BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

ALLEN McAFEE,	)	
Petitioner,	)	
	)	
v.	)	PCB 2015-084
	)	(UST Appeal)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
Respondent.	)	

NOTICE

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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

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Dated: January 15, 2015

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

ALLEN McAFEE,	)	
Petitioner,	)	
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v.	)	PCB 2015-084
	)	(UST Appeal)
ILLINOIS ENVIRONMENTAL	)	
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RESPONDENT'S POST-HEARING BRIEF

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA" or "Agency"), 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 Brief to the Illinois Pollution Control Board ("Board").

I. INTRODUCTION

The Illinois EPA reserves and renews its objection to the Board's jurisdiction over the subject matter in this case due to lack of express statutory authority giving the Board over the Project Labor Agreement Act. The Agency incorporates all of the arguments previously filed in this case in the Agency's Motion to Dismiss.

This matter cannot be considered in a light other than favorable to the Illinois EPA's decision. Petitioner did not offer any evidence at hearing. The matter must then be decided solely upon the Administrative Record as filed by the Illinois EPA. It is clear from the record in this case that the September 26, 2014 decision of the Illinois EPA should be upheld.

II. BURDEN OF PROOF

Section 105.112(a) of the Board's procedural rules (35 Ill. Adm. Code 105.112(a)) provides that the burden of proof shall be on a Petitioner. In reimbursement appeals, appeals

that would be under Section 105.112(a), the applicant for reimbursement has the burden to demonstrate that costs are related to corrective action, properly accounted for, and reasonable. Rezmar Corporation v. Illinois EPA, PCB 02-91 (April 17, 2003), p. 9.

As the Board itself has noted, the primary focus of the Board must remain on the adequacy of the permit application and the information submitted by the applicant to the Illinois EPA. John Sexton Contractors Company v. Illinois EPA, PCB 88-139 (February 23, 1989), p. 5. Further, the ultimate burden of proof remains on the party initiating an appeal of an Illinois EPA final decision. John Sexton Contractors Company v. Illinois Pollution Control Board, 201 Ill. App. 3d 415, 425-426, 558 N.E.2d 1222, 1229 (1st Dist. 1990).

Thus, the Petitioner must demonstrate to the Board that it has satisfied this high burden before the Board can enter an order reversing or modifying the Illinois EPA's decision under review. In this matter, the Petitioner cannot meet this burden, for a number of reasons, but notably based upon the fact that the Illinois EPA **correctly** notified the Petitioner of its need to enter into a Project Labor Agreement in this matter under current law and Petitioner did not present evidence to the contrary. In fact, the Petitioner presented no evidence at hearing whatsoever. The Petitioner **failed** to meet its burden of proof.

III. STANDARD OF REVIEW

Section 57.8(i) of the Environmental Protection Act ("Act") grants an individual the right to appeal a determination of the Illinois EPA to the Board pursuant to Section 40 of the Act (415 ILCS 5/57.8(i)). Section 40 of the Act (415 ILCS 5/40) is the general appeal section for permits and has been used by the legislature as the basis for this type of appeal to the Board. When reviewing an Illinois EPA decision on a submitted corrective action plan and/or budget, the Board must decide whether or not the proposals, as submitted to the Illinois EPA, demonstrate

compliance with the Act and Board regulations. Broderick Teaming Company v. Illinois EPA, PCB 00-187 (December 7, 2000).

The Board will not consider new information not before the Illinois EPA prior to its determination on appeal. The Illinois EPA's final decision frames the issues on appeal. Todd's Service Station v. Illinois EPA, PCB 03-2 (January 22, 2004), p.4; Pulitzer Community Newspapers, Inc. v. EPA, PCB 90-142 (Dec. 20, 1990). In deciding whether the Illinois EPA's decision under appeal here was appropriate, the Board must therefore look to the documents within the Administrative Record ("AR"). Normally the Board would look at the testimony presented at hearing. However, as noted above, testimony was not presented at the hearing.[1]

IV. STATEMENT OF FACTS

The facts in this case are presented within the Illinois EPA's administrative record already on file with the Board. No facts, actually no evidence at all, was presented at hearing to alter the facts contained within the Administrative Record. The facts in the Illinois EPA record supporting this motion are as follows:

1. On July 24, 2014, the Illinois EPA received an amended Stage 3 Site Investigation Plan dated May 28, 2014. (AR at 192)

2. Hernando Albarracin, manager of the Agency's Leaking Underground Storage Tank ("LUST") Section reviewed the submittal for the necessity of a Project Labor Agreement ("PLA") on September 18, 2014. (AR at 197)

3. Illinois EPA modified the plan and it was conditionally approved on September 26, 2014. (AR at 192)

4. Illinois EPA determined that the use of a PLA was required. (AR at193)

[1] Citations to the Administrative Record will hereinafter be made as, "AR at x."

