BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

FOX MORAINE, LLC, Petitioner, v. UNITED CITY OF YORKVILLE, CITY COUNCIL, Respondent.	)	PCB No. PCB 07-146

NOTICE OF FILING

TO: All counsel of Record (see attached Service List)

Please take notice that on December 1, 2009, the undersigned filed with the Illinois Pollution Control Board, 100 West Randolph Street, Chicago, Illinois 60601, **Petitioner's Motion for Leave to File a Reply in Support of its Motion for Reconsideration**.

Dated: December 1, 2009

Respectfully submitted,

On behalf of FOX MORAINE, LLC

/s/ Charles F. Helsten
One of Its Attorneys

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

FOX MORAINE, LLC,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB No. 07-146
	)	
UNITED CITY OF YORKVILLE, CITY COUNCIL,	)	
	)	
	)	
Respondent.	)	

PETITIONER'S MOTION FOR LEAVE TO FILE A REPLY IN SUPPORT OF ITS MOTION FOR RECONSIDERATION

NOW COMES Petitioner, FOX MORAINE LLC, by and through its attorneys, George Mueller and Charles Helsten, pursuant to 35 Ill.Adm.Code 101.500(e), requesting leave to file a Reply brief in support of Petitioner's Motion for Reconsideration, stating as follows:

1. On November 4, 2009, Petitioner Fox Moraine filed a Motion for Reconsideration, requesting that the Board reconsider its Order of October 1, 2009.

2. On November 18, 2009, Yorkville filed a Response brief opposing the Motion for Reconsideration, in which Yorkville accuses Fox Moraine of "blatantly disregarding the rules and mischaracterizing the facts and the law," violating Supreme Court Rule 23, and "mak[ing] things up." (Response at pp. 5-7).

3. The Board's Rules authorize the Board to permit the filing of a Reply to prevent material prejudice. 35 Ill.Adm.Code 101.500(e).

4. Inasmuch as Fox Moraine has no other means for responding to the scurrilous allegations of Yorkville's Response brief, Fox Moraine requests leave to file the attached Reply brief to prevent the material prejudice that will otherwise result from the baseless and misleading allegations proffered in Yorkville's Response.

WHEREFORE, Petitioner Fox Moraine respectfully requests that the Board enter an

order granting leave to Fox Moraine to file the attached Reply in Support of the Motion for Reconsideration.

Dated: December 1, 2009

Respectfully submitted,

On behalf of Petitioner Fox Moraine

/s/ Charles F. Helsten
One of Its Attorneys

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

FOX MORAINE, LLC, Petitioner, v. UNITED CITY OF YORKVILLE, CITY COUNCIL, Respondent.	)	PCB No. 07-146

PETITIONER'S REPLY IN SUPPORT OF ITS MOTION FOR RECONSIDERATION

NOW COMES Petitioner, FOX MORAINE LLC, by and through its attorneys, George Mueller and Charles Helsten, pursuant to 35 Ill.Adm.Code 101.500(e), and for its Reply in support of its Motion for Reconsideration, states as follows:

I. Petitioner Fox Moraine filed its motion for reconsideration to ensure the full exhaustion of administrative remedies.

On November 4, 2009, Petitioner Fox Moraine ("Fox Moraine") filed a Motion for Reconsideration, requesting that the Board reconsider its Order of October 1, 2009. Fox Moraine's motion was filed to ensure that it would be deemed to have fully exhausted its administrative remedies in advance of an appeal for judicial review, inasmuch as Illinois case law is not entirely consistent on the question of whether a motion for reconsideration must be filed before seeking judicial review of an administrative decision. While several decisions have concluded that the exhaustion requirement of seeking reconsideration does not apply to the PCB, *see Strube v. Pollution Control Board*, 242 Ill.App.3d 822, 610 N.E.2d 717 (3d Dist. 1993); *Land & Lakes Co. v. Pollution Control Board*, 245 Ill.App.3d 631, 616 N.E.2d 349 (3d Dist. 1993); *Grigoleit Co. v. Pollution Control Board*, 245 Ill.App.3d 337, 613 N.E.2d 371 (4th Dist. 1993); *Worthen v. Village of Roxana*, 253 Ill.App.3d 378, 382, 623 N.E.2d 1058, 1061-62 (5th Dist. 1993), other courts have held that a motion for reconsideration is, in fact, required.. Most

