BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PETITION OF BRICKYARD DISPOSAL & RECYCLING, INC.,	)	
	)	PCB No. 16-66
	)	(Permit Appeal- Land)
Petitioner,	)	
	)	
	)	
v.	)	
	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
	)	
Respondent	)	

NOTICE OF FILING

PLEASE TAKE NOTICE that today I have filed with the Office of the Clerk of the Pollution Control Board the Petitioner's Response to Respondent's Motion To Reconsider. Copies of these documents are hereby served upon you, via electronic filing or service.

To: John Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph, Suite 11-500
Chicago, Illinois 60601

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

David G. Samuels
Assistant Attorney General
500 South Second Street
Springfield, Illinois 62706
dsamuels@atg.state.il.us
ebs@atg.state.il.us

Dated: January 6, 2017

BROWN, HAY & STEPHENS, LLP
Claire A. Manning
cmanning@bhslaw.com
Registration No.: 3124724
William D. Ingersoll
wingersoll@bhslaw.com
Registration No.: 6186363
205 S. Fifth Street, Suite 700
P.O. Box 2459
Springfield, IL 62705-2459

Respectfully submitted,

BRICKYARD DISPOSAL & RECYCLING, INC

By: /s/Claire A. Manning

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PETITION OF BRICKYARD DISPOSAL & RECYCLING, INC.,	)	PCB 2016 - 66
	)	(Permit Appeal- Land)
Petitioner,	)	
	)	
v.	)	
	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent	)	

PETITIONER'S RESPONSE TO RESPONDENT'S MOTION TO RECONSIDER

Petitioner Brickyard Disposal & Recycling, Inc. ("Brickyard"), by and through its attorneys Brown, Hay & Stephens, LLP, responds as follows to the Motion for Reconsideration ("Motion") filed by Respondent Illinois Environmental Protection Agency ("Agency").

Section 101.520 of the Board's procedural rules, 35 Ill. Adm. Code 101.520, allows for timely reconsideration of any final Board order. That section further provides that in ruling upon any such 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." The Board has repeatedly observed, as courts have long held, 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." See *Will County v. Village of Rockdale*, 2016 WL 4400987, at slip.op.,1, citing *Korogluyan v. Chicago Title & Trust Co*., 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1992). Sometimes, as in the Will County case referenced above, the Board grants the motion to reconsider for the purpose of determining whether the Board properly applied relevant standards but then, on reconsideration, upholds its original order.

Rarely if ever does the Board reconsider *and revise* its final order, where there has been no error in application of law. Here, there has been no such error; rather, the Board's Order was deliberately and thoughtfully issued. While the Agency cites to the case of *Chatham v. Illinois EPA,* PCB 15-173 (Nov. 5, 2015), the Board actually declined to grant the Agency's motion to reconsider in that case, finding that the Agency's "renewed argument provides no basis to conclude that the Board erred in its application of the law." *Chatham*, slip. op. at 3. The Board should follow that same course here where its Order on summary judgment was legally sound and based upon (a) the Agency's decision letter; (b) agreed facts; (c) an extensive record; (d) cross motions for summary judgment; and (e) full briefing by both parties. Here, as in Chatham, the Agency's renewed arguments provide no basis for the Board to revisit its well-considered Order in this permit decision appeal.

For purposes of clarity Petitioner is compelled to discuss the context of this case, as Respondent's Motion tends to obfuscate it. Brickyard submitted a permit application seeking redesign of an area of the landfill known as "the wedge" – to allow for the placement of solid waste in that area. The Agency denied the permit application without reviewing its technical merits; instead, the Agency deemed the application incomplete for two discreet reasons which, pursuant to a myriad of Board and court decisions, and in order to satisfy principles of fundamental fairness in a permit appeal, define the issues on appeal before the Board. See *Pulitzer Community Newspapers, Inc. v. IEPA*, PCB 90-142 (Dec. 20, 1990) (*citing Centralia Environmental Services. Inc. v. IEPA*, PCB 89-170 at 6 (May 10, 1990), *City of Metropolis v. IEPA*, PCB 90- 8 (February 22, 1990) and *Technical Services Co. v. IEPA*, PCB 81-105 at 2 (November 5, 1981)).

