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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD CLERK'S OFFICE

SEP 15 2003

PEOPLE OF THE STATE OF ILLINOIS,)

Complainants,)

vs.)

QC FINISHERS, INC., an Illinois Corporation,))

Respondent.)

PCB # 01-07

(Enforcement-Air)

STATE OF ILLINOIS
Pollution Control Board

NOTICE OF FILING

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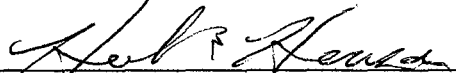
Ms. Paula Becker Wheeler
Assistant Attorney General
Office of the Attorney General
188 West Randolph Street, 20th Floor
Chicago, Illinois 60601

Mr. Bradley Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 W. Randolph Street
Chicago, Illinois 60601

Clerk, Illinois Pollution Control Board
100 W. Randolph Street
State of Illinois Center
Suite 11-500
Chicago, Illinois 60601

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the original and nine copies of a MOTION TO STRIKE OR IN THE ALTERNATIVE, MOTION FOR LEAVE TO REPLY TO COMPLAINANT'S RESPONSE TO RESPONDENT'S MOTION FOR RECONSIDERATION and REPLY TO COMPLAINANT'S RESPONSE TO RESPONDENT'S MOTION FOR RECONSIDERATION on behalf of QC Finishers, Inc., a copy of which is hereby served upon you.

Respectfully submitted,


Heidi E. Hanson

Dated September 12, 2003
Heidi E. Hanson
H. E. Hanson, Esq. P.C.
4721 Franklin Ave, Suite 1500
Western Springs, IL 60558-1720
(708) 784-0624

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STATE OF ILLINOIS
Pollution Control Board

**MOTION TO STRIKE OR IN THE ALTERNATIVE,
MOTION FOR LEAVE TO REPLY
TO COMPLAINANT'S RESPONSE
TO RESPONDENT'S MOTION FOR RECONSIDERATION**

NOW COMES Respondent, QC Finishers, Inc. by and through its attorney, H. E. HANSON ESQ. P.C., pursuant to 35 Ill Adm. Code 101.500 and moves the Board to strike Complainant's Response to Respondent's Motion for Reconsideration or, in the alternative, to grant it leave to file a Reply. In support of its motion Respondent states as follows:

MOTION TO STRIKE

1. On July 29, 2003 Respondent timely filed its Motion for Reconsideration of Board Order in this matter. Copies were mailed to the Board's Clerk, the Hearing Officer and the Assistant Attorney General all on the same day.
2. The Motion was received by the Board's Clerk on July, 31, 2003. Certified mail receipts (attached) show that copies were received by the Hearing Officer on July 30, 2003 and by the Assistant Attorney General on August 4, 2003.
3. Board rules 35 Ill Adm Code 101.520(b) and 101.500(d) provide that the response to a motion for reconsideration must be filed within 14 (fourteen) days after the filing of the motion.
4. On August 28, 2003 Complainant filed a "Response to Respondent's Motion for Reconsideration of the Board's June 19, 2003 Board Order."
5. Complainant's Response was filed 24 (twenty four) days after the date that Complainant received the Motion, therefore it was 10 (ten) days late.
6. Complainant's response was not accompanied by either a motion for leave to file instanter or a motion for extension of time.

7. No explanation of the substantial delay was offered and no good cause for the delay was shown, therefore pursuant to 35 Ill. Adm. Code 101.522 there is no basis on which an extension could have been granted.

8. Respondent has been prejudiced by the late filing of this Response in that had Respondent filed it on time, the Board could have considered Respondents Motion for Reconsideration at the September 4, 2003 Board meeting and the parties could have proceeded with depositions sooner and could have reviewed discovery produced to date with a better understanding of the points at issue in this proceeding.

WHEREFORE Respondent respectfully requests that the Board strike Complainant's untimely response.

MOTION FOR LEAVE TO FILE A REPLY

9. In the alternative, if the Board does not strike the Complainant's late-filed Response, the Respondent requests leave to reply to it pursuant to 35 Ill Adm. Code 101.500(e).

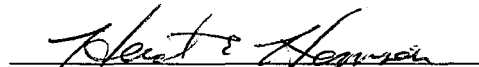
10. A reply is necessary to avoid material prejudice to the Respondent in that the Response raises new issues not covered in the Motion for Reconsideration.

11. The Response argues first, that the Motion for Reconsideration is not ripe and therefore the Board is without authority to review it and second, that the Board may not reconsider its order for any reason other than new evidence or a change in the law.

12. If the Board does not permit Respondent to reply, Respondent will not be able to present opposing arguments on those issues, which were raised for the first time in Complainant's Response.

WHEREFORE Respondent respectfully requests that the Board grant it leave to reply to Complainant's Response.

