BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

PIASA MOTOR FUELS, INC., Petitioner,	)	
v.	)	PCB 2018-54
	)	(LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

NOTICE OF FILING AND PROOF OF SERVICE

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PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board, pursuant to Board Procedural Rule 101.302(d), Petitioner's Response to Motion to Dismiss, copies of which are herewith served upon the above persons.

The undersigned hereby certifies that I have served this document by e-mail upon the above persons at the specified e-mail address before 5:00 p.m. on the 17th of December, 2019. The number of pages in the e-mail transmission is 13 pages.

Respectfully submitted,
PIASA MOTOR FUELS, INC.,
Petitioner,

BY: LAW OFFICE OF PATRICK D. SHAW

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PIASA MOTOR FUELS, INC., Petitioner,	)	
v.	)	PCB 2018-054 (LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

PETITIONER'S RESPONSE TO MOTION TO DISMISS

NOW COMES Petitioner, PIASA MOTOR FUELS, INC. (hereinafter "Piasa"), pursuant to Section 101.500(d) of the Pollution Control Board's procedural regulations (35 Ill. Adm. Code § 101.500(d)), responds to the Illinois EPA's Motion to Dismiss, stating as follows:

STATEMENT OF UNDISPUTED FACTS

On March 14, 2014, Petitioner submitted an application for payment for corrective action activities in the amount of $300,744.45. (R.1356)[1] Thereafter, the Agency approved a voucher for 242,762.33. (R.1272) Among the denial reasons given for the deduction was a lack of supporting documentation. (R.1274 - R.1275)

On August 19, 2014, Petitioner submitted an application for payment in the amount of $57,982.12, with additional documentation. (R.1472) Thereafter, the Agency approved a voucher for $45,181.47 and cutting the rest for lack of supporting documentation. (R.1459; R.1461)

On July 19, 2017, Petitioner submitted an application for payment in the amount of

[1] There were five previous applications for payment. (R.1469)

$20,776.86, including additional documentation. (R.1528 - R.1578) Thereafter, the Agency approved a voucher for $7,720.42. (R.1579) The reasons given for the deductions include several that had not been given in the previous applications for payment, but did not include any statement that the application for payment was an improper request for reconsideration or is barred by *res judicata.* (R.1581 - R.1582)

On January 2, 2018, Petitioner filed a petition for review of the July 19, 2017, decision. The Board accepted the petition for review, finding that the "petition meets the content requirements of 35 Ill. Adm. Code 105.408." (Board Order of January 11, 2018) On May 28, 2019, the Agency filed the record on appeal. On November 18, 2019, Petitioner filed its motion for summary judgment. On December 3, 2019, the Agency filed the subjection motion to dismiss.

ARGUMENT

In ruling on a motion to dismiss, the Board takes all well-pled allegations as true and draws all reasonable inferences from them in favor of the non-movant. McAfee v. IEPA, PCB 15-84, at p. 5 (Dec. 4, 2014).

I. JURISDICTION

There are three types of jurisdictional issues that arise in administrative law proceedings, which must be kept separate:

> **An administrative agency is different from a court because an agency only has the authorization given to it by the legislature through the statutes. Consequently, to the extent an agency acts outside its statutory authority, it acts without jurisdiction. The term 'jurisdiction,' while not strictly applicable to an administrative body, may be employed to designate the authority of the administrative body to act. Thus, in administrative law, the**

> **term 'jurisdiction' has three aspects: (1) personal jurisdiction--the agency's authority over the parties and intervenors involved in the proceedings, (2) subject matter jurisdiction--the agency's power "to hear and determine causes of the general class of cases to which the particular case belongs", and (3) an agency's scope of authority under the statutes.**

Business and Professional People for Public Interest v. Illinois Commerce Com'n, 136 Ill.2d 192, 243 (1989) (citations and internal quotations omitted)

Here, the Agency argues that third aspect of jurisdiction, but appears confused as to which agency lacks jurisdiction to act and which statute such jurisdiction is barred. One of the cases cited by the Agency is instructive in that it was later overruled because it had failed to accurately construe the applicable statutory language. Ogle County Board v. PCB, 272 Ill. App.3d 184, 191 (2nd Dist. 1995); see Maggio v. PCB, 2014 IL App (2d) 130260, ¶27 (affirming Board's ruling that Illinois Supreme Court had effectively overturned Ogle County Board). Herein, Petitioner will argue first that the relevant statutory language must be found in the Agency's denial letter, and having failed to do so, the issue has been waived.