First, the Agency's decision letter stated that the permit application implicated the statutory definition of "new pollution control facility" under Section 3.330 of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/3.330(b)(2)(2014) and therefore, according to the Agency,

local siting was required prior to the Agency's review of the application. Second, the Agency's decision letter stated that the permit application was deficient (and therefore would not be technically reviewed) because it did not include a new or revised Groundwater Impact Assessment ("GIA"), as the Agency believed was required by Board rules, specifically Sections 811.317(a)(1) and (c)(1), 35 Ill. Adm. Code 811.317(a)(1) and (c)(1).

As both of these determinations constitute legal conclusions on the part of the Agency, the case is perfectly poised for Board decision via summary judgment. Accordingly, both parties filed such motions. As repeatedly recognized by the Board, and based upon well-established Illinois law, summary judgment is appropriate where there are no genuine issues of material fact (which require the decision-maker to hold a hearing to determine prior to decision). See *IEPA and Village of New Lenox v. PCB*, 386 Ill. App. 3d 375. 391 (3rd Dist. 2008). See also the Board's procedural rules at 35 Ill. Adm. Code 101.202 (defining summary judgment as "the disposition of an adjudicatory proceeding without hearing when the record, including pleadings, depositions 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.") and 35 Ill. Adm. Code 101.516 ("[I]f the record, including pleadings, depositions 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."). Here, both parties asserted in their respective summary judgment motions that there were no genuine issues of material fact which required a hearing. Upon review of the parties' stipulated facts and the Agency record, the Board found as follows:

> The Board finds no genuine issue of material fact and that the parties' dispute is over questions of how the Act and Board regulations apply to undisputed facts. The Board therefore decides the legal questions presented, *i.e.*, whether Brickyard's proposed redesign requires new local siting approval and a new GIA. See Order, at. p. 5.

Accordingly, the Board remanded Brickyard's permit application to the Agency for a review of its technical merits. The Agency now seeks reconsideration, asserting that the Board erred in its decision by: "*sua sponte* raising a new issue and basis" upon which it granted summary judgment for Brickyard; failing to "construe facts regarding the GIA in the Agency's favor"; overlooking "facts contrary to its holding on the new issue it raised"; and improperly resolving "a genuine issue of material fact that was central to its holding on the issue of siting." See Motion at p. 2.

These arguments are nothing more than a rehash of the arguments the Agency made in its Motion for Summary Judgment and in its Response to Petitioner's Motion for Summary Judgment. As such, the Motion raises no new evidence or change of law, or any other argument, that would warrant the Board to conclude its Order was erroneous. As such, the Board should summarily deny the Agency's Motion. Nonetheless, even if the Board were to address the arguments made by the Agency, the Motion should be denied as no legitimate grounds for reconsideration have been raised as to either denial point.

First, as to the GIA issue, the Board decided the case before it. It did not need to, nor did it *sua sponte* (on its own motion), raise new issues. As stated above, the issues in a permit appeal are framed by the Agency's decision letter. The reasons for that principle are abundantly clear here (so that the permit applicant understands the Agency's rationale in order that it may effectively and fairly appeal that decision to the Board, as allowed by law). Here the Board found that the Agency's decision letter sufficiently set forth its rationale as to the GIA: that the Agency construed Section 811.317 to require a new or revised GIA, even where an existing GIA pursuant to Part 811 was already in place at the landfill. The Board disagreed with the Agency's construction of the Boards' rules, holding that regardless of whether the wedge area constituted a

new unit, Brickyard's permit application was sufficiently complete to require the Agency's technical review of its application:

> The Board agrees with the Agency that Brickyard is subject to these requirements. Brickyard's permit application does not include a GIA, but rather includes a GIA Evaluation. R47137. Brickyard summarizes in its application that Hydrologic Evaluation of Landfill Performance ("HELP") modeling showed no buildup of leachate head on the proposed slope, and that that leachate head in Unit 2 would not be affected by adding municipal solid waste to the proposed wedge. R47003. Based on the HELP modeling, Brickyard proposed that there would be no impact on groundwater as a result of filling the wedge with waste, and that no change in the design and operation of the liner and leachate collection system was required. R47137, R47145. As a result, it was not necessary to revise the previously submitted GIA already in the Agency's possession. R47002-3.

