

**BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS**

MCLEAN COUNTY ASPHALT,)
 Petitioner,)
 v.)
ILLINOIS ENVIRONMENTAL) PCB No. 05-154
PROTECTION AGENCY,) (LUST Appeal)
 Respondent.)

NOTICE

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

Curtis W. Martin
Robert E. Shaw
Shaw & Martin, P.C.
123 South 10th Street, Suite 302
P.O. Box 1789
Mt. Vernon, IL 62864

Carol Webb, Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue, East
P.O. Box 19274
Springfield, IL 62794-9274

PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board a RESPONSE TO MOTION FOR SUMMARY JUDGMENT, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

John J. Kim
Assistant Counsel
Special Assistant Attorney General
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)
Dated: December 5, 2005

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on December 5, 2005, I served true and correct copies of a RESPONSE TO MOTION FOR SUMMARY JUDGMENT, by electronic filing to the Clerk of the Illinois Pollution Control Board and by placing true and correct copies in properly sealed and addressed envelopes and by depositing said sealed envelopes in a U.S. mail drop box located within Springfield, Illinois, with sufficient First Class Mail postage affixed thereto, to the Petitioner and Hearing Officer:

Dorothy M. Gunn, Clerk (Electronic filing)
Illinois Pollution Control Board
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original final decision was subject to appeal, and that the Petitioner failed to exercise its appeal rights as to that decision. Petition, Exhibit A, Attachment A.

II. THE ILLINOIS EPA ALREADY ACTED ON THE SUBMISSION

The Illinois EPA's position, as set forth in the January 6, 2005 final decision, was that it had already issued a decision on the subject proposed amended budget. That decision is not included with the Petitioner's motion for summary judgment or the petition for review. But the Illinois EPA has clearly stated that a decision on the amended site classification work plan budget that was dated on September 9, 2004, and received by the Illinois EPA on September 10, 2004, had already been issued in a previous final decision.

As the Board noted in the case of Kean Oil Company v. Illinois EPA, PCB 97-146 (May 1, 1997), a submission that is identical in nature to a previous submission cannot restore or resurrect an appeal right on the part of the would-be petitioner. In Kean Oil, the Board agreed with the Illinois EPA that the action was barred by res judicata after the Illinois EPA demonstrated all necessary elements of such finding had been met. Key in that discussion was the Board's consideration of the similarity or identical nature of the two submissions by the petitioner (i.e., the first submission that led to a final decision that was not appealed, and the second submission that led to a finding that no appeal could be taken).

The Illinois EPA argues that in this situation, the Board cannot grant the motion for summary judgment on the ground posited by MCA since it is unclear whether the original budget and the amended budget are, in fact, identical or similar enough in nature to warrant the Illinois EPA's final decision of January 2005. If the two documents are identical or similar enough, the Illinois EPA's decision was correct. That decision cannot be reached without a review and discussion of the content of the two documents, and any such discussion or arguments on that issue are factual in

nature. The mere assertions of the Petitioner, without any evidentiary proof in support, that the amended plan was different are insufficient to form the basis for summary judgment. Therefore, there exists a genuine issue of material fact as to whether the Illinois EPA's January 2005 final decision should be affirmed or reversed.

III. CONCLUSION

For the reasons stated herein, the Illinois EPA respectfully requests that the Board deny the Petitioner's motion for summary judgment on the basis that there exists a genuine issue of material fact.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent

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This filing submitted on recycled paper.