Respectfully submitted,
QC FINISHERS, INC.



By: H. E. Hanson Esq. P.C.

Heidi E. Hanson

Dated September 12, 2003
Heidi E. Hanson
H. E. Hanson, Esq. P.C.
4721 Franklin Ave, Suite 1500
Western Springs, IL 60558-1720
(708) 784-0624

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PS Form 3800, June 2002 See Reverse for Instructions

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STATE OF ILLINOIS

Pollution Control Board

REPLY

**TO COMPLAINANT'S RESPONSE TO
RESPONDENT'S MOTION FOR RECONSIDERATION**

NOW COMES Respondent, QC Finishers, Inc., by and through its attorney, H. E. HANSON ESQ. P.C., pursuant to 35 Ill Adm. Code 101.500(e) and for its reply to Complainant's Response to Respondent's Motion for Reconsideration states as follows:

1. On July 29, 2003 Respondent filed a Motion for Reconsideration of the Board's June 19, 2003 order striking several of Respondent's affirmative defenses.
2. The Motion, among other things asked the Board to clarify that the opinion did not foreclose the use of nonaffirmative defenses, requested that the Board reexamine a recent Illinois Supreme Court case that was contrary to cases cited by the opinion, and noted that the Board had decided to strike an affirmative defense based on alleged violation of a Board rule which had not been alleged in the Complaint.
3. On August 28, 2003 the Complainant filed a response to Respondent's Motion for Reconsideration of the Board's Order of June 19, 2003 (hereinafter "the Response").
4. The Response does not actually answer any of the points raised in the Motion for Reconsideration, so Complainant is deemed to have no argument with the merits of the motion. See 35 Ill. Adm. Code 101.500(d).
5. Complainant's Response instead takes issue with the Board's authority to hear the motion for reconsideration and with the factors the Board may consider in ruling on the Motion.

The Board Has the Authority to Reconsider Orders Striking Affirmative Defenses.

6. The Response begins by arguing that the Board does not have the authority to reconsider any order other than an order that terminates the entire proceeding. Response pages 1 and 2.

7. This argument misreads 35 Ill Adm. Code 101.520. That rule states in pertinent part,

a) Any motion for reconsideration or modification of a final Board order must be filed within 35 days after receipt of the order...c) A timely filed motion for reconsideration or modification stays the effect of the final order." (emphasis added).

8. The term "final order" is defined as an order "that terminates the proceeding". 35 Ill Adm. Code 101.202. The term "final Board order" is not defined. The difference in wording within the same rule is significant.

9. In the first subsection the Board is simply establishing deadlines for motions to reconsider. In the second quoted subsection the Board is addressing the need to stay a decision which disposes of the proceeding. (Such a stay would typically not be necessary for an order dealing with affirmative defenses.) Therefore the written order must be finalized before the deadline for filing a motion for reconsideration begins to run, but the Board only provides an automatic stay for those orders that terminate a proceeding.

10. In addition 35 Ill Adm Code 101.908 allows for interlocutory appeal of Board decisions. It would seem unlikely that the Board would adopt a blanket refusal to reconsider all interlocutory matters, because in taking a second look at the law it might reconsider and thereby avoid an injustice and/or an expensive and time-consuming appeal.

11. Complainant also ignores a line of cases in which the Board has reconsidered orders which were not "final orders" as defined in 35 Ill Adm Code 101.202.

12. In People v. Panhandle Eastern, PCB 99-191, 2001 Ill ENV LEXIS 496 (October 18, 2001) the People, in an argument directly opposed to their current position, moved the Board to "reconsider its February 1, 2001 order in which the Board affirmed the hearing officer's ruling to exclude the People's Exhibit 5 from evidence." 2001 Ill ENV LEXIS 496 at *4. The Board considered the motion and denied it on the merits. Id at *4 - *6.

13. In People v. Community Landfill Company, PCB 97-193 (July 26, 2001), the Board granted Respondent's motion for reconsideration of summary judgment of one of twelve counts and in Revisions to Antidegradation Rules, R01-13, (February 21, 2002) slip op at 2, the Board granted a participant's motion to reconsider a second notice (non-final) order.

14. The most intriguing case to address the issue is People v. Skokie Valley Asphalt, PCB 96-98, in which two motions for reconsideration were filed. The first motion, filed by the People, asked the Board to reconsider an order denying a motion for summary judgment. Id., Board Order of August 9, 2001. The Board granted the motion. Later, in the same proceeding Skokie Valley filed a motion asking the Board to reconsider an order striking two affirmative defenses. The People, in a response virtually identical to the Response they filed in this proceeding, argued that Skokie Valley's motion for reconsideration was not ripe. The Board rejected the People's argument and considered Skokie Valley's motion for reconsideration of the affirmative defenses. Id., Board Order of July 24, 2003.