notably, the First Appellate District held in *Illinois Health Maintenance Organization Guar. Ass'n v. Shapo*, 357 Ill.App.3d 122, 134, 826 N.E.2d 1135, 1146-47 (1st Dist. 2005), that decisions which have held that a motion for reconsideration is not required are incorrectly decided, and are in conflict with the Illinois Supreme Court's decision in *Castaneda v. Illinois Human Rights Comm'n*, 132 Ill.2d 304, 547 N.E.2d 437 (1989), in which the Supreme Court held that even discretionary motions for reconsideration must be filed to fully exhaust administrative remedies. Therefore, in addition to wanting to bring to the Board's attention the errors and misapplications of law in the October 1, 2009 Order, Fox Moraine filed the pending motion to avoid the risk of an exhaustion problem in conjunction with a judicial appeal.

II. Yorkville offers a truncated version of the standard on motions for reconsideration.

In addition to pointing out newly discovered evidence which was not available at the time of trial, changes in the law, or errors in the decision-maker's previous application of existing law, a post-judgment motion such as Fox Moraine's Motion for Reconsideration may be used to afford the decision-maker an opportunity to correct errors brought to its attention by the movant. *See e.g. Philip Morris USA, Inc. v. Byron*, 226 Ill.2d 416, 423 (2007)(dissent, Justice Freeman), citing *In re Marriage of King*, 336 Ill. App. 3d 83, 87 (2002); *Federal Kemper Life Assurance Co. v. Eichwedel*, 266 Ill. App. 3d 88, 98-99 (1994); *Regas v. Associated Radiologists, Ltd.*, 230 Ill. App. 3d 959, 967 (1992). The Board may also reconsider its decisions in order to correct erroneous language in its opinions. *See e.g. The Grigoleit Company v. IEPA*, PCB 92-23 (August 26, 1993). Ultimately, the Board may, on reconsideration, "correct any error, omission, or oversight found in the Board's decision." *McLean County Disposal v. County of McLean*, PCB 87-133 (March 10, 1988, at 1).

Yorkville entirely disregards the use of motions for reconsideration for the correction of

errors resulting from misapplication of existing law. Thus, Yorkville improperly states the standard on a motion for reconsideration, and contrary to that improperly asserted standard, Fox Moraine's motion properly seeks to bring to the Board's attention matters that are appropriate for correction upon reconsideration.

III. Yorkville misrepresents the content of Fox Moraine's motion for reconsideration.

Yorkville's Response erroneously alleges that "the Board has already heard, fully evaluated, and rejected the arguments Fox Moraine makes in its motion." (Response at 1). This assertion completely ignores the fact that Fox Moraine's motion focuses on what it believes are errors in the Board's October 1, 2009 Order, including the absence of a technical assessment of the evidence in that Order. (*See, e.g.*, Motion for Reconsideration at ¶11). Clearly, this argument was not, and indeed could not have been, previously raised inasmuch as it focuses squarely on the content of the Board's October 1, 2009 Order, which was unavailable prior to October 1, 2009.

Similarly, Fox Moraine's motion challenges the absence of any explanation of the Board's legal analysis with respect to a number of issues and arguments raised by Fox Moraine, thereby preventing a meaningful review of the reasoning used to reach the Board's conclusions and holdings. (*See, e.g.*, Motion for Reconsideration at ¶¶ 7, 17, 25). Once again, it would be impossible for Fox Moraine to have raised this prior to the time the Order was published, and therefore this is not an argument previously asserted and decided by the Boar. Yorkville's claim, therefore, that "Fox Moraine is simply re-arguing the points it previously raised, and nothing more" is patently false.

IV. Yorkville misapprehends the Appellate Court's reversal of the Pollution Control Board in *City of Rochelle.*

Yorkville erroneously asserts that Fox Moraine "falsely" represents the Rule 23 Order issued by the Appellate Court, which vacated the Board's decision in *City of Rochelle v. Rochelle Waste Disposal and the Rochelle City Council*, PCB No. 07-113 (Jan. 24, 2008). Yorkville also falsely claims that the issue of whether a consultant's report constituted evidence in the record was "not an issue before the Second District" in *City of Rochelle*. (Response at 6).

