, costs were incurred after the notification, and the costs were associated with corrective action. *Id.*; *see* PCB 21-03 R. at 0181-278.

Kuber does not disagree with the IEPA’s assertions that Tank 6 remained in service following the 2008 release and there was no open excavation surrounding Tank 6 at that time. However, Kuber argues that the IEPA has provided no evidence of a release from Tank 6 prior to the 2020 release. Pet. Resp. at 3. Kuber argues that the record supports its Motion for Partial Summary Judgment, because it demonstrates that there was a release in 2020 from Tank 6 but no evidence of a release from Tank 6 prior to 2020. *Id.*

Kuber claims that, despite the IEPA making unsupported assertions about OSFM’s role, the OSFM saw evidence of a release during the removal of Tank 6. *Id.* at 4. While the IEPA asserts the OSFM does not confirm releases, Kuber argues that the OSFM inspector did observe and confirm visual and olfactory indications of a release from Tank 6 during removal of Tank 6 in 2020. *Id.* Kuber argues that, 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 responding to the release are eligible for reimbursement from the UST fund. *Id.*

The IEPA does not contest that a release occurred, but argues that it occurred in 2008 and not in 2020. IEPA Resp. at 6. The IEPA states that a report to IEMA triggers certain requirements, even if the reported event ultimately does not meet the definition of a release. *Id.* The IEPA argues that OSFM deems tanks eligible for reimbursement from the UST Fund but does not confirm releases and does not determine if the release is a re-reporting of a prior release. *Id.* That task is left up to the IEPA after the 20-day and 45-day reports are submitted. *Id.* It is at this point that enough information has been collected to determine if the newly reported release is the same or different from the prior reported release. *Id.* In this case, the IEPA argues that information in Kuber's 45-Day Report made it clear that the 2020 reported release merely re-reported the 2008 release. *Id.* at 6-7. IEPA concluded that there was one release at the site from Tank 1 in 2008. *Id.* at 7.

Kuber argues that OSFM only determined that Tanks 1 through 5 were eligible for reimbursement in 2008 and did not include Tank 6, which the IEPA acknowledges. IEPA Resp. at 7, *see also* Pet. Mot. SJ at 2-3. The IEPA also notes that OSFM did not include newly installed Tanks 7 or 8 at that time either. *Id.* However, the IEPA argues that OSFM makes those determinations based upon information from the tank owner and operator which must not have requested that Tank 6 be determined to be eligible at that time. *Id.* Further, during the 2008 release, the IEPA argues that Kuber never investigated near the pump island used by Tank 1 and Tank 6 or in the direction of Tank 6, so there would not have been any information available to make such determination. *Id.*

The IEPA argues that during late 2019 or early 2020, Kuber did a subsurface investigation of the Site, the purpose of which is not given in their 45-day report, nor are the results. IEPA Resp. at 7. However, Kuber states that it found hydrocarbons, which the IEPA argues would not be unusual at a gas station with a prior release remediated to Tier II standards. *Id.* Kuber then applied for and was given a permit to remove Tank 6. *Id.*, citing A.R. 0201. The IEPA emphasizes that Kuber did not investigate Tanks 7 and 8 as sources of the leak. *Id.* The IEPA suggests that Kuber performed the subsurface investigation solely to notify IEMA of a release so the planned tank pull would qualify for reimbursement from the Fund. *Id.*

When Tank 6 was pulled there was staining on the walls and odor from the open excavation. IEPA Resp. at 7. IEPA notes that the fuel dispensers and piping were not removed during the 2008 Incident, and no samples were taken in that area. *Id.* The IEPA argues that Tank 1 was located very close to the fuel dispensing area, so the samples taken from C-1, C-2 and C-3 in 2020, which were the samples that showed contaminants, could have been and most likely were from the release from Tank 1 that remained from 2008. *Id.* at 7-8. The IEPA argues that those samples are the main source of Kuber's belief that a new release has occurred. However, it argues that the proximity of Tank 1 and the lack of sampling data from 2008 makes it unlikely that it is a new release and that it merely re-reports the release in 2008. *Id.* at 8.

