BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

PAK-AGS, Inc, Petitioner,	)	
v.	)	PCB 2015-014
	)	(UST Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

NOTICE

John Therriault
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

Carol Webb, Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P. O. Box 19274
Springfield, IL 62794-9274

Patrick Shaw
Mohan, Alewelt, Prillaman & Adami
1 North Old Capitol Plaza, Suite 325
Springfield, IL 62701-1323

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

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

Melanie A. Jarvis
Assistant Counsel
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: January 15, 2015

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

PAK-AGS, Inc,	)	
Petitioner,	)	
	)	
v.	)	PCB 2015-014
	)	(UST Appeal)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
Respondent.	)	

MOTION FOR RECONSIDERATION

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, Melanie A. Jarvis, Assistant Counsel and Special Assistant Attorney General, and, pursuant to 35 Ill. Adm. Code 101.520 and 101.902, hereby responds to Petitioner's Motion for Modification of Interim Order and Authorization of Payment of Attorney's Fees as Costs of Corrective Action, and respectfully moves the Board to reconsider its December 4, 2014 interim order, in that the Board erred in its application of existing law. In support of said motion, the Illinois EPA states as follows:

I. STANDARD FOR REVIEW

In reviewing a motion for reconsideration, the Board will consider factors including, but not limited to, error in the previous decision and facts in the record that were overlooked. *Dewey's Service, Inc. v. IEPA*, PCB 99-107 (May 6, 1999). The intended purpose of a motion for reconsideration is to bring to the court's attention, inter alia, errors in the court's previous application of the existing law. *Broderick Teaming Company v. IEPA*, PCB 00-187 (June 21, 2001), p. 1 and *Citizens Against Regional Landfill v. County Board of Whiteside County*, PCB 93-156 (March 11, 1993); both citing to, *Korogluyan v. Chicago Title & Trust Co.*, 213 Ill. App. 3d 622, 572 N.E.2d 1154 (1st Dist. 1992).

II. THE BOARD ERRED IN ITS ORDER AND HAS MISSAPPLIED APPLICABLE LAW

A. Background

The Board, on December 4, 2014, issued an *interim* opinion and Order in the above captioned case. It is from this *interim* opinion that the Agency seeks reconsideration.

B. Argument – Misapplication of Applicable Law

In the *interim* opinion the Board found that Section 57.8 does not authorize the Agency to deny PAK-AGS' application for payment on incident 20110945 based upon a lack of supporting documentation regarding incident 20050545. (*Interim* opinion at 19) The Board reached this finding based upon the rational that Budget review pursuant to Section 57.7 of the Act was the appropriate time for the Agency to determine if documentation supporting PAK-AGS' Stage 1 Site Investigation Actual Costs was sufficient for plan and budget approval. (*Interim* opinion at 19) The Board further considered the facts that within the Stage 1 Plan/Budget certification, the Agency confirmed with EMI that the Stage 1 Plan/Budget was not addressing it as part of the site investigation or remediation. (Interim opinion at 19, R. at 322-323) Thereafter, the Board reasoned that "…Section 57.8(a)(1) of the Act specifically limits the Agency's review when payment is sought for an approved plan or budget to 'auditing for adherence to the corrective action measures in the proposal.'" (*Interim* opinion at 19; Board citing to *Evergreen FS v. IEPA*, PCB 11-51, 12-61)

However, the Board fails to consider the argument presented by the Agency within the pleadings as well as the provisions of Section 57.8 to which the Board referenced.

The facts of this case are clear from the record. An incident occurred in 2005 on-site. An incident number was assigned incident number 20050545. The OSFM has issued no E&D for this

incident. Petitioner registered with OSFM as the owner and operator for the tanks on-site, for which there was a clear indication that incident 20050545 was applicable. Petitioner pulled tanks. Petitioner reported a release. This release was assigned incident number 20110945. Petitioner went to OSFM and requested an E&D for 20110945 which was assigned a deductible of $5,000. Petitioner ignored incident 20050545. Petitioner pulls tanks. Petitioner files with the Agency its Stage 1 Site Investigation Action Costs plan. The Illinois EPA notes the prior incident. Petitioner throughout the plan acknowledges the prior release. Petitioner submits its application for payment.

Now, consider the fact that the Board, at the axis of the finding within the December 4, 2014 *interim* opinion, is a Board reasoning and ruling that Section 57.8 (that entire Section) does not authorize the Agency to deny an application for payment of costs based upon a lack of supporting documentation for another incident on-site. The Agency believes this is contrary to the express language of the Act and regulations. The Agency would like the Board to consider the following and consider the misapplication of the law that results from the *interim* opinion.

