

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PRARIE RIVERS NETWORK,)
NATURAL RESOURCES DEFENSE)
COUNCIL, SIERRA CLUB,)
ENVIRONMENTAL LAW & POLICY)
CENTER, FRIENDS OF CHICAGO)
RIVER, and GULF RESTORATION)
NETWROK,)

Petitioner,)

v.)

PCB No. 14-106, 14-107, 14-108
Consolidated
(Third Party NPDES Appeal-Water)

ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY, and)
METROPOLITAN WATER RECLAMATION)
DISTRICT OF GREATER CHICAGO,)

Respondent.)

To: See attached service list.

NOTICE OF ELECTRONIC FILING

PLEASE TAKE NOTICE that on the 18th day of February, 2015, the undersigned filed the attached **Illinois Environmental Protection Agency's Response to Petitioners' Motion for Reconsideration** by electronic filing.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

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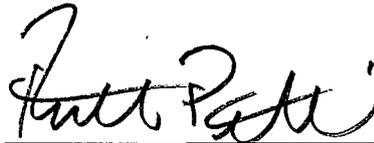
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CERTIFICATE OF SERVICE

I, Robert W. Petti, an Assistant Attorney General, certify that on the 18th day of February, 2015, I caused to be served by U.S. Mail, the foregoing Notice of Filing, and Illinois Environmental Protection Agency's Response to Petitioners' Motion for Reconsideration, to the parties named on the Notice of Filing, by depositing same in postage prepaid envelopes with the United States Postal Service located at 100 West Randolph Street, Chicago, Illinois 60601.



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PCB No. 14-106, 107, and 108
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ILLINOIS ENVIRONMENTAL)
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DISTRICT OF GREATER CHICAGO,)

Respondent.)

**ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S RESPONSE TO
PETITIONERS' MOTION FOR RECONSIDERATION**

On December 18, 2014, the Illinois Pollution Control Board ("Board") issued its Opinion and Order in the above-captioned Permit Appeal, concluding that:

[t]he Board finds that the permit conditions challenged in this proceeding do not violate the Act or Board regulations. The Board affirms the permits issued by the Agency for the District's plants. Nothing in the Board's opinion precludes enforcement against the District for violating any applicable water quality standard. Further the Board encourages the Agency to continue its strategy to assess and reduce nutrient loss to Illinois waters and the Gulf of Mexico.

(Opinion and Order at p. 27.) On January 20, 2015, the Petitioners filed their Motion for Reconsideration of the Opinion and Order of December 18, 2014 ("Motion for Reconsideration"). Petitioners' Motion for Reconsideration contends that the Opinion and Order "overlooks" key arguments and facts contained in the summary judgment briefs and the Administrative Record. (Motion for Reconsideration p. 1)

A motion to reconsider is intended to bring before the Board newly discovered evidence not available at the time of the hearing, changes in the law, or errors in the application of existing law. The Petitioners' Motion for Reconsideration does not accomplish this purpose. Instead, the Motion merely restates facts and arguments presented throughout the summary judgment briefing, without introducing new evidence, a change in existing law, or supporting any contention that the Board misapplied existing law. Because the Motion merely restates facts and arguments previously presented to the Board and fails to offer any accepted basis for reconsideration of the Opinion and Order, the Motion for Reconsideration must be denied.¹

ARGUMENT

Section 101.902 of the Board's procedural rules provides that, "[i]n ruling upon 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; *see also Broderick Teaming Co. v. Illinois Env't'l Protection Agency*, PCB 00-187, 2001 WL 376542 at *2 (April 5, 2001). A motion for reconsideration may be filed "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 at 2 (Ill.Pol.Control.Bd. Mar. 11, 1993) (citing *Korogluyan v. Chicago Title & Trust Co.*, 213 Ill. App. 3d 622, 627).

