

BEFORE THE POLLUTION CONTROL BOARD  
OF THE STATE OF ILLINOIS

KB SULLIVAN INC.,                    )  
    Petitioner,                        )  
    v.                                    )     PCB: 2021-078  
  )     (UST Appeal)  
ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY,                )  
    Respondent.                      )

**NOTICE OF FILING AND PROOF OF SERVICE**

TO: Carol Webb, Hearing Officer                    Melanie Jarvis  
    Illinois Pollution Control Board            Division of Legal Counsel  
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PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board, pursuant to Board Procedural Rule 101.302 (d), PETITIONER'S MOTION FOR SUMMARY JUDGMENT, a copy of which is herewith served upon the attorneys of record in this cause.

The undersigned hereby certifies that a true and correct copy of this Notice of Filing, together with a copy of the document described above, was today served upon the Hearing Officer and Division of Legal Counsel by electronic-mail, this 10<sup>th</sup> day of June, 2022. The number of pages of this filing, other than exhibits, is 11 pages.

Respectfully submitted,  
KB SULLIVAN INC.,  
Petitioner,

BY: LAW OFFICE OF PATRICK D. SHAW

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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Petitioner,	)	
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v.	)	PCB: 2021-078
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**PETITION FOR REVIEW OF AGENCY LUST DECISION**

NOW COMES Petitioner, KB SULLIVAN INC., by its undersigned counsel, moves for summary judgment pursuant to Section 101.516(b) of the Board's Procedural Rules (35 Ill. Adm. Code § 101.516(b)), as follows:

**STATEMENT OF UNDISPUTED FACTS**

This appeal arises from confirmed releases from an active gas station located at 111 West Jackson Street, Sullivan, Moultrie County, Illinois. (R.0006; R.0013) The site is surrounded by residential and commercial properties. (R.0013) A release from a 10,000 gallon gasoline tank was reported in 1990, and assigned Incident No. 900146. (R.0007) In 2007, releases were reported from the same tank, as well as two 8,000 gasoline tanks, a 5,000 gallon diesel tank, a 5,000 gasoline tank, and a 2,000 kerosene tank. (R.0007) These releases were assigned Incident No. 2004-0969 and deemed to have commingled with the prior unremediated release from 1990. (R.0005) As a part of early action, all of the tanks were removed and replaced with new tanks in 2004. (R.0007) Tank removal also included

excavation and disposal of 1,698.37 tons of contaminated backfill. (R.0007)

KB Sullivan purchased the subject property in 2007, subsequently elected to proceed as owner of the underground storage tank releases, and was found eligible to access the Underground Storage Tank Fund by the Office of the State Fire Marshal. (R.0005; R.0044) On-site investigation revealed soil and groundwater contamination along all property boundaries. (R.0008) However, access for off-site investigation was only permitted by the owner of one of six surrounding properties, the News Progress newspaper. (R.0008) Subject to the limited off-site access made available, the soil and groundwater plumes were defined. (R.0008)

On February 17, 2012, a corrective action plan and budget was submitted to the Agency. (R.0001) The plan stated that on-site soil contamination met Tier 2 site remediation objectives and proposed to use an industrial/commercial land use restriction. (R.0012) With respect to contamination of the News Progress property, an environmental land use control would restrict use of the property to industrial or commercial uses with the property owner's consent to applicable restrictions.

(R.0012) With respect to potential soil contamination under adjoining streets, the plan calls for obtaining highway authority agreements from the City of Sullivan and from the Illinois Department of Transportation. (R.0012) Finally, with respect to groundwater contamination, the plan proposed either a citywide or limited groundwater ordinance to eliminate the risk of exposure to contaminated groundwater. (R.0012-R.0013) In summary, the corrective action plan proposed no physical remediation, but required approvals to be obtained from various third

parties to allow contamination to safely remain in place without remediation. Once the institutional controls and agreements are in place, all wells are to be abandoned and a Corrective Action Completion Report summarizing all these activities will be submitted. (R.0013-R.0014) The budget estimated the cost to be \$33,896.53.

