

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,

Complainant,

v.

PCB NO. 12-21

ALTIVITY PACKAGING, LLC,
a Delaware limited liability company,
INTRA-PLANT MAINTENANCE CORPORATION,
an Illinois corporation,
IRONHUSTLER EXCAVATING, INC.,
an Illinois corporation, and
RON BRIGHT, d/b/a Quarter Construction,

Respondents.

NOTICE OF ELECTRONIC FILING

To: See Attached Service List

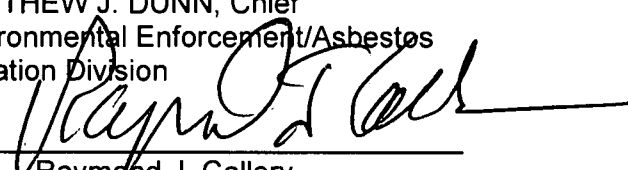
PLEASE TAKE NOTICE that on September 4, 2013, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, c/o John T. Therriault, Assistant Clerk, James R. Thompson Center, 100 W. Randolph St., Ste. 11-500, Chicago, IL 60601, COMPLAINANT'S RESPONSE TO THE MOTION TO RECONSIDER AND MODIFY BOARD ORDER, a copy of which is attached hereto and herewith served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN,
Attorney General of the
State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

BY: 
Raymond J. Callery
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500 South Second Street
Springfield, Illinois 62706
217/782-9031
Dated: September 4, 2013

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Complainant,)
)
 v.)
)
 ALTIVITY PACKAGING, L.L.C.,)
 a Delaware limited liability company,)
 INTRA-PLANT MAINTENANCE)
 CORPORATION, an Illinois corporation,)
 IRONHUSTLER EXCAVATING, INC.,)
 an Illinois corporation, and RON BRIGHT,)
 d/b/a QUARTER CONSTRUCTION,)
)
 Respondents.)

PCB No. 12-021
(Enforcement - Land)

COMPLAINANT'S RESPONSE TO THE MOTION TO RECONSIDER AND MODIFY BOARD ORDER

Complainant, PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, Attorney General of the State of Illinois, replies to the Motion to Reconsider and Modify Board Order filed by Respondents IRONHUSTLER EXCAVATING, INC. and RON BRIGHT ("Respondents"), as follows:

A. BACKGROUND

On August 26, 2013, Respondents filed their Motion to Reconsider and Modify Board Order ("Motion to Reconsider"). This motion seeks to overturn the Illinois Pollution Control Board's ("Board") Opinion and Order of July 25, 2013 ("Board's Order") granting the Complainant's Motion for Summary Judgment which had been pending since August of last year. Also on August 26, 2013, Respondents filed their Motion for Leave to File *Instante*r and their Objections to Complainant's Motion for Summary Judgment and Cross-Motion for Summary Judgment ("Objections to Motion for Summary

Judgment”).

The Motion for Summary Judgment was filed on August 10, 2012. Complainant initially agreed to delay hearing on the Motion for Summary Judgment so that Respondents' counsel could take certain discovery depositions. The discovery depositions were taken on November 28, 2012 (Jason Thorp) and on November 29, 2012 (Paul Purseglove). On January 8, 2013, the deadline for Respondents to respond to the Motion for Summary Judgment was set for January 31, 2012.

On January 29, 2012, Complainant, at Respondents' request, agreed to extend the response deadline until February 28, 2013. On February 26, 2013, Respondents filed their First Motion for Extension of Time seeking to extend the deadline for responding to the Motion for Summary Judgment until March 28, 2013. On March 11, 2013, the Hearing Officer extended the Respondents' deadline through March 28, 2013 without objection.

On March 27, 2013, the Respondents filed their Second Motion for Extension of Time and the Complainant objected. On March 28, 2013, the Hearing Officer denied the Second Motion for Extension of time and noted that the Complainant had already agreed to two earlier continuances. On July 8, 2013, the Respondents informed the Hearing Officer that their response would be filed within thirty days.

B. ARGUMENT

Section 101.902 of the Board's General Rules provides the standard for motions for reconsideration. "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 was in error." 35 Ill. Adm. Code 101.902. In *Citizens Against Regional Landfill v. County Board of Whiteside* the Board observed that "the intended purpose of a motion for reconsideration is to bring to the court's attention *newly discovered* evidence which was *not available at the time of hearing*, changes in the law or errors in "the court's previous application of the existing law", PCB 92-156, slip op. at 2 (Mar. 11, 1993) (emphasis added) (citing *Korogluyan v. Chicago Title & Trust Co.*, 213 Ill.App.3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1992)).