¹ Petitioners' Motion for Reconsideration contends that the Board did not apply the proper standard for summary judgment because the Opinion and Order states that there is a factual "dispute" in the positions taken by Petitioners and Respondents regarding a certain fact in the Administrative Record relating to the significance of the impairment designations for the receiving waters from the Stickney Plant. However, this comment is not developed in the Petitioners' Memorandum in Support of the Motion for Reconsideration. Further, the Board resolves the factual "dispute" in the context of the Opinion and Order based on the facts present in the Record. See Opinion and Order at p. 17.

Petitioners' Motion for Reconsideration sets forth no new facts, no change in the law, and fails to demonstrate that the Board erred in the application of the existing law. Instead, the Petitioners' argument for reconsideration is based on the hollow assertion that the Opinion and Order "overlooks" facts in the record and arguments raised through the summary judgment motions. However, each argument, and each fact, allegedly overlooked by the Board, is either mentioned or discussed in the Opinion and Order or is part of the Administrative Record. Accordingly, Petitioners' Motion for Reconsideration must be denied.

First, Petitioners' Motion for Reconsideration introduces no facts that were not available, prior to December 18, 2014, as part of the Administrative Record. As stated above, the purpose of a motion for reconsideration is to bring to the court's attention newly discovered evidence that was not available at the time of the hearing, changes in the law or errors in the court's previous application of existing law. *Evanston Ins. Co. v. Riseborough*, 378 Ill. Dec 778 (2014). The Appellate Court has held that, for purposes of a motion to reconsider, "newly discovered evidence" is evidence not available prior to the hearing. *Emrikson v. Morfin*, 977 N.E.2d 1165 (1st Dist. 2012). The Appellate Court further held that "[i]n the absence of a reasonable explanation regarding why the evidence was not available at the time of the original hearing, the circuit court is under no obligation to consider it." *Id.*

The Petitioners' Motion for Reconsideration does not offer any facts that were not available prior to the submission of the summary judgment briefs. Instead, the Motion for Reconsideration merely restates facts that were part of the Administrative Record considered by the Board in making its findings in the December 18, 2014 Opinion and Order.

For example, Petitioners contend the Board overlooked evidence that a 1.0 mg/L effluent limit for phosphorus is not adequate to prevent violations of water quality standards. (Motion for

Reconsideration at p.5). Petitioners argue the Board failed to consider criteria proposed by U.S. EPA and criteria adopted by other jurisdictions in the Midwest that have established more stringent effluent standards for phosphorus. (*Id.* at p. 5). In the Opinion and Order, however, the Board specifically acknowledges the criteria Petitioners allege the Board overlooked, and directly references the more stringent numeric effluent limits on phosphorus from other jurisdictions, noting as well that these criteria from other jurisdictions were raised for consideration in the Petitioners' Summary Judgment briefs. (Opinion and Order at p. 15). Ultimately, the Board found that despite Petitioners' presentation of this criterion, the 1.0 mg/L limit on phosphorous is consistent with effluent standards adopted by the Board in Illinois. (*Id.*) Therefore, as with the rest of the facts raised in the Motion for Reconsideration, it is inarguable that the Board did not overlook these criteria but, in fact, considered the evidence as part of the decision set out in the Opinion and Order.

Clearly, the Board's analysis included review of the Administrative Record, and there is no basis for the assertion that any facts, like the one described above, were overlooked. (See, Opinion and Order at p. 10). Accordingly, without new evidence presented to support the Petitioners' Motion for Reconsideration, the Motion for Reconsideration must be denied.

Next, Petitioners fail to identify any change in law that would require reconsideration of the Opinion and Order. The portions of the United States Clean Water Act, the Illinois Environmental Protection Act, and the Illinois Pollution Control Board Regulations relied upon by the Illinois Environmental Protection Agency ("Illinois EPA") in its arguments, and relied upon by the Board in the Opinion and Order, have not changed since the record closed in this matter. Additionally, there is no new case law presented by petitioners that would necessitate reconsideration of the Opinion and Order.