15. Apparently the "ripeness issue" has not discouraged the People from filing motions to reconsider Board orders that did not terminate the proceedings, when the People found it expeditious to do so. Panhandle Eastern, Skokie Valley. It is surprising that they attempt to raise this specious issue when their opponents file the same motions.

16. Even if the Board were to depart from its previous reading of 101.520, motions to reconsider orders that do not terminate the proceeding would still be allowable pursuant to Board rule, 35 Ill. Adm. Code 101.500, which states that the "Board may entertain any motion the parties wish to file that is permissible under the Act or other applicable law, these rules, or the Illinois Code of Civil Procedure."

17. In conclusion, the Board has already rejected Complainant's ripeness argument. The Board has the authority under 35 Ill. Adm Code 101.520, and on several recent occasions has used that authority to reconsider orders that did not terminate the proceeding. Even if the Board were to reverse its prior position on 101.520 there is sufficient support pursuant to 35 Ill. Adm. Code 101.500 for the Board to entertain the Motion for Reconsideration in this case.

The Board Has Broad Authority to Reconsider its Orders For Whatever Reasons it Deems Appropriate.

18. Complainant also argues that failure to show either new evidence or a change in the law should defeat the Motion.

19. Complainant cites only to 35 Ill Adm. Code 101.902 as authority for this proposition.

20. Board rule 101.902 states that "in ruling upon a motion for Reconsideration, the Board will consider factors including new evidence, or a change in the law." (emphasis added).

21. Complainant's reading of 101.902 appears to ignore the underlined phrase. It is apparent from the wording of the rule itself that "new evidence" and "changes in the law" were not intended to be the exclusive factors for reconsideration. Rule 101.902 merely lists them as examples of factors which can be considered.

22. As the Board stated in People v. Community Landfill Company, PCB 97-193 (July 26, 2001) slip op at 3,

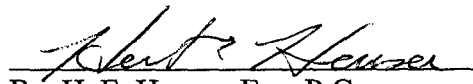
"In ruling upon a motion for reconsideration, the Board will consider factors including new evidence, or a change in the law, to conclude that the Board's decision is in error. 35 Ill. Adm. Code 101.902. In addition, the Board will consider errors in its application of law." (emphasis added)

23. The Board has also recognized frequently in case law that the factors may include "errors in the court's previous application of existing law" citing with approval Korogluyan v. Chicago Title & Trust Co., 213 Ill. App.3d, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1992), in a number of its own opinions. McDonough v. Robke, PCB 00-163 (Sept.4, 2003) slip op. at 2. People v. Skokie Valley Asphalt, PCB 96-98, (July 24, 2003) slip op. at 2. Broderick Teaming Company v. Illinois EPA, PCB 00-187 (June 21, 2001) slip op at 1. Illinois EPA v. Goodwin, AC 02-17 (October 3, 2002).

24. In conclusion, the Complainant's attempt to read the word " including" out of Board rule 101.902 must fail. The Board has stated frequently, and as recently as two weeks ago (McDonough), that it will recognize factors other than new evidence and changes in the law as a basis for reconsideration.

WHEREFORE Respondent respectfully requests that the Board consider and grant its Motion for Reconsideration.

Respectfully submitted,
QC FINISHERS, INC.


By: H. E. Hanson Esq. P.C.
Heidi E. Hanson

Dated September 12, 2003
Heidi E. Hanson
H. E. Hanson, Esq. P.C.
4721 Franklin Ave, Suite 1500
Western Springs, IL 60558-1720
(708) 784-0624

CERTIFICATE OF SERVICE

I, the undersigned, certify that I have served the attached MOTION TO STRIKE OR IN THE ALTERNATIVE, MOTION FOR LEAVE TO REPLY TO COMPLAINANT'S RESPONSE TO RESPONDENT'S MOTION FOR RECONSIDERATION and REPLY TO COMPLAINANT'S RESPONSE TO RESPONDENT'S MOTION FOR RECONSIDERATION by deposit in a U. S. Mailbox before 4:00 p.m. on September 12, 2003 upon the following persons:

One copy:

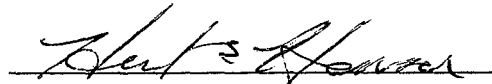
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Hearing Officer
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100 W. Randolph Street
Chicago, Illinois 60601

Original and nine copies:

Clerk, Illinois Pollution Control Board
100 W. Randolph Street
State of Illinois Center
Suite 11-500
Chicago, Illinois 60601

Dated: September 12, 2003



Heidi E. Hanson
H. E. Hanson, Esq. P.C.
4721 Franklin Ave, Suite 1500
Western Springs, IL 60558-1720
(708) 784-0624

This filing is submitted on recycled paper.