

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

PAK-AGS, Inc.)	
Petitioner,)	
)	
v.)	PCB 2015-14
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
Respondent,)	

NOTICE OF FILING AND PROOF OF SERVICE

TO: Carol Webb	Melanie A. Jarvis
Hearing Officer	Assistant Counsel
Illinois Pollution Control Board	Division of Legal Counsel
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Springfield, IL 62794-9274	Springfield, IL 62794-9276

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board, Change of Address for Petitioner’s Attorney, copies of which are herewith served upon the hearing officer and upon the attorney of record in this case.

The undersigned hereby certifies that a true and correct copy of this Notice of Filing, together with a copy of the documents described above, were today served upon the hearing officer and counsel of record of all parties to this cause by enclosing same in envelopes addressed to such attorneys and to said hearing officer with postage fully prepaid, and by depositing said envelopes in a U.S. Post Office mailbox in Springfield, Illinois on the 3rd day of February, 2015.

PAK-AGS, INC.

BY: LAW OFFICE OF PATRICK D. SHAW

BY: /s/ Patrick D. Shaw

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THIS FILING SUBMITTED ON RECYCLED PAPER

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PETITIONER’S RESPONSE TO MOTION FOR RECONSIDERATION

NOW COMES, Petitioner, PAK-AGS, INC., by its undersigned counsel, pursuant to Section 101.500(c) of the Board’s Procedural Rules (35 Ill. Adm. Code § 101.500(c)), in response to the Motion for Reconsideration received by Petitioner on January 20, 2015, states as follows:

I. THE BOARD DID NOT MISAPPLY APPLICABLE LAW.

The Agency argues that the Board failed to consider the arguments previously presented. (Mot. Recon. at p 3). A motion for reconsideration which offers nothing new but consists of reargument is properly denied. Burgess v. Chicago Sun-Times, 132 Ill.App.3d 181, 189 (1st Dist. 1985).

As an initial matter, Petitioner did not “acknowledge[] the prior release.” (Mot. Recon., at p. 4) While the Board expressly did not reach the issue of whether there was a prior release from an underground storage tank, (Interim Opinion and Order, at p. 20), this appears to be an implicit acknowledgment that there is an issue as to whether there was a prior release. This issue, however, per the Board’s ruling cannot be raised at the payment stage.

The bulk of the Agency’s reargument is a contention that since this a deductible issue,

and deductibles relate to payment, then the payment stage is appropriate. There are several flaws with this view. First, the actual grounds for denial of payment is the lack of an eligibility and deductibility (E&D) determination. While the Agency's apparent objective in doing so appears to be entirely financial, this does not moot the means utilized are to require Petitioner to become eligible to access the LUST Fund for incident 20050545. The E&D determination addresses not only the deductible, but also eligibility. Moreover, an E&D letter will only issue if the owner confirms a release. (415 ILCS 5/57.9(c)) The existence of a confirmed release and eligibility to access the LUST Fund are clearly important issues at the planning and budget stage.

Even if the deductible can be treated as a separate issue, it still relates to the budget. Since the Board first promulgated rules for Title XVI, an E&D determination was required to accompany any budget. (35 Ill. Adm. Code § 732.305(b)(2) ("A site classification budget plan, which shall include, but not be limited to, a copy of the eligibility and deductibility determination of the OSFM . . .")¹. What is the purpose of the budget? The budget is the means by which the costs of clean-up can be predicted to the extent consistent with the submittal. The owner/operator is incentivized to obtain pre-approval of the plan or budget before commencing work because otherwise the owner/operator is placed at clear risk of not being paid. (35 Ill. Adm. Code § 734.335(d)) In other words, the budget (at least when submitted prior to the work), is meant to provide a benefit to the owner/operator in terms of planning the work and planning for the financial commitments needed for the work. Inserting clearly anticipatable costs at the payment stage is inconsistent with this function.

¹ The inclusion of the E&D determination with any budget was part of the Illinois EPA proposal to the Board in the R94-2 proceeding.

Finally, the record belies the Agency's claim of inconvenience. The technical reviewer identified the prior LUST incident and could have raised any concerns about this approach at the planning and budget stage. That reviewer researched the previous incident and apparently would have rejected or required modification of the plan if he concluded that the recent release was a re-reporting of a prior incident. (R. at 322-23) The Board should reject the Agency's request to re-review determinations made at the technical stage.

II. THE BOARD SHOULD NOT RECONSIDER WHETHER PETITIONER WAS A "PREVAILING PARTY."

Nor should the Board reconsider its decision that Petitioner is a "prevailing party." Petitioner exercised its statutory right to a hearing (415 ILCS 5/57.8(a)(4)) There is no requirement for petitioners to file waivers of their statutory right to a hearing and for a Board ruling within 120 days. There is substantial risk that a motion for summary judgment will not resolve the entire case, resulting in more time and expense than would have occurred if a hearing were held.² Otherwise, Petitioner has no idea how a requirement to exhaust motions for summary judgment can be a narrow construction of the fee-shifting provisions of the Act where the Act makes no reference to motions for summary judgment. As for precedent, this is certainly not the first time that a hearing was held without witnesses. Prime Location v. IEPA, PCB No. 09-67, at p. 3 (Aug. 20, 2009).

² Without belaboring the point, counsel also points out that he typically has to make his decision to go to hearing and forego waiving the decision deadline early and without the Agency record. In this case, counsel was prepared to put on a witness to testify to the conversation between the Agency reviewer and the consultant before receiving the Agency record.

Respectfully submitted,

PAK-AGS, INC.,
Petitioner,

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