One item that the Petitioners do present for the first time in the Motion for Reconsideration is the record from the Board's proceedings in IPCB R08-9, a rule making hearing held in 2008. Petitioners assert that portions of the record in IPCB R08-9 support the proposition that segments of the Little Calumet River and North Shore Channel receive effluent discharge directly from the Plants at issue in this matter. (Motion to Reconsider at p. 8). Obviously, the proceeding before the Board in R08-9 is not new law and does not represent a change in the law subsequent to December 18, 2014. Further, the 'new' information from the R08-9 rulemaking, regarding specific waters that receive effluent discharge from the Plants at issue in this matter, was considered by the Board in the Opinion and Order. (See, Opinion and Order at p. 17). In the Opinion and Order, the Board acknowledges "[t]he O'Brien Plant discharges to the North Shore Channel and the Calumet Plant to the Little Calumet River." (Id.). Thus, not only is there no change in existing law or new law presented through the introduction of portions of the record from R08-9, but the rulemaking, which proceeds this action, is not new law.

Like the rest of the statutory law, regulations, and case law presented in the Petitioners' Motion for Reconsideration, the record in R08-9 rule making proceedings was available to Petitioners prior to the Opinion and Order, and does not represent new law, or new facts, for the purpose of the Motion for Reconsideration. Without a presentation of any new facts, as discussed above, and without presentation of any new law or a change in law the Motion for Reconsideration must be denied.

Finally, Petitioners fail to support the contention that the Board erred in its application of the law by overlooking certain of Petitioners' arguments. Instead, the Petitioners simply restate many of the same arguments raised through summary judgment and addressed in the Opinion

and Order. Petitioners outline the arguments they contend were overlooked with short headings in the Motion for Reconsideration. (See Motion for Reconsideration at p. 1-6). Petitioners expand on this outline in Petitioners' Memorandum in Support of Petitioners' Motion for Reconsideration. Careful reading of the Opinion and Order demonstrates that each of these allegedly overlooked arguments is considered in the Board's review and decision. (See Opinion and Order at p. 10 and 11).

For instance, the Petitioners claim that the Board overlooked, or misapplied, the regulations requiring the Illinois EPA to "ensure" permitted discharges will not cause violations of water quality standards. (Motion for Reconsideration at p. 3 and 4). In making this assertion the Petitioners entirely misstate the Opinion and Order. The Petitioners assert that the Opinion and Order "does not cite or discuss the implications of 35 Ill. Adm. Code 309.141(d) that require the IEPA 'ensures compliance' with water quality standards . . ." (*Id.* at p. 3). Further, the Petitioners state "the Opinion does not discuss the language of 35 Ill. Adm. Code 309.143(a) requiring limits against pollutants that have a 'reasonable potential' to cause or contribute to water quality standard violations." (*Id.*). These assertions by Petitioners are inaccurate.

In the paragraph that opens the "Board Analysis and Finding" section of the Opinion and Order, the Board discusses both Section 309.141(d) and Section 309.143(a). (Opinion and Order at p. 13). The Board continues its discussion of these regulations, among others, over numerous pages before ultimately concluding "the record supports the Agency's decision that the 1.0 mg/L limit on phosphorous is sufficient to prevent a violation of the cited water quality standards." (*Id.* at p. 18).

Simply because the Board did not find in the Petitioners favor on these arguments, does not imply that the Board overlooked the arguments. In fact, each argument restated in the Motion

for Reconsideration was before the Board on summary judgment and each argument was considered as part of the Opinion and Order. Accordingly, the Petitioners' Motion for Reconsideration fails to demonstrate any error in the application of existing law in the Opinion and Order, and the Motion for Reconsideration must be denied.

Conclusion

The Petitioners' Motion for Reconsideration is simply a restatement of the facts and arguments presented on summary judgment, without introduction of new evidence, a change in existing law, or supporting any contention that the Board misapplied existing law. Because the Motion for Reconsideration is simply a restatement of facts previously considered by the Board and fails to offer a basis for reconsideration of the December 18, 2014 Opinion and Order, the Motion for Reconsideration must be denied.

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