The IEPA contests Kuber's assertion that sampling for the 2008 Incident confirmed that there had been a release from Tank 1 but no release from Tank 6 prior to 2008 Incident sampling events. IEPA Resp. at 4. The IEPA argues that no samples were collected close to Tank 6 in 2008, and therefore that Kuber's statement is unsubstantiated. *Id.* The IEPA points out that the 2008 Incident was reported when Tank 1 was removed and Tanks 2 through 5 were abandoned,

but Tank 6 remained in service and there was no open excavation surrounding Tank 6 at the time. *Id.* Thus, the IEPA argues that the OSFM did not inspect Tank 6 and it cannot be confirmed whether Tank 6 had a release prior to the 2008 sampling events. *Id.*

Board Finding. While the facts regarding Tank 6 are undisputed, a genuine issue of material fact exists not only when material facts are disputed, but also when different and reasonable conclusions can be drawn from those undisputed facts. *Adames*, 233 Ill. 2d at 296. Construing the record strictly against Kuber and liberally in favor of the IEPA, the Board finds that reasonable persons might draw different inferences from these undisputed facts. The Board finds the record insufficient at this time to allow the Board to determine which inference is correct. Because Kuber and the IEPA draw different conclusions as to whether Tank 6 had a prior release, the Board seeks clarification in testimony at hearing. The Board directs the parties to proceed to hearing on this issue.

Tank 6 Contamination Plume

Kuber argues that the 2008 soil contamination plume is further evidence that the 2020 Incident is a new release, because it did not include Tank 6. Pet. Mot. SJ at 13. Kuber argues that the IEPA's finding that Tank 6 was within the plume of the 2008 Incident is contradicted by its approval of the plume map in the 2008 CAP that did not include Tank 6. *Id.*; see PCB 21-03 R. at 0312; see also PCB 21-5 R. at 0327-330. Kuber argues that while Tank 6 was included in the groundwater plume (see PCB 21-03 R. at 0100), the plume maps submitted with the 2008 CAP do not show Tank 6 within the soil plume. *Id.* at 13-14; see PCB 21-03 R. at 0098, 0102.

Thus, Kuber argues that both IEPA justifications for finding that the 2020 release re-reports the 2008 release are inaccurate. *Id.* Kuber argues that the soil indicator contaminant concentrations present at Tank 6 indicate a new release – higher levels of both pyrene (which had not been detected in 2008) and higher levels of ethylbenzene were detected. *Id.* Kuber argues that Tank 6 is now within the plume of pyrene, which was not detected in 2008 borings in that area. *Id.*

Kuber points out that the IEPA does not dispute the soil contamination plume contained in the CAP for the 2008 release did not include Tank 6. Instead, IEPA argues that Tank 6 would have been in the contamination plume even if it was not reflected in the map. Pet. Resp. at 2-3. Kuber further points out that the soil contamination plume map was attached to the CAP for the 2008 release submitted to and approved by the IEPA. *Id.* at 3. Kuber argues that, if the IEPA now asserts that the maps in the 2008 CAP are incorrect, it is attempting to reverse its approval of the 2008 CAP, which was a final agency decision. *Id.*

The IEPA argues that it does not approve individual maps contained within plans. It further argues that the map in question was in a plan that was approved despite being drawn incorrectly. IEPA explains that the plume should have extended to a sampling point that was below Tier I objectives. IEPA Reply at 1.

The IEPA asserts that the concentrations below Tier 1 objectives are typically used to define the plume boundaries. IEPA Resp. at 4. The IEPA states that, as shown on Figures 4 and

6, the plume boundary arbitrarily excluded Tank 6 when the nearest clean sample was MW-9. *Id. citing* PCB 21-3 R. at 0098 & 0102 respectively. The IEPA contests Kuber's assertion that the IEPA accepted the soil contamination plume as shown on Figures 4 and 6, because the IEPA approved the CAP in which the figures were included. *Id.* The IEPA argues that the northeast soil contamination plume boundary was not properly shown. *Id.* The IEPA points out that, in every direction except northeast (the direction of Tank 6), the soil contamination plume boundaries were based on concentrations below Tier 1 objectives. *Id.* at 4-5. The IEPA points out that the northeast soil contamination plume boundary stopped short of Tank 6 even though no samples were collected close to Tank 6, and the nearest clean sample was MW-9, which was northeast of Tank 6. *Id.* at 5. IEPA concludes that Tank 6, based upon the technical data submitted at the time, was included in the plume, even if it was not shown on the map. *Id.*

Board Finding. The Board is unconvinced by Kuber's argument that that the contamination plume is further evidence that the 2020 Incident is a new release. The Board finds that the significance of the contamination plume is a disputed material fact, and that different inferences from that fact may be drawn. The Board cannot weigh and resolve the conflicting evidence presented during summary judgment. Construing the record as it must at summary judgment, the Board finds a genuine issue of material fact based on the record before it. Thus, the Board directs the parties to proceed to hearing on this issue.

