BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

ALLEN McAFEE,	)	
Petitioner,	)	
v.	)	PCB 15-84
	)	(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), a PETITION'S RESPONSE TO MOTION TO DISMISS, a copy of which is herewith served upon the attorneys of record in this cause.

The undersigned hereby certifies that a true and correct copy of this Notice of Filing, together with a copy of the document described above, were today served upon counsel of record of all parties to this cause by enclosing same in envelopes addressed to such attorneys with postage fully prepaid, and by depositing said envelopes in a U.S. Post Office Mailbox in Springfield, Illinois on the 26th day of November, 2014.

Respectfully submitted,
ALLEN McAFEE, Petitioner

BY: MOHAN, ALEWELT, PRILLAMAN & ADAMI

BY: /s/ Patrick D. Shaw

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ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

PETITIONER'S RESPONSE TO MOTION TO DISMISS

NOW COMES Petitioner, ALLEN McAFEE, by its undersigned counsel, in response to Respondent's Motion to Dismiss, states as follows:

1. The Illinois EPA's position is not supported by the text of the law, or the legislative history of the recent amendment, and in any event, does not nullify the implication of the Illinois EPA's actions have on other parts of the LUST Program that the Board traditionally reviews.

2. These issues have arisen as a result of the Economic Development Act of 2013. (P.A. 98-0109, effective date July 25, 2013). For the Board's convenience, Petitioner attaches the relevant provisions of the EDA of 2013 as Exhibit A.

3. The EDA of 2013 made three changes relevant to the LUST Program:

   A. Amended the Project Labor Agreements Act; (Ex A, at p. 2)

   B. Amended Sections 57.7, 57.8 and 57.9 of the Illinois Environmental Protection Act (Ex. A, at pp. 9, 19-20, 25 & 28); and

   C. Amended the Prevailing Wage Act (Ex. A, at pp. 30-31)

4. Initially, it should be observed that the structure of this amendment shows that the Illinois EPA's position is without merit. The General Assembly could have simply amended the

Project Labor Agreements Act (and the Prevailing Wage Act), and given the Illinois EPA unreviewable discretion.

5. Instead, the General Assembly took the additional steps to integrate labor issues into the existing planning and payment process that is reviewable by the Illinois Pollution Control Board, and no change was made to an owner/operator's right to appeal plans and payment applications denied or modified by the Illinois EPA.

6. First, Section 57.7 of the Illinois Environmental Protection Act was amended to read:

> **(3) In approving any plan submitted pursuant to subsection (a) or (b) of this Section, the Agency shall determine, hy a procedure promulgated by the Board under Section 57.14, that the costs associated with the plan are reasonable, will he incurred in the performance of site investigation or corrective action, and will not be used for site investigation or corrective action activities in excess of those required to meet the minimum requirements of this Title. The Agency shall <u>also</u> determine, pursuant to the Project Labor Agreements Act, whether the corrective action shall include a project labor agreement if payment from the Underground Storage Tank Fund is to be requested.**

(415 ILCS 5/57.7(c)(3) (emphasis added)

7. The Illinois General Assembly added project labor agreement provisions to the pre-existing provisions of Section 57.7(c)(3), which are expressly reviewable by the Illinois Pollution Control Board under Section 57.7(c)(4) of the Act. (415 ILCS 5/57.7(c)(4)) The General Assembly did not give the EPA authority to require project labor agreements outside the context of reviewable plans. The purpose of doing so was clearly to require harmonization of the Act's requirements with respect to remediation objectives and costs, with the new conditional requirement of project labor agreements. Without such harmonization, owner/operators will be

at risk of incurring costs for work that is not reimbursable from the LUST Fund.

8. Next, Section 57.8 of the Act was amended read as follows:

For purposes of this Section, a complete application shall consist of:

. . .

(F) If the Agency determined under subsection (c)(3) of Section 57.7 of this Act that corrective action must include a project labor agreement, a certification from the owner or operator that the corrective action was (I) performed under a project labor agreement that meets the requirements of Section 25 of the Project Labor Agreements Act and (ii) implemented in a manner consistent with the terms and conditions of the Project Labor Agreements Act and in full compliance with all statutes, regulations, and Executive Orders as required under that Act and the Prevailing Wage Act.

(415 ILCS 5/57.8(b)(F))

9. This provision utilizes the pre-existing payment application process to ensure compliance with any project labor agreement made obligatory at the planning stage. Specifically, the owner/operator is required to submit this affidavit as part of the application for payment, and presumably the failure to include the affidavit would be used as grounds to reject the application, an action that is also clearly reviewable to the Board under Section 57.8(I) of the Act.

10. The final change to the Illinois Environmental Protection Act was to increase the resources of the UST Fund. (415 ILCS 5/57.11(a) & (f)) The obvious concern here is that these new changes will increase the costs of the program, which poses a risk of potential conflict between rates and work plans originating from labor laws and rates and work plans in the Board's rules.

11. "When construing a statute, this court's primary objective is to ascertain and give effect to the legislature's intent, keeping in mind that the best and most reliable indicator of that

intent is the statutory language itself, given its plain and ordinary meaning. In determining the plain meaning of the statute, we consider both the subject the statute addresses and the legislative purpose in enacting it." People v. Elliott, 2014 IL 115308, P11.