5. Further, the Agency included instructions as to the implementation of the PLA. (AR at 193)

9. The Petitioner filed an appeal of the Illinois EPA's September 26, 2014 decision regarding PLAs on October 27, 2014. Petitioner did not appeal the modifications made to the plan.

10. Petitioner requested a hearing on the matter and it was held on December 15, 2015. Petitioner presented no testimony, submitted no documents into evidence, and made no opening or closing arguments at the hearing which lasted under five minutes.

V. ISSUE

It is clear that the Illinois EPA's final decision must frame the issues on appeal. Todd's Service Station v. Illinois EPA, PCB 03-2 (January 22, 2004), p. 4; Pulitzer Community Newspapers, Inc. v. EPA, PCB 90-142 (Dec. 20, 1990). The issue presented is whether a Project Labor Agreement is required under Section 57.7(c)(3) of the Act and 30 ILCS 571/1 et seq. of the Project Labor Agreement Act ("PLAAct") Based upon the express language of applicable law and the facts presented, the answer is YES.

VI. ARGUMENT

Petitioner's main argument can be condensed down to a claim that Section 57.7 (c)(3) of the Act "… requires the Agency to consider whether to require PLAs for corrective action, but not site investigation." (Brief at 7) The argument is more fully presented within Subsection C of Petitioner's pleading. Petitioner asserts that since the last sentence of this subsection uses the terms 'corrective action' as opposed to corrective action and/or site investigation that the maxim " *expression unis est exclusion alteri*" should be applied. Petitioner is wrong.

Initially, it is important to note that the maxim which Petitioner relies upon is merely a rule used to help courts ascertain the intent of the legislature; it is NOT a rule of law. (See:

People v. the Village of Lisle, (2000) 316 Ill.App.3d 770, 737 N.Ed.2d 1099) And, the maxim is of assistance only where the meaning of a statue is ambiguous, because that maxim requires the interpretation of a statue by use of an implication. (See: People v. Dunlap et al., (1982) 110 Ill. App.3d 738, 442 N.Ed.2d 1379) This matter does not require the Board to avail itself to an implication to discern anything. Also, as noted by courts, this maxim may give way if clearer expression of legislative intent may be found elsewhere. (See generally: Cremer v. City of Macomb Board of Fire and Police Commissioners, (1996) 281 Ill.App.3d 497, 666 N.E.2d 1209) Finally, use of the maxim is tempered by the reasoning that where a statue contains a grant of power enumerating certain things which may be done and also a grant of power which, standing alone, would include such things and more, the general grant may be given full effect, if context shows that enumeration was not intended to be exclusive. (See: Shamel v. Shamel, (1954) 3 Ill.2d 425, 121 N.E.2d 819) As presented below, the intention of the legislature to apply a PLA to both site investigation and corrective action is clear.

The Agency would note that before the Board avails itself to limiting its decision based upon the absence of words within a companion sentence of a subsection, it first should look to the entirety of that Title, as well as, that subsection and Section. Section 57.7(c)(3) of the Act is not limited to just the term "corrective action" which is used within the second sentence of that subsection. To the contrary, it is clear from the language used by the General Assembly, to which the language cited by Petitioner was added, that the subsection applies to any "plan."

And, specifically the provision provides:

> "[i]n approving **ANY PLAN** … the Agency shall determine … that the costs associated with **THE PLAN** are reasonable…"
>
> (See: Section 57.7(c)(3) of the Act, Emphasis added)

Now, I suppose if the Petitioner claims that the Board should note that the first sentence uses twice the terms "corrective action" or "site investigation" and that some significance should be assigned to this fact, Petitioner surely would not object to the Agency noting to the Board that the very same provision uses the term "plan" twice.

The Agency believes the use of the term "***plan***" is significant since that very term is defined within this very Section, at subsection 57.7(c)(5) of the Act. This subsection states expressly:

> For purposes of this Title, the term "*plan*" shall include:
>
> (A) Any **site investigation plan** submitted pursuant to subsection (a) of this Section;
> (B) Any **site investigation budget** submitted pursuant to subsection (a) of this Section;
> (C) Any corrective action plan submitted pursuant to subsection (b) of this Section; or
> (D) Any corrective action plan budget submitted pursuant to subsection (b) of this Section.
>
> (See: Section 57.7(c)(5) of the Act, Emphasis added)

As such, site investigations are definitely included within the intent of this provision, by definition.

Additionally, Petitioner's argument fails because a similar argument applies to the remaining content of this subsection. The subsection itself, within Section 57.7(c)(3) of the Act, states that any plan pursuant to subsection (a) or (b) of this Section, shall be evaluated. Subsection (a) refers to site investigation and subsection (b) refers to corrective action. Both are contemplated. And, there is no indication that by referencing only corrective action in the PLA sentence that it is not referencing both again also. Why? Because, once again, the General Assembly defined the term "*corrective action*" at Section 57.2 of the Act.

