

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

1441 KINGSHIGHWAY LLC,)
)
 Petitioner,)
 v.) PCB No. 2024-032
) (LUST Permit Appeal)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,)
)
 Respondent.)

NOTICE OF FILING AND PROOF OF SERVICE

TO: Carol Webb, Hearing Officer
Illinois Pollution Control Board
1021 N. Grand Avenue East
P.O. Box 19274
Springfield, IL 62794-9274
(carol.webb@illinois.gov)

Richard Kim
Illinois Environmental Protection Agency
Division of Legal Counsel
1021 North Grand Avenue East
P.O. Box 19276
(richard.kim@illinois.gov)

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board, Petitioner's Motion for Reconsideration, copies of which are herewith served upon the above persons.

The undersigned hereby certifies that a true and correct copy of this Notice of Filing, together with a copy of the document described above, were today served upon the above persons by electronic-mail, this 22nd day of March, 2024.

1441 KINGSHIGHWAY LLC,

BY: LAW OFFICE OF PATRICK D. SHAW

BY: /s/ Patrick D. Shaw

Patrick D. Shaw
Law Office of Patrick D. Shaw
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BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

1441 KINGSHIGHWAY LLC,)	
)	
Petitioner,)	
v.)	PCB No. 2024-032
)	(LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

PETITIONER'S MOTION FOR RECONSIDERATION

NOW COMES Petitioner, by its undersigned attorney, pursuant to Section 101.502(a) of the Board's Procedural Rules, 35 Ill. Adm. Code 101.502(a), moves the Hearing Officer to reconsider the Order of March 18, 2024, stating as follows:

1. On March 18, 2024, the Hearing Officer granted Respondent's Motion to Supplement the Record, noting that "Petitioner did not respond."
2. Undersigned counsel did not receive Respondent's Motion. I have looked through the "spam" and "trash" folders of my e-mail application to make sure. I have no reason to believe that this was anything but an advertent mistake.
3. Had I received Respondent's Motion, I would have made the objection made hereinafter.
4. Section 105.410(b) of the Board's Procedural Rules states:

The record must include:

- 1) **The plan or budget submittal or other request that requires an Agency decision;**
- 2) **Correspondence with the petitioner and any documents or materials submitted by the petitioner to the Agency related to the plan or budget submittal or other request;**

- 3) **The final determination letter; and**
- 4) **Any other information the Agency relied upon in making its determination.**

(35 Ill. Adm. Code 105.410(b); see also 35 Ill. Adm. Code 105.116 (certification requirement))

5. The subject document is entitled “Underground Storage Tank Removal Inspection Narrative” (hereinafter “the Narrative”) and dated August 30 & 31, 2022. The Narrative is written by Robert Mileur from the Marion Regional Office of the Illinois EPA.

6. The Narrative is clearly neither (1) a submittal from Petitioner, (2) correspondence between the parties related to the submittal, nor (3) the final determination letter.

7. As to the fourth category of items to be contained in the administrative record, the certified record already evidences the Narrative was not “relied upon” by the Agency in making its determination.

8. The October 18, 2023 final determination letter modified the budget submittal for the following reason:

Based on additional information received by the Illinois EPA, the 12,000-gallon tank (Tank 2) and 8,000-gallon tank (Tank 3) compromise one single 20,000-gallon compartment tank, not two separate tanks as was previously indic[a]ted in the reimbursement requests. Therefore, the maximum payment amounts are based on two 20,000-gallon USTs.

(A.R.351 & 352 (both deductions))

9. The additional information was received from the Office of the State Fire Marshal (“OSFM”) on October 12, 2023. (A.R.357-358 (copy of e-mail exchange attached hereto as Ex. A)) On that date, the Illinois EPA asked OSFM for its removal logs in order to “find out” whether the tanks included a compartment tank. (A.R.358) The removal logs were supplied and are contained in the record. (A.R.359-364) OSFM further communicated that the OSFM

inspector at the tank removal was asked and stated that “to the best of his recollection, tanks 2 & 3 were a 20,000 compartment tank. We don’t identify tanks as being compartment tanks. All tanks are recorded separately.” (A.R.357)

10. Since the Narrative states that there “was a double compartment tank,” and one of the tanks had “two separate compartments,” it appears inconceivable that the Agency would have been trying to “find out” whether the tanks included a compartmentalized tank from OSFM if they were in possession of the Narrative at that time. The far more likely conclusion to be drawn is that those involved in the review of the decision at issue herein were unaware of the document produced by the Marion office or that someone from the Marion office had gone to the tank removal. The Illinois Environmental Protection Act requires OSFM to have an inspector on site at the time of removal. (415 ILCS 5/57.5(c))

11. The administrative record filed on January 31, 2024, was certified by Becky Fielder, whose e-mail exchange is in the record. (Ex. A) The certification constitutes sworn evidence that the information relied upon in making the final determination was included in the record.

