ILLINOIS POLLUTION CONTROL BOARD
December 4, 2014

ALLEN McAFEE,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 15-84
	)	(UST Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Petitioner.	)	

ORDER OF THE BOARD (by D. Glosser):

On October 27, 2014 Allen McAfee (petitioner) timely filed a petition (Pet.) asking the Board to review a September 26, 2014 determination of the Illinois Environmental Protection Agency (Agency). *See* 415 ILCS 5/40(a)(1) (2012); 35 Ill. Adm. Code 101.300(b), 105.402, 105.404, 105.406. The Agency's determination concerns petitioner's leaking underground storage tank (UST) site located at 504 South Maple, Brighton, Macoupin County.

On November 13, 2014, the Agency filed a motion to dismiss (Mot.) the petition for review. On November 26, 2014, petitioner filed a response.

On December 2, 2014, the Board received a filing from the Agency captioned "Reply to Petitioner's Response to Motion to Dismiss". The filing was not accompanied by a motion for leave to file a reply. The Board's rules state that "[t]he moving person will not have the right to reply, except as permitted by the Board or the hearing officer to prevent material prejudice." 35 Ill. Adm. Code 101.500(e). The reply filed by the Agency was not accompanied by a motion, nor does the reply state why material prejudice would result if the reply were not allowed. Therefore, the Board did not consider the reply in ruling on the motion.

For the reasons discussed below, the Board denies the motion to dismiss.

PETITION

According to the petition, on September 26, 2014, the Agency approved petitioner's Stage 3 site investigation plan and budget subject to modifications. The Agency further required that a project labor agreement be included. Pet. at 2. Petitioner contends that the Agency is not authorized to require a project labor agreement for site investigation activities pursuant to Section 57.7(c)(3) of the Environmental Protection Act (Act). Pet. at 3. Section 57.7(c)(3) provides:

> In approving any plan submitted pursuant to subsection (a) or (b) of this Section, the Agency shall determine, by a procedure promulgated by the Board under

> Section 57.14, that the costs associated with the plan are reasonable, will be 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 also 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) (2012).

Petitioner further claims that the Board rules do not include standards for the Agency to exercise the discretionary power under Section 57.7(c)(3) of the Act, and the Agency failed to cite specific reasons for requiring the project labor agreement. Pet. at 3.

The Agency's denial letter, attached to the petition for review, states that the Agency "has determined that the use of a project labor agreement . . . is required, as set forth in Attachment A." Pet. Exh. A at 2. The Attachment A to the denial letter does not discuss a project labor agreement. *Id*. at Attach A.

MOTION TO DISMISS

The Agency argues that a motion to dismiss should be granted where the well-pled facts, considered in a light most favorable to a nonmovant, indicate no set of facts upon which the nonmovant would be entitled to the relief requested. Mot. at 2, citing Uptown Federal Savings & Loan Assoc. v. Kotsiopoulos, 105 Ill. App. 3d 444, 434 N.E.2d 476 (1st Dist. 1982); People v. Stein Steel Mills Services, Inc., PCB 02-1 (Nov. 15, 2001). The Agency notes that the Board stated: "'[a] motion to dismiss, like a motion for summary judgment, can succeed where the facts, taken in a light most favorable to the party opposing the motion, prove that the movant is entitled to dismissal as a matter of law.' BTL Specialty Resins v. IEPA, PCB 95-98 (Apr. 20, 1995)." Mot. at 2-3. The Agency asserts that if the Board lacks jurisdiction it must dismiss the matter. Mot. at 3, citing Wei Enterprises v. IEPA, PCB 04-22 (Feb. 19, 2004); Mick's Garage v. IEPA, PCB 03-126 (Dec. 18, 2003); Panhandle Eastern Pipe Line Co. v. IEPA, PCB 98-102, slip op. at 30 (Jan. 21, 1999); Kean Oil v. IEPA, PCB 97-146 (May 1, 1997). The Agency asserts that the Board lacks jurisdiction to hear this proceeding. Mot. at 3.

