

**BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS**

A & H IMPLEMENT COMPANY,)	
Petitioner,)	
)	
v.)	PCB 12-53
)	(UST Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
Respondent.)	

NOTICE

John Therriault, Acting Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

Carol Webb, Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P. O. Box 19274
Springfield, IL 62794-9274

Patrick Shaw
Fred C. Prillaman
Mohan, Alewelt, Prillaman & Adami
1 North Old Capitol Plaza, Suite 325
Springfield, IL 62701-1323

PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board a **REPLY TO PETITIONER'S RESPONSE TO MOTION TO DISMISS** copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

Melanie A. Jarvis
Assistant Counsel
Division of Legal Counsel
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217/782-5544
217/782-9143 (TDD)
Dated: March 27, 2012

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REPLY TO PETITIONER'S RESPONSE TO MOTION TO DISMISS

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, Melanie A. Jarvis, Assistant Counsel and Special Assistant Attorney General, and, pursuant to 35 Ill. Adm. Code 101.500, 101.506 and 101.508, hereby respectfully replies to Petitioner's Response to Motion to Dismiss and moves the Illinois Pollution Control Board ("Board") to **DISMISS** the above case and in support of said motion, the Illinois EPA states as follows:

I. JURISDICTION ARGUMENT

1. Where the Board finds it lacks jurisdiction to hear a case, it must dismiss the matter. WEI Enterprises v. Illinois EPA, PCB 04-22 (February 19, 2004); Mick's Garage v. Illinois EPA, PCB 03-126 (December 18, 2003); Panhandle Eastern Pipe Line Co. v. IEPA, PCB 98-102, slip op. at 30 (January 21, 1999); Kean Oil v. Illinois EPA, PCB 97-146 (May 1, 1997).

2. While Motions to Dismiss for other reasons may have a 30 day time limit under Board regulations, challenges to a tribunal's jurisdiction can be raised at any point in the proceeding. Concerned Boone Citizens, Inc. v. M.I.G. Investments, Inc. (2d Dist.1986), 144, Ill.App.3d 334, 494 N.E.2d 180; Ogle County Board v. PCB, 272 Ill. App. 3d 184, 191, 649 N.E.2d

545, 551 (2d Dist. 1995).

3. The Illinois EPA assumed in its original motion that the facts in Petitioner's own Petition for Review would be used by the Board for the purposes of deciding the motion to dismiss, as given and in the light most favorable to Petitioner. The Illinois EPA did reserve its right to challenge Petitioner's facts, characterizations of the facts and the ability to offer within its own right if the appeal proceeds further.

4. The Illinois EPA letter dated September 1, 2011 informed the Petitioner about the final Illinois EPA decisions which were made in letters dated July 20, 2009 and December 17, 2009, but no new final decision was made in the September 1, 2011 letter.

5. The Board does not have Jurisdiction to hear this case. Petitioner claims to be aggrieved by the September 2011 letter issued by the Illinois EPA. However this letter post dates prior letters which encompass the final determination on the issue the Petitioner seeks to have reviewed. It is clear that the Board cannot hear a matter where the Petitioner appeals from a letter that merely gives them notice of two prior final Illinois EPA decisions, which, Petitioner failed to appeal at the time.

6. The law is very clear on this issue. Reichhold Chemicals, Inc. v. PCB (3d Dist.1990), 204 Ill.App.3d 674, 561 N.E.2d 1343, held that the Illinois EPA has no statutory authority to reconsider a permit decision. Further, it is well established that an administrative agency has no inherent authority to amend or change its decision and may undertake reconsideration only where authorized by statute. (Pearce Hospital v. Public Aid Commission (1958), 15 Ill.2d 301, 154 N.E.2d 691; Reichhold Chemicals Inc. v. PCB (3d Dist.1991), 204 Ill.App.3d 674, 561 N.E.2d 1343.)

7. The Board found in Mick's Garage v. Illinois EPA, PCB 03-126 (December 18, 2003) that it lacked jurisdiction to review the Illinois EPA's February 7, 1992 deductibility

determination. The Board stated that it “has held that a condition imposed in a permit, not appealed to the Board under Section 40(a)(1), may not be appealed in a subsequent permit. Panhandle Eastern Pipe Line Co. v. IEPA, PCB 98-102, slip op. at 30 (Jan 21, 1999)”.

8. In Kean Oil v. Illinois EPA, PCB 97-146 (May 1, 1997), the Board held that it was concerned that there was “an attempt by petitioner to misuse the submittal process in order to remedy its failure to properly appeal the first decision by the Agency concerning this matter.”

9. The September 1, 2011 letter in and of itself is NOT an appealable final decision of the Illinois EPA. The Petitioner is attempting to get a second bite of the apple in trying to appeal two final decisions, July 20, 2009 and December 17, 2009, it failed to appeal in 2009. The Board does not have jurisdiction to hear this case. See, Mick's Garage.

II. ESTOPPEL ARGUMENT

1. The Petitioner contends that it relied upon conversations between the Illinois EPA project manager and the Petitioner's consultant. Even assuming that the facts are as represented by the Petitioner, the case law is very clear on discussion between project managers and consultants. Estoppel is not allowed in these circumstances.

2. In White and Brewer Trucking v. IEPA, PCB 96-250 (March 20, 1997), the Board held that “any mistaken advice that the permit reviewer gave, while regrettable, could not estop the Illinois EPA. A permit reviewer is not the Illinois EPA and the Illinois EPA took no official action until it issued the first denial letter to White & Brewer.”

3. The Illinois EPA made final decisions, whether the project manager made prior representations to the consultant is irrelevant. The Petitioner knew about the prior final decisions issued to it, and the case law is clear that those Illinois EPA final decisions could not be reconsidered.

4. The Petitioner's estoppel argument does not meet the high standard when a governmental agency is involved.

III. CONCLUSION

For the reasons stated herein, the Illinois EPA respectfully requests that the Board dismiss this action against the Illinois EPA for lack of jurisdiction.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent

Melanie A. Jarvis
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Dated: March 27, 2012

This filing submitted on recycled paper.

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on March 27, 2012, I served true and correct copies of **REPLY TO PETITIONER'S RESPONSE TO MOTION TO DISMISS** via the Board's COOL system and by placing true and correct copies thereof in properly sealed and addressed envelopes and by depositing said sealed envelopes in a U.S. Mail drop box located within Springfield, Illinois, with sufficient First Class postage affixed thereto, upon the following named persons:

John Therriault, Acting Clerk
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