

BEFORE THE POLLUTION CONTROL BOARD  
OF THE STATE OF ILLINOIS

ILLICO INDEPENDENT OIL CO., )	
Petitioner, )	
v. )	PCB 17-84
) )	(LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL )	
PROTECTION AGENCY, )	
Respondent. )	

**NOTICE OF FILING AND PROOF OF SERVICE**

TO: Carol Webb, Hearing Officer	Melanie Jarvis
Illinois Pollution Control Board	Division of Legal Counsel
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PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board, pursuant to Board Procedural Rule 101.302(d), Petitioner's Post-Hearing Brief, copies of which are herewith served upon the above persons.

The undersigned hereby certifies that I have served this document by e-mail upon the above persons at the specified e-mail address before 5:00 p.m. on the 6<sup>th</sup> of February, 2019. The number of pages in the e-mail transmission is 6 pages.

Respectfully submitted,  
ILLICO INDEPENDENT OIL CO.,  
Petitioner,

BY: LAW OFFICE OF PATRICK D. SHAW

BY: /s/ Patrick D. Shaw

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**PETITIONER'S MOTION FOR RECONSIDERATION**

NOW COMES Petitioner, ILLICO INDEPENDENT OIL CO. (hereinafter "Petitioner"), by and through its undersigned attorney, and pursuant to 35 Ill. Admin. Code § 101.520, moves the Illinois Pollution Control Board ("Board") to reconsider its December 20, 2018, order, stating as follows:

**I. INTRODUCTION**

"[T]he 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." Citizens Against Regional Landfill v. County Board of Whiteside, PCB 92-156, slip op. at 2 (Mar. 11, 1993)

With all due respect to the Board, the December 20, 2018, order was based upon an erroneous application of existing law in finding that Petitioner failed to demonstrate compliance with legal provisions not before the Board, nor explanation of the specific type of information needed to meet any such burden.

## II. LEGAL ARGUMENT

Pursuant to the Illinois Environmental Protection Act, if the Illinois Environmental Protection Agency (hereinafter “the Agency”) disapproves or modifies a plan, a written determination “shall” be provided the owner or operator, accompanied by:

- (A) an explanation of the Sections of this Act which may be violated if the plans were approved;**
- (B) an explanation of the provisions of the regulations, promulgated under this Act, which may be violated if the plan were approved;**
- (C) an explanation of the specific type of information, if any, which the Agency deems the applicant did not provide the Agency; and**
- (D) a statement of specific reasons why the Act and the regulations might not be met if the plan were approved.**

(415 ILCS 5/57( c)(4))

The Pollution Control Board has long held that the detailed Agency statement frames the issues in controversy in Section 40 hearings. Oscar Mayer & Co. v. EPA, PCB 78-14, slip op. at p. 3 (June 8, 1978).<sup>1</sup> This interpretation of the statute was quoted and enforced by the Illinois Supreme Court in Environmental Protection Agency v. Pollution Control Board, 86 Ill. 2d 390, 405 (1981). There, the Agency expressly denied the permit application due to Rule 203(a), but sought to argue that the applicant violated Rule 203(f). The Supreme Court rejected the argument, quoting from the Board’s decision in Oscar Mayer at length, and stating:

**We do not believe, however, that the issue of compliance with Rule 203(f) was even before the Board. . . . We believe that the Agency had a duty, reading sections 39 and 40 of the Act together, to specify reasons for the denial,**

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<sup>1</sup> Permit appeals, such as Oscar Mayer, are also reviewed pursuant to Section 40 of the Act and require a substantially similar letter from the Agency. Compare 415 ILCS 5/39(a) with 415 ILCS 5/57( c)(4).

