BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS *ex rel.* LISA MADIGAN, Attorney General of the State of Illinois	)	
Complainant,	)	PCB 2008-007
vs.	)	***VIA ELECTRONIC FILING***
UNION PACIFIC RAILROAD COMPANY, a Delaware corporation,	)	
Respondent.	)	

NOTICE OF FILING

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Please take notice that today, November 6, 2009, I have filed with the Office of the Clerk of the Illinois Pollution Control Board by electronic filing Union Pacific Railroad Company's Reply in Support of Motion for Reconsideration, along with Notice of Filing and Certificate of Service, a copy of which is attached hereto and served upon you.

Respectfully submitted,

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By: /s/ Thomas A. Andreoli
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CERTIFICATE OF SERVICE

I, Thomas A. Andreoli, an attorney, hereby certify that I caused a copy of Union Pacific Railroad Company's Reply in Support of Motion for Reconsideration, along with Notice of Filing and Certificate of Service, to be served upon the service list on November 6, 2009, by regular mail.

/s/ Thomas A. Andreoli
Thomas A. Andreoli

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REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION

Union Pacific Railroad Company ("Union Pacific") has moved the Illinois Pollution Control Board (the "Board") to reconsider its August 20, 2009 Order ("Order") denying Union Pacific's Motion to Sever the State's claims and to require the State to re-file separate actions for each of the two unrelated alleged releases addressed in the Complaint. Union Pacific asked the Board to reconsider the Order on three grounds: *First*, the Board based its ruling upon the materially incorrect finding that the two alleged releases involved "the same NPDES permit and the same facility." Order at 7. Union Pacific submitted new evidence with its Motion for Reconsideration demonstrating that this finding was incorrect. *Second*, the Order relied upon and misapprehended hearsay evidence offered by the State in opposition to the Motion to Sever. *Third*, the Order's conclusion that no material prejudice would result from the State's improper consolidation of claims was in error.

On October 23, 2009, the State filed its Response to the Motion for Reconsideration. Union Pacific has sought leave to file this Reply in order to prevent material prejudice caused by the State's Response. 35 Ill. Admin. Code § 101.500(e). Specifically, this Reply is necessary

because the Response (1) contains inaccurate statements relating to the new evidence now before the Board, (2) misstates the Complaint's allegations and the facts as they are known related to the alleged November 2005 release at the Proviso Yard and the alleged February 2006 release at the Global II intermodal facility, and (3) again fails to provide a proper foundation for the hearsay document offered in opposition to the Motion to Sever. The State's Response also contains highly prejudicial language and argument that is simply inappropriate in connection with the Motion for Reconsideration or in any other context before the Board.

Reply

A. Inaccurate Statements Relating To The New Evidence Before The Board

The State asserts in its Response that "[r]espondent has not presented any new evidence that could serve as a basis for reconsideration." Resp. to Mot. for Reconsideration at 3. This assertion misstates the new evidence now before the Board.

In ruling upon a motion for reconsideration, the Board will consider new evidence to determine whether a prior decision was in error. *See* 35 Ill. Admin. Code § 101.902. In denying Union Pacific's Motion to Sever, the Board found that the two releases alleged in the Complaint involved "the *same* NPDES permit at the *same* facility." Order at 7 (emphasis provided). This finding, which provided a central basis for the Board's conclusion, was in error. The competent evidence before the Board—including the new evidence submitted with Union Pacific's Motion for Reconsideration—indisputably shows that the alleged November 2005 release and the alleged February 2006 release took place on different properties which were governed by separate NPDES permits until at least February 14, 2006 and, based upon the evidence, as late as March 1, 2006.