12. As discussed earlier, the clear objective of the Economic Development Act of 2013 as relevant to the LUST Program, was twofold: (1) Make corrective action subject to certain labor laws (those involving prevailing wages and project labor agreements), and (2) coordinate these new requirements within the exist LUST Program. While the first change could have been made without the second, the need to coordinate the new labor requirements with existing environmental requirements was necessary to ensure that the work and costs necessitated under labor laws are consistent with and achieve the purposes of the Act. The legislature chose to make the prevailing wage determination a part of the corrective action plan submittal.

13. By amending the Act, the legislature can also be assumed to continue to want "a unified, state-wide program supplemented by private remedies, to restore, protect and enhance the quality of the environment, and to assure that adverse effects upon the environment are fully considered and borne by those who cause them." (415 ILCS 5/2(b)) The Illinois EPA's position, that disputes regarding this portion of the corrective action plan should be resolved on a county-level runs contrary to the purpose of the Act that was amended. The result would be that the program would differ from county to county.

14. The legislative history of Economic Development Act of 2013, supports the importance of the Board's role in harmonizing the new labor requirements within the existing framework.

15. The Economic Development Act of 2013 passed the House of Representatives, on

May 1, 2013, and the House Sponsor of then Senate Bill 20, explained how the new labor requirements would be implemented:

> **Q. . . . The wage rates for the LUST projects are set by... currently set by the Pollution Control Board not by the prevailing wage schedule from the Illinois Department of Labor. So, with this PLA what are the... what are the rates going to be? Are they going to be determined by the PLA? Are they going to be determined by prevailing wage or are they going to be determined by the Pollution Control Board?**
>
> . . .
>
> **A. . . . the Pollution Control Board needs to update their numbers. And so, that's the route that's going to be looked at to try to do expeditiously.**

(Ex. B, at p. 191-192 (excerpts from House floor debate))

The Sponsor further explained that the additional expenses created by project labor agreements "would be reimbursable" and "that can be handled by Rules." (Ex. B, at p. 193)

16. The next day, Senate Bill 20 passed the Senate with similar discussions. (Ex. C (excerpts from Senate floor debate). First, the additional costs of PLAs were assured to be reimbursable, including attorney's fees. (Ex. C, at pp. 110-111). Second, at least with respect to the conflict between Board rates and prevailing wages: the Board "would have to pay prevailing wage." (Ex. C, at p. 112)

17. Taken together, these discussion show no intention that the Board not have a role in these changes, but the Board was expected to "update" existing practices in light of the new laws incorporated into the Act.

18. The LUST rules have been updated from time to time, and the Act requires that "[t]he Agency shall propose and the Board shall adopt amendments to the rules governing the

administration of this Title to make the rules consistent with the provisions herein." (415 ILCS 5/57.14a(a))

19. Instead, the Illinois EPA issued a "Fact Sheet," which purports to contain the procedures required by the new laws. (Ex. D (Fact sheet dated July 2013, before stage 2 and 3 site investigation plans were added to the list required to obtain a project labor agreement). Such fact sheets are unpromulgated rules that courts have found invalid and the Board has found lack any legal or regulatory effect. Illinois Ayers v. IEPA, PCB 03-214 (April 1, 2004).

20. The new amendments did not give the Illinois EPA any new rulemaking authority, or authority to determine labor requirements outside of the process of reviewing corrective action plans and budgets, which are subject to Board rulemaking and adjudicatory review.

21. The LUST Program as re-imagined by the Illinois EPA is a dysfunctional mess, relying upon unpromulgated rulemaking to create work requirements and expenses potentially in conflict with the Board rules setting maximums of each. Any resulting disputes will be resolved on a county-by-county basis.

22. Petitioner does not want to address the merits of the underlying dispute any more than necessary to address the jurisdictional issue, but the denial letter states that any additional work and expenses that exceed the Board's subpart H rates can be resolved with the Board's competitive bidding process. There are a number of questions regarding that position, beginning with the statutory requirement that the bidding process be "optional," (415 ILCS 5/57.7(c)(3)(C)) and ending with the assumption that the bidding process is for work and costs contemplated by the Board's existing provisions.

23. Furthermore, the Illinois EPA's purported option of appealing these types of

issues to the courts pursuant to Administrative Review Law is not supported by the reality that only Board decisions are reviewable under that law. (415 ILCS 5/41) Had the legislature wanted to make parts of corrective action plans reviewable under this law, it would have needed to amend Section 41 of the Act.

23. Finally, even if the Board disagrees with all of the aforementioned arguments, it still has authority to decide whether or not *site investigation plans*, which are described distinctly from *corrective action plans* in Section 57.7(c)(3) of the Act, are outside of the Board's subject matter jurisdiction as a result of the recent amendment. The Board has the right and the responsibility to determine its own jurisdiction. E.g., Bevis v. Pollution Control Board, 289 Ill. App. 3d 432 (5th Dist. 1997). If the amendatory language to Section 57.7(c)(3) does not apply to site investigation plans, then the Agency's jurisdictional argument fails as well.

WHEREFORE, Petitioner, ALLEN McAFEE, prays that the Motion to Dismiss be denied and the Board grant Petitioner such other and further relief as it deems meet and just.

ALLEN McAFEE,
Petitioner

By its attorneys,
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