BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

ILLICO INDEPENDENT OIL CO., Petitioner,	)	
v.	)	PCB 17-84
	)	(LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

NOTICE OF FILING AND PROOF OF SERVICE

TO: Carol Webb, Hearing Officer
Illinois Pollution Control Board
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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 Leave to File Reply in Support of Motion for Summary Judgment Instanter, copies of which are herewith served upon the above persons.

The undersigned hereby certifies that I have served this document by e-mail upon the above persons at the specified e-mail address before 5:00 p.m. on the 3rd of May, 2018. The number of pages in the e-mail transmission is 11 pages.

Respectfully submitted,
ILLICO INDEPENDENT OIL CO.,
Petitioner,

BY: LAW OFFICE OF PATRICK D. SHAW

BY: /s/ Patrick D. Shaw

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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PETITIONER'S MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT INSTANTER

NOW COMES Petitioner, ILLICO INDEPENDENT OIL CO. (hereinafter "Illico"), pursuant to Section 101.500(e)) of the Pollution Control Board's procedural regulations (35 Ill. Adm. Code § 101.500(e)), and hereby moves for leave to file the attached REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT instanter, stating as follows:

1. On April 19, 2018, Respondent filed its Response to Petitioner's Motion for Summary Judgment.

2. Said Response raised issues not found in the Agency's decision letter, and Petitioner would be prejudiced if unable to address them.

3. Pursuant to Section 101.500(e), the Board is authorized to grant leave to file a reply, and this motion is timely.

WHEREFORE, Petitioner, ILLICO prays for an order granting leave to file the attached Reply In Support of Motion for Summary Judgment, or for such other and further relief as the Board deems meet and just.

ILLICO INDEPENDENT OIL CO.,
Petitioner

By its attorneys,
LAW OFFICE OF PATRICK D. SHAW

By: /s/ Patrick D. Shaw

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REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

NOW COMES Petitioner, ILLICO INDEPENDENT OIL CO. (hereinafter "Illico"), pursuant to Section 101.500(e)) of the Pollution Control Board's procedural regulations (35 Ill. Adm. Code § 101.500(e)), and hereby replies in support of its motion for summary judgment, stating as follows:

I. RESPONSE TO DISPUTED FACTS.

A motion for summary judgement cannot be denied by the mere existence of disputed facts, as the issue is whether there are "genuine issues of material fact." Outboard Marine Corp. v. Liberty Mut. Ins. Co., 154 Ill. 2d 90, 102 (1992). "Moreover, the mere allegation that material factual disputes exist does not create a triable issue of fact." (Id.) Instead, the person opposing summary judgment must submit affidavits or other competent evidence "to show whether issues raised are genuine and whether or not each party has competent evidence to offer which tends to support his side of the issue." Reynolds v. Heerey, 88 Ill.App.3d 101, 105 (1st Dist. 1980). Where the evidence submitted fails to support a genuine issue of fact, summary judgment cannot be denied. Id. at 102. "The issue of fact must also be material; issues that do not matter to the result are immaterial and do not preclude summary judgment . . .." Whitman v. Lopatkiewicz, 152 Ill.App.3d 332, 337 (2nd Dist. 1987).

Here, the Illinois EPA has merely alleged disputed facts without submitting evidence that it would present at hearing as to any genuine issue of material fact. Moreover, many of the alleged disputed facts are resolved by reviewing Petitioner's citation to the record, i.e., the presence of typographic errors. Finally, there is frequently no explanation as to why the disputed fact is material to issues in this case, which is particularly important in this type of proceeding in which the issues are defined by the Agency decision letter.

Discussing each of the allegations of disputed facts in turn:

> **Also on December 14, 2016, Illico submitted a corrective action plan (R.174 - R.237) . . ..**

The record indicates that the actual date was December 14, 2015, and as such there is no genuine issue of material fact raised.

> **On December 18, 2016, Illico's consultant e-mailed the Agency project manager to explain that due to issues with the property, remediation would need to be performed by the end of February, and requested that, if at all possible, review of the pending plans and budgets be completed by February 2, 2016, in order to meet this deadline. (R.422)**

As implied by the sentence and clear from the record, the actual date was December 18, 2015, and as such there is no genuine issue of material fact raised.

