

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Complainant,)	
)	
v.)	PCB 04-016
)	(Enforcement - Air)
PACKAGING PERSONIFIED, INC., an)	
Illinois corporation,)	
)	
Respondent.)	

PEOPLE'S RESPONSE TO RESPONDENT'S MOTION TO RECONSIDER

NOW COMES the Complainant, PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* LISA MADIGAN, Attorney General of the State of Illinois, ("People"), and herein replies to Respondent's, PACKAGING PERSONIFIED, INC., an Illinois corporation ("Packaging"), Motion to Reconsider. In support of this Response, the People state as follows:

I. BACKGROUND

On July 11, 2005, the People filed a First Amended Complaint against Packaging before the Illinois Pollution Control Board ("Board"); thereafter, on October 17, 2005, Packaging filed its Answer to the People's First Amended Complaint. A hearing was held before the Board in Elmhurst, Illinois, on June 29 and 30, 2009, in which the parties put forward their evidence through the testimony of seven witnesses and sixty-four (64) exhibits. Both parties reserved closing argument for written post-hearing briefs, which were duly submitted and fully apprised the Board of each party's arguments. After considering the evidence at hearing and the arguments as presented in the parties' post-hearing briefs, on September 8, 2011, the Board issued its final Opinion and Order ("Final Order"). The Final Order found liability against Packaging on eleven of twelve counts in the People's First Amended Complaint and ordered Packaging to pay a civil penalty in the amount of \$456,313.57. On October 19, 2011,

Respondent filed with the Board a Motion to Reconsider, requesting that the Board reconsider its findings in the Final Order and reassess a new, lower civil penalty.

II. ARGUMENT

Pursuant to the Board's procedural rules, "In ruling on a motion for reconsideration, the Board will consider factors including new evidence, or a change in the law, to conclude that the Board's decision was in error." 35 Ill. Adm. Code 101.902. In *Citizens Against Regional Landfill v. County 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). In its Motion to Reconsider, Packaging merely reargues the evidence put forward at hearing, evidence which has already been contemplated by the Board in the substantial record it considered prior to the issuance of its Final Order. Packaging does not provide a single new fact or any change in law to support its Motion for Reconsideration, thereby leaving the Board with no basis to grant the motion. Since none of the Respondent's arguments set forth any basis to support the Board's reconsideration of its Final Order, Packaging's Motion to Reconsider should be denied in its entirety.

In its Motion to Reconsider, Packaging requests that the Board reconsider its findings on three issues: (1) the compliance of Press #5, (2) Packaging's recordkeeping obligations in its permit and (3) the amount of economic benefit enjoyed by Packaging for its delayed compliance. The first issue identified in Packaging's Motion to Reconsider is whether the Board should have found that its "Press #5" was in compliance with the Board's regulations based on an informal

test performed by its consultant. Packaging does not point to any newly discovered fact but makes this argument *from the transcript* of the June 2009 hearing. Respondent even identifies the very page of the Final Order on which the Board acknowledges Packaging's argument that the Board should consider the informal test. (Resp.'s Motion, p.1, and Final Order, p.7) The fact that the Board acknowledges this argument in its Final Order and decides against it clearly shows that the Board has carefully considered, and rejected, this argument. Moreover, Packaging's claim that there was "no evidence presented" to contradict the results of the informal test is not compelling. The Board is well aware of the evidence presented at the hearing, which included evidence identifying the components of a formal stack test, Packaging's admission that it knew it was required to perform a formal test, and Packaging's decision not to perform the test that was required. Paragraphs one through three of the Motion for Reconsideration do nothing but rehash the position put forward and argued by the Packaging before the Board at hearing and in its post-hearing brief, and do not provide any basis for the reconsideration of this issue.

In paragraphs four and five of its Motion for Reconsideration, Packaging raises the argument that Packaging satisfied the recordkeeping requirements of its permit conditions by having MSDS sheets at the facility. As with the first issue, Packaging makes its argument in reference to the transcript from the hearing – information already before the Board and already considered by the Board. In these paragraphs, Packaging reargues Section II.E of its post-hearing brief. As reflected in the Final Order, the Board has already taken note of Packaging's argument and the People's response:

Packaging argues that it "has always maintained records of its ink usage and the VOM and HAP content associated with its operations vis-à-vis MSDS sheets and its daily production records (*i.e.*, job tickets)." Resp. Br. at 17. Packaging concedes that "the form in which it has maintained its records was not in the manner that [IEPA] would have preferred," but insists that the records "contained the necessary data." *Id.* The People reply that Packaging was required to maintain

“records compiled from the raw information,” not simply the raw information.
Reply Br. at 5.