As Fox Moraine made clear in its Motion for Reconsideration, the applicant in *City of Rochelle* challenged a condition which required the applicant to erect a "fourteen-foot" berm, arguing that the fourteen-foot berm requirement was unsupported by evidence in the record and was therefore against the manifest weight of the evidence. The Board's Order in *City of Rochelle* stated, at page 52, that requiring the fourteen-foot berm was not against the manifest weight of the evidence because although no evidence was presented at the hearing to support that fourteen-foot height requirement, it was referenced in a report prepared and submitted by a engineering consultant, Patrick Engineering:

> Patrick Engineering also recommended a special condition providing that [p]erimeter berms shall be built in advance of the cells in order to screen operations to a reasonable extent. It is recommended to require the berms to be built at least 500 feet in advance of the eastern-most edge of the cell being constructed. By way of example, prior to completion of Cell 3's liner completion, the southern berm along Creston Road shall be constructed... The berm shall be at least 14 feet in height, placed between the waste footprint and Creston Road, and located between E 4,500 and E 7,500. C-265 (recommended condition 24).

(PCB Order, January 24, 2008, at pp. 51-52).

The Board concluded that because Patrick Engineering referenced a fourteen foot berm in

its report, there was evidence in the record to support such a requirement. *Id.* The Appellate Court, however, disagreed and vacated the Board's Order, observing that "both the City and the Council next contend that Special Condition 23, which provides for the building of berms 14 feet in height around the perimeter of the site, is against the manifest weight of the evidence. We agree." *City of Rochelle v. PCB, et al.*, Cons. Nos. 2-02-0427 and 2-08-0433, at *4 (Ill.App.Ct. Sept. 4, 2009). The Court went on to explain that:

> [i]n its opinion and order, the PCB noted that Patrick Engineering and the hearing officer recommended the berm be at least 14 feet in height. The PCB also noted some of Devin Moose's general testimony that berms help to screen operations from view and control litter. The PCB then concluded, based on the [Patrick Engineering] recommendations; Moose's testimony, 'and RWD's operating record", that Special Condition 23 (and another condition related to an operational screening berm) was not against the manifest weight of the evidence. Our examination of the record finds no support for the PCB's conclusion that 14 foot berms were required. There was no ***evidence*** either in favor of or in opposition to such a height. There was also no evidence suggesting that the planned 8 to 10 foot high berm was insufficient. ... However, ***there simply is no evidence*** to support the finding that a 14 foot berm would be necessary...The PCB's technical expertise must be applied to the record and not imposed arbitrarily or at random. The record supports the requirement that a berm be installed. However, the 14 foot height requirement is against the manifest weight of the evidence. Therefore, we determine the final order of the Board is invalid and vacate said order.

Id. at pp. 4-5 (emphasis added).

The Appellate Court therefore soundly rejected the Board's erroneous conclusion that the consultant's recommendation of a fourteen foot berm, made in a report submitted after the close of evidence in the hearing, was evidence that could be used to support a finding by the decision-

maker. Fox Moraine, therefore, accurately depicted the Appellate Court's holding in *City of Rochelle*, that a consultant's report submitted after the close of evidence could not be deemed evidence in support of the challenged condition. Yorkville's spurious claims to the contrary are, therefore, utterly baseless.

V. Yorkville falsely accuses Fox Moraine of violating Illinois Supreme Rule 23

Yorkville complains that Fox Moraine "violated" Supreme Court Rule 23 because Fox Moraine's brief did not include a copy of the Rule 23 Order in which the Appellate Court vacated the Board's Order in PCB 07-113. However, the Appellate Court's Order vacating the Board's Order in PCB 07-113 is readily available for viewing on the Board's website, and is therefore available to the Board, opposing counsel, and in fact any member of the public, at any time, which is or should be immediately obvious to any attorney who practices before the Board. *See* http://www.ipcb.state.il.us/documents/dsweb/Get/Document-66915. It would, therefore, have unnecessarily wasted valuable natural resources to append a copy of that Order to Fox Moraine's brief. Therefore in keeping with the Board's policy of reducing unnecessary waste of natural resources wherever possible, Fox Moraine declined to unnecessarily attach a copy of the Order to its brief.

