BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* LISA MADIGAN, Attorney General of the State of Illinois,	)	
Complainant,	)	PCB 2008-007 (Enforcement – Water)
v.	)	
UNION PACIFIC RAILROAD COMPANY, a Delaware corporation,	)	***VIA ELECTRONIC FILING***
Respondent.	)	

NOTICE OF FILING

John Therriault
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph Street - Suite 11-500
Chicago, Illinois 60601

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Hearing Officer
James R. Thompson Center
100 W. Randolph Street - Suite 11-500
Chicago, Illinois 60601

Please take notice that today, October 23, 2009, I have filed with the Office of the Clerk of the Illinois Pollution Control Board by electronic filing Complainant's Response to Union Pacific Railroad Company's Motion for Reconsideration, along with Notice of Filing and Certificate of Service, a copy of which is attached hereto and served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. LISA MADIGAN, Attorney General
of the State of Illinois

BY: _____

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PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* LISA MADIGAN, Attorney General of the State of Illinois,	)	
Complainant,	)	PCB: 2008-007
vs.	)	(Enforcement – Water)
UNION PACIFIC RAILROAD COMPANY, a Delaware Corporation,	)	***VIA ELECTRONIC FILING***
Respondent.	)	

RESPONSE TO UNION PACIFIC RAILROAD COMPANY'S MOTION FOR RECONSIDERATION

On July 16, 2007, the People of the State of Illinois, *ex rel.* Lisa Madigan, Attorney General of the State of Illinois (Complainant), filed a complaint against Union Pacific Railroad Company (Respondent), before the Illinois Pollution Control Board (Board) for violations of the Illinois Environmental Protection Act.

On April 3, 2009, Respondent filed a Motion to Sever. On August 20, 2009, the Board issued an order denying the Motion to Sever. On September 29, 2009, Respondent filed a Motion to Reconsider the Board's Order denying the Motion to Sever.

Introduction

Respondent has made three arguments in support of its motion to reconsider: (1) there were material factual errors, (2) the Board improperly relied on hearsay evidence in making its determination, and (3) the Board misapplied the law by ruling against Respondent.

Legal Standard

"The intended purpose of a motion to reconsider is to bring to the court's attention newly discovered evidence, changes in the law, or errors in the court's previous application of existing

law. The decision to grant or deny a motion for reconsideration lies within the discretion of the circuit court and will not be reversed absent an abuse of that discretion." Farmer's Automobile Insurance Association v. Universal Underwriters Insurance Company, 348 Ill.App.3d 418, 422, 810 N.E.2d 562, 566 (1st Dist. 2004).

Respondent's motion for reconsideration fails to meet any one of the criteria set forth under Illinois case law and should therefore be dismissed as being a vacuous motion devoid of any merit worth considering.

Argument

A. Respondent has not presented newly discovered evidence.

One of the factors that the Board will consider in reviewing a motion to reconsider is whether or not the petitioner has brought to the Board's attention newly discovered evidence. 35 Ill. Adm. Code § 101.902. Respondent contends it has offered new evidence because it has included a general stormwater NPDES permit. It does not dispute the permit covering the oil/water separator. Respondent simply rehashes its previously discredited argument that the two locations where the pollution was found are "entirely separate" for the purposes for this litigation.

Respondent is alleging that two different areas, both owned, operated, and controlled by Respondent, which are connected by land that is owned and operated by Respondent, which the two incident areas and the connecting land are used by Respondent to operate its business are "entirely separate" because they have different street addresses and are used for different purposes in the same business owned and operated by the same party.

Complainant alleges violations stemming from two separate incidents. Both incidents involved the failure of the oil/water separator to control oil runoff properly. Respondent owns

and operates the oil/water separator. The oil/water separator is governed by NPDES Permit No. IL0002127. In one of the incidents, the runoff ended up in 301 W. Lake Street, Northlake, Illinois, property that Respondent owns, operates and controls 24/7 for its business. In the other incident, the runoff ended up in 5050 W. Lake Street, Northlake, Illinois, a property that Respondent owns, operates and controls 24/7 for the same business. Thus, Respondent is arguing that two incidents, which resulted from the failure of the same oil/water separator owned, operated and controlled by Respondent, which led to runoff that discharged to two places owned, operated, and controlled by Respondent, which occurred less than three months apart, are so different so as to require the Board to sever the claims.

This same argument was made in the Motion to Sever and the Board properly analyzed the argument and rejected it. Respondent has not presented any new evidence that could serve as a basis for reconsideration.

B. Change in the Law.

As the Appellate Court in Farmers' Automobile, 348 Ill. App.3d 418, 422, 810 N.E.2d 562, 566 (Dist. 1st 2004), ruled, "The intended purpose of a motion to reconsider is to bring to the court's attention ... changes in the law...". Respondent fails to cite to any changes in the law that can help the Board to reconsider its previous ruling.

C The Board did not improperly rely on hearsay evidence.

The Board did not improperly rely on hearsay evidence, and even if it had, the ultimate ruling would not change.