People v. Packaging Personified, Inc., Opinion and Order of the Board, September 8, 2011, at pg. 26. Having considered Packaging’s argument related to the MSDS sheets, the Board found that Packaging failed to keep the required records. Packaging has not provided *any* newly discovered fact or change in law to show that the Board’s determination, after considering these arguments, was incorrect. Additionally, Packaging’s suggestion that it was somehow penalized by not receiving a FESOP from the Illinois EPA in a “timely manner” is absurd in the context. The People’s Complaint only alleges violations from August 13, 2003 to August 13, 2004; these dates are noted by the Board in its Final Order (p. 25). Packaging did not apply for the FESOP until August 30, 2004, which was after the period of time set forth in the People’s allegations.

The final issue reargued by Packaging is the Board’s calculation of the economic benefit enjoyed by Respondent for delaying its compliance with the flexographic printing regulations. At hearing, Packaging presented three “alternatives to compliance” for the Board to consider in determining the lowest cost alternative to compliance. In its Motion to Reconsider, Packaging puts forward a fourth “alternative to compliance” with an entirely new economic benefit calculation. The “supplemental report” is a new exhibit containing new evidence based on information that was available to Packaging at the time of hearing and could have been presented *but was not*. The 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 . . .” *See supra Korogluyan*, 213 Ill. App. 3d at 627 (emphasis added). This new evidentiary exhibit should be barred as improper. The Board has already adopted one of Packaging’s – *not the People’s* – proposed scenarios for calculating economic benefit. *See* Final Order at p. 38. The new analysis does not rely upon or incorporate any new fact or any change in law but merely reconstructs the

same facts before the Board at hearing. Packaging cannot come back now and make new arguments based on old facts because it is unhappy that its original arguments were not strong enough. Packaging's argument does not meet the standard for a motion for reconsideration, and its "supplemental report" is improper and should not be considered by the Board.

III. CONCLUSION

Nowhere in the Respondent's Motion to Reconsider does it assert any of the information required for the Board to reconsider vacating its Final Order, *i.e.* newly discovered evidence which was not available at the time of the hearing or changes in the law, to conclude that the Board's decision was in error. Such information simply does not exist. Moreover, it is improper for Packaging to put forth a new exhibit and make a new factual argument that it chose not to include at hearing. Packaging's Motion to Reconsider should be denied in its entirety. For all the reasons set forth above in this Response, the People respectfully request that the Board enter an order denying the Packaging's Motion to Reconsider.

WHEREFORE, Plaintiff, PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* LISA MADIGAN, Attorney General of the State of Illinois, respectfully requests that the Board enter an order denying in its entirety Respondent's Motion to Reconsider and granting such other relief as the Board deems appropriate and just.

Respectfully submitted,

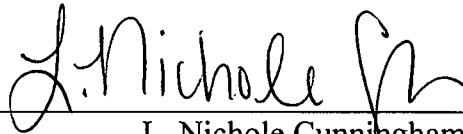
PEOPLE OF THE STATE OF ILLINOIS,
ex rel. LISA MADIGAN, Attorney
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BY: 
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Date: November 2, 2011

CERTIFICATE OF SERVICE

I, LORREN NICHOLE CUNNINGHAM, an Assistant Attorney General for the State of Illinois, certify that on the 2nd day of November, 2011, I caused to be served upon Respondent the foregoing Notice of Filing and People's Response To Respondent's Motion For Reconsideration by depositing the same in postage prepared envelopes with the United States Postal Service located at 100 West Randolph Street, Chicago, Illinois 60601.

A handwritten signature in cursive script, appearing to read "L. Nichole Cunningham". The signature is written in black ink and is positioned above a horizontal line.

L. Nichole Cunningham
Assistant Attorney General
Environmental Bureau