The Agency's assertion that the Board's above decision was rendered *sua sponte* belies the context of its own permit decision on this point, and the arguments Brickyard made in response thereto:

> Brickyard simply seeks technical review of a redesign that would allow placement of municipal solid waste in an area of the facility currently designed to require clean fill and, toward that end, seeks a technical review of the regulatory elements required for such waste placement, within the context of the existing Unit 2, and its existing GIA. Petitioner's Motion, at p. 21.

Here, the Board clearly (and correctly) held that Brickyard is entitled to have its permit application reviewed by the Agency on its technical merits. The Agency's citation to its permit reviewer notes at pages 47567-69 of the Agency record is of no consequence, since the notes do not constitute a technical review of the application – and the Agency's decision was one of incompleteness, not technically insufficiency. The Board's decision therefore represents its determination that the application, on its face, meets the requirements of Section 811.317. The Board made no determination on the technical sufficiency of Brickyard's application. See Order, at. p. 11.

Accordingly, consistent with Section 39 of the Act, the Agency is obligated to technically review the adequacy of the existing GIA – and the technical information presented in the permit application asserting its efficacy for purposes of environmental protection. If technically sufficient, the Agency must grant the permit application; if not, it must explain why, in the context

of the Act and Board regulations, the permit application is technically deficient. If the applicant disagrees, it is then entitled (again) to appeal such decision to the Board. The Agency simply cannot act outside of its authority under Section 39 of the Act. The Agency is acting outside of its authority when it declines to accept the decision of the Board as to permit appeals. See *Grigoleit v. Pollution Control Board*, 245 Ill. App. 3d 337 (4th Dist., 1993).

Second, as to the denial point concerning siting, the Board correctly relied upon the agreed facts, and the drawings presented to Vermilion County in the 1992 siting hearing, to conclude that siting of the area that is the subject of this redesign has already occurred and further siting is redundant ("...a waste-free wedge was never required by the County. The County would have had no reason to expect anything but waste to be in what only later the Agency would delineate as a non-waste wedge. There is no sense in asking that the County now apply the siting criteria to having waste in the wedge area. It already did that in 1992."). See Order, at. p. 8. The Agency's legal argument on this point (that there is a genuine issue of material fact as to whether the county sited the entirety of the wedge area) is indeed perplexing, given that that (a) it made no such determination in its permit decision letter, as it was obligated to do if such was its position; and (b) it conflicts with the Agency's own record, which includes the drawings presented to the County at the siting hearing and, in reviewing those drawings, the Agency permit reviewers opined that the area certainly appeared to have been the subject of siting in 1992. See R. at 47549, 47547, and 46988 ("I found nothing in these 'siting' plan sheets (drawings and notes) that prohibits waste disposal in the 'wedge fill' that is the subject of this file review.").

The Agency's motion for reconsideration simply rehashes arguments it already made, which the Board already rejected. As such, reconsideration is not required or appropriate. Brickyard requests that the Board deny the Agency's motion.

Respectfully submitted,

BRICKYARD DISPOSAL & RECYCLING, INC.

By_____/s/Claire A. Manning_____

BROWN, HAY & STEPHENS, LLP
Claire A. Manning
cmanning@bhslaw.com
Registration No.: 3124724
William D. Ingersoll
wingersoll@bhslaw.com
Registration No.: 6186363
205 S. Fifth Street, Suite 700
P.O. Box 2459
Springfield, IL 62705-2459
(217) 544-8491

CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 6th day of January, 2017, I have served by the manner indicated below the attached PETITIONER'S RESPONSE TO RESPONDENT'S MOTION TO RECONSIDER upon the following persons:

John Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph, Suite 11-500
Chicago, Illinois 60601
(Via Electronic Filing)

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, Illinois 62794-9274
Carol.webb@illinois.gov
(Via Email)

David G. Samuels
Assistant Attorney General
500 South Second Street
Springfield, Illinois 62706
(217) 782-9031
dsamuels@atg.state.il.us
ebs@atg.state.il.us
(Via Email)

By: _____/s/Claire A. Manning_____

BROWN, HAY & STEPHENS, LLP
Claire A. Manning
cmanning@bhslaw.com
Registration No.: 3124724
William D. Ingersoll
wingersoll@bhslaw.com
Registration No.: 6186363
205 S. Fifth Street, Suite 700
P.O. Box 2459
Springfield, IL 62705-2459
(217) 544-8491