Absent new evidence or a change in the law, the Board may not grant a motion to reconsider without a showing of a misapplication of existing law. Farmer's Automobile Insurance Association, 348 Ill.App.3d at 422, 810 N.E.2d at 566.

Respondent contends that the Board misapplied the hearsay rules when the Board admitted a letter—set on Respondent's letterhead, signed by Respondent's employee, a manager of Environmental Field Operations at Respondent's head office who has authority to speak on behalf of the company on environmental issues. Notably, Respondent does not deny the authenticity or veracity of the letter.

A writing must be made in "the regular course of business" to satisfy the hearsay exception. 35 Ill. Adm. Code § 101.626(e). In its regular course of business, Respondent must navigate several regulatory regimes to conducts its business. Responding to questions and concerns of regulatory agencies is part of the regular course of business for Respondent. This particular letter was written by Respondent's official in response to a Violation Notice issued by the Illinois EPA and kept at the Illinois EPA's archive in the regular course of the Illinois EPA's business. [See Affidavit of Sharon Dowson, Manager of the Bureau of Water, Division of Water Pollution Control Records Unit at the Illinois EPA, attached as Exhibit A].

Even if the letter should not have been relied on, the Board could appropriately rule that the violations occurred at a single site. Respondent argued that the violations occurred at two separate sites, and the claims should be severed. The complaint alleges that a single source of pollution, release of fuel oil occurred at Respondent's facility which manifested itself at the oil/water separator. The Board could appropriately rule that the Complainant's characterization of the violations, based on the Complaint itself, show that no prejudice would occur by not severing the claims.

D. <u>There was no error in the Board's conclusion that no material prejudice would occur</u>.

Disagreeing with a Board's order is not a sufficient basis to support a motion to reconsider. Respondent has not shown that any prejudice would occur by not severing the

claims. It has not shown that the Board misapplied the current law to the facts. Respondent has merely regurgitated the same argument it made in the discredited motion to sever.

Absent new evidence or a change in the law, the Board may not grant a motion to reconsider without a showing of a misapplication of existing law. Farmer's Automobile Insurance Association, 348 Ill.App.3d at 422, 810 N.E.2d at 566. In one case cited in support of Respondent's motion to reconsider, the motion to reconsider at issue addressed a court's interpretation of a legal issue that predicated further analysis. Itasca Bank and Trust Company v. Thorleif Larson and Son, Inc., 352 Ill.App.3d 262, 265, 815 N.E.2d 1259, 1261 (2004).

Respondent alleges that the Board misapplied the law because the Board reached a different conclusion than the one Respondent was hoping for. It has made no new arguments about how it believes the law was misapplied and why it would be so prejudiced.

Even if every factual assertion made by Respondent were true, it would still need to show prejudice. In the underlying motion to sever, Respondent argued two theories of prejudice: (1) that the Board would necessarily make "impermissible negative inferences" because some alleged violations were "strict liability" and others were "operational" liability and (2) it would be too difficult to determine individual damages absent severing the claims. Respondent has offered no authority as to how and why prejudice would result because of the damages issue.

There is no mention of the individual damages argument in the Motion to Reconsider or the memorandum in support of that motion, so presumably Respondent has dropped the argument. Even if it has not, the argument is without merit. The pollution came from the malfunction of the same oil/water separator. Even if it were "difficult" to compute the individual damages, it would not matter because all the pollution stemmed from the same source. Additionally, "difficult" is not "impossible." Further, it is unclear why any "difficulty" in

calculating damages would lead to prejudice. The Board has extensive experience in calculating damages in the myriad of cases it has decided. Respondent has offered no authority for why the Board would not be capable of addressing this issue.

Complainant has never asserted that the offenses were "strict liability", merely that they were *malum prohibitum*, where liability is appropriate if the polluter had the "capability of controlling [the source of] the pollution." Phillips Petroleum Company v. Illinois Environmental Protection Agency, 72 Ill.App.3d 217, 220, 390 N.E.2d 620, 623 (1979), People v. A.J. Davinroy Contractors, 249 Ill.App.3d 788, 793, 618 N.E.2d 1282, 1286 (1993). Surely Respondent is not denying that it controls the oil/water separator for which it has sought, and received, an NPDES permit for operating. Respondent also owns and operates, as part of its business, the property where both fuel releases were found. Respondent has not denied control of this property, and has admitted that it uses the property for its business. It is unclear how Respondent could run such a complicated business without the capability of control over its premises.

Additionally, Respondent has offered no authority for why the Board would not be competent to hear a case involving "strict liability" and "operational" liability together. It merely asserts that the Board will necessarily draw an "impermissible negative inference." Respondent's contention that the Board will be unable to properly apply law to facts is a malicious assault on the intellectual integrity of the Board and is not a sufficient basis to support a motion to reconsider.

Respondent's arguments are not even internally consistent. Respondent's characterization of the alleged violations is inconsistent with its requested relief. Complainant has alleged four violations. Each of these violations occurred twice, with the resulting pollution manifesting itself at the oil/water separator. Respondent has characterized some of the violations

as "strict liability" offenses and others as "operational" offenses. Respondent has not specified which violations were "strict liability" and which were "operational," so some work must be done to determine which claims Respondent seeks to have severed.

