

ILLINOIS POLLUTION CONTROL BOARD
March 22, 2018

JOHNS MANVILLE,)
)
 Complainant,)
)
 v.) PCB 14-3
) (Citizens Enforcement - Land)
 ILLINOIS DEPARTMENT OF)
 TRANSPORTATION,)
)
 Respondent.)

ORDER OF THE BOARD (by C.K. Zalewski):

In this enforcement action, Johns Manville (JM) alleges that the Illinois Department of Transportation (IDOT) illegally dumped asbestos waste at two sites in Waukegan, Lake County. The Board found that IDOT violated the Environmental Protection Act (Act) (415 ILCS 5 (2016)) at certain areas within the two sites. JM cleaned up those areas and seeks reimbursement from IDOT. The Board ordered another hearing to develop additional facts regarding JM's cleanup work at those specific areas, the amount and reasonableness of JM's costs for that cleanup work, and the share of JM's costs attributable to IDOT.

For this hearing, IDOT sought to conduct discovery concerning the involvement of Commonwealth Edison Company (ComEd) in JM's cleanup activities—IDOT alleges ComEd compensated JM for cleanup costs. ComEd and JM moved to prevent IDOT from conducting this discovery. The Board found that IDOT's discovery requests pertain to information that is neither relevant nor calculated to lead to relevant evidence for the remedy hearing.

IDOT filed a motion asking the Board to reconsider this decision. IDOT argues that: (1) the Board erred in applying the law when it found that information concerning ComEd's involvement is irrelevant; and (2) the Board did not consider the entire record when making its decision. The Board denies IDOT's motion for reconsideration. IDOT's initial argument reiterates an argument that the Board's previous order addressed. IDOT's second argument fails to substantiate its claim that the Board overlooked facts in the record.

In this order, the Board first summarizes the case's procedural history, beginning with its order finding IDOT liable. Next, the Board describes the applicable law on motions for reconsideration. Finally, the Board analyzes the arguments and denies IDOT's motion.

PROCEDURAL HISTORY

On December 15, 2016, the Board issued an interim opinion and order, finding IDOT violated the Act in specified areas of two sites near a JM manufacturing facility in Waukegan. Johns Manville v. Illinois Dept. of Transportation, PCB 14-3 (Dec. 15, 2016) (Dec. 2016 Order).

Specifically, the Board found that IDOT dispersed and buried asbestos waste in these areas during road construction.

The Board directed the hearing officer to hold an additional hearing to develop facts necessary to derive the appropriate remedy for IDOT's violations. The Board limited the hearing to three issues: (1) the cleanup work performed by JM in the portions of the two sites where the Board found IDOT responsible for waste present in soil; (2) the amount and reasonableness of JM's costs for this work; and (3) the share of JM's costs attributable to IDOT. Dec. 2016 Order at 22.

Before the hearing on remedy, IDOT made several discovery requests regarding purported payments from ComEd to JM related to cleanup at the two sites. JM and ComEd both opposed the discovery requests by, among other things, filing motions with the Board. On October 5, 2017, the hearing officer directed JM and IDOT to brief the issue of whether IDOT's three discovery requests seek relevant information or are calculated to lead to relevant information.

On December 21, 2017, the Board ruled that IDOT sought information that is neither relevant nor calculated to lead to relevant information. Johns Manville v. Illinois Dept. of Transportation, PCB 14-3 (Dec. 21, 2017) (Dec. 2017 Order). IDOT moved for reconsideration on January 26, 2018 (Mot.). On February 9, 2018, both Johns Manville and Come Ed filed responses opposing IDOT's motion.

MOTION FOR RECONSIDERATION

The Board's procedural rules allow parties to file a motion for reconsideration of a Board order. When deciding a motion for reconsideration, the Board will "consider factors including new evidence, or a change in the law, to conclude that the Board's decision was in error." 35 Ill. Adm. Code 101.902. In addition to these two grounds, the Board will consider whether it erred in applying existing law. Chatham BP v. IEPA, PCB 15-173 slip op. at 2 (Nov. 5, 2015), *citing* Korogluyan v. Chicago Title & Trust Co., 213 Ill.App.3d 622 (1st Dist. 1991).

DISCUSSION

IDOT Alleges a Recognized Ground to Reconsider

IDOT makes two arguments for reconsideration. First, IDOT argues that the Board erred in finding irrelevant any payments from ComEd to JM related to the cleanup work. As noted, error in applying existing law is a recognized ground for reconsideration. *See* Chatham BP, PCB 15-173, slip op. at 2. Second, IDOT argues that the Board overlooked specific facts in the record, resulting in an erroneous application of existing law.

IDOT Reiterates an Argument Addressed in Prior Board Order

A motion to reconsider must do more than merely reiterate arguments already made by the movant and rejected by the Board. In its motion, IDOT first argues that the Board erred in

determining that information concerning ComEd's alleged payments to JM for cleanup work is not relevant to issues to be addressed at the remedy hearing. Mot. at 6-8. Specifically, IDOT argues that discovery on "any monies paid by [ComEd], or any commitments to pay" is necessary "to calculate [JM's] costs for purposes of reimbursement." *Id.* at 6. IDOT adds that Illinois case law illustrates "great latitude" for conducting discovery. *Id.* at 7-8.

IDOT made this argument in its original brief. In that brief (IDOT Br.), IDOT also argued that an agreement for payment between JM and ComEd is relevant because it "almost certainly addresses the question of how [JM] would deal with costs of the work to be performed by them [and] could be highly relevant to at least some of the issues that IDOT will be called upon to address" at the remedy hearing. IDOT Br. at 4.

In its December 2017 order, the Board addressed this argument, finding that IDOT failed to explain how payments between ComEd and JM pertain to "what cleanup work was performed, how much it cost, whether the cost was reasonable, or what share is attributable to IDOT." Dec. 2017 Order at 4. Because IDOT's first argument was already raised and rejected, it cannot be a basis for reconsideration.

IDOT Does Not Establish That the Board Overlooked Facts

IDOT asks the Board to reconsider for a second reason: the Board overlooked JM's joint obligation with ComEd to clean up the site under a federal order. Mot. at 8-9. IDOT indicates that had the Board considered these facts, it would have properly applied existing law and granted IDOT's discovery requests. IDOT argues that the Board's order "ignores the fact that [JM] and [ComEd] are both jointly obligated . . . for addressing the asbestos" and "completely ignores the fact that [JM's] Complaint makes multiple references" to its joint obligations with ComEd. *Id.* at 8.

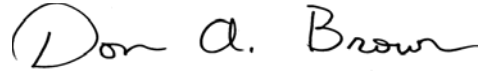
However, IDOT fails to establish that the Board overlooked these facts. On the contrary, the Board's prior order directly addressed them, finding that IDOT did not show how payment arrangements for joint obligations under a *federal* proceeding are relevant to crafting a remedy for IDOT's violations of *Illinois* law. Dec. 2017 Order at 4-5. Because the Board did not overlook these facts, IDOT's second argument cannot be a basis for reconsideration.

CONCLUSION

IDOT's first argument for reconsideration merely repeats an argument that the Board rejected in its prior order. IDOT fails to substantiate its second argument for reconsideration. The Board therefore denies IDOT's motion to reconsider the Board's December 21, 2017 order. The Board directs the parties to proceed as called for by that order.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on March 22, 2018, by a vote of 5-0.

A handwritten signature in black ink that reads "Don A. Brown". The signature is written in a cursive style with a large, circular initial "D".

Don A. Brown, Clerk
Illinois Pollution Control Board