Specifically, Union Pacific attached to its Motion for Reconsideration authenticated copies of the following:

- NPDES Permit No. IL0002127 (issued Aug. 14, 1996; effective Sept. 1, 1996) (Mot. for Reconsideration, Ex. A);
- General NPDES Stormwater Permit No. ILR003013 (issued May 30, 2003; effective June 1, 2003) (Mot. for Reconsideration, Ex. B);
- NPDES Permit No. IL0002127 (issued Jan. 24, 2006; effective Mar. 1, 2006) (Mot. for Reconsideration, Ex. C);
- the IEPA's termination notice for General NPDES Stormwater Permit No. ILR003013 (dated Feb. 14, 2006) (Mot. for Reconsideration, Ex. D); and
- the IEPA's notice declining to terminate NPDES Permit No. IL0002127 (dated Mar. 10, 2006) (Mot. for Reconsideration, Ex. E).[1]

This evidence, which the State does not (and could not) dispute, shows that prior to February 14, 2006, Union Pacific had a General NPDES Stormwater Permit (No. ILR003013) for the Global II intermodal facility, which was and is a separate property from the Proviso Yard. During this same time period, Union Pacific had a different NPDES Permit (No. IL0002127) for the Proviso Yard, which was and is a separate property from Global II.

In January 2006, Union Pacific requested that the Illinois Environmental Protection Agency (the "IEPA") cancel the existing permits for the two properties and issue a new general NPDES permit covering both of them. Mot. for Reconsideration at 2-3. Union Pacific made this request in conjunction with a program of ongoing improvements (under the IEPA's voluntary Site Remediation Program) to address stormwater originating at the Proviso Yard, certain parts of Global II, and other offsite sources west of the two properties. *Id*.

The IEPA denied Union Pacific's request. Instead, on January 24, 2006, the IEPA reissued NPDES Permit No. IL0002127, effective March 1, 2006. Mot. for Reconsideration,

[1] Union Pacific verified that these exhibits are true and correct copies of documents received by Union Pacific from the IEPA on or about the referenced dates. Mot. for Reconsideration at 3. These documents are competent evidence for purposes of Union Pacific's Motion to Sever and Motion for Reconsideration under Section 10-40(a) of the Administrative Procedure Act, 5 ILCS 100/10-40, as public records, and as admissions by the State.

Ex. C. On February 14, 2006, the IEPA canceled General NPDES Stormwater Permit No. ILR003013 applicable to Global II. *Id.*, Ex. D. Then, on March 10, 2006, the IEPA notified Union Pacific that it had declined to terminate NPDES Permit No. IL0002127. *Id.*, Ex. E. In lieu of the railroad's request, the IEPA stated that NPDES Permit No. IL0002127 would remain in effect for the Proviso Yard, while Global II's general stormwater permit would be terminated. *Id.*, Ex. E. In that March 10, 2006 notice, the IEPA specifically identified Global II and the Proviso Yard as separate "*facilities*." *Id.* (emphasis provided).

The competent evidence, including the new evidence submitted with the Motion for Reconsideration, shows that the alleged November 2005 release and the alleged February 2006 release did not involve "the same NPDES permit" or "the same facility." *Cf.* Order at 7. Global II and the Proviso Yard are different properties; they were permitted under separate NPDES permits until at least February 14, 2006 and as late as March 1, 2006, when reissued NPDES Permit No. IL0002127 took effect. As demonstrated in Union Pacific's Motion for Reconsideration, the Order's finding on this point was in error. The State's assertion that Union Pacific has not presented new evidence is wrong and, in effect, would deny the Board the opportunity to rule on the Motion for Severance based upon a correct set of facts.

B. Misstatement Of The Complaint's Allegations And Facts As They Are Known

The State's Response contains the following misstatement of the facts before the Board related to the alleged November 2005 release at the Proviso Yard and the alleged February 2006 release at Global II:

> In one of the incidents, the runoff ended up in 301 W. Lake Street, Northlake, Illinois, property that Respondent owns, operates and controls 24/7 for its business. In the other incident, the runoff ended up in 5050 W. Lake Street, Northlake, Illinois, a property that Respondent owns, operates and controls 24/7 for the same business. Thus, Respondent is arguing that two incidents, which resulted from the failure of the same oil/water separator owned,

> operated and controlled by Respondent, which led to runoff that discharged to two places owned, operated, and controlled by Respondent, which occurred less than three months apart, are so different so as to require the Board to sever the claims.

