

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

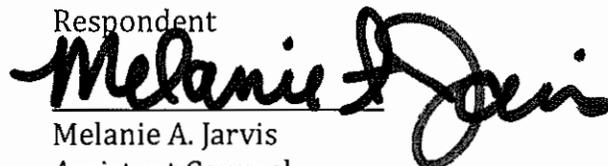
Carol Webb, Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P. O. Box 19274
Springfield, IL 62794-9274

Patrick Shaw
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 an **RESPONDENT'S POST-HEARING REPLY BRIEF** 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: November 6, 2014

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MOTION FOR LEAVE TO FILE REPLY

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 Section 101.500(e) of the Illinois Pollution Control Board's ("Board") procedural rules (35 Ill. Adm. Code 101.500(e)), hereby files a motion for leave to file a reply to the Petitioner's Post-Hearing Reply Brief. In support of this motion for leave, the Illinois EPA provides as follows.

1. The Petitioner filed its Post-Hearing Reply Brief on November 3, 2014.
2. Illinois EPA received its copy of Petitioner's Reply on November 6, 2014.
3. Petitioner adds three new exhibits and argument based upon such at this late date in the process
4. The Illinois EPA would be prejudiced without the opportunity to respond and move to strike these exhibits and additional new argument based upon such.

For the reasons stated herein, the Illinois EPA hereby respectfully requests that the Board and Hearing Officer allow the Illinois EPA to file a reply to the Petitioner's response to prevent material prejudice.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

A handwritten signature in black ink that reads "Melanie A. Jarvis". The signature is written in a cursive style with a horizontal line underneath the name.

Melanie A. Jarvis
Assistant Counsel
Special Assistant Attorney General
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This filing submitted on recycled paper.

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RESPONDENT'S POST-HEARING REPLY BRIEF/MOTION TO STRIKE

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 hereby submits its Response to the Petitioner's Post-Hearing Reply Brief and Motion to Strike to the Illinois Pollution Control Board ("Board").

I. Motion to Strike

The Petitioner filed its Post-Hearing Reply Brief on November 3, 2014. Illinois EPA received its copy of Petitioner's Reply on November 6, 2014.

First, the Agency objects to this filing because it is not a response brief, what Petitioner attempts to use this pleading for is a substitution for a hearing. Petitioner waited till this late date and time to present additional documents and testimony derived from documents. This is objectionable since the Illinois EPA has absolutely no opportunity to respond due to the Board's procedural rules not allowing for a right to reply without seeking permission. Further, the Illinois EPA has no ability to seek cross of a document, review the basis for conclusion contained within the document, and ask the document questions or indeed to present testimony of opposing opinions or experts. More importantly, this information, like most of Petitioner's other information in this matter, was never presented to the Illinois EPA for review or consideration

during the administrative process which framed the Illinois EPA's decision. Petitioner uses these documents, in part, to fill in the gaps of arguments that should be presented to an Administrative Agency prior to the Board taking consideration of what decision may or may not be made prior to the issue being ripe for Board review. The Illinois EPA will not waive a right to the procedural safeguards of hearing or pleading.

The Petitioner has had ample time to provide the documents presented in this pleading to the Illinois EPA or Board. These documents surely existed during the application process, during the filing of the appeal, during the hearing that was scheduled (at which Petitioner offered other tangential documents) and also during the drafting and filing of Petitioners Post-Hearing Brief. Again, the Illinois EPA objects to the introduction and arguments associated with these documents and requests that the Board at very least rule that such are not included within either the hearing exhibits or the record in this matter.

Further, the Agency should not be placed in the position that Petitioner is attempting to fashion for them, that of, being asked to respond to an ever changing quagmire of argument and documents which Petitioner never presented for review during the process which Petitioner was obliged to follow in the first place. Petitioner attempts at this late date to offer that any response by the Illinois EPA to its belated and ever evolving theories are somehow misplaced. For this reason alone, the Board should strike any argument and documents not before the Illinois EPA in the administrative record filed in this matter or Petitioner should have presented some witness to bolster its contentions that appear nowhere but within its pleadings at this stage. Further, it is patently unfair for the Petitioner to proffer these new documents and argument when the Illinois EPA has so little time to respond. The Petitioner is the party in charge of the decision deadline

and by adding new information into a reply brief at a time that allows the Illinois EPA no time to fully respond puts the Illinois EPA in an untenable position.

In summary, Petitioner attempts to present evidence that normally would require an expert witness to present, while affording the Illinois EPA no opportunity to respond as it would if there was a full blown hearing. Petitioner chose to not call any witnesses at hearing, denying the Illinois EPA the right to cross examine anyone on this new information or to fully vet the assertions within the most recent pleading.

Most importantly though, is the fact that none of these exhibits, nor even the argument they represent, was before the Illinois EPA when it made the final decision that is the subject to this appeal. Where the Illinois EPA has not considered a document or argument, the Board may be without jurisdiction to consider it, and it is intuitively unreasonable to suggest that such matter is appropriate for a Board review, until, at very least, the Illinois EPA has considered the matter/issue/argument and made some final determination. Illinois EPA asks that these documents and the arguments associated with it be struck.

II. BURDEN OF PROOF

The Petitioner **fails** to meet its burden of proof. There is nothing in the Administrative Record, nor was anything presented at hearing, nor anything in the Petitioner's briefs that demonstrate that the final decision of the Illinois EPA is in error. The Petitioner simply fails to present any tangible or persuasive argument on which the Board could rely in reversing the Illinois EPA's final decision

IX. CONCLUSION

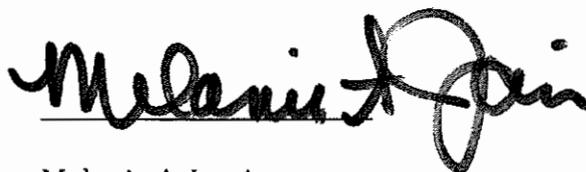
For all the reasons and arguments included herein, the Illinois EPA respectfully requests that the Board strike the exhibits attached to Petitioner's reply and affirm the Illinois EPA's June

23, 2014 final decision. The Petitioner has not met even its *prima facie* burden of proof, and certainly has not met its ultimate burden of proof. For these reasons, the Illinois EPA respectfully requests that the Board affirm the Illinois EPA's final decision.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent

A handwritten signature in black ink, appearing to read "Melanie A. Jarvis". The signature is written in a cursive style with a horizontal line underneath the name.

Melanie A. Jarvis
Assistant Counsel
Division of Legal Counsel
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Dated: November 6, 2014

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CERTIFICATE OF SERVICE

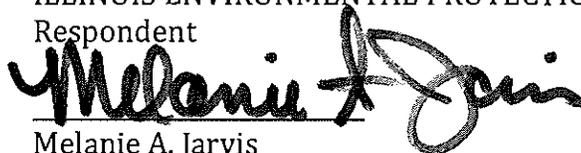
I, the undersigned attorney at law, hereby certify that on **November 6, 2014**, I served true and correct copies of an **RESPONDENT'S POST-HEARING REPLY BRIEF/MOTION TO STRIKE** via the Board's COOL system and by placing true and correct copies thereof in properly sealed and addressed envelopes and 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
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Suite 11-500
Chicago, IL 60601

Carol Webb, Hearing Officer
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