The Agency argues that petitioner appeals a decision letter relating to a Stage 3 Site Investigation Plan that the Agency conditionally approved. Mot. at 3. However, the Agency asserts the petition does not challenge the modification proposed by the Agency, but rather challenges the Agency's "informing" petitioner that a project labor agreement was required. *Id*. The Agency argues that the Agency's determination on the project labor agreement is the only determination that petitioner challenges in the appeal. *Id*.

The Agency argues that the Board's authority over contested cases is pursuant to Section 40 of the Act (415 ILCS 5/40 (2012)); however, the Agency asserts the Board is not granted subject matter jurisdiction over the Project Labor Agreement Act (PLA Act) (30 ILCS 571/1 *et seq*. (2012)). Mot. at 3-4. The Agency maintains that neither the Act nor the PLA Act grants the Board jurisdiction to review the initial decision by the Agency under the PLA Act, and the Agency is not the only state agency making decisions under the PLA Act. Mot. at 4.

The Agency argues that Section 57.7(c)(3) of the Act is clear that the Agency "shall also 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." Mot. at 4, quoting 415 ILCS 5/57.7(c)(3) (2012)). The Agency asserts that any appeal of the Agency determination that a project labor agreement is required would be an appeal to the circuit court. *Id*. The Agency argues the Board "simply does not have jurisdiction to hear appeals under the PLA Act." Mot. at 5.

RESPONSE TO MOTION

Petitioner argues that the the Agency's position is not supported by the "text of the law, or the legislative history of the recent amendments." Resp. at 1. Petitioner notes that the Agency's responsibilities under the PLA Act arise from the Economic Development Act of 2013 (P.A. 9801019, eff. July 25, 2013) (EDA). *Id*. Petitioner asserts that the EDA amended the PLA Act, Sections 57.7, 57.8, and 57.9 of the Act, and the Prevailing Wage Act. *Id*. Petitioner maintains that the "structure of this amendment shows" the Agency's position "is without merit". *Id*. Petitioner claims that the General Assembly could have simply amended the PLA Act to allow the Agency to require project labor agreements, and this would have given the the Agency "unreviewable discretion". However, by also amending the Act, the General Assembly integrated the labor issues into existing planning and payment provisions, which are appealable to the Board. Resp. at 2. The General Assembly did not limit owner or operator appeal rights in adding the project labor agreements. Petitioner opines that the General Assembly intended to ensure that work performed by an owner or operator would be reimbursable from the leaking UST Fund. Resp. at 2-3.

Petitioner notes that Section 57.8(a)(6)(F) of the Act (415 ILCS 5/57.8(a)(6)(F) as amended by P.A. 9801019, eff. July 25, 2013) was amended to require inclusion of the project labor agreements information in a request for payment after completion of corrective action. Resp. at 3. Specifically Section 57.8(a)(6)(F) of the Act provides:

> 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(a)(6)(F) as amended by P.A. 9801019, eff. July 25, 2013).

Petitioner argues that Section 57.8(a)(6)(F) of the Act makes use of the pre-existing application for payment procedure to ensure that project labor agreements, required at the planning stage, have been complied with. Resp. at 3. Petitioner maintains that the failure to include this information would also be appealable to the Board. *Id*.

Petitioner argues that "[w]hen 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." Resp. at 3-4, quoting People v. Elliott, 2014 IL 115308, ¶11. Petitioner maintains that the clear objective of the EDA was to make corrective action subject to certain labor laws and to coordinate these new requirements with existing UST requirements. Resp. at 4. Petitioner opines that the Agency's position that the Board cannot hear appeals and that the appeal is to circuit court runs contrary to the purposes of the Act, and could result in a program that is different county to county. *Id*.

Petitioner also argues that the legislative history of the EDA demonstrates that the General Assembly did not intend to remove the Board from its role of reviewing the Agency's decisions on UST plans and budgets. Resp. at 5. Petitioner opines that the General Assembly expected that the UST rules would be updated to reflect the project labor agreements; however, the Agency has not proposed such changes to the Board. *Id*. at 5-6. The petitioner asserts that instead the Agency issued a "Fact Sheet" that is an unpromulgated rule, and the Board and the courts have held that unpromulgated rules have no legal or regulatory effect. *Id*. at 6, citing Illinois Ayers v. IEPA, PCB 03-214 (Apr. 1, 2004).