(R.0130)

On May 16, 2012, the Illinois Environmental Protection Agency approved the corrective action plan and budget in full. (R.0267) Thereafter, from time to time, Petitioner sought and obtained reimbursement for various activities approved in the plan and budget. (R.0292 (three reimbursements have previously been made totaling \$18,103.02))

On October 20, 2020, Petitioner submitted a reimbursement claim for corrective action work taking place from January 1, 2015 to March 31, 2020. (R.0294) The amount requested was \$2,125.96 for numerous charges over five years. (R.0295-R.0296) The reimbursement claim was based upon ten monthly statements of consulting costs over that period, which were summarized in the cover letter. (R.0295 - R.0296) Each statement identified the work performed, who performed the work and the number of hours worked. (R.0316 - R.0342) In addition, the submittal included an affidavit signed by the owner/operator and by a licensed professional engineer certifying that the application for payment had been prepared under the supervision of the licensed professional engineer, and the costs are correct and reasonable. (R.0301)

On February 5, 2020, the Agency denied the application for payment entirely,

stating in relevant part:

**The claim requests costs associated with a Corrective Action Completion Report. To date the IEPA has not received this Corrective Action Completion Report and has not received any technical documentation since February 17, 2012.**

(R.0346)

February 17, 2012 is the date of the Corrective Action Plan and Budget.

(R.0001)

On March 19, 2021, Petitioner timely filed its petition for hearing with the Illinois Pollution Control Board (hereinafter “the Board”), which accepted the petition on April 1, 2021.

**LEGAL STANDARDS AND SCOPE OF REVIEW**

The owner or operator may submit a complete application for final or partial payment once every ninety days. (415 ILCS 5/57.8) The Agency's refusal to pay the application in full or part may be appealed to the Board. (415 ILCS 5/57.8(i)) Such Agency refusal must be accompanied by an explanation of the legal provisions that may be violated if the application is approved, a statement of specific reasons why the legal provisions might be violated, and an explanation of the specific type of information, if any, the Agency deems the applicant did not provide. (35 Ill. Adm. Code § 734.610(d)) On appeal to the Board, the Agency statements and explanation frame the issues. Abel Investments v. IEPA, PCB 16-108, slip op. at 3 (Dec. 15, 2016) The Board must decide whether KB Sullivan's submittal to the Agency demonstrated compliance with the Act and the Board's rules. Id.

Petitioner has the burden of proof in these proceedings. Abel Investments v. IEPA, PCB 16-108, slip op. at 3 (Dec. 15, 2016). The standard of proof in UST appeals is a "preponderance of the evidence." Id. ("A proposition is proved by a preponderance of the evidence when it is more probably true than not."). "The Board's review is generally limited to the record before IEPA at the time of its determination." Id. However, the purpose of this proceeding is to provide petitioners an opportunity to challenge the underlying decision pursuant to principles of fundamental fairness by submitting evidence and argument. EPA v. PCB, 138 Ill. App. 3d 550, 552 (3rd Dist. 1985) (the Board hearing "includes consideration of the record before the [Agency] together with receipt of testimony

and other proofs under the panoply of safeguards normally associated with a due process hearing").

Accordingly, the nature of these proceedings are well suited for disposition by motion for summary judgment as they primarily concern documentation requirements for both parties. In addition to those requirements mentioned above, all plans, budgets, and reports must be submitted to the Agency on forms prescribed by the Agency. (35 Ill. Adm. Code § 734.135(a)) If the Agency needs additional information, it can ask for it. See Knapp v. IEPA, PCB 16-103, slip op. 9 (Sept. 22, 2016)

The Board has promulgated rules for summary judgments: "If the record, including pleadings, depositions and admissions on file, together with any affidavits, shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law, the Board will enter summary judgment." (35 Ill. Adm. Code § 101.516(b)) This motion for summary judgment is based upon the record filed by the Agency and the explanation given in the Agency decision letter. A party opposing a motion for summary judgment may not rest on its pleadings, but must "present a factual basis which would arguably entitle [it] to a judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219 (2d Dist. 1994).