Moreover, Yorkville asserts that the Board should not consider the effect of the Appellate Court's Order in *City of Rochelle* because to do so would undermine the purpose of Rule 23. Yorkville, however, ignores the actual purpose of Illinois Supreme Court Rule 23, which is to reduce the total number of Appellate Court opinions which are published each year. In order to reduce the overall number of published orders each year, Rule 23 therefore requires that an order only be published if:

> (1) the decision establishes a new rule of law or modifies, explains or criticizes an existing rule of law; or

> (2) the decision resolves, creates, or avoids an apparent conflict of authority within the Appellate Court.

Ill.S.Ct. Rule 23.

In this case, the Rule 23 Order in *City of Rochelle* does not merit publication under the criteria listed above, and moreover, its application is effectively limited to siting application cases before the Pollution Control Board, which further argues against full publication (inasmuch as it has application to a very small number of cases). The fact that the *City of Rochelle* Order has limited application does not, however, mean that the Board should ignore its holding, given that it demonstrates the Court's sound rejection of the notion that a consultant's report, provided after the close of evidence in a hearing, can be deemed to constitute "evidence in the record." Because that very principle is at issue here, Fox Moraine brings the *City of Rochelle* Order to the Board's attention, lest the same error be replicated in the instant litigation.

Conclusion

Yorkville's Response opposing the Motion for Reconsideration effectively ignores the arguments raised in the Motion for Reconsideration, misrepresents the arguments it does mention, and misstates the law, including the holding in the Appellate Court's Order reversing the Board's decision in *City of Rochelle*, PCB 07-113.

Rather than address Fox Moraine's arguments that, *inter alia*, the Board erred by failing to apply its technical expertise to determine the sufficiency of the evidence, and that the Board further erred by failing to provide any legal analysis to explain its conclusions on questions of law, Yorkville erroneously claims that all of Fox Moraine's arguments have been previously asserted and rejected by the Board. This assertion is simply illogical, inasmuch as the shortcomings identified in the Board's analysis of the evidence and analysis of the legal questions at issue in the appeal could not have been argued before the Board's Order was even

drafted.

Yorkville further misstates and misrepresents the Appellate Court's reversal of the Board in *City of Rochelle*, falsely stating that the Appellate Court never even considered the question of whether the Patrick Engineering report constituted evidence to support the challenged condition. As is clear from the passages provided above, the Appellate Court concluded that the Patrick Engineering report did not constitute evidence in the record that could support the challenged condition, and the Court therefore reversed the Board's Order concerning that condition because there was nothing in the evidence to support it.

Finally, contrary to Yorkville's assertion that Fox Moraine's motion was filed for an improper purpose, Fox Moraine reiterates that it filed the instant motion for the purpose of fully exhausting all available administrative remedies before judicial appeal. Clearly, therefore, the instant motion was not filed for any improper purpose.

WHEREFORE, Petitioner Fox Moraine respectfully requests that the Board reconsider its Order of October 1, 2009, and enter an order modifying that order.

Dated: December 1, 2009

Respectfully submitted,

On behalf of Petitioner

/s/ Charles F. Helsten
One of Its Attorneys

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AFFIDAVIT OF SERVICE

The undersigned, pursuant to the provisions of Section 1-109 of the Illinois Code of Civil Procedure, hereby under penalty of perjury under the laws of the United States of America, certifies that on December 1, 2009, she served a copy of the foregoing upon:

Via E-Mail – hallorab@ipcb.state.il.usl Bradley P. Halloran Hearing Officer Illinois Pollution Control Board James R. Thompson Center 1000 W. Randolph St., Ste. 11-500 Chicago, IL 60601	Via E-Mail – dombrowski@wildman.com Leo P. Dombrowski Wildman, Harrold, Allen & Dixon 225 West Wacker Dr. Suite 3000 Chicago, IL 60606-1229
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