Initially, as noted above within the facts presented by this situation, the Agency did indeed specifically note the prior incident to Petitioner's consultant. The Petitioner chose not to consider that incident in its Plan for State 1 Site Investigation. If the Board is saying that the Agency must consider deductibles for all incidents at this stage, the Agency does not find support for such a consideration at this stage of the process. The Agency does recognize that there is a requirement within the Board's regulations stating that any owner or operator intending to seek payment from the Fund, must submit a site investigation budget with corresponding site investigation plan. That budget must include a copy of the eligibility and deductibility determination ("E&D") of the OSFM. (See: 35 Ill. Adm. Code 734.310) Yet, this is not the only place an owner or operator is required to

submit such, including Section 57.8 (Payment). And, to be clear, the Board did not mean to limit the owner or operator to a past, present or future owner or operator – it provided that ANY owner or operator seeking "payment" was the subject of the provision. So, as becomes obvious, Petitioner's contention that it is no longer the owner of the property or it wasn't the owner or operator in 2005 is meaningless – as argued by the Agency.

However, looking at the provisions within Section 57.7 (budget and plan stage) and the corresponding regulations, it is difficult to imagine requiring an E&D from an owner or operator at this stage. Most significantly, in a review of the Act, specifically the provisions regarding the Agency's review of a site investigation plan and budget, nothing directly gives the Agency the right to review the deductible at that stage in the process. Reviewing a deductible during this stage doesn't add to the determinations the Agency will make under the review under this Section (site investigation and budget for that).

So where does the concept of reviewing an applicable deductible appear within the Act? The concept of deductibles appears most often and most clearly and significantly within Section 57.8 and the corresponding payment provisions of the regulations. Yes, the "PAYMENT" phase of the process. This is the very stage that the Board claims is too late for a review. A mere two subsections away from subsection (a)(1) (upon which the Board pinned its reasoning and ruling) is subsection Section 57.8(a)(4) which states:

> (4) Any deductible, as determined pursuant to the Office of the State Fire Marshal's eligibility and deductibility final determination in accordance with Section 57.9, shall be subtracted from any payment invoice paid to an eligible owner or operator. Only one deductible shall apply per underground storage tank site.
>
> (See: 415 ILCS 5/57.8(a)(4))

Therefore, according to the Act, ***any*** deductible shall be subtracted from ***any payment*** invoice paid to an eligible owner or operator and limits this providing that only one deductible shall apply per underground storage tank site. As such, it is within this very stage of the process, the "payment" phase that the law directs the Agency, when conducting itself under a Section 57.8 review to consider – ***prior to payment of any invoice*** – what deductible shall apply. And for that matter, the Board's own regulations under the payment section provide that a complete application for payment must contain a copy of the Office of State Fire Marshall ("OSFM") or Agency Eligibility and Deductible determination. Within "SUBPART F: PAYMENT FROM THE FUND" Subpart, the regulations provide that:

> Section 734.615 Authorization for Payment, Priority List
> …
> b) The following rules must apply regarding deductibles:
> …
> 4) Where more than one deductible determination is made, the higher deductible must apply.

(See: 35 Ill. Adm. Code 734.615)

The Agency would note that it is within the PAYMENT provision that the Board expressly provides that "where more than one deductible determination is made…" acknowledging that the Agency will face situations where more than one applies and expressing an intent for the Agency to be allowed to review such situations at this point in the process.

The Illinois EPA is charged with reviewing and assessing payments and invoices from the Fund. A critical element is policing the deductible that applies. The Agency is told that prior to PAYMENT OF ANY INVOICE, subtract the deductible – and only one deductible shall apply per site. Then, the Agency is deemed responsible for making sure that the higher deductible per site applies. Both of these responsibilities are included within the "Payment" provisions of the Act and

regulation. However, based upon a strained interpretation of a single subsection within the very same Section (57.8) the Agency is now precluded from this review at this point.

Does this have a practical effect? Yes. As noted above, there is little or no authority by which the Agency could reject a budget based upon a lack of information on a deductible on-site. Further, in practice, the submission of an OSFM determination at that stage is used by the Agency to assist in the accomplishment of those tasks outline within that Section, reviewing the Site Investigation and Budget for such costs. Staff would review a determination to see if the release under review would have an eligibility finding, i.e., are all of the tanks associated with the release eligible, if not, no costs could be recovered for such. It is at the PAYMENT stage where the Illinois EPA can consider all incidents and deductibles and apply the higher of such.

Why is this important at the payment stage? There are several reasons. Firstly, the Act and the regulations place this review squarely within the language of Section 57.8 and accompanying regulations. Secondly, it is at this stage in the process that the Agency may require additional information based upon a finding of lack of supporting documentation (as the Agency indeed did in this matter). Third, it is at this stage where the owner or operator actually seeks payment from the Fund and at which the most strident review should be held. Prior reviews, Early Action, site investigation/corrective action plans, budgets are primarily technical in nature as the language of the Act and regulations indicates. The "payment" stage is designed for Agency review of costs as well as deductibles and insuring the higher deductible applies (Section 734.615 providing that one is controlling per site (57.8(a)(4)) or that indeed the Agency review "any deductible" against "any payment invoice" (Section 57.8(a)(4)).