> **During the removal of the tanks, the OSFM representative observed petroleum contamination around the USTs and associated piping, and directed the consultant to report Incident # 2016-0095, which was deemed a re-reporting of the previous incident. (R.561)**

The Agency does not actually dispute these facts, but alleges that the Illinois EPA has not determined whether the incident is a re-reporting "because the owner/operator has not submitted the results of the soil confirmation samples." (Resp. at p. 5) The purpose of confirmation

samples is to measure the effectiveness of corrective action activities after their completion. (35 Ill. Adm. § 734.335(a)(4)) They do not determine whether or not there has been a release. Cf. Prime Location Properties v. IEPA, PCB 09-67, slip op. at 31 (Aug. 20, 2009) (explaining that remediation objectives do not determine whether there has been a release). Moreover, if the Agency needed the results of confirmation samples to review the subject corrective action plan, then the Agency was required to identify in its decision letter "the specific type of information, if any, which the Agency deems the applicant did not provide the Agency." (415 ILCS 5/57.7 (c)) That the Agency did not address the re-reporting issue or the confirmation samples indicates that the entire dispute is not material to the proceeding.[1]

> **After the submittal, Illico's consultant clarified in an e-mail to the project reviewer that removal of the USTs was not only due to the reported releases, but also necessary in order to access and remove highly contaminated soils around the tanks. (R.629) The Agency project reviewer's notes indicate that tank removal is the motivating concern:**

This portion of the Motion for Summary Judgment is followed by an extended quote in which the review indicates that the motivating concern was that it was a planned tank pull. (R.655) The Board can read the pages from the record and draw its own conclusions, but the Agency's objection, again made without evidentiary support, such as an affidavit from the reviewer, is apparently that the reviewer's motivating concern was that "a property sale was the

[1] To be clear, the corrective action plan did include conformation sampling following tank removal. (R.589) Generally, the results would be reported in the corrective action completion report, assuming corrective action achieves applicable remediation objectives. (35 Ill. Adm. Code § 734.345(a)(2)(C)) Alternatively, they would be submitted in another corrective action plan if achievement of remediation objectives have not yet been demonstrated. So, it is not that the confirmation sampling results would not have been given to the Agency, but having not requested them during the review process, they are not in the record. In any event, the notion that whether or not corrective action was appropriate based upon the results of corrective action would be a quite circuitous line of reasoning.

owner/operator's motivating concern." (Response, at p. 6) There is nothing in the Act or Board regulations that qualifies the appropriateness of corrective action activities on whether there are property transactions in the background of events.[2] This site had a release in 1992, and to observe that a property transaction in 2016, might have been a motivating factor in undertaking the only remediation at the site to occur is to completely miss the forest for the trees. The Agency's response does not raise any material facts to this proceeding.

> **Specifically, the Agency stated that the only reported sampling locations showing exceedances of applicable site remediation objectives are at SB-4/MW-4, SB-17 and SB-31. (R.577) These are locations immediately to the West of the tank pit, within what will later be referred to as the blue zone. (R.489; R.598)**

The Agency appears to be disputing its own decision letter, which stated that "[b]ased on the information provided, the only reported sample locations at the subject site that exceed Tier 2 industrial/commercial remediation objectives and/or site-specific soil satt1ration limits would be SB-4/MW-4, SB-17 and SB-31." (R.577- R.578) The Agency cannot raise a genuine issue of material fact by disputing its own decisions.

> **The site location for SB-15 is to the North of the tank pit, along the product lines and in the area subsequently identified as the green zone. (R.598)**

The Agency does not identify anything factually wrong with this statement, which was offered to clarify the Agency reviewer's statement: " Looks like I missed that there was a Tier 2 exceedence at SB-15 (5-6')." (R.582) There is no material issue of genuine fact that SB-15 was in an area that contaminated soil was permitted to be removed and it was along a migration pathway connected to the tanks.

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[2] The most important observation to make upon the reviewer's notes is how non-technical the concerns are.