Resp. to Mot. for Reconsideration at 3.

This misstatement is inaccurate and misleading in several respects. At a basic level, the State has flip-flopped the chronology and misidentified the location of the two alleged releases addressed in the Complaint. The first alleged release occurred in November 2005, purportedly at the Proviso Yard, which is located at 5050 W. Lake St., in Melrose Park, Ill., *not* Northlake. Compl. at ¶¶ 6-8; *see* Mem. of Law in Support of Mot. to Sever at ¶¶ 1-6. The second and unrelated alleged release occurred in February 2006 at the Global II intermodal facility located at 301 W. Lake St. in Northlake, Ill. While the locations are misidentified, the State's concession in its Response that the alleged releases involved two separate properties should be considered for purposes of the Motion to Sever and the instant Motion for Reconsideration.

At a more substantive level, the State has contradicted the Complaints' allegations and the facts as they are known. The State has never actually alleged that the "two incidents … *resulted* from the failure of the same oil/water separator" or that the failure of the oil/water separator "led to runoff that *discharged to two places*." *Compare* Resp. to Mot. for Reconsideration at 3 and Complaint at ¶¶ 6-13. The weir structure was not the *cause* of the alleged pollution. That puts it backward at best. The weir structure drains a broad area including the Proviso Yard, parts of Global II, the Tri-State Tollway, and surrounding municipalities. The weir structure did not cause the alleged releases; it is simply where some residue (a "sheen") of fuel oil purportedly caused or allowed to be released into the environment at two separate times, on two separate properties, and based upon entirely unrelated facts and circumstances ultimately

discharged.[2] The mere existence of a common downstream outfall—shared by many other business, government facilities and communities—does not provide a basis for consolidating claims which have no other connection whatsoever.

C. Failure To Provide A Proper Foundation For Hearsay Evidence

In its Motion for Reconsideration, Union Pacific showed that the State's unverified and misleading assertions that Global II and the Proviso Yard are "the same facility" resulted in error. Mot. for Reconsideration at 4-5. In particular, Union Pacific objected to the State's use of, and the Board's mistaken reliance upon, a June 6, 2006 letter from Union Pacific to the IEPA for the proposition that Global II and the Proviso Yard are "located on the same parcel of land, just in different locations on the parcel." Resp. in Opp'n to Mot. to Sever at 2 (citing Ex. A). As the Order recognized, the State provided no other "evidence" in opposition to the verified facts presented in support of Union Pacific's Motion to Sever. *See* Order at 6. Those facts established unambiguously that Global II and the Proviso Yard are not the same facility.

The State now seeks to provide a foundation for use of the June 6, 2006 letter as a business record. The June 6, 2006 letter, however, simply is not a business record of the IEPA. *See* Mot. for Reconsideration at 4-5. The affidavit attached to the State's Response to the Motion for Reconsideration (as Ex. A) does not provide a proper business record foundation. The document is not even complete on its face and should not be used for the purpose offered by

[2] Moreover, the alleged February 2006 release at Global II did not involve stormwater "runoff" at all. *See* Compl. at ¶¶ 9-13; Mot. to Sever at ¶ 7, n. 1. It involved an actual accidental fuel oil spill by a non-railroad contractor at the intermodal facility, which required and received an emergency response. *Id*. As discussed in the Motion to Sever, the Complaint does not contain any allegations of any actual fuel oil release at the Proviso Yard in November 2005. There was none. Mot. to Sever at ¶ 5. Rather, the Complaint merely alleges that the IEPA was "notified … that there had been a recent fuel oil release" at the Proviso Yard. Compl. at ¶ 6. The Complaint does not identify any cause or source for the alleged pollution.

the State in its current form or otherwise.[3] Union Pacific also objects to the State's attempt in its Response to the Motion for Reconsideration to use the June 6, 2006 letter (which post-dated the alleged February 2006 release and the cancellation of General NPDES Stormwater Permit No. ILR003013) as impermissible evidence of subsequent remedial measures. *See* Resp. to Mot. for Reconsideration at 8.