**including, if it intended to raise the issue before the Board, the lack of compliance with Rule 203(f), or be precluded from raising that issue.**

Id.; see also Mathers v. Pollution Control Bd., 107 Ill.App.3d 729, 738 (3<sup>rd</sup> Dist. 1982) (referring these principles as the Board's "statutory mandate")

The Pollution Control Board is a creature of statute; "any power or authority claimed by it must find its source within the provisions of the statute by which it is created." Estate of Slightom v. Pollution Control Board, 2015 IL App (4th) 140593, ¶ 24. The burden of proof in these proceedings lies with the petitioner (415 ILCS 5/40), and the sole question before the Board is whether issuance of the application would result in future violations of the Act or the regulations. John Sexton Contractors Co. v. Illinois Pollution Control Bd., 201 Ill.App.3d 415, 425 (1<sup>st</sup> Dist. 1990). However, this does not mean that petitioner must address each and every statutory or regulatory provision starting with Section 1, because the issues are framed by the Agency denial decision, the explanation of which statutes or regulations would be violated and the specific type of information necessary to prevent the potential violation.

The Board erred herein as a matter of law in upholding denial of the corrective action plan based upon rules not asserted in the Agency decision letter. Specifically, Sections 734.630(o); 734.630(tt) and 734.630 (aaa) were relied upon by the Board as legal requirements that may be violated if the plan was approved (Board Opinion, at p. 10), and none of these rules appear in the underlying Agency decision letter. (Rec. at pp. 634-648)

In sharp contrast, the Agency's previous decision letter specifically identified Section 734.630(o) and other provisions, explained why the plan may not comply with these provisions

and described the specific type of information needed. (Rec. at p. 578)<sup>2</sup> These details provided the information needed to decide whether to appeal the decision to the Board or submit the specific information identified. By identifying the legal provisions in the Board's final order which were not found in the Agency decision letter, the Board has relegated to itself the permitting responsibility, when its statutory role is to ensure the rights of applicants have not been denied.

Obviously this does not mean that the Board's role is to automatically approve the applications, but the Board has no authority to review Agency approvals, even if clearly erroneous. The purpose of the statutory framework has always been to protect the due process rights of the applicant. See David P. Currie, Enforcement Under the Illinois Pollution Law, 70 Nw. U. L. Rev. 389, 477-478 (1975) (explaining how a statement of reasons from the Agency could be used to define nature and scope of administrative review to permit meaningful judicial review and address due process concerns). Beyond framing the legal compliance issues for review, the decision letter establishes the scope of relevant evidence and discovery. See Mathers v. Pollution Control Bd., 107 Ill.App.3d 729, 738 (3<sup>rd</sup> Dist. 1982) (affirming Board strike evidence not relevant to decision letter); Oscar Mayer & Co. v. EPA, PCB 78-14, slip op. at p. 3 (June 8, 1978) (affirming Hearing Officer ruling on interrogatories). Given the limited timeframe for Board review, the Board's statutory mandate is utterly reasonable, and even if it wasn't reasonable, it is mandatory.

Finally, in the only Board precedent addressing these issues, Prime Location Properties,

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<sup>2</sup> "The owner/operator must calculate Tier 2 remediation objectives based on the mass-limit equations and non-mass-limit equations in order to determine the most restrictive objectives for a site." (Rec. at p. 578)

LLC v. IEPA, PCB 09-67 (Aug. 20, 2009), aff'd 2012 IL App (5th) 100072-U, none of these legal provisions relied upon by the Board were raised to reject a corrective action plan that also sought approval for removing underground storage tanks. All that was necessary for those tanks to be removed was that the tanks had experienced a release, and there is no question that the tanks in this case had experienced a release.

WHEREFORE, Petitioner, ILLICO INDEPENDENT OIL CO., prays the Board reconsider its December 20, 2018, order, and reverse the Agency's decision, and for such other and further relief as it deems meet and just.

ILLICO INDEPENDENT OIL CO.,  
Petitioner

By its attorneys,  
LAW OFFICE OF PATRICK D. SHAW

By: /s/ Patrick D. Shaw

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