Petitioner argues that the new amendments did not give the Agency any new rulemaking authority or the authority to determine if project labor agreements are necessary, outside of the UST program. Resp. at 6. Petitioner reiterates that UST program decisions by Agency are reviewable by the Board. *Id*. Furthermore, petitioner asserts that the Agency's argument that its decisions are reviewable under the Administrative Review Law is not supported as only the Board's decisions are reviewable under the Administrative Review Law. Resp. at 6-7.

Petitioner maintains that even if the Board disagrees with the above arguments, the Board may still decide if the Board has the authority to review whether or not Section 57.7(c)(3) of the Act (415 ILCS 5/57.7(c)(3) (2012)) applies to site investigation plans. Resp. at 7. Petitioner asserts that the Board has the right and the responsibility to determine its jurisdiction. *Id*., citing Bevis v. IPCB, 289 Ill. App. 3d 432 (5th Dist. 1997). Petitioner opines that if Section 57.7(c)(3) of the Act (415 ILCS 5/57.7(c)(3) (2012)) does not apply to site investigation plans, the Agency's arguments must fail. *Id*.

STATUTORY AND REGULATORY BACKGROUND

Section 5(d) of the Act provides:

> The Board shall have authority to conduct proceedings upon complaints charging violations of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order; upon administrative citations; upon petitions for variances or adjusted standards; upon petitions for review of the Agency's final determinations on permit applications in accordance with Title X of this Act; upon petitions to remove seals under Section 34 of this Act; and upon other petitions for review of final determinations which are made pursuant to this

> Act or Board rule and which involve a subject which the Board is authorized to regulate. The Board may also conduct other proceedings as may be provided by this Act or any other statute or rule. 415 ILCS 5/5(d) (2012).

Section 57.7(c)(3) of the Act provides:

> In approving any plan submitted pursuant to subsection (a) or (b) of this Section, the Agency shall determine, by a procedure promulgated by the Board under Section 57.14, that the costs associated with the plan are reasonable, will be 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 also 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 5/57.3(c)(3) (2012).

Section 57.7(c)(4) of the Act provides that "[a]ny action by the Agency to disapprove or modify a plan or report . . . shall be subject to appeal to the Board in accordance with the procedures of Section 40." 415 ILCS 5/57.7(c)(4) (2012); *see* 415 ILCS 5/40 (2012).

Section 40(a)(1) of the Act provides:

> If the Agency refuses to grant or grants with conditions a permit under Section 39 of this Act, the applicant may, within 35 days after the date on which the Agency served its decision on the applicant, petition for a hearing before the Board to contest the decision of the Agency. However, the 35-day period for petitioning for a hearing may be extended for an additional period of time not to exceed 90 days by written notice provided to the Board from the applicant and the Agency within the initial appeal period. The Board shall give 21 day notice to any person in the county where is located the facility in issue who has requested notice of enforcement proceedings and to each member of the General Assembly in whose legislative district that installation or property is located; and shall publish that 21 day notice in a newspaper of general circulation in that county. The Agency shall appear as respondent in such hearing.

DISCUSSION

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. *See, e.g.*, William Spencer v. Clinton Landfill, Inc. and IEPA, PCB 15-63 (Nov. 6, 2014); Beers v. Calhoun, PCB 04-204, slip op. at 2 (July 22, 2004). "[I]t is well-established that a cause of action should not be dismissed with prejudice unless it is clear that no set of facts could be proved which would entitle the plaintiff to relief." Smith v. Central Ill. Reg'l. Airport, 207 Ill. 2d 578, 584-85, 802 N.E.2d 250, 254 (2003). The Agency seeks dismissal of the UST appeal arguing that the Board lacks authority to review the Agency's decision regarding a project labor agreement