In order to prevail on a motion to reconsider, a party must provide *new information* which was *not available* at the time of a Board decision, show that there has been a change in law which puts the Board's decision in error or prove that the Board misapplied the law when making its decision. Respondents here have failed to satisfy any one of these requirements.

1. Respondents Have Provided No New Evidence Not Previously Available

The Respondents have provided no new evidence which was not available well before the Board's decision on July 25, 2013. Respondents attached twelve exhibits to their now offered Objections to Motion for Summary Judgment.¹ The first eight exhibits were all generated in 2008. The first three were actually filed as exhibits with the Motion for Summary Judgment in August 2012. Respondents' Exhibit 4 is the April 22, 2008 report of Michael Rapps. Respondents' Exhibit 5 is a May 28, 2008 letter from Respondents' counsel to the Illinois Environmental Protection Agency ("Illinois EPA").

¹ Should the Board grant Respondents' Motion to Reconsider Complainant intends to file a full reply to the Objections to Motion for Summary Judgment.

Respondents' Exhibit 9 is a copy of the transcript of the discovery deposition of Jason Thorp. Respondents' Exhibit 10 is a copy of the transcript of the discovery deposition of Paul Purselove. These depositions were taken in November 2012.

The only arguably "new" evidence Respondents have submitted are the August 16, 2013 Affidavit of Ron Bright and the August 23, 2013 Affidavit of Michael Rapps. These affidavits, however, do not constitute "newly discovered evidence." Mr. Bright is, of course, a respondent in this matter. His original version of the events relative to the Complaint is contained in his letter of March 19, 2008 which was filed with the Motion for Summary Judgment in August 2012 as Exhibit A to Attachment 3. Mr. Bright's new affidavit does not add anything of significance. This affidavit merely expands on his recollection of events which occurred in 2008.

As stated in his new affidavit, Mr. Rapps has been a consultant for Respondents since at least April 2008. Other than vouching for Mr. Bright's August 23, 2013 affidavit, there is no indication that Mr. Rapps has anything new to present as to this case. There is no suggestion that he has returned to the site since his visit in 2008 or reviewed any scientific data generated since 2008. The new Rapps affidavit appears primarily to be a rehash of Mr. Rapp's April 22, 2008 report and counsel for Respondents' May 28, 2008 letter to the Illinois EPA. The issue of sampling methodology concerning the grab samples taken at the site was discussed in detail at Jason Thorp's deposition in November 2012. Neither Mr. Bright's affidavit nor Mr. Rapps' affidavit can be characterized as newly discovered evidence.

2. There Has Been No Relevant Change in the Law

In the Motion to Reconsider, Respondents allude to "pending action by the U.S. Supreme Court" which was "expected to further illuminate a particular point the Respondents wished to raise . . ." Motion to Reconsider at page 2. In the Objections to Motion for Summary Judgment now being tendered by the Respondents, the case of *Peugh v. United States*, 133 S. Ct. 2072 (2013), is cited at page 14. *Peugh* is an U. S. Supreme Court decision decided on June 10, 2013 overturning a criminal conviction for bank fraud based upon the application of the *Ex Post Facto* Clause of the U.S. Constitution, U.S.C.A. Const. Art. I, § 9, cl. 3. *Peugh* held that the *Ex Post Facto* Clause is violated when a criminal defendant is sentenced under current federal sentencing guidelines providing a higher sentence range than the federal guidelines in effect at the time of the criminal offense. 133 S. Ct. at 2088.

The *Peugh* decision does not have any relevance to this case. The Respondents at page 14 of their Objections to Motion for Summary Judgment attempt a strained argument relating to the Board's clean construction demolition debris ("CCDD") regulations and the *ex post facto* doctrine. Respondents suggest that the Complaint somehow rests on the retroactive application of the Board's CCDD regulations. Complainant, however, has pleaded no violations of 35 Ill. Adm. Code Part 1100. The only violations alleged in the Complaint are of Section 21(a) of the Act (open dumping of waste) and Section 21(e) of the Act (disposal of waste at a site not meeting the requirements of the Act or of the Board's regulations), 415 ILCS 5/21(a) and (e) (2012). The decision in *Peugh* has no bearing on this case. The *ex post facto* doctrine has no bearing on this case. Respondents have cited no other purported change in the law.