The State further asserts that "[e]ven if the letter should not have been relied on, the Board could appropriately rule that the violations occurred at a single site." Resp. to Mot. for Reconsideration at 4. This self-serving assertion is not well-founded. Union Pacific provided competent evidence that the Proviso Yard and the Global II intermodal facility are not the same facility.[4] Absent some competent contrary evidence, which the State has not provided and cannot provide, Union Pacific is entitled to rely upon the evidentiary protections of the Board's adjudicatory processes. 83 Ill. Admin. Code § 504.

D. Inappropriate And Prejudicial Language And Argument

The remainder of the State's Response is merely argument and merits no reply, but for one statement. In its Response, the State asserts that Union Pacific's request to sever the State's claims is "*a malicious assault on the intellectual integrity of the Board*." Resp. to Mot. for Reconsideration at 6 (emphasis provided). This form of *ad hominem* attack is highly prejudicial

[3] Even if the June 6, 2009 letter were deemed admissible on other grounds, the letter does not state nor does it stand for the proposition, as mischaracterized by the State, that the Proviso Yard and the Global II intermodal facility are "located on the same parcel of land, just in different locations on the parcel." *See* Resp. in Opp'n to Mot. to Sever at 2.

[4] The evidence shows, *inter alia*, that Global II and the Proviso Yard at all relevant times were "two separate properties" (Mem. of Law in Support of Mot. to Sever at ¶¶ 1-3); with separate IEPA generator ID numbers (Mot. for Reconsideration at 4); were separately fenced and located in and accessed through different street addresses in different municipalities (Reply in Support of Mot. To Sever at 4); served different purposes (*Id*.); were staffed with different personnel (*Id*.); reported separately to the IEPA on stormwater management matters (*Id.*); and were separately permitted for stormwater discharges at all times prior to February 14, 2006 and as late as March 1, 2006 (*see* discussion *supra*).

and simply inappropriate in response to Union Pacific's Motion for Reconsideration or in any context before the Board. The State's assertion is also, again, simply incorrect.

Union Pacific has sought severance in good faith, because the State for its own purposes has improperly consolidated claims in this action (1) which the State pursued at all times under separate violation notices and classifications prior to the Complaint; (2) which arose from two unrelated alleged releases, on two separate properties, at two different times; and (3) which indisputably have no common cause. The alleged November 2005 release at the Proviso Yard and the alleged February 2006 release at Global II are not analogous, in the State's words, to "months of fecal coli form effluent violations caused by inadequate chlorination" by a publicly owned treatment works. This flawed analogy is contrary to the Complaint's allegations, the facts as they are known, and common sense. *See* State Resp. in Opp'n to Mot. to Sever at 3.

Moreover, consolidation unavoidably will prejudice Union Pacific's ability to defend these unrelated claims. It will allow the State to obtain an impermissible negative inference against Union Pacific as to either the alleged November 2005 release or the alleged February 2006 release, despite the Board's best efforts to address these unrelated claims separately. (The State has assured as much by combining the two unrelated alleged releases addressed by the Complaint within the same counts of the pleading.) Consolidation also will prejudice a fair hearing because the State by its admission is seeking liability and damages based upon a "pattern of violations" which was not alleged and does not exist. Resp. in Opp'n to Mot. to Sever at 3. As the Order recognized, the alleged releases also would involve different witnesses and potential evidence. Order at 6. Severance is both appropriate and essential to the convenient, expeditious and completer determination of the issues.

In sum, the State should be required to put on its proof, and Union Pacific should have the opportunity to defend the alleged November 2005 release at the Proviso Yard and the unrelated alleged February 2006 release at Global II each on its own merits. There is nothing malicious in this request. It is only a plea for fairness.

Conclusion

WHEREFORE, for these reasons, Union Pacific Railroad Company respectfully requests that the Illinois Pollution Control Board grant its Motion for Reconsideration.

Dated: November 6, 2009

Respectfully submitted,

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