12. In Reliable Stores v. OSFM, PCB 19-92 (June 18, 2020), the Board granted a contested motion to supplement the record given the petitioner did not dispute that the material offered was relied upon in making the decision. Id. at p. 2. In contrast, Respondent’s motion does not expressly state that the material offered had been relied upon and if it does so by implication, then Petitioner disputes that implication in light of the evidence in the record certified by Becky Fielder.

13. Respondent’s motion fails to demonstrate the documents are properly part of the record and therefore should not be made part of the record.

WHEREFORE Petitioner prays for an Order from the Hearing Officer finding that the March 18, 2024 Order was entered without prior opportunity for Petitioner to respond and that upon further review the supplemental materials are not appropriate for inclusion in the record, and therefore vacate the Order of March 18, 2024, or such other and further relief as the Hearing Officer deems meet and fit.

Respectfully submitted,

1441 KINGSHIGHWAY LLC,

BY: LAW OFFICE OF PATRICK D. SHAW

BY: /s/ Patrick D. Shaw

Patrick D. Shaw
Law Office of Patrick D. Shaw
80 Bellerive Road
Springfield, IL 62704
217-299-8484
pdshaw1law@gmail.com

Fiedler, Becky

From: Bauer, Brian P.
Sent: Thursday, October 12, 2023 3:22 PM
To: Fiedler, Becky
Subject: FW: OSFM request

Follow Up Flag: Follow up
Flag Status: Flagged

FYI

From: Bradley, Shelly <Shelly.Bradley@Illinois.gov>
Sent: Thursday, October 12, 2023 1:11 PM
To: Bauer, Brian P. <Brian.Bauer@Illinois.gov>; Lock, Deanne <Deanne.Lock@Illinois.gov>
Subject: RE: OSFM request

I spoke with the inspector (Travis Smith) who witnessed the removals and to the best of his recollection, tanks 2 & 3 were a 20,000 compartment tank. We don't identify tanks as being compartment tanks. All tanks are recorded separately. Hope this helps.

Shelly

From: Bauer, Brian P. <Brian.Bauer@Illinois.gov>
Sent: Thursday, October 12, 2023 12:52 PM
To: Lock, Deanne <Deanne.Lock@Illinois.gov>; Bradley, Shelly <Shelly.Bradley@Illinois.gov>
Subject: FW: OSFM request

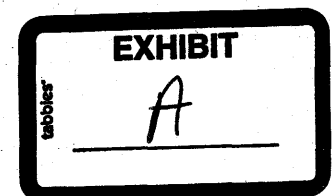
Shelly and Deanne

Is there any documentation that the OSFM would have that an UST would be compartmentalized UST?

We believe the 2 USTs at this site are compartment UST and not 3 different USTs.

Thanks

Brian Bauer
Interim Manager
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Illinois Environmental Protection Agency
1021 North Grand Avenue East P.O. Box 19276
Springfield, Illinois 62794-9276
Brian.Bauer@Illinois.gov
217/782-3335
Fax 217/782-9308



From: Fiedler, Becky <Becky.Fiedler@illinois.gov>
Sent: Thursday, October 12, 2023 12:05 PM
To: Bauer, Brian P. <Brian.Bauer@illinois.gov>
Subject: FW: OSFM request

Brian, this is what OSFM sent back. Is there any other information they would have that would confirm that T2 & T3 is a compartmentalized tank?

From: Malcom, James <James.Malcom@illinois.gov>
Sent: Thursday, October 12, 2023 12:02 PM
To: Fiedler, Becky <Becky.Fiedler@illinois.gov>
Subject: OSFM request

See OSFM removal logs attached...

From: Bradley, Shelly <Shelly.Bradley@illinois.gov>
Sent: Thursday, October 12, 2023 11:55 AM
To: Malcom, James <James.Malcom@illinois.gov>
Subject: RE: OSFM request

Attached are two removal logs.

Shelly

From: Malcom, James <James.Malcom@illinois.gov>
Sent: Thursday, October 12, 2023 8:45 AM
To: Bradley, Shelly <Shelly.Bradley@illinois.gov>
Subject: OSFM request
Importance: High

Shelly,

Can I get the removal log for facility #6041816? We need to determine if the 2 UST's removed were two separate UST's or 1 compartmentalized tank?

From: Fiedler, Becky <Becky.Fiedler@illinois.gov>
Sent: Thursday, October 12, 2023 8:43 AM
To: Malcom, James <James.Malcom@illinois.gov>
Subject: OSFM request
Importance: High

Morning Jamie!

Can you please request documentation/information from OSFM for facility 6041816 (Tamers in Washington Park)? I need to find out if two of the tanks is actually one compartmentalized tank.

Thanks!

State of Illinois - CONFIDENTIALITY NOTICE: The information contained in this communication is confidential, may be attorney-client privileged or attorney work product, may constitute inside information or internal deliberative staff