

ILLINOIS POLLUTION CONTROL BOARD
July 24, 2003

PEOPLE OF THE STATE OF ILLINOIS,)
)
Complainant,)
)
v.) PCB 96-98
) (Enforcement – Water)
SKOKIE VALLEY ASPHALT, CO., INC.,)
EDWIN L. FREDERICK, JR., individually)
and as owner and president of SKOKIE)
VALLEY ASPHALT, CO., INC., and)
RICHARD J. FREDERICK, individually and)
as owner and vice president of SKOKIE)
VALLEY ASPHALT, CO., INC.,)
)
Respondents.)

ORDER OF THE BOARD (by T.E. Johnson):

On June 5, 2003, the Board issued an order that struck the first two affirmative defenses filed by Skokie Valley Asphalt Co., Inc., Edwin L. Frederick, Jr., and Richard J. Frederick (respondents), but allowed a third affirmative defense to stand. The Board also denied Skokie Valley Asphalt Co., Inc.'s (Skokie Valley) motion to dismiss Edwin L. Frederick, Jr. and Richard J. Frederick (the Fredericks) from this cause concerning alleged violations at respondents' facility at Grayslake Village, Lake County.

On June 27, 2003, the respondents filed a motion for reconsideration of the Board's June 5, 2003 order. On July 7, 2003, the complainant filed a response to the motion for reconsideration. The respondents filed a response to complainant's response to the motion for reconsideration on July 16, 2003.

For the reasons articulated below, the Board denies respondents' motion to reconsider.

PRELIMINARY MATTERS

On July 16, 2003, the respondents filed a reply (entitled response) to complainant's response to the motion for reconsideration. Pursuant to the Board's regulations, the moving party does not have the right to reply except as permitted by the Board or hearing officer to prevent material prejudice, and any reply must be accompanied by a motion for leave to file a reply. *See* 35 Ill. Adm. Code 101.500(e). The respondents did not allege that material prejudice would result if the reply were not accepted, did not seek permission from either the Board or hearing officer, and did not file a motion for leave to file a reply. Accordingly, the July 16, 2003 reply is not accepted.

MOTION FOR RECONSIDERATION

In their motion, respondents assert that the Board mistakenly struck arguments in favor of the respondents' sole affirmative defense and failed to affirm the sole affirmative defense based on laches and equitable estoppel. Mot. at 3. The respondents assert that its December 20, 2002 response clearly pleads only one sole affirmative defense that is supported by the allegations the two preceding paragraphs. *Id.*

The respondents argue that their motion to dismiss was timely filed because it is not subject to the timing limitations of 35 Ill. Adm. Code 101.506 which only applies to motions attacking the sufficiency of a pleading and not to any motion pertaining to the pleading. Mot. at 4. The respondents assert that it is obvious that material prejudice would result in a matter where the full dismissal of two of the named respondents is at issue. Mot. at 5. The respondents argue that the Board's ruling in support of its decision to deny the respondents motion to dismiss the Fredericks is not supported by the facts pled in this matter, and that the movants simply need to show that the requisite elements of laches exist even if all inferences from the facts that evidence the elements are drawn in favor of the complainant. Mot. at 6-7.

In response, the complainant asserts that the Board's June 5, 2003 order is not a final order and therefore not ripe for reconsideration because it did not terminate the proceedings in this case. Resp. at 2. The complainant contends that even if the June 5, 2003 order be construed as final, the respondents do not provide any new evidence or assert a change in law, and should be denied. Resp. at 3-4.

DISCUSSION

Despite complainant's arguments concerning the finality of the June 5, 2003 order, the Board will consider the motion for reconsideration.¹ In ruling on a motion for reconsideration, the Board will consider factors including new evidence, or a change in the law, to concluded that the Board's decision was in error. 35 Ill. Adm. Code 101.902. In Citizens Against Regional Landfill v. County of Board of Whiteside, PCB 93-156 (Mar. 11, 1993), the Board observed that "the intended purpose of a motion for reconsideration is to bring to the court's attention newly discovered evidence which was not available at the time of hearing, changes in the law or errors in the court's previous application of the existing law." Korogluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1992).

Respondents have not presented any new evidence or changes in law to enable the Board to conclude its earlier decision was in error. Rather, the respondents simply re-address arguments already considered and rejected by the Board. Respondents' motion to reconsider is, therefore, denied.

¹ The current situation is similar to that faced by the Board earlier during these proceedings when the Board considered complainant's motion to reconsider a May 3, 2001 order denying complainant's motion for summary judgment. See People v. Skokie Valley Asphalt, PCB 96-98 (Aug. 9, 2001).

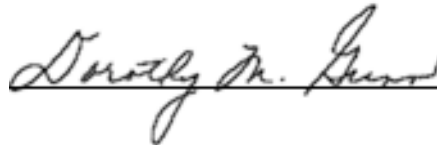
Further, the Board notes that respondents' assertion that the Board mistakenly struck arguments in favor of the respondents' sole affirmative defense and therefore failed to affirm the sole affirmative defense based on laches and equitable estoppel is specious. In the June 5, 2003 order, the Board specifically acknowledged that affirmative defenses one and two, though listed as separate affirmative defenses, were essentially the basis for the third affirmative defense. People v. Skokie Valley, PCB 96-98, slip op. at 5 (June 5, 2003), slip op. at 5. The Board stated that if the allegations in affirmative defenses one and two are accepted as true, *laches*, as asserted in the third affirmative defense, may be a defense available to the respondents. *Id.* For that reason, the Board struck affirmative defenses one and two, but did consider them as the basis for affirmative defense number three. *Id.*

CONCLUSION

The Board declines to accept respondents' reply to complainant's response to the motion for reconsideration, and denies the respondents' motion for reconsideration. The parties are directed to expeditiously complete discovery in this matter and proceed to hearing.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on July 24, 2003, by a vote of 6-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board