

THE ILLINOIS POLLUTION CONTROL BOARD

FREEDOM OIL COMPANY,)	
)	
Petitioner,)	PCB 03-54
)	PCB 03-105
vs.)	PCB 03-179
)	PCB 04-02
ILLINOIS ENVIRONMENTAL)	(LUST Fund)
PROTECTION AGENCY,)	PCB 03-56
)	(UST Appeal)
Respondent.)	(Consolidated)

**RESPONSE TO RESPONDENT'S MOTION TO STRIKE PORTIONS OF
PETITIONER'S MOTION FOR SUMMARY JUDGMENT**

NOW COMES the Petitioner, FREEDOM OIL COMPANY, an Illinois corporation ("Freedom"), by its attorneys, Howard and Howard Attorneys, P.C., and hereby responds to the Motion to Strike Portions of the Petitioner's Motion for Summary Judgment filed by the Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("IEPA"), and states as follows:

Introduction

IEPA seeks to strike Affidavits supporting Freedom's Motion for Summary Judgment. IEPA's Motion to Strike Affidavits is frivolous and never should have been filed. The motion overlooks the fact that this Board's rules specifically permit the use of affidavits in summary judgment.

Notably, IEPA does not suggest the representations made in the affidavits present "new evidence" before the Board. Rather, IEPA merely states that the representations are post record.

This position is absurd. The rules clearly contemplate testimony by parties at the hearing. All such testimony would be post record. Under IEPA's position, the only thing that could be presented at the hearing would be the record. No testimony could be offered because such testimony would not be part of the record.

Affidavits in summary judgment proceedings are a mere substitute for testimony that would occur at trial. This Board specifically authorizes their use because such use permits the Board to avail itself of a useful alternative to a hearing.

Affidavits are Clearly Contemplated in Support of Motions for Summary Judgment by Section 101.516

Section 101.516(b) of title 35 of the Illinois Administrative Code provides:

If the record, including pleadings, deposition 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 Administrative Code § 101.516(b).

Notice, the language above contemplates use of the record "together with any affidavits." The record is not the affidavits, and the affidavits are not part of the record. Affidavits are separate items that may be submitted together with the record.

Clearly, the purpose of permitting affidavits is to facilitate the use of summary judgment. The use of affidavits is a substitute for testimony that would be permitted at the hearing. *Skipper Marine Electronics, Inc. v. United Parcel Services, Inc.*, 210 Ill. App. 3d 231, 236, 569 N.E.2d 55, 58 (1st Dist. 1991) (Affidavit in support of motion for summary judgment is actually substituted for testimony in open court.) Allowing affidavits allows this Board to render summary judgment when cases do not require hearing.

Obviously, witnesses are permitted to testify at a hearing even though such statements are post record. Thus, there is no limitation on using affidavits simply because the testimony in them was made post record. To the extent this IEPA's sole objection, IEPA's position is absurd and is contradicted by the presence of Section 101.516(b).

IEPA's Case Law Does Not Support Its Motion to Strike

This Board's rules do not preclude testimony by witnesses even if made after the record. Were that the case, this Board could hear no witnesses at a hearing on this matter. Yet, this is clearly not the law. Testimony that is post record must be allowed.

In *Alton Packaging Corporation v. Pollution Control Bd.*, 162 Ill. App. 3d 731, 738, 516 N.E. 2d 275, 280 (5th Dist. 1987) the Illinois Appellant Court reviewed prior rulings of the Illinois Supreme Court concerning what may be considered by the Illinois Pollution Control Board. Although upholding the rule that "new matter" outside the record may not be offered, it reviewed case law and stated parties clearly may present testimony testing the reliability of the information upon which the Agency relied.

Thus, the cases relied upon by the IEPA are not applicable. These cases merely preclude the introduction of new matter, such as new reports, which were not part of the record. They do not preclude testimony made at a time after the record.

As discussed above, the case of *Alton Packaging Corporation v. Pollution Control Bd.*, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987) cited by the Illinois EPA actually supports Freedom's submission of the Affidavits. The *Alton* court specifically found the permit applicant, during the Board hearing, is to be afforded an opportunity to challenge the reasons given by the Agency for denying such permit by

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means of cross-examination and the receipt of testimony “to test the validity of the information relied upon by the Agency.” 516 N.E.2d at 180 citing *Environmental Protection Agency v. Pollution Control Bd.*, 115 Ill. 2d 65, 503 N.E.2d 343 (1986). *Alton Packaging* merely precluded a party from seeking to offer new evidence. It did not preclude testimony that occurred after the record. The party in *Alton Packaging* sought to submit its own modeling study, even though the study had not been presented to the Agency in the permit proceeding. Since Freedom is not attempting to introduce a new study or testing but testimony, the case is factually distinguishable.

Similarly in *Saline County Landfill, Inc. v. Illinois EPA*, PCB 02-108 (May 16, 2002), the petitioner attempted to substantially change its siting plan between siting approval and permitting. Freedom is not attempting to change the record or add additional evidence to it. It is merely submitting Affidavits which contain testimony that would be admissible at hearing.

IEPA has not cited anything in the affidavits as being new matter. That is because the testimony in the affidavits is based entirely upon matters in the record and represents the opinion of these experts concerning such material. It is thus testing the conclusions of IEPA from the matters in the record.

IEPA cannot cite any authority that affidavits are prohibited because made post record. Such a position is absurd and amounts to preclusion of all testimony. Its motion should be denied as unfounded in law.

WHEREFORE, Petitioner, Freedom Oil Company, an Illinois corporation, for the reasons stated above, respectfully requests this Court deny the Illinois Environmental

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Protection Agency's Motion to Strike Portions of the Petitioner's Motion for Summary Judgment.

Respectfully submitted,

HOWARD & HOWARD ATTORNEYS, P.C.

By: 
Janice M. Powell

Dated: May 18, 2005

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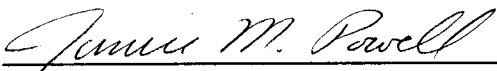
CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 18th day of May, 2005, I have served the attached Response by depositing same via first-class U.S. mail delivery to:

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