A. The Agency Waived any Purported Lack of Statutory Authority to Act by Not Raising the Issue in Its Decision Letter.

The Agency's argument appears to be premised upon an interpretation of Section 40(a)(1) of the Illinois Environmental Protection Act that it asserts precludes the Agency from reconsidering its decision. (Motion, at p. 6) This provision relates to appeals of permit denials which are made relevant by Section 57.8(i) of the Act as the manner for challenging the Agency's payment decisions. (415 ILCS 5/57.8 (i))

Upon receiving any application, the Agency had a duty under Sections 39 and 40 of the

Act to specify reasons for the denial which it intended to raise before the Board or be precluded from raising that issue. Environmental Protection Agency v. Pollution Control Board, 86 Ill. 2d 390, 405 (1981). While Section 40 of the Act addresses proceedings before the Board, Section 39 of the Act addresses the Agency's responsibilities in reviewing applications, including that of requiring a detailed statement and explanation of the legal provisions that would be violated if the submittal were approved. A similar requirement for detailed statements exist in the Leaking Underground Storage Tank Program. ((415 ILCS 5/57(c)(4); 35 Ill. Adm. Code § 734.610(d))

If the Agency wished to claim that it lacked authority to review any given payment application, it was incumbent upon the Agency to set forth the factual and legal explanation it was relying upon in its decision letter. For example, in A & H Implement Company v. IEPA, PCB 12-53, at p. 2 (May 17, 2012), the Agency issued a denial letter which claimed that the submittal was an improper request to reconsider two of the Agency's previous final decisions. Without addressing the merits of the competing claims, the Board denied the Agency's motion to dismiss the pending appeal because the Board had jurisdiction to review the Agency's decision to treat the submittal as seeking an improper reconsideration. Id. at 8.

Unlike the situation in A & H Implement Company, the Agency did not preserve the argument that it lacked authority to review any of the submittals, but instead asserted its authority to review the payment applications by issuing vouchers in part, and by denying the remainder for reasons other than its lack of jurisdiction. It is therefore precluded from seeking a Board determination that it lacked authority to do what it did.

B. Alternatively, the Agency had authority to review the 2017 application for payment.

There is nothing in Section 40(a)(1) of the Act which precluded the Agency from reviewing the 2017 application for payment. That Section only states in relevant part that an applicant may appeal an Agency decision within 35 days. Board regulations authorize applications for partial or final payment to be submitted no more frequently than once every 90 days. (35 Ill. Adm. Code § 734.605(e)) Also all applications for payment for corrective action must be submitted no later than one year after the issuance of a No Further Remedation letter. (35 Ill. Adm. Code § 734.605(j)) Beyond these, there are no other restrictions to the number of applications for payment that can be submitted.

The decisions cited by the Agency identify potential issues with Agency reconsideration, but do not in fact state that the Agency cannot ever reconsider its decision. What does it mean to reconsider a decision? "[T]he 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." Citizens Against Regional Landfill v. County Board of Whiteside, PCB 92-156, slip op. at 2 (Mar. 11, 1993). In other words, reconsideration is a means by which a judicial body can correct errors. The Agency frequently reconsiders its decisions as demonstrated in A & H Implement Company v. IEPA, PCB 12-53, at p. 2 (May 17, 2012). There, an Agency employee told the consultant that the Agency's previous decisions "had been mistaken" and asked the consultant to resubmit revised pages, which were then approved. That reconsideration of the Agency's earlier decisions was not appealed to the Board – after all the submission was approved. Id. After the Agency corrected its mistake, the consultant sought to amend the budget to include the costs imposed by

the Agency's errors, which the Agency choose to treat as an improper request for reconsideration. Id. As discussed earlier, the Board decided it could review the Agency's denial reason that it was an improper request for reconsideration as against the petitioner's argument that it was a new submission supported by new information. Id. at p. 8. While the Board did not have the administrative record before it and was largely drawing from arguments from counsel based upon a few documents, the Board's ruling was not that the Agency was not authorized to reconsider its decision, but could be described as recognizing that the Agency could reconsider its decision in a new submittal. As stated in Citizens Against Regional Landfill, reconsideration is a means by which new evidence, new legal precedent or errors can be identified raided to permit correction of errors. Most such reconsiderations are denied by the Board summarily for not meeting the standard, some are given more weighty consideration, yet still denied, and a few give rise to revised Board decisions. However, the reconsideration request is addressed is not of any jurisdictional significance because the Act does not say anything about reconsiderations.