> **[S]ince it was unable to determine how much of the work was performed in the orange zone, all of the costs were deducted. (R.640 - R.647 (Modifications #1, #9, #17, #24, #26, #29, #30, #31 & #32) Consequently, the $208,048.76 deducted from the budget, includes corrective action performed in all zones.**

Petitioner agrees that #17 expressly applied to the orange zone and should not have been listed with the other modifications. Otherwise, there is no genuine issue of material fact concerning these items, which are set forth in more detail in the Motion's appendix.

In summary, none of the alleged disputed facts give rise to genuine and material issues that need to be resolved through testimony.

II. RESPONSE TO ARGUMENT

A. AGENCY RAISING ISSUES NOT RAISED IN DECISION LETTER

On pages 12 through 13 and 16 through 18 of the Response, the Illinois EPA lists a number of arguments that it making. These are all irrelevant. The Illinois EPA denial letter frames the issues in the proceedings before the Board and the Illinois EPA is required to specify all reasons for its decision or be precluded from raising that issue. Environmental Protection Agency v. Pollution Control Bd., 86 Ill. 2d 390, 405 (1981). The decision letter must contain an explanation of the Sections of this Act, or the regulations promulgated thereunder, which may be violated if the plan was approved, an explanation of the specific type of information, if any, which the Agency deems the applicant did not provide the Agency, and a statement of specific reasons why the law might not be met if the plan was approved. (415 ILCS 5/57.7(c)(4)) The Agency is transparently seeking to rewrite the decision letter with provisions not relied upon in the decision letter and information never requested.

B. LEGAL ISSUES RESOLVED BY PRIME LOCATION PROPERTIES

The closest precedent to these issues is the Board's decision in Prime Location Properties v. IEPA, PCB 09-67 (Aug. 20, 2009), which was cited four times in the motion and left unmentioned in the response. As in Prime Location Properties, tanks were removed as part of corrective action; early action was irrelevant. There is nothing inappropriate about this, nor is there anything inappropriate about performing corrective action before seeking approval as is specifically authorized by the Act. In Prime Location Properties, site conditions limited how close soil borings could be advanced near some of the tanks, creating room for the Agency to later opportunistically argue that there had been no release until discovered during corrective action. Site conditions frequently provide limitations to where borings can be advanced.

In Prime Location Properties, the Agency argued that the contamination discovered during the tank removal must have been from a subsequent new release and not a re-reporting of the original release from the tanks. The evidence did not support such an interepretation there, nor here, but the Agency here actually declines to commit to any interpretation, while holding out the possibility that it will reject the re-reporting interpretation at some later date. (Response, at p. 5) The "new release" interpretation can only justify denying the submittal, if its actually a rationale presented in the Agency decision letter. If additional information is needed, it must be identified in the decision letter as well. The conclusion in Prime Location Properties cannot be avoided by not committing to any position.

The Agency agreed that contamination above applicable site remediation objectives had migrated to areas adjacent to the tank pit (namely the blue and green zones) when it approved remediation in those areas, and it also agrees that soil and groundwater contamination surrounded

the tanks. (Response, at p. 14) The release reported in 1992 received no remediation until the subject corrective action. It should not be surprising that contamination surrounded the tanks in 2016. Still, if the Agency needed to make a re-release determination in order to make its decision, it was encumbent upon it, to request any additional information it needed. Given that the Agency reviewed two corrective action plans, one submitted before and one after corrective action, the oversight is glaring.

CONCLUSION

No provision of the Act, or the Board's regulations, would be violated by removing the underground storage tanks, piping, pump islands and backfill or soil from the orange zone contaminated at concentrations greater than the Tier 2 remediation objectives. Accordingly, the related modifications to the budget premised on such modifications to the plan should also be reversed.

WHEREFORE, Petitioner, ILLICO INDEPENDENT OIL CO., prays the Board reverse the Agency's decision to modify the plan and budget, offer Petitioner an opportunity to prove its legal costs in this matter, award Petitioner its legal costs and for such other and further relief as it deems meet and just.

ILLICO INDEPENDENT OIL CO.,
Petitioner

By its attorneys,
LAW OFFICE OF PATRICK D. SHAW

By: /s/ Patrick D. Shaw

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