Ethylbenzene Levels

Kuber states that the borings in the area used to draw the soil plume in 2008 (MW-4, MW-2, MW-5 and MW-9) had a maximum concentration of ethylbenzene of 61.5 ppb. Pet. Mot. SJ at 13; *see* PCB 21-03 R. 0082-88. Kuber asserts that in 2020, the level of ethylbenzene in the canopy area had a maximum concentration of 194 ppb at CS-3, more than three times the concentration in any of the 2008 samples. *Id.*; *see* PCB 21-03 R. at 0198-199. Kuber argues that the detection of pyrene in 2020 and the higher concentrations of ethylbenzene in 2020, when compared to the 2008 data, demonstrate that a new release occurred in 2020. *Id.* Kuber argues that the IEPA was incorrect in concluding that the 2020 Incident is a re-reporting of the 2008 Incident. *Id.*

Kuber argues that both of IEPA's justifications for determining that the 2020 release re-reports the 2008 release are inaccurate. Pet. Mot. SJ at 14. Kuber argues that the soil indicator contaminant concentrations present at Tank 6 indicate a new release because they detect higher levels of both pyrene (which had not been detected in 2008) and higher levels of ethylbenzene. *Id.* Kuber argues that Tank 6 is now within the plume of pyrene, which was not detected in 2008 borings in that area. *Id.*

The IEPA contests Kuber's assertion that the level of ethylbenzene in 2020 in the canopy area had a maximum concentration of 194 ppb, more than three times the concentration in any of the 2008 samples. IEPA Resp. at 5. The IEPA argues that the concentrations of ethylbenzene in 2008 Early Action samples from the North Wall and the East Wall samples of Tank 1 were 1.5 to 2.8 times greater than 194 ppb. *Id.*

The IEPA states that Tank 1 was located immediately adjacent to and west of the canopy area, and notes that the east wall of the 2008 excavation for Tank 1 would have been very close to CS-3, which was collected in 2020. IEPA Resp. at 5. The IEPA further points out that the only ethylbenzene detected in 2020 was detected in samples CS-1, CS-2, and CS-3, which were collected beneath the piping and pump islands that were jointly served by Tanks 1 and 6. *Id.* The IEPA also notes that there were no samples collected close to this piping or these pump islands during investigation of the 2008 Incident. *Id.* at 5-6.

Board Finding. The Board agrees with the IEPA that a decision regarding ethylbenzene levels cannot be made based on the record now before it, and the Board finds that additional explanation and clarification on this issue is necessary. Construing the record as it must, and because the Board cannot weigh and resolve this conflicting evidence at summary judgment, the Board finds a genuine issue of material fact as to whether ethylbenzene levels in 2020 show that a new release occurred. Thus, testimony will help the Board to resolve this issue and directs the parties to proceed to hearing.

Board Precedent

Kuber states that in Weeke Oil Company v. IEPA, the Board found that a 2008 release was not a new release but a re-reporting of a 1998 release. Pet. Mot. SJ at 15, citing Weeke Oil Company v. IEPA, PCB 10-1 (May 20, 2010). Kuber argues that the Board pointed to the fact that the Tier 1 objectives had not been exceeded at the site and that any evidence of contamination was consistent with the conditions of the No Further Remediation (NFR) Letter for the 1998 release. *Id.*, citing Weeke Oil at 24. Kuber distinguishes that finding from the case at hand, considering the 2008 Incident is ongoing and has not been resolved by a NFR letter like in Weeke Oil. *Id.* Additionally, Kuber argues that, as explained in Prime Location, the definition of “release” is not limited to exceedances of remediation objections. *Id.* Thus, Kuber argues that, as explained above, soil samples indicate that two separate releases occurred. *Id.*

