

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

VOGUE TYRE & RUBBER COMPANY,)
) Petitioner,)
) v.)
 ILLINOIS ENVIRONMENTAL)
 PROTECTION AGENCY,) (UST Appeal)
) Respondent.)

PCB No. 96-10
(UST Appeal)

RECEIVED
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OCT 15 2003
STATE OF ILLINOIS
Pollution Control Board

NOTICE

Dorothy M. Gunn, Clerk
 Illinois Pollution Control Board
 James R. Thompson Center
 100 West Randolph Street
 Suite 11-500
 Chicago, IL 60601

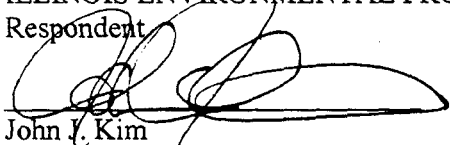
Bradley P. Halloran, Hearing Officer
 Illinois Pollution Control Board
 James R. Thompson Center
 100 West Randolph Street
 Suite 11-500
 Chicago, IL 60601

Jeffrey E. Schiller
 Schuyler, Roche & Zwirner
 One Prudential Plaza
 Suite 3800
 130 East Randolph Street
 Chicago, IL 60601

PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board a MOTION FOR RECONSIDERATION, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
 Respondent



John Y. Kim
 Assistant Counsel
 Special Assistant Attorney General
 Division of Legal Counsel
 1021 North Grand Avenue, East
 P.O. Box 19276
 Springfield, Illinois 62794-9276
 217/782-5544
 217/782-9143 (TDD)
 Dated: October 14, 2003

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

VOGUE TYRE & RUBBER COMPANY,)	
. Petitioner,)	
v.)	PCB No. 96-10
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MOTION FOR RECONSIDERATION

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, John J. Kim, Assistant Counsel and Special Assistant Attorney General, and, pursuant to 35 Ill. Adm. Code 101.520 and 101.902, and by motion filed no later than 35 days following the receipt of the order entered by the Illinois Pollution Control Board ("Board") on September 4, 2003, hereby respectfully moves the Board to reconsider that order in that the Board erred in its decision. The Illinois EPA received service of the Board's order on September 8, 2003. In support of this motion, the Illinois EPA states as follows:

I. STANDARD FOR REVIEW

The purpose of a motion for reconsideration is to bring to the court's or Board's attention newly-discovered evidence which was not available at the time of the hearing, changes in the law, or errors in the court's or Board's previous application of the existing law. Vogue Tyre & Rubber Company v. Office of the State Fire Marshal, PCB 95-78 (January 23, 2003), citing to, Citizens Against Regional Landfill v. County Board of Whiteside County, PCB 93-156 (March 11, 1993), and Korogluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 572 N.E.2d 1154 (1st Dist. 1992).

Here, the Illinois EPA argues that the Board incorrectly applied its procedural rules in reviewing the Respondent's motion for summary judgment, and that in fact no further filings are needed in order for the Board to render a decision in this case. There is a sufficient record from which the Board may enter a decision on the merits of the Illinois EPA's motion for summary judgment and Vogue Tyre & Rubber Company's ("Vogue Tyre") response.

II. BACKGROUND

This appeal stems from a decision issued by the Illinois EPA dated June 15, 1995, in which the Illinois EPA determined that remediation conducted at the site in question was not subject to regulation pursuant to Parts 731 or 732 of the Board's regulations (35 Ill. Adm. Code Parts 731 and 732). On February 1, 2002, following a long history of the Petitioner filing motions to stay the proceedings, the Illinois EPA filed a motion to dismiss the appeal for a lack of prosecution. On March 7, 2002, the Board issued an order denying the motion to dismiss but directing the Petitioner to provide a date certain by which a related federal proceeding would be resolved. The Board further directed the Hearing Officer to schedule a hearing if no such date could be provided.

Since that time, a hearing in this matter has yet to be scheduled. However, the parties, through discussions with the Hearing Officer, decided that the matter could be resolved through the filing of a motion for summary judgment. Thus the Illinois EPA filed a motion for summary judgment, and the Petitioner, Vogue Tyre & Rubber Company ("Vogue Tyre"), filed a response.