ARGUMENT

The Illinois Environmental Protection Act expressly authorizes partial payment for corrective action work from time to time: “An owner or operator may submit a request for partial of final payment regarding a site no more frequently than once every 90 days.” (415 ILCS 5/57.8) The fourth partial payment request was submitted on October 20, 2020, which is over five years from the most recent payment. (R.0292)

Board regulations impose additional limitations, not applicable here, for site investigation plans. “Applications for payment of costs associated with a Stage 1, Stage 2, or Stage 3 site investigation may not be submitted prior to the approval or modification of a site investigation plan for the next stage of the site investigation or the site investigation completion report, whichever is applicable.” (35 Ill. Adm. Code 734.605(h)) In other words, if payment for Stage 1 site investigation activities was at issue here, then the Agency could lawfully insist that the Stage 2 Site Investigation Plan be approved first. While the Agency did not identify any such regulation, the existence of such a limitation on payment for site investigation work demonstrates that no similar requirement exists for corrective action work. People v. Davontay A., 2013 IL App (2d) 120347, ¶ 28 (“The maxim *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another) is based in logic and common sense . . .”)

The only statutory provision identified in the Agency determination letter is inapplicable as a matter of law. Specifically, the Agency claims its decision is



authorized by “Section 57.7(c)(3) of the Act because [costs] may be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of Title XVI of the Act.” (R.0346) Section 57.7(c)(3) governs plans and budgets, not payment applications and therefore the letter is not legally authorized by any applicable statute. (415 ILCS 5/57.(c)(3))

The only regulatory provision identified in the Agency decision letter is not supported by the record. Specifically, the Agency claims that all costs lack supporting documentation pursuant to 35 Ill. Adm. Code § 734.630(cc). (R.0346) The Board’s regulations specifically list the contents required for a complete application for payment. (35 Ill. Adm. Code § 734.605(a)) All of the listed items were included in the payment application. The ninth item listed requires:

**An accounting of all costs, including but not limited to, invoices, receipts, and supporting documentation showing the dates and descriptions of the work performed.**

((35 Ill. Adm. Code § 734.605(a)(9) (emphasis added))

The application for payment included monthly statements of consulting costs which identified the work performed, who performed the work, and the date and hours the work was performed. (R.0316 - R.0342) Where postage was charged, copies of receipts were attached. (R.0324; R.0338) The Board has upheld the Agency’s denial for lack of supporting documentation when the owner/operator repeatedly refused the Agency’s request for laboratory invoices. T-Town Drive Thru v. IEPA, PCB 07-85, slip op. at 54 (April 3, 2008) No such requests were made here. Nor does the Agency letter identify any missing documentation showing the dates

and descriptions of the work performed.

Instead, the Agency's denial letter states that "[t]o date the IEPA has not received the Corrective Action Completion Report and has not received any technical documentation since February 17, 2012," when the corrective action plan was submitted. (R.0346) As a matter of law, technical documentation is not "supporting documentation showing the dates and descriptions of the work performed." (35 Ill. Adm. Code 734.605(a)(9)) Technical documentation in the form of plans and reports are submitted to the Agency pursuant to Section 57.7 of the Act. (415 ILCS 5/57.7) Therefore, the Agency denial letter fails to show that the application for payment lacked supporting documentation.

More broadly, the assumption that the Corrective Action Completion Report or some similar document must be submitted in order to receive partial payment violates the requirement that the Agency accept requests for partial payment, so long as they are made no more frequently than every ninety days. (415 ILCS 5/57.8) Petitioner has previously obtained partial payments in 2013, 2014 and 2015, and certainly waiting five years for the most recent request cannot be unreasonable.

Therefore, as a matter of law, the Agency's record and the Agency's decision letter show by a preponderance of the evidence that the application for payment should have been granted.

WHEREFORE, Petitioner, KB SULLIVAN, INC., prays that the Board find the Agency erred in its decision, direct the Agency to approve the application for payment as submitted, allow Petitioner to submit proof of legal costs, and for such other and further relief as it deems meet and just.

KB SULLIVAN INC.,  
Petitioner

By its attorneys,  
LAW OFFICE OF PATRICK D. SHAW

By: /s/ Patrick D. Shaw

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