> "*Corrective action*" means activities associated with compliance with the provisions of Sections 57.6 and 57.7 of this Title. (See: Section 57.2 – Definitions of the Act)

The term Petitioner itself claims is definitive on this matter, is indeed definitive, but in the Illinois EPA's favor. The term "*corrective action*" applies to Section 57.7 of the Act which encompasses both subsection (a) [site investigation] as well as subsection (b) [corrective action].

Petitioner also pretends that somehow an Agency Fact Sheet, which was not presented at hearing, should be interpreted in a certain way. Initially, the Agency will **once again** object to the procedural process that is being allowed by the Board in matters where no hearings are being held. At very least, the Agency needs to be allowed to discern what Petitioner based its argument upon. It is Petitioner's burden of presenting a case and it is within the right for the Agency to be allowed to verify the unsupported facts Petitioner presents, not to the Agency prior to making its decision; not to the Agency and Board at hearing, but cowardly during the briefing stage when no witnesses can be called to refute the Petitioner's claims. Currently, Petitioner has been allowed to request a hearing, present absolutely no evidence or argument, and then file a brief, not unlike a motion for summary judgment, when there are obvious issues of fact and law. However, to the Petitioners contention relative to the Fact Sheet, Petitioner offers that the Agency changed its Fact Sheet to include expressly that site investigations were included. True, though meaningless[2].

Petitioner provides "[i]n other word, the labor component for drilling equipment require a PLA, though this accounts for a small portion of site investigation activities." (Brief at 11) No explanation. No examples. No testimony on how this relates to the current matter in any aspect.

[2] Both fact sheets attached to Petitioner's brief provide expressly: "This fact sheet is for general information only and is not intended to replace, interpret, or modify laws, rules, or regulations." Reliance upon them and argument based upon them in a Pleading before the Board should be viewed skeptically.

Nothing at all. Petitioner just likes to drop these verbal sticky bombs into the discussion and then walk away to observe whether any of the baseless arguments stick with the Board. Once again, these are arguments that are not before the Agency prior to its decision. They are not before the Board at the hearing stage. Petitioner's attorney unequivocally stated at hearing that he had no documents to enter into evidence. Yet here he is, yet again, in another case before the Board, attaching documents during briefing, even though he had every opportunity to supply them so that the Agency would be afforded due process and an opportunity to fully cross examine any witnesses or challenge any documents at the hearing stage.

Thus, Petitioner's claim that the General Assembly clearly determined that site investigations were not required have a PLA as they have no benefit to such cannot be given any credibility. Furthermore, the remainder of Petitioner's pleading is likewise not persuasive. Within subsection D of its Pleading, Petitioner attempts to offer a hodgepodge reasons for reversal, including:

(1) that by "… simply check[ing] a box on a sheet identifying its conclusions" the Agency is not providing a justification for a decision,

(2) "there is no consideration given to the substantial issue of cost and delay caused by imposing PLAs on a plan with minimal relevant labor costs"; and finally

(3) that requiring new workers at the site would be "inefficient" "…without the benefit of that previous experience" of prior workers. (Brief at 12/13)

To the first point, the Agency provided a decision based upon the criteria outlined within the PLAAct, 30 ILCS 571/1 et seq. (AR at 193) The PLAAct is very straight forward. The Agency followed the law and used a checklist of reasons when a PLA is required right from the list in the PLAAct. In this case, the use of a PLA was found necessary because it would advance the State's

interest in labor continuity and stability in completing the Project work in accordance with the plan approved by the Illinois EPA. Further, the use of a PLA was found necessary because it would advance the State's interest of advancing minority-owned and women-owned businesses and minority and female employment.

The Agency objects to the Petitioner's second alleged issue with the Agency's decision. Petitioner states, in short, that the Agency gave no consideration to the issue of cost and delay with the minimal labor costs. There is no evidence in the record to support this argument. The Agency objects to Petitioner placing words in its mouth. This second argument is therefore likewise without merit.

Finally, the third argument presented by Petitioner, relative to efficiency and experience of prior workers, is absolutely meritless. There is no evidence in the record to support this argument. Not a single utterance was presented at hearing from Petitioner that can be remotely related to this contention. No witness. No documents. No argument. Nothing.

The Agency objects to allowing the Petitioner, who bears the burden of proof in this matter, to offer argument based upon pure speculation and conjecture. The Agency points out the sum and substance of Petitioner's hearing presentation:

HEARING OFFICER: Okay. Mr. Shaw, you may present your case.

MR. SHAW: We have no case to present today. We will rest.

(Transcript at 5/6)

The Agency could not put this any better.

VII. CONCLUSION

If the Board once again determines it has jurisdiction to hear this case over the Agency's objections, the Illinois EPA respectfully requests that the Board affirm the Illinois EPA's September 26, 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 the reasons set forth in this brief, the Illinois EPA respectfully requests that the Board affirm the Illinois EPA's final decision.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent

_____

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Dated: January 15, 2015

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on **January 15, 2015**, I served true and correct copies of an **RESPONDENT'S POST-HEARING BRIEF** 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:

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