On September 4, 2003, the Board entered an order in this matter, having considered a motion for summary judgment filed by the Respondent and a response filed by the Petitioner. The Board concluded that the record before the Board at the time included the original petition filed by Vogue Tyre, the Illinois EPA's motion for summary judgment, and Vogue Tyre's response. The Board noted that none of the pleadings were accompanied by affidavits supporting the facts therein, and therefore the Board denied the motion for summary judgment because the record did not include sufficient facts for the Board to determine that the Illinois EPA was entitled to judgment as a matter of law. Vogue Tyre & Rubber Company v. Illinois EPA, PCB 96-10 (September 4, 2003).

III. THERE IS A SUFFICIENT RECORD BEFORE THE BOARD TO RULE UPON THE MOTION FOR SUMMARY JUDGMENT AND RESPONSE

In its order dated September 4, 2003, the Board stated that there was an insufficient record before it to determine whether or not the Illinois EPA is entitled to judgment as a matter

of law. The Board noted that no affidavits had been filed with the motion for summary judgment or response that would otherwise support the facts therein. The Board therefore concluded that it was unable to reach a decision on the merits of the motion and response.

A. The Board's Procedural Regulations Do Not Require That Affidavits Must Accompany Motions For Summary Judgment

In the September 2003 order, the Board cited to Section 101.504 of its procedural rules (35 Ill. Adm. Code 101.504) when noting that none of the pleadings had been accompanied by affidavits supporting the facts included in the pleadings. Section 101.504 provides:

All motions and responses must clearly state the grounds upon which the motion is made and must contain a concise statement of the position or relief sought. Facts asserted that are not of record in the proceeding must be supported by oath, affidavit, or certification in accordance with Section 1-109 of the Code of Civil Procedure [735 ILCS 5/1-109]. A brief or memorandum in support of the motion or response may be included.

A plain reading of Section 101.504 shows that there is no requirement that affidavits must accompany all motions or responses filed before the Board. Rather, the section states that any facts asserted that are *not of record* must be supported by, *inter alia*, an affidavit.

That interpretation is consistent with Illinois law. Under Illinois law, a motion for summary judgment may be filed at any time. Bank of Waukegan v. Epilepsy Foundation of America, 163 Ill. App. 3d 901, 905, 516 N.E.2d 1337, 1339 (2nd Dist. 1987). Further, a party may file a motion for summary judgment with or without supporting affidavits. American Buyers Club of Mt. Vernon, Illinois, Inc. v. Zuber, 57 Ill. App. 3d 899, 900, 373 N.E.2d 786, 788 (5th Dist. 1978).

Thus in this case, the question is whether the facts asserted in both the motion for summary judgment and the response are otherwise found in the record. Of course, that begs the question of what "of record" is. In this case, clearly the record before the Board is made up of the pleadings filed thus far.

B. The Record Consists Of The Pleadings Filed To Date

The Illinois EPA has not filed the administrative record of its decision with the Board to date. However, there is still a record that exists in this case, consisting of the pleadings that have been filed to date. Aside from numerous motions to stay, the record thus consists of the Petition for Review ("Petition") filed by Vogue Tyre on July 18, 1995, the motion for summary judgment filed by the Illinois EPA, the response to that motion filed by Vogue Tyre, and orders entered by the Board and the Hearing Officer.

As can be seen by the motion for summary judgment, all factual matters contained therein were taken from the Petition, with page numbers to the Petition included. As the Illinois EPA stated in the motion, neither party contests that the tanks in question were removed in 1986, the sole fact upon which the Illinois EPA based its denial of Vogue Tyre's reports. Illinois EPA's Motion, p. 3.

C. The Illinois EPA And Vogue Tyre Are In Agreement On All Relevant Facts

Looking to the response filed by Vogue Tyre, the statement is made that the essential facts that are pertinent to the case are not in dispute. Vogue Tyre's Response, p. 1. Both the Petitioner and the Respondent in this case are in total agreement on the relevant facts upon which the Illinois EPA issued its decision under appeal; the only disagreement is to whether the application of the law to those uncontested facts was correct.

