

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
Illinois Pollution Control Board
1021 N. Grand Avenue East
P.O. Box 19274
Springfield, IL 62794-9274
(Carol.Webb@illinois.gov)

Melanie Jarvis
Division of Legal Counsel
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276
(Melanie.Jarvis@illinois.gov)

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 Motion for Leave to File Reply in Support of Motion for Reconsideration Instant, 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 27th of February, 2019. The number of pages in the e-mail transmission is 8 pages.

Respectfully submitted,
ILLICO INDEPENDENT OIL CO.,
Petitioner,

BY: LAW OFFICE OF PATRICK D. SHAW

BY: /s/ Patrick D. Shaw

Patrick D. Shaw
LAW OFFICE OF PATRICK D. SHAW
80 Bellerive Road
Springfield, IL 62704
217-299-8484
pdshaw1law@gmail.com

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

PETITIONER’S MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION INSTANTER

NOW COMES Petitioner, ILLICO INDEPENDENT OIL CO. (hereinafter “Illico”), pursuant to Section 101.500(e) of the Pollution Control Board’s procedural regulations (35 Ill. Adm. Code § 101.500(e)), and hereby moves for leave to file the Attached Reply in Support of Motion for Reconsideration instanter, stating as follows:

1. On February 14, 2019, the Illinois Environmental Protection Agency (hereinafter “the Agency”) filed its Response to Petitioner’s Motion for Reconsideration.

2. Said Response raised new issues or arguments not previously raised, specifically (1) timeliness of the motion; (2) identification of language in the Agency denial letter asserted to frame the issues in this appeal; and (3) distinguishing the controlling precedent of Prime Location Properties v. IEPA, PCB 09-77 (Aug. 20, 2009).

3. The first issue obviously could not be raised until after the motion was filed, but it would nonetheless be prejudicial if Illico were unable to address it. The second and third issues were not previously by the Agency in either the Agency’s Response to the Motion for Summary Judgment or the Agency’s Post-Hearing Brief. Had the Agency done so, Illico would have addressed these issues in its replies and thus Illico would also be prejudiced if unable to reply to

the new matter.

4. Pursuant to Section 101.500(e), the Board is authorized to grant leave to file a reply, and this motion is timely.

WHEREFORE, Petitioner, ILLICO prays for an order granting leave to file the attached Reply In Support of Motion for Reconsideration, or for such other and further relief as the Board deems meet and just.

ILLICO INDEPENDENT OIL CO.,
Petitioner

By its attorney,

LAW OFFICE OF PATRICK D. SHAW

By: /s/ Patrick D. Shaw

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REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION

NOW COMES Petitioner, ILLICO INDEPENDENT OIL CO. (hereinafter "Illico"), pursuant to Section 101.500(e)) of the Pollution Control Board's procedural rules (35 Ill. Adm. Code § 101.500(e)), replies in support of its motion for reconsideration, stating as follows:

I. TIMELINESS

The Board's order was received on January 2, 2019, see Exhibit A, and thus this motion is timely. (35 Ill. Adm. Code § 101.520(a))

II. ISSUE PRECLUSION

The Agency cites to a portion of its decision letter, never before cited by it in these proceedings. The relevant language from that letter follows:

Pursuant to Subsections 57.7(b)(2) and 57.7(c) of the Environmental Protection Act [(415 ILCS 5) (Act)] and 35 Illinois Administrative Code (35 Ill. Adm. Code) 734.505(b) and 734.510(a), the Corrective Action Plan is modified. The Illinois EPA has determined that the modifications listed in Attachment A of this letter are necessary to demonstrate compliance.

Pursuant to Subsections 57.7(b)(3) and 57.7(c) of the Act and 35 Ill. Adm. Code 734.505(b) and 734.510(b), the Corrective Action Plan Budget is modified. Based on the modifications listed in Section 2 of Attachment B of this letter, the Corrective Action Plan Budget is approved for the amounts listed in Section 1 of Attachment B of this letter. However, it should be noted that the amount of payment from the Underground Storage Tank Fund (Fund) may be limited by Subsections 57.7(c), 57.8(d), 57.8(e), and 57.8(g) of the Act, as well as 35 Ill. Adm. Code 734.630 and 734.655.

(R.634 (emphasis added))

The Agency points to the second paragraph, but it is actually the first paragraph that is relevant to this appeal. This appeal challenged the Agency's modification of the corrective action plan to the extent it precluded removal of underground storage tanks. The plan is what is referenced in the first paragraph. As a result of the modification of the plan, the Agency decision letter made thirteen modifications to the budget "[p]ursuant to Subsection 57.7(c)(3) of the Act and 35 Ill. Adm. Code 734.510(b)," because the costs were associated with tank removal which was not being approved in the plan. See Petitioner's Post-Hearing Brief, Appendix A. While Illico disagrees that the second paragraph supra meets (or even is intended to meet) the requirements of a detailed statement, its language is simply not relevant here.

The Act requires the Agency to provide an explanation of the Sections of the Act or the provisions of the regulations, including specific reasons why those provisions would be violated. (415 ILCS 5/57.7(c)(4)) The purported language does not meet those requirements. Furthermore, since the propriety of removing tanks was not deemed to be an issue of law, but a challenge to the adequacy of the evidence, that same provision required the Agency to explain "the specific types of information" that the applicant needed to provide. (Id.) The purported language, as well as the Board's opinion, fails to address that requirement as well.

As the Board is no doubt aware, there may be a hundred legal provisions referenced in the paragraph relied upon by the Agency to "frame the issues;" fifty-seven provisions are contained in 35 Ill. Adm. Code 734.630 alone. Moreover, this provision is standard language in all Agency decision letters, and if given the legal effect urged by the Agency, LUST appeals will no longer be appeal proceedings, but *de novo* review of the submittals by the Board.

III. BOARD PRECEDENT.

The Agency argues that the cases are factually distinct because there is a difference between “whether or not the tanks had a release or if the release was from overfills and spills.” (Response, at p. 5) In Prime Locations, the release was also from overfills. Prime Location Properties v. IEPA, PCB 09-77, slip op. at p. 31 (Aug. 20, 2009). Furthermore, the evidence of a release was confirmed based merely upon “detectable levels of BTEX parameters” in some soil borings. (Id.) In other words, none of the factual distinctions the Agency claims are distinguishable between the two cleanups, and it is arbitrary and capricious to apply different standards to each.

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 attorney,

LAW OFFICE OF PATRICK D. SHAW

By: /s/ Patrick D. Shaw

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LAW OFFICE OF PATRICK D. SHAW
80 Bellerive Road
Springfield, IL 62704
217-299-8484
pdshaw1law@gmail.com

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IPCB

Illinois Pollution Control Board

James R. Thompson Center
100 W. Randolph St., Suite 11-500
Chicago, IL 60601-3233

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