

ILLINOIS POLLUTION CONTROL BOARD
June 19, 2008

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

ORDER OF THE BOARD (by T.E. Johnson):

This is an appeal of an Illinois Environmental Protection Agency (Agency) determination denying reimbursement from the Underground Storage Tank (UST) Fund. T-Town Drive Thru, Inc. (T-Town) had applied to the Agency for reimbursement concerning T-Town's leaking petroleum UST site located at 101 West Main Street in Teutopolis, Effingham County. The Agency denied T-Town reimbursement in the amount of \$8,109.02 for claimed "sample handling and analysis" costs, and T-Town appealed to the Board. On April 3, 2008, the Board denied T-Town's motion for summary judgment, granted the Agency's counter-motion for summary judgment, and affirmed the Agency's denial. Today the Board rules on T-Town's motion to reconsider.

T-Town filed the motion to reconsider on May 8, 2008 (Mot.), asking the Board to reverse its April 3, 2008 decision. The Agency filed a response opposing the motion on May 22, 2008 (Resp.). A motion to reconsider may be brought "to bring to the [Board's] attention newly discovered evidence which was not available at the time of the hearing, changes in the law or errors in the [Board's] previous application of existing law." Citizens Against Regional Landfill v. County Board of Whiteside County, PCB 92-156, slip op. at 2 (Mar. 11, 1993), citing Korogluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1991); *see also* 35 Ill. Adm. Code 101.902. In addition, a motion to reconsider may specify "facts in the record which were overlooked." Wei Enterprises v. IEPA, PCB 04-23, slip op. at 3 (Feb. 19, 2004).

The Board stated in its April 3, 2008 decision that the Agency's denial letter frames the issue on appeal. *See, e.g.,* Kathe's Auto Service Center v. IEPA, PCB 96-102, slip op. at 13 (Aug. 1, 1996). The Agency denied reimbursement for lack of supporting documentation because T-Town failed to provide the invoices of Teklab, Inc. (Teklab), the environmental testing laboratory that analyzed the samples. In its motion for summary judgment, T-Town maintained that Teklab "merely analyzed the samples and reported the results to [T-Town's contractor, United Science Industries, Inc. (USI)]. Everything else was done and provided by USI." T-Town Motion for Summary Judgment at 19. The Board observed, however, that other than the costs for sampling devices (\$221.97) and sample shipping (\$205.60), which apparently

resulted from the activities of USI, the record before the Agency disclosed no “sample handling and analysis” work performed by USI. The Board found that without Teklab’s invoices, the Agency could not determine how much of the \$7,681.45 balance was accounted for by the laboratory’s charges. The Board affirmed the Agency, finding that without the laboratory invoices, T-Town failed to provide adequate supporting documentation.

The Board has reviewed T-Town’s motion to reconsider and the Agency’s response. Some of T-Town’s motion repeats arguments already considered and rejected by the Board. T-Town’s new arguments mischaracterize the Board’s decision. The Board made no finding that any information other than the laboratory invoices was required to be a part of T-Town’s reimbursement application. Mot. at 9. There was no other issue on appeal, as framed by the denial. Nor did the Board find that USI “contributed nothing” to the sample handling and analysis work or that USI tried to “evade limits on handling charges.” *Id.* at 4, 16. However, by omitting laboratory invoices from a claim for sample handling and laboratory analytical costs, T-Town left a gap in the record that raised the *potential* concerns articulated by the Board and warranted the denial issued by the Agency.

Further, contrary to T-Town’s assertions, the Board did not “mistake professional consulting costs incurred for ‘sampling’ as costs incurred for ‘sample handling and analysis’” or find that USI attempted to “double-dip.” Mot. at 4, 8. The Board described USI’s professional consulting sampling precisely to clarify that it did *not* make up any part of the sample handling and analysis. Nor is there any validity to T-Town’s contention that the Board restricted sample handling and analysis costs to laboratory analytical charges. *Id.* at 8. Moreover, T-Town’s arguments about Agency “*post-hoc* second-guessing” (Mot. at 14, 15) are baseless and, as the Agency points out (Resp. at 4, 5), contradicted by the Board’s decision.

Finally, in its motion to reconsider, T-Town attempts to introduce new evidence purportedly constituting an “explanation” of the sample handling and analysis services and “who provided them.” Mot. at 9-11. Because these T-Town offerings are outside of the record that was before the Agency, the Board cannot consider them. *See* L. Keller Oil Properties, Inc./Farina v. IEPA, PCB 07-147, slip op. at 4 (Mar. 20, 2008). As the Board stated in its April 3, 2008 decision, the Board must decide whether the reimbursement application, as submitted to the Agency, demonstrates compliance with the Environmental Protection Act (415 ILCS 5 (2006)) and the Board’s regulations. *See, e.g.,* Kathe’s Auto Service, PCB 96-102, slip op. at 13. Accordingly, the Board’s review is limited to the record that was before the Agency at the time of the Agency’s determination. *See, e.g.,* Karloack v. IEPA, PCB 05-127, slip op. at 7 (July 21, 2005); *see also* 35 Ill. Adm. Code 105.412.

Applying the standards articulated above, the Board denies T-Town’s motion to reconsider.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2006); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706.

Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on June 19, 2008, by a vote of 4-0.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal flourish extending to the right.

John Therriault, Assistant Clerk
Illinois Pollution Control Board