

**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 a **MOTION FOR LEAVE TO FILE REPLY** and **RESPONDENT'S REPLY TO PETITIONER'S RESPONSE BRIEF/MOTION TO STRIKE** 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

**BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS**

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

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, filing on that same day a Motion for Leave to File Reply and Post-Hearing Reply Brief/Motion to Strike.
3. The Petitioner has now filed a Response to Motion for Leave to File Reply.
4. The Illinois EPA files this Motion to Leave and Response requesting the opportunity to respond and move once more to strike the Petitioner’s November 3, 2014 filing as well as its latest attempt to reply to the Agency’s Post-Hearing Brief.

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

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: November 20, 2014

This filing submitted on recycled paper.

**BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS**

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

RESPONDENT'S REPLY TO PETITIONER'S RESPONSE 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 following the accompanying Motion to File argues that Petitioner's most recently pleading of November 17, 2014, entitled Response to Motion for Leave to File Reply ("Response to Reply/Strike"), is not allowed procedurally, offers argument which could have been raised in prior pleadings and is devoid of any merit. As such, the Illinois EPA respectfully requests that the Board **STRIKE** the pleading and argument contained therein.

1. It is important to note that the Environmental Protection Act ("EPA Act") and the Board's regulations have established procedural rules by which a LUST appellant must abide. (See: 415 ILCS 5/57 *et seq* and 35 Ill Adm./ Code 101-130) Petitioner has failed once again to follow this procedure.

2. The very basis for each of the assertions offered up within Petitioner's Response to the Agency's Motion to Reply/Strike are found exclusively within something that Petitioner cites to within the Illinois EPA's "response brief."

3. As a matter of fact, of the seven paragraphs which are the Petitioner's Response, three (Paragraphs 1, 3 and 5) are prefaced upon something within the State's "response brief." (See: Response to Motion to Reply/Strike, page 1, par. 1 "In its response brief.... (Resp. Brief, at p. 10) and Response to Motion to Reply/Strike, page 1, par 3 "...in the Response Brief (Resp. Brief, at pp. (sic) 11-12) as well as Response to Motion to Reply/Strike, page 1, par 5 "...in its response brief ... (Response Brief, at p. 14))

4. The Illinois EPA respectfully offers that these statements can hardly form the basis for the need to respond to the Agency's November 6, Motion to Reply/Strike since they were known and available to the Petitioner at the time of the Agency filing its October 20, 2014, Post-Hearing Brief. Any argument that would have (or could have) stemmed from such should have indeed been made when Petitioner filed its Reply to the Agency's Post-Hearing Brief.

5. Petitioner takes no time at all within its November 17, Response to Motion to Reply/Strike to explain how the statements, which were again within a pleading that Petitioner has already replied to, somehow now have life breathed into them following the Agency's November 6, Motion to Reply/Strike. Thus, the Petitioner's November 17, 2014 pleading is utterly without basis.

6. The Agency is once more compelled to object and move to Strike Petitioner's most recent pleading, based upon similar rational to the State of Illinois's November 6 pleading. Firstly, Petition is not responding to anything within the November 6 pleading. Secondly, Petitioner has, once again, attempted to introduce argument which it failed (or chose not) to make or bolster when the procedural rules (and safeguards that govern these proceedings) allowed for Petitioner to reply, i.e, within Petitioners November 3, Reply brief.

7. Once again, in short, Petitioner has had every opportunity to argue its case. Petitioner chose not to avail itself to a true Hearing, but then availed itself to a Post-Hearing Brief and indeed a Reply to the Agency's Post-Hearing Brief. Its demand to file Responses and continue to offer additional documents and assertions outside of those avenues should not be allowed.

8. Petitioner's entire pleading before the Board today is summed up very nicely by Petitioner itself. At paragraph 4 of the November 17, Response to Motion to Reply/Strike, Petitioner states: "[i]nstead of requesting that the Board strike or disregard this unsupported testimony from legal counsel, Petitioner decided to identify official documents pertaining to the shear valve, including one that is referenced and incorporated into the OSFM regulations under discussion."