The Illinois EPA did not contest the facts contained within the Petition. Rather, those facts were recited back in the motion for summary judgment. Also, the Illinois EPA has not filed any other pleading that is in any other way responsive to the Petition. Therefore, the Illinois EPA has admitted the well-pleaded facts in the Petition. Bank of Waukegan, 163 Ill. App. 3d at 905, 516 N.E.2d at 1339. Therefore, taking into account the statements made by both parties in

the motion for summary judgment and the response, from both the perspective of the Illinois EPA and Vogue Tyre, there is no dispute of any of the facts relevant to the decision under appeal. That said, the Board should have proceeded to a review and decision on the merits of the Illinois EPA's motion. When ruling upon a motion for summary judgment, it is not the court's function to resolve a disputed factual question, but rather to determine whether one exists. Stonitsch v. Laredo Construction Company, 221 Ill. App. 3d 902, 905, 583 N.E.2d 49, 52 (1st Dist. 1991). The Board has not identified any question as to whether a factual dispute exists, only that there are insufficient facts upon which it may determine whether a decision can be issued. The Illinois EPA has already established that there is no requirement that motions for summary judgment have an accompanying affidavit, and therefore the Board should look to the other pleadings to see whether facts can be gleaned upon which a decision may be reached.

The Petition filed by Vogue Tyre contains all the facts relevant to the decision under appeal, and all the facts necessary to review and decide upon the motion for summary judgment. The Illinois EPA effectively admitted to those facts and included citations thereto in its motion for summary judgment. Vogue Tyre then responded that it agreed there was no dispute as to any relevant facts. Simply put, there is no fact in dispute to which the Board can point that remains as an obstacle to the Board rendering a decision in this long-pending matter.

Particularly instructive on this issue is the case of Metropolitan Sanitary District of Greater Chicago v. Pontarelli & Sons, Inc., 7 Ill. App. 3d 829, 288 N.E.2d 905 (1st Dist. 1972). In Pontarelli, the appellate court stated that the purpose of summary judgment is to determine whether there is a genuine issue of fact involved in the case. Ordinarily issues are made up by the pleadings. From an inspection of the pleadings, the court can determine whether or not a factual issue is raised. On summary judgment proceedings, the court considers the pleadings, the

affidavits and the entire record to determine whether or not it can be said that a material dispute exists as to the facts. If no answer or responsive pleading is filed to a complaint, then uncontradicted allegations must be taken as true. Pontarelli, 7 Ill. App. 3d at 838-839, 288 N.E.2d at 911.

Based on the statements by the Illinois EPA and Vogue Tyre, the Board should have concluded that there was no material fact in dispute. There is no requirement that an affidavit accompanies a motion for summary judgment, and in this instance the Illinois EPA's recitation of the relevant facts (and Vogue Tyre's subsequent agreement as to those facts) was taken straight from the Petition itself. All those documents were before the Board at the time of its September 2003 decision. The Illinois EPA respectfully argues that it was erroneous of the Board to conclude that affidavits were necessary, when the parties in their pleadings agreed as to the pertinent facts.

IV. CONCLUSION

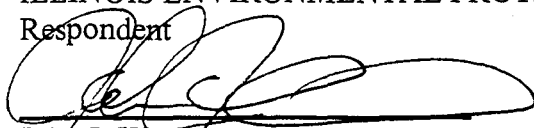
The Board's conclusion in the September 4, 2003 decision was in error, since it was premised on several bases that were inconsistent with the Board's procedural rules and Illinois law. The Board indicated that without supporting affidavits, it was unable to ascertain whether or not a dispute of any material facts existed. The Board's procedural rule does not require an affidavit to accompany a motion for summary judgment, but rather does require an affidavit for any matters that are not of record. Here, the record before the Board consisted in part of the Petition, motion for summary judgment, and response. Through those three documents, it was clearly established that the parties were not in dispute as to any of the material facts of the case. The Illinois EPA respectfully argues that the Board should have concluded that the record before it was sufficient to determine no dispute existed as to any material fact, and then proceeded to a

determination of the merits of the motion for summary judgment. The Illinois EPA asks that the Board reconsider its decision of September 4., 2003, and instead conclude that the record was sufficient to render a decision on the motion for summary judgment. The Illinois EPA further asks that the Board enter a decision in its favor, based on the arguments contained within the motion for summary judgment.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent



John J. Kim
Assistant Counsel
Special Assistant Attorney General
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)
Dated: October 14, 2003

This filing submitted on recycled paper.

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on October 14, 2003, I served true and correct copies of a MOTION FOR RECONSIDERATION, 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:

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

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

Jeffrey E. Schiller
Schuyler, Roche & Zwirner
One Prudential Plaza
Suite 3800
130 East Randolph Street
Chicago, IL 60601

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



John D. Kim
Assistant Counsel
Special Assistant Attorney General
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
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