The Board is a creature of statue and has only the authority granted to the Board by statute. *See* Granite City Division of National Steel Company v. IPCB, 155 Ill. 2d 149, 162, 613 N.E.2d 719, 724 (1993)). "The best evidence of legislative intent is the statutory language itself, which must be given its plain and ordinary meaning." Ultsch v. Ill. Mun. Retirement Fund, 226 Ill. 2d 169, 181 (Ill. 2007); Allstate Inc. Co. v. Menards, Inc., 202 Ill. 2d 586, 591, 270 (Ill. 2002) ("The statute's plain language is the best indicator of the legislature's intent."), citing Lulay v. Lulay, 193 Ill. 2d 455, 466 (2000). Likewise, the Supreme Court also held in Ultsch that "[w]here the language of a statute is plain and unambiguous, a court need not consider other interpretive aids," dictating that a court can never declare that the legislature intended an interpretation other than the plain language of the statute and that when the language of a statute is plain and unambiguous, a court does not need to use other interpretive analyses. *Id.* at 184-85, 101-02. Thus, the Board will look to the language of the Act to determine if the Board has the authority to review the Agency's decision to require a project labor agreement.

Under the Act, the the Agency decides whether to approve proposed cleanup plans and budgets for leaking UST sites, and if the the Agency disapproves or modifies a submittal, the UST owner or operator may appeal the decision to the Board. *See* 415 ILCS 5/40(a)(1), 57-57.17 (2012); 35 Ill. Adm. Code 105.Subpart D. In this case, the Agency modified petitioner's Stage 3 site investigation plan and budget. Clearly, Section 57.7(c)(4) of the Act (415 ILCS 55/47.7(c)(4) grants the Board the authority to hear a decision by the Agency on petitioner's Stage 3 site investigation plan and budget.

In addition to granting the Board the authority to review the Agency decisions on permit appeals, Section 5 of the Act (415 ILCS 5/5 (2012)) also grants the Board the authority to hear "other petitions for review of final determinations which are made pursuant to this Act or Board rule and which involve a subject which the Board is authorized to regulate." 415 ILCS 5/5(d) (2012). The Board found that the general grant of authority is sufficient to allow the Board to review the Agency's decision involving the sale of emission reduction credits, where the Board regulates the program, even if the statute does not include a specific appeal right. *See* Chicago Coke Company v. IEPA, PCB 10-75, slip op. at 7-8 (Sept. 2, 2010).

The Agency modified the plan and budget and required a project labor agreement, which is allowed under Section 57.7(c)(3) of the Act (415 ILCS 5/57.7(c)(3) (2012)). The Agency asserts that the Board cannot review the Agency's decision to require a project labor agreement as that decision is made pursuant to the PLA Act. Section 10 of the PLA Act provides:

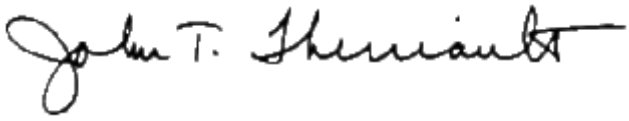
> Public works projects. On a project-by-project basis, a State department, agency, authority, board, or instrumentality that is under the control of the Governor shall include a project labor agreement on a public works project when that department, agency, authority, board, or instrumentality has determined that the agreement advances the State's interests of cost, efficiency, quality, safety, timeliness, skilled labor force, labor stability, or the State's policy to advance minority-owned and women-owned businesses and minority and female employment. For purposes of this Act, *any corrective action* performed pursuant to Title XVI of the Environmental Protection Act for which payment from the Underground Storage

Tank Fund is requested shall be considered a public works project. (emphasis added) 30 ILCS 571/10 (2012).

Section 57.7(c)(3) of the Act states that the Agency "shall also 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." (emphasis added) 415 ILCS 5/57.7(c)(3) (2012). Petitioner contends that that the Agency is not authorized to require a project labor agreement for site investigation activities pursuant to Section 57.7(c)(3) of the Act. Pet. at 3. Thus, in this instance, the Board is being asked to review the Agency's decision on a site investigation plan and to review the Agency's interpretation of the language of the Act. The Board finds that under the plain language of Sections 5, 40(a)(1) and 57.7(c)(4)of the Act (415 ILCS 5/5, 40(a)(1), and 57.7(c)(4) (2012)) this review is within the Board's authority. Therefore, the Board denies the motion to dismiss.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on December 4, 2014, by a vote of 4-0.



John T. Therriault, Clerk
Illinois Pollution Control Board