3. The Board Correctly Applied the Law

The Complaint does not allege any violations of 12(a) of the Act (water pollution) or of 12(d) of the Act (water pollution hazard), 415 ILCS 12(a) and (d) (2012). The Complaint does not allege ground water contamination. Complainant was not required to prove any of those matters to prevail. The only issues in this case were: 1) was the miscellaneous material excavated from the Altivity construction site and dumped at the Close quarry "waste" under the Act and 2) were the Respondents legally responsible for the improper disposal of this material. There never was any genuine factual dispute regarding these issues.

The excavated material or "miscellaneous material" was "waste." Testing Service Corporation ("TSC") was retained to provide a soil condition report concerning the soil at the proposed Altivity construction site. TSC determined that the miscellaneous material at the excavation site included "deposits of silt, sand and gravel along with notable amounts of cinders and brick." Because of the "miscellaneous debris within the fill," TSC recommended the material not be reused. "Once excavated and removed, the material became 'discarded material,' thereby falling within the definition of 'waste' under the Act. See 415 ILCS 5/3.535 (2012)." Board's Order at p. 7.

The miscellaneous material was not returned to the economic mainstream. The Board's Order concluded: ". . . other than Bright's conflicting statements that the material is 'being beneficially re-used by Bright as road base' and 'this fill was to help raise the ground level to slop toward existing pond' the record provides no indication that Bright contemplated returning the material to the economic mainstream." Board Order at p. 7.

This conclusion is in keeping with the Court's decision in *People v. Lincoln, Ltd.*, 383 Ill. App. 3d 198, 206, 890 N.E.2d 975, 982 (1st Dist. 2008) (Lincoln did not return the material to the stream of commerce when it permanently kept the material on site for its own use). Even if Mr. Bright's affidavit had been presented in a timely manner the outcome would be the same.

The Respondents were legally responsible for the improper disposal of the miscellaneous material at the Close Quarry. It is undisputed that Bright was the operator of the Close Quarry in January of 2008 and accepted the miscellaneous material by allowing Ironhustler to dispose of it there. See *Perkinson v. Pollution Control Board*, 187 Ill. App. 3d 689, 695, 543 N.E.2d 901, 904 (3rd Dist. 1989) (control over premises on which disposal took place is sufficient to find violation). Board Order at p. 7. By contracting to construct a wastewater treatment plant for Alitivity, Intra-Plant took control over those activities necessary to complete the project including the disposal of the excavated material. Ironhustler admitted in its answer to the Complaint that Intra-Plant subcontracted the excavation and disposal of the miscellaneous material to it. An off-site generator such as Intra-Plant or Ironhustler may cause open dumping within the plain meaning of Section 21 of the Act. See *People ex rel. Ryan v. McFalls*, 313 Ill. App. 3d 223, 227, 728 N.E. 2d 1152, 1155 (3rd Dist. 2000). Board's Order at p. 7.

Based upon the record and the law, the Board correctly applied the law in its decision of July 25, 2013 allowing the Motion for Summary Judgment.

C. CONCLUSION

Respondents were provided with more than ample opportunity to respond to the

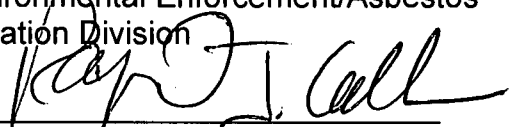
Motion for Summary Judgment but failed to do so in a timely manner. Respondents represented to the Hearing Officer on July 8, 2013 that a response to the Motion for Summary Judgment would be filed within thirty days. The Hearing Officer did not, however, modify her earlier order denying Respondents' request for a third extension of time. It must be noted that the Bright affidavit is dated August 16, 2013 and the Rapps affidavit is dated August 23, 2013. Respondents did not have a response ready to file within thirty days of July 8, 2013 hearing.

For the above and foregoing reasons, the Board should deny the Respondents' Motion to Reconsider and reaffirm the decision it made in the July 25, 2013 Opinion and Order.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS
LISA MADIGAN
ATTORNEY GENERAL

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

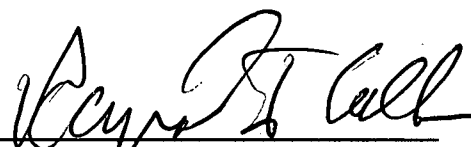
BY: 
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Dated: September 4, 2013.

CERTIFICATE OF SERVICE

I hereby certify that I did on September 4, 2013, cause to be served by First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box in Springfield, Illinois, a true and correct copy of the following instruments entitled NOTICE OF ELECTRONIC FILING and COMPLAINANT'S RESPONSE TO THE MOTION TO RECONSIDER AND MODIFY BOARD ORDER upon the persons listed on the Service List.



Raymond V. Callery
Assistant Attorney General

This filing is submitted on recycled paper.

SERVICE LIST

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