Moreover, it is critical to recognize that there appears to be nothing within the Act or regulations requires an owner or operator to elect to go under the program and seek

reimbursement from the Fund. Nothing in the Act requires the owner or operator to seek an E&D from OSFM. (See: Section 57.9(c)) It is logical that the process works by not requiring an owner or operator to seek an E&D, but once that owner or operator seeks payment from the Fund, they would be required to submit all E&D's for each incident on the site so that the Agency can review and apply the correct deductible to payments that the owner or operator is seeking payment.

This matter boils down to relatively simple facts. Petitioner seeks reimbursement from the Fund. The Agency is charged with the critical duty of policing payment from the Fund. Petitioner sought status from OSFM as the registered owner and operator of tanks. Petitioner knows of the 2005 incident. Petitioner has not presented evidence that it sought an E&D from OSFM. Petitioner now seeks payment from the Fund. The Agency requires additional information on the earlier incident, an E&D from OSFM to be presented by Petitioner prior to payment. And, finally, the regulations and Act are designed to require this review at the "payment" phase of the process. As such, the Agency seeks the Board's reconsideration of the December 4, 2014, *interim* opinion.

C. <u>Argument – Attorney Fees</u>

The Illinois EPA objects to the assessment of attorney fees. The Petitioner's attorney requested a hearing in this case, which turned out to be nothing more than a scheduling conference that could have been held over the phone. There was **<u>absolutely no need</u>** for a hearing in this case. Basically in order to get around prior rulings of the Board that held legal fees could not be assessed after motions for summary judgment, Petitioner's attorney decided to hold "Pseudo" hearings where no witness are called, little to no documents are presented, and there are no opening or closing arguments. These "hearings" are for one purpose only. Do these hearings advance the case? **NO.** These hearings do nothing but advance the Petitioner's attorney's wallet. The costs to the Board and the Agency in such instances are not acceptable.

Further, in *In re Marriage of Tiballi,* 2014 IL 116319, 6 N.E.3d 172 (2014), the Illinois Supreme Court, in citing, *Vicencio v. Lincoln-Way Builders, Inc.,* 204 Ill. 2d 2995, 300. 273 Ill.Dec. 390, 789 N.E.2d 290 (2003), stated that statutes allowing the recovery of costs are in derogation of the common law and therefore must be narrowly construed.

In *L. Keller Oil Properties/Farina v. IEPA*, PCB 06-189, 06-190 (Consolidated) (July 25, 2013), the Board stated that Section 57.8(l) of the Act provides that the Board "may authorize payment of legal fees" only if the owner or operator "prevails before the Board" under Title XVI of the Act. 415 ILCS 5/57.8(l) (2010); *see* 35 Ill. Adm. Code 732.606(g). This subsection of the Act provides for the reimbursement of legal fees incurred in prevailing before the Board, and thus it constitutes a "fee-shifting" statute. *See Brundidge, et al. v. Glendale Federal Bank, F.S.B.*, 168 Ill.2d 235, 245, 659 N.E.2d 909, 914 (1995). The Board must strictly construe fee-shifting statutes, and the amount of fees to be awarded lies within the broad discretionary powers of the Board. *See Globalcom, Inc. v. Illinois Comm. Comm'n*., 347 Ill. App. 3d 592, 618, 806 N.E.2d 1194, 1214 (citations omitted). The Board has stated that "[t]he plain language of Section 57.8(l) of the Act … guides the Board in [its] analysis of when to allow the prevailing party to receive legal defense costs." *Illinois Ayers Oil Co*., PCB 03-214, slip op. at 7. Therefore, the Board here must determine whether the record demonstrates that Keller has prevailed before the Board in seeking payment under Title XVI. *See* 415 ILCS 5/57.8(l) (2010). In *Keller* the Board found that the Petitioner had not prevailed before the Board.

It is within the Board's discretion to award fees, even after a full hearing is held in a case. In this instance, the Board should take into account the precedent this case sets when a pseudo hearing is held when a case could have been decided via Summary Judgment just in order to be awarded attorney fees. Certainly when a party holds a pseudo hearing, without advancing the case,

as a way to in effect get awarded legal costs for filing motions for summary judgments, the statute should be narrowly construed and attorney fees not awarded as a reward for such a practice.

III. CONCLUSION

The Illinois EPA reserves the right to appeal all issues in the Board's rulings. The Illinois EPA requests that the Board reconsider its December 4, 2014 decision as specified in the above argument.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent

_____

Melanie A. Jarvis
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: January 15, 2015

This filing submitted on recycled paper.

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on January 15, 2015, I served true and correct copies of a MOTION FOR RECONSIDERATION via the Board's COOL system and 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:

John Therriault, Acting Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

Carol Webb, Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P. O. Box 19274
Springfield, IL 62794-9274

Patrick Shaw
Fred C. Prillaman
Mohan, Alewelt, Prillaman & Adami
1 North Old Capitol Plaza, Suite 325
Springfield, IL 62701-1323

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

_____

Melanie A. Jarvis
Assistant Counsel
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)