ILLINOIS POLLUTION CONTROL BOARD
March 5, 2015

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

INTERIM OPINION AND 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) (2014); 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.

The Agency determined that petitioner must use a Project Labor Agreement (PLA) in performing site investigation at the site. Petitioner argues that a PLA is not appropriate and asks the Board to direct the Agency to approve the plan and budget without out the PLA. The petitioner also seeks the payment of attorney's fees. For the reasons set forth below, the Board finds under Section 57.7 of the Environmental Protection Act (Act) (415 ILCS 5/57.7 (2014)), the phrases "site investigation" and "corrective action" must both be given meaning. Therefore, the phrase "site investigation" is not included in the phrase "corrective action" and PLAs cannot be required for site investigation activities pursuant to Section 57.7(c)(3) of the Act.

The opinion begins with a recitation of the procedural background and continues with a summary of the relevant facts. The Board next sets forth the statutory background and then summarizes the arguments of the parties. The Board then sets forth its discussion.

PROCEDURAL BACKGROUND

On October 27, 2014, petitioner timely filed a petition asking the Board to review a September 26, 2014 determination of the Agency. On November 13, 2014, the Agency filed a motion to dismiss the petition for review. On December 4, 2014, the Board denied the motion to dismiss.

On December 15, 2014, a hearing was held before Board Hearing Officer Carol Webb (Tr.). No witnesses testified and arguments were reserved for the briefs (Tr. at 5-6).

On January 9, 2015, petitioner filed its brief (Br.) and on January 15, 2015, the Agency filed its brief (Resp.). On February 5, 2015, petitioner filed a reply (Reply).

PRELIMINARY MATTER

Petitioner asks that the Board take official notice of documents on the Agency's website. Br. at 2. The Agency takes issue with petitioner attaching documents from the Agency's website during briefing. The Agency asserts that petitioner "had every opportunity to supply" the documents at hearing and did not do so. Resp. at 9. The Agency argues that presentation at hearing would have afforded the Agency "due process and an opportunity to fully cross examine any witnesses". *Id*. The Agency asserts that in any event, petitioner's contentions regarding the fact sheet are meaningless even if true. Resp. at 8.

In reply, petitioner notes that it asked the Board to take official notice of information on the Agency's website relating to PLAs. Reply at 5, citing 35 Ill. Adm. Code 101.630; People v. Young, 355 Ill. App. 3d 317, 321 (2nd Dist. 2005) ("we may take judicial notice of information that the Department of Corrections has provided on its website."). The petitioner reminds that the Agency's decision letter referred petitioner to the website. *Id*., citing R. at 193.

Petitioner argues that the "important issue for official notice is that the opposing party is given an opportunity to respond; otherwise notice can be taken at any stage of a proceeding." Reply at 5, citing ESG Watts v. IPCB, 282 Ill. App. 3d 43, 54 (4th Dist. 1996) (affirming Board's taking of official notice in Agency's post-hearing brief). Petitioner notes that the Board's rules allow official notice of all facts of which judicial notice may be taken and of other facts within the specialized knowledge and experience of the Board. 35 Ill. Adm. Code 101.630. Petitioner asserts that the courts will go so far as take judicial notice of information for