The cases cited by the Agency address two situations: (1) whether reconsideration is grounds to dismiss an otherwise properly and timely filed Petition for Review; and (2) whether Agency can revise a previous decision ab initio. In Reichhold Chemicals v. PCB, 204 Ill. App. 3d 674 (3rd Dist. 1990), the applicant filed a petition for review with the Board, while at approximately the same time asking the Agency to reconsider its decision. Id. at 676. The Agency took the position that the request for reconsideration required the applicant to "forego review by the Board until the Agency completed its review." Id. at 676. The Board agreed and dismissed the appeal. The Appellate Court held that the Board had a statutory duty to review the permit denial once Reichhold filed its petition for review within the 35 day period allowed by

law. Id. at 678. Nothing in the case stated that the Agency could not reconsider its decision; merely that such a reconsideration does not effectuate any change to the Board's duty to hear cases filed under Section 40(a) of the Act. In order for the Board to have properly dismissed the permit appeal, Section 40(a) of the Act would have needed to be amended to state that the appeal deadline is stayed pending resolution of any request for reconsideration. In other words, the effect of any reconsideration can not be to deprive a person of rights in the statute.

In Panhandle Eastern Pipe Line Co. v. PCB, 734 N.E.2d 18 (4th Dist. 2000), the facility experience certain exceedances of its air permit which triggered new requirements under its previous permits (and federal regulations). The facility sought to amend its permitting to avoid this outcome. While permits can be revised, the Appellate Court affirmed the Board's position that they are revised only prospectively and as a technical matter the previous permits were also expired. Id. at p. 23. The dynamics of permitting are not entirely the same as the present cleanup and reimbursement program, but a similar result was reached in Mick's Garage v. IEPA, PCB 03-126 (Dec. 18, 2003). There, the IEPA had issued an eligibility and deductible determination under the pre-1993 LUST Program and the owner/operator sought to revise that decision after the authority to make those determinations had been transferred to the Office of the State Fire Marshal. The IEPA could not reconsider its decision because it no longer had authority to make those decisions. While, on the other hand, the Office of the State Fire Marshal had authority to reconsider its decisions (e.g., R.1560), Mick's Garage had not elected to be governed by existing law and was subject to those consequences.

In summary, the only applicable statutory obligation in Section 40 of the Act is for the Board to hear the timely filed petition for review of the 2017 Agency decision.

II. *RES JUDICATA*

Res judicata is a judicially created doctrine resulting from the practical necessity that there be an end to litigation and that controversies once decided on their merits shall remain in repose. Villlage of Bartonville v. Lopez, 2017 IL 120643 ¶ 49. Thus, under the doctrine of res judicata , a final judgment on the merits rendered by a court of competent jurisdiction acts as a bar to a subsequent suit between the parties involving the same cause of action. Id. "There must be (1) a final judgment on the merits rendered by a court of competent jurisdiction, (2) an identity of cause of action, and (3) an identity of parties or their privies." Id. ¶ 50.

While courts have refused to apply the doctrine of *res judicata* to administrative proceedings. See Ashland Chemical Co. v. Pollution Control Bd., 57 Ill.App.3d 1052, 1054 (3rd Dist. 1978), they will do so if "the administrative determination is made in proceedings that are adjudicatory, judicial, or quasijudicial in nature." Vill. of Bartonville v. Lopez, 2017 IL 120643 ¶ 71. The Agency decision regarding payment applications is none of these. Cf. Illinois E.P.A. v. Illinois Pollution Control Bd., 138 Ill.App.3d 550, 552 (3rd Dist. 1985) (explaining why preponderence of evidence standard applies in Board permitting reviews because the Agency proceeding was not judicial) Accordingly, if *res judicata* applies here, it is to preclude relitigation of Board determinations.

A. **The Agency Waived any Res Judicata Claims by Not Raising the Issue in Its Decision Letter.**

For the same reasons that the Agency is precluded from raising its jurisdictional claims discussed supra, the Agency is precluded from raising its *res judicata* claims in this proceeding

for failure to identify the issue in its decision letter. In addition to the arguments made earlier, res judicata is an affirmative defense that can be waived by failing to assert it in a timely manner. Treadway v. Nations Credit Financial Servs., 383 Ill.App.3d 1124 (5th Dist. 2007) (distinguishing other waiver cases).

