BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

T-TOWN DRIVE THRU, INC., Petitioner,	)	
v.	)	PCB 07-85 (UST Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

NOTICE

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PLEASE TAKE NOTICE that I have today caused to be filed a RESPONSE TO PETITIONER'S MOTION FOR RECONSIDERATION with the Illinois Pollution Control Board, copies of which are served upon you.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

/s/ James G. Richardson
James G. Richardson
Assistant Counsel

Dated: May 22, 2008
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THIS FILING IS SUBMITTED ON RECYCLED PAPER

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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v.	)	PCB 07-85 (UST Appeal)
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RESPONSE TO PETITIONER'S MOTION FOR RECONSIDERATION

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, James G. Richardson, Assistant Counsel, and pursuant to 35 Ill. Adm. Code 101.500 and 101.520, hereby submits to the Illinois Pollution Control Board ("Board") its Response to Petitioner's Motion for Reconsideration. The Illinois EPA received Petitioner's Motion for Reconsideration ("Motion" or "Mot.") on May 9, 2008. The Illinois EPA respectfully requests that the Board deny Petitioner's Motion.

I. STANDARD OF REVIEW

Pursuant to 35 Ill. Adm. Code 101.902, the Board in ruling on a motion for reconsideration will consider factors including new evidence, or a change in the law, to conclude that the Board's decision was in error. In Citizens Against Regional Landfill v. County Board of Whiteside, PCB 93-156 (March 11, 1993), the Board noted 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 the 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).

Therefore in order to prevail on a motion to reconsider, the movant must demonstrate that

one of the three criteria has been met to justify reconsideration of an order. Here Petitioner fails to raise any meritorious argument that would warrant the Board's reconsideration of its April 3, 2008 Opinion and Order of the Board ("Order"). No changes in the law are presented. Concerning new evidence, if it is truly new then it could not have been considered by the Illinois EPA in making its March 2, 2007 final determination and cannot be reviewed in an appeal of that determination. L. Keller Oil Properties, Inc./Farina v. Illinois EPA, PCB 07-147, slip op. at 4 (March 20, 2008). If it is not new evidence, it cannot support a reconsideration of the Order. This leaves erroneous application of the existing law. The bulk of the Motion's assertions are summed up in its Conclusion with the statement "It thus was procedurally improper for the Board to draw those inferences, and, as shown herein, factually wrong as well." Mot. at 17. Factual findings, conclusions or inferences are based on existing evidence. Challenging them is not a basis for seeking reconsideration of an order. What challenges to the Board's application of existing law that may be present in the Motion were already addressed in the Order and do not justify reconsideration of the Order.

II. ARGUMENT

Petitioner makes a remark in its Introduction that requires comment. It states "Comprising only 4½ pages, the Cross-Motion was a plainly inadequate rebuttal of Petitioner's Motion and reflected the attitude that, as one Agency employee warned Petitioner's contractor, "The Agency always wins." Mot. at 3. The author of the instant Response also penned the referenced Cross-Motion. Unfortunately for Petitioner, this author had neither previously heard this alleged claim nor experienced such success in past appearances on behalf of the Illinois EPA before the Board. Use of such an untrue and unsubstantiated claim reflects more negatively on the Petitioner and its camp than on its intended target.

Para-phrasing from the title of the Section, Petitioner's first arguments concern the Double-Dipping inference. Mot. at 3. 35 Ill. Adm. Code 732.845 states that professional consulting services are to be reimbursed on a time and materials basis and 35 Ill. Adm. Code 732.835 provides maximum amounts not to be exceeded for sample handling and analysis. Petitioner acknowledges that it would be improper to be compensated for the same work under both provisions. Mot. at 5. But its understanding of these provisions is subject to question when it failed to submit an invoice from Teklab identifying what services Teklab provided and the cost of the services. Further doubt is raised by the fact that Petitioner misquotes the Order on three separate occasions to support its position. Petitioner states "The Board further agreed that where a contractor and a subcontractor both contribute to a Subpart H item, how the fixed amount "might be allocated between the contractor and subcontractor is irrelevant." Mot. at 4. Petitioner makes this same claim on Pages 11 and 16. The actual language of the Order was limited and provided "Further, how those amounts, *once reimbursed*, might be allocated between contractor and subcontractor is irrelevant under the regulations." Order at 22 (emphasis added). But concerning costs prior to reimbursement, the Board in the next paragraph states "Whether the costs requested have been properly accounted for, however, so as to warrant reimbursement, is addressed not in Subpart H ("Maximum Payment Amounts"), but rather in Subpart F ("Payment from the Fund")." The motion hardly addresses the Order's Subpart F discussion.