9. Indeed, the Petitioner made a choice. A choice not supported by the procedural rules and one which could raise an objection from the Agency, but a choice none the less. Petitioner decided to present additional documents and argument, chose not to move for admission, elected not to support the documents with by legal precedent until now, as well as the choices not to present any witness for testimony, avoiding hearing and the like; all will avoiding the procedural rules and objections that likely would have arisen during such.

10. Petitioner just decided to make up a procedural right to introducing documents and argument, belatedly. Then when the Agency filed an objection and moved to strike, options which may have been allowed to Petitioner as it noted, Petitioner once again decided to forgo motion practice or procedure and attempts the very same thing. Petitioner offers that such documents are submitted correctly based upon case law and argument available to

Petitioner at the time of its filing of the Reply and argument that was or could have been offered at the procedurally correct time and pleading.

11. Moreover, what the Agency objects to is aptly summed up by Petitioner's statement at paragraph 7 of its current pleading, where Petitioner suggests that "[w]hile judicial use of internet sources appears to be an emerging phenomena..." The Illinois EPA objects to the Petitioner using a theory such as it identifies in this paragraph as an attempt to create its own phenomena of presenting no information at hearing and then providing information only afterword by pleading. Petitioner is attempting to fashion a process by which it does not have to bother with objection (as evidenced by this Motion) or to lay foundation or allow the State to cross examine witness testimony, present contrary theory or argument etc.

12. The Agency further objects to the Petitioners November 17, 2014 filing noting that Petitioner has not filed a Motion for Leave to file a "Response."

13. The Petitioner selectively quotes the Agency's brief. Neglected are the concepts where the Illinois EPA offers that it is responding to arguments within Petitioner's Post-Hearing Brief that were not presented to either administrative body. Also not mentioned is the concept expressed above that sentence where the Illinois EPA requests that the Board strike from the record such argument. The Illinois EPA finally noted it felt compelled to respond. As such, it is disingenuous for Petitioner to now offer that "... it is responding to unsupported testimony from legal counsel". Petitioner brought up the unsubstantiated issue and Illinois EPA felt the need to respond.

14. Petitioner attempts to characterize themselves as the victim in the situation. It attempts to declare the Agency as the one who brought up the "...extended discussion of the

shear valve..." when such argument is offered by the Agency in response to the Petitioner's argument and the Illinois EPA expressly provided to the Board that such were offered in an "arguendo" manner. (See: Agency's Post-Hearing Brief at 11)

15. The Illinois EPA once again is faced with Petitioner presenting absolutely no testimony at all at hearing, then raising issues without support, then belatedly attempting to bolster its contentions with information that it does not present at hearing, under oath, through witness or ability to the State of Illinois to review, refute or present contrary interpretation.

16. Petitioner somehow feels that it can provide citation to only statements made within the Agency's Post-Hearing Brief, and not anything within the Agency's Motion to File or Response to justify the Board's time. Notice Petitioner's pleading which provides only to citations to the "response brief" and not to the Motion to which Petitioner apparently feels compelled to respond to which would be the Agency Motion for Leave to File Reply. Such statements were apparent to Petitioner prior to Petitioner filing the Response brief it filed on November 3, 2014. As such, what possible harm can Petitioner offer for the Board to review to justify this new Motion when it can and does not cite to anything in the Motion for Leave it attempts to challenge? Petitioner continues to **regurgitate** arguments that it has had every procedural opportunity to fully offer, and then blindsides the Illinois EPA with additional argument or documents thereafter. As such, the Illinois EPA not only filed a Motion to Respond but also aptly entitled and argued its pleading as a Motion to Strike – a key fact which is conveniently not addressed by Petitioner in its newest pleading.

17. All of the Petitioner's arguments are merely a smoke screen and an attempt to distract the Board from the real circumstances of this case. The Petitioner **FAILED** to meet its burden of proof and cannot prevail.

IX. CONCLUSION

For all the reasons and arguments included herein, the Illinois EPA respectfully requests that the Board DENY Petitioner's November 17, 2014, filing and **STRIKE** all argument contained therein.

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 20, 2014

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on **November 20, 2014**, I served true and correct copies of **MOTION FOR LEAVE TO FILE REPLY** and **RESPONDENT'S REPLY TO PETITIONER'S RESPONSE 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
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

Carol Webb, Hearing Officer
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