It is also relevant herein that the motion to dismiss this appeal was filed long after the petition for review was filed and only after a motion for summary judgment was filed with respect to the merits of the issues raised in the Agency decision letter. Petitioners are prejudiced by the belated introduction of issues that challenge the Board's ability to consider the motion for summary judgment. The equities dictate that the motion to dismiss be deemed waived.

B. Alternatively, the Agency had authority to review the 2017 application for payment.

"*Res judicata* should only be applied only as fairness and justice require, and only to facts and conditions as they existed at the time judgment was entered. Courts must balance the need to limit litigation against the right to a fair adversarial proceeding in which a party may fully present its case." Yorulmazoglu v. Lake Forrest Hosp., 359 Ill.App.3d 554, 563 (1st Dist. 2005). "Res judicata is first and foremost an equitable doctrine, which may be relaxed where justice requires. In other words, the question is not solely whether the doctrine of res judicata applies; we must also ask whether it should be applied." People v. Kines, 2015 IL App (2d) 140518 ¶ 21 (emphasis in original).

The single Board decision relied upon the Agency is Kean Oil v. Illinois EPA, PCB 97-146 (May 1, 1997). In that decision, the applicant filed an application for payment, which was denied in part by the Agency. Thereafter, the applicant sought a 90-day extension of the deadline

to file an appeal which was docketed as PCB 96-88. When the appeal deadline lapsed, the Board dismissed the appeal for failure to file the petition for review. Thereafter, according to the Agency, the applicant submitted an identical payment application for the costs denied in the earlier payment application. The Agency successfully moved to dismiss the appeal on grounds of *res judicata* and based upon the petitioner's failure to respond, which was treated as waiver. "While the Board is not prohibiting Kean Oil from submitting a new application to the Agency that provides additional information or evidence, this appears to be an attempt by petitioner to misuse the submittal process in order to remedy its failure to properly appeal the first decision by the Agency concerning this matter." Id. at p. 8.

The first factor required for *res judicata* is a previous final judgment on the merits rendered by a court of competent jurisdiction. The Board found that it's "order dismissing Kean PCB 96-88 was a final judgment on the merits rendered by a court of competent jurisdiction." Id. at p. 8. There is no prior Board order in this matter, and therefore *res judicata* is improper.

The second factor required for *res judicata* is an identity of cause of action. The Board relied upon an Agency affidavit that "provided no new or additional information addressing any of the Illinois EPA's previous denial points." Id. at p. 4 (emphasis added) While the Board apparently took the Illinois EPA at its word, at least given that Kean Oil failed to object, the Board has the last three applications for payment and a record that shows that Petitioner was not attempting to misuse the submittal process. Each application for payment asked for a different amount, received a voucher for at least some portion requested and resulted in at least some changes to the Agency's denial letter. While there is certainly a narrowing of issues moving forward, it is important to keep mind that the purpose of *res judicata* is to reduce litigation from

splitting what can be handled in one proceeding in many. Vill. of Bartonville v. Lopez, 2017 IL 120643 ¶ 78 ("The purpose of res judicata is to promote judicial economy by requiring parties to litigate, in one case, all rights arising out of the same set of operative facts, as well as to prevent imposing an unjust burden that would result if a party could be forced to relitigate what is essentially the same case.") If the Agency's contention is that Petitioner was expected to submit multiple appeals for issues it deemed ripe at various points, then the purpose of *res judicata* is not served and should not be applied. The applications for payment are not identical, nor were they treated as such by the Agency in its decision letter.

Petitioner does not dispute the third component, necessitating the same parties, other than to repeat that there was not a judicial or quasijudicial proceeding before the Board and thus the concept of "parties" is not precise.

Finally given that this case is in equity, the Agency should be barred from seeking equitable relief given its own unclean hands. The Agency has continuously engaged in a practice of strategic ambiguity in providing little to none of the information required in its decision letters so as to give petitioners notice of what the issues are that may be resolved by reapplication or by filing a petition for review. Here, petitioner's consultant had to conduct a Freedom of Information Act inquiry to determine what the Agency was thinking. The Agency's misuse of the determination letter process should not be used to its advantage in such a way.

WHEREFORE, Petitioner, PIASA MOTOR FUELS, INC., prays that the Board deny the motion to dismiss in its entirety, authorize it to petition the Board for an award of its attorney's fees, and grant Petitioner such other and further relief as it deems meet and just.

PIASA MOTOR FUELS, INC.,
Petitioner

By its attorneys,
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