Sampling-related activities can be classified as 35 Ill. Adm. Code 732.835 or 732.845 costs, while Section F identifies the requirements for seeking reimbursement of these costs. By not providing an invoice from Teklab, Petitioner invited speculation as to what its motives or goals were in doing so. But challenging factual findings, conclusions or inferences as Petitioner does here cannot be the basis for granting a motion to reconsider.

Petitioner's next arguments concern the No Everything Else inference. Mot. at 8. This section apparently seeks to identify work or costs other than laboratory analysis that can be considered as sample handling and analysis. The bulk of this section is introduced with the statement "However, lest there be any doubt, Petitioner, in cooperation with its contractor, has prepared the following explanation of the services at issue and who provided them." Mot. at 9. Specially prepared for this Motion, and with no references to the information in the Administrative Record that the Illinois EPA reviewed, this constitutes new evidence. As previously noted, because this evidence could not have been considered by the Illinois EPA in making its final determination it cannot properly be reviewed in an appeal of that determination. L. Keller Oil Properties, Inc./Farina v. Illinois EPA, PCB 07-147, slip op. at 4 (March 20, 2008). Petitioner again bolsters its arguments in this section with the previously noted misquote of the Order. Mot. at 11.

Most of Petitioner's arguments in the section concerning Section 57.7 of the Act were already presented to and addressed by the Board. Petitioner concludes this section with concerns about "widespread *post-hoc* second-guessing of decisions" by the Illinois EPA. Mot. at 14. But Petitioner has no reason to be uneasy since the Board shares it views, stating "The Board agrees with T-Town that the Agency, having approved a corrective action plan and budget, cannot later reconsider the merits of the approved tasks and costs just because the reimbursement application is submitted…..When an application requests reimbursement for costs that are at or under the amounts of Subpart H and the approved budget, *and* provides documentation demonstrating that the costs were actually incurred for approved work, the Agency cannot "second-guess" whether the requested reimbursement is reasonable." Order at 24-25. Of course in the instant case, Petitioner failed to provide the necessary documentation for reimbursement to occur. Perhaps the only new point here is Petitioner's suggestion, buried in Footnote 8, that Subpart F may conflict with Sections 57.7 and

57.8 of the Act. Mot. at 13. But there is no elaboration of this theory or explanation as to how reimbursement could occur without Subpart F. Nothing presented in this section is sufficiently significant to justify a reconsideration of the Order.

Petitioner again raises the specter of Illinois EPA "second-guessing" in its final section of arguments. But as noted in the previous paragraph, if a reimbursement application seeks costs at or under Subpart H amounts and contains documentation that the costs were incurred for approved work, Petitioner has nothing to fear. Petitioner's owner-operator costs arguments were basically presented to the Board when Petitioner argued that two invoices it received from its consultant adequately documented the costs in question. The Board took note of these two invoices but still held that the Teklab invoice was needed for reimbursement of the costs. Order at 24, 29. Here again, nothing in this section merits reconsideration of the Order.

III. CONCLUSION

Petitioner boldly started its Motion by assailing the Illinois EPA and declaring its intent to provide points and authorities to enable the Board "to get its decision right." Mot. at 3. But then Petitioner did not even bother to reference the factors needed to support a motion to reconsider or demonstrate how its arguments satisfied those requirements. It misquoted the Order to support its position. Petitioner presented new evidence and challenged inferences even though these are not proper factors to support a motion to reconsider. Petitioner's Motion is inadequate as it contains no information or arguments that satisfy the requirements for granting a motion to reconsider. The Illinois EPA respectfully requests that the Motion be denied.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

/s/ James G. Richardson
James G. Richardson
Assistant Counsel

Dated: May 22, 2008

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on May 22, 2008 I served true and correct copies of a RESPONSE TO PETITIONER'S MOTION FOR RECONSIDERATION upon the persons and by the methods as follows:

[*ElectronicFiling*]
John T. Therriault
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[1st Class U.S. Mail]

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