Lastly, Kuber argues that the facts of this proceeding can be distinguished from prior Board cases involving re-reporting. Pet. Mot. SJ at 14. Kuber states that in Prime Location Properties, LLC v. IEPA, PCB 09-67, the Board found that a 2006 release was not a new release triggering new document submission requirements. *Id.*, citing Prime Location Properties, LLC v. IEPA, PCB 09-67, slip op. at 31 (Aug. 20, 2009) (interim order); *see also* Prime Location Properties, LLC, PCB 09-67 (Nov. 5, 2009). Kuber asserts that the Board clarified that the definition of “release” is not limited to exceedances of remediation objections. *Id.* Additionally, Kuber claims that the Board found that the limited prior investigation on the east side of the site in that case, which was limited due to restrictions of site structures, did not rule out a release from USTs 3-7 in that area. *Id.*

Kuber claims that here, as explained in Prime Location, the definition of “release” is not limited to exceedances of remediation objections. *Id.* Kuber states that “release” is defined in the Act and regulations as “any spilling, leaking, emitting, discharging, escaping, leaching or disposing of petroleum from an underground storage tank into groundwater, surface water or subsurface soils.” *Id.*, quoting 415 ILCS 5/57.2 (2020); 35 Ill. Adm. Code 734.115. Kuber argues that pyrene was detected for the 2020 Incident, but not around Tank 1 or Tank 6 for the

2008 Incident. *Id.*; *see* PCB 21-03 R. at 0082-88; PCB 21-03 R. at 0198-0199. Additionally, Kuber argues that the sampling data shows greater concentrations of ethylbenzene in connection with the 2020 Incident than the 2008 Incident. *Id.*; *see* PCB 21-03 R. at 0082-88; & 0198-199. Kuber asserts that the detection of pyrene in 2020 and the higher concentrations of ethylbenzene in 2020, when compared to the 2008 data, indicate that a new release occurred in 2020. *Id.*; *see* PCB 21-03 R. at 0082-88; & 0198-0199.

The IEPA notes that Kuber distinguishes Weeke Oil Company v. IEPA, PCB 10-1 (May 20, 2010), from this case by stressing that Weeke involved a site with a NFR. IEPA Resp. at 9. The IEPA argues that, while the NFR letter was one aspect of the Weeke decision, it did not hinge on whether the new incident re-reported the initial incident. *Id.* The Board held in Weeke, while affirming the IEPA's decision, that Weeke failed to establish that a new release had occurred at the site. *Id.* If a new release had occurred, whether the initial release was open or closed by the issuance of an NFR would have been irrelevant. *Id.* The IEPA argues that Weeke established that the IEPA has the authority to make decisions on whether an incident is a re-reporting of a prior release. *Id.* Here, based upon all the evidence in the Administrative Record, the IEPA argues that it made the correct decision in determining that the 2020 Incident at the Kuber's site is a re-reporting of the 2008 release. *Id.*

Board Finding. The Board is not persuaded by Kuber's argument that the Board's decisions in Weeke Oil Company v. IEPA, PCB 2010-0001 (May 20, 2010), and Prime Location Properties, LLC, PCB 09-67 (Nov. 5, 2009) require it to grant Kuber's motion for partial summary judgment. The Board cannot draw a conclusion that the precedent of either case requires a finding for Kuber.

CONCLUSION

The facts and arguments outlined above reveal genuine issues of material fact, precluding the Board from granting Kuber's motion for partial summary judgment. Based on the record now before it, the Board finds that Kuber has not demonstrated that there are no genuine issues of material fact and it is entitled to judgment as a matter of law.

The Board denies Kuber's motion for partial summary judgment on the issue of the 2020 incident being a re-reporting of the 2008 Incident. The Board directs its assigned hearing officer and the parties to proceed expeditiously to hearing.

ORDER

1. The Board denies Kuber's motion for partial summary judgment.
2. The Board directs its assigned hearing officer to proceed expeditiously to hearing.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on November 4, 2021, by a vote of 4-0.

A handwritten signature in cursive script that reads "Don A. Brown". The signature is written in black ink and is positioned above a horizontal line.

Don A. Brown, Clerk
Illinois Pollution Control Board