Counts I, II, and IV of the complaint have "allow" as the operative behavior. This has been consistently held by the Illinois courts to be *malum prohibitum*. Phillips Petroleum Company, 72 Ill.App.3d at 220, 390 N.E.2d at 623, A.J. Davinroy Contractors, 249 Ill.App.3d at 793, 618 N.E.2d at 1286. The courts have held that the Respondent must have control over the source of the pollution for a finding of liability. Respondent has characterized the need for control as "operational," distinguishing it from the other "strict liability" violations. Count III's operative behavior is "discharge", which seems to fit Respondent's classification of "operational". Thus, if Respondent is to be believed, then all violations are "operational" and thus there is no need to sever the claims.

The logic of Respondent's argument seems to require the claims be severed into four actions. One of Respondent's theories of prejudice requires the counts to be separated by the nature of the violation. Another theory requires the counts to be separated by location. Separating by the nature of the violation will not relieve the purported issues that separating by location will address, and vice-versa. Thus, Respondent is apparently asking the Board to sever the case into four actions, all of which will involve the same parties and witnesses, because the two areas where the fuel release was discovered were different parts of the same facility and the Board will be unable to properly apply law to facts.

In any event, ascertaining what Respondent specifically meant in its memorandum is unnecessary. Respondent's oil/water separator malfunctioned on two separate occasions. On November 23, 2005, the Illinois EPA observed a rainbow/silver sheen on the water going over

the final weir of the oil/water separator. This was the effect of a fuel oil release that occurred at the Proviso Yard facility. On February 19, 2006, the effect of a fuel release which occurred at the Global II property was observed again at the oil/water separator. Both releases were observed at the oil/water separate. Proviso Yard and Global II are property owned, operated, and controlled by Respondent. Respondent has never denied that it controlled, or had the capability of controlling, both areas and the oil/water separator. In fact, in its June 6, 2006 response to the VN, Respondent admits to problems with the separator and proposes, "To improve oil separation a new in ground oil water separator will be installed in the 3rd quarter 2006 to replace the existing weir structure." (See June 6, 2006, letter p. 3 attached as Exhibit A to Complainant's Response in Opposition to Motion to Sever"). The same witnesses would be called for all the violations. If anything, severing the claims would prejudice Complainant's ability to resolve the case in a timely and efficient manner.

Conclusion

In its Motion to Reconsider, Respondent has not presented any newly discovered evidence, has not pointed to any changes in the law, and was incapable of alleging any misapplication of the law other than regurgitating the same argument it put forward in the Motion to Sever.

WHEREFORE, for the reasons stated above, Complainant respectfully request that the Illinois Pollution Control Board deny Respondent's motion to reconsider the Board's order of August 20, 2009, and deny assess costs for responding to this frivolous motion, and to provide such other relief as the Board deems appropriate.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN
Attorney General
State of Illinois

MATTHEW J. DUNN, Chief
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BY: _____

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AFFIDAVIT OF SHARON DOWSON

I, Sharon Dowson, certify under penalty of perjury pursuant to Section 1-109 of the Illinois Code of Civil Procedure, 735 ILCS 5/1-109 (2008), that the statements set forth in this affidavit are true and correct, and further state that if called upon to testify in this matter, I would competently testify as follows:

1. I am currently employed by the Illinois Environmental Protection Agency ("Illinois EPA"), as Manager of the Bureau of Water, Division of Water Pollution Control Records Unit.

2. I have been employed by the Illinois EPA as Manager of the Bureau of Water, Division of Water Pollution Control Records Unit since October 1, 2003.

3. As Manager of the Bureau of Water, Division of Water Pollution Control Records Unit, my duties and responsibilities include, ensuring that the Illinois EPA Bureau of Water, Division of Water Pollution Control maintains proper records of and letters and correspondence received from other entities.

4. As Manager of the Bureau of Water, Division of Water Pollution Control Records Unit, I supervise the maintenance of records.

5. The following attached document is a true and accurate copy of the original, official record in the custody of the Illinois EPA, Bureau of Water, Division of Water Pollution Control files:

June 6, 2006, Union Pacific Railroad Company response to Violation Notice Number M-2006-02009

6. I directed my staff to identify, locate and copy the record described in paragraph 5 of this affidavit.

7. To the best of my knowledge and belief, the record attached hereto is a true and accurate copy of Bureau of Water records maintained in Springfield, Illinois.

Sharon Dowson

Sharon Dowson

SUBSCRIBED AND SWORN to before me
this 22nd day of October, 2009.

Brenda Boehner

NOTARY PUBLIC

OFFICIAL SEAL
BRENDA BOEHNER
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 11-3-2009

CERTIFICATE OF SERVICE

I, Zemeheret Bereket-Ab, an attorney, hereby certify that I caused a copy of Complainant's Response to Union Pacific Railroad Company's Motion for Reconsideration, along with a Notice of Filing and a Certificate of Service, to be served upon the persons listed on the Notice of Filing, by regular mail.

Zemeheret Bereket-Ab

ZEMEHERET BEREKET-AB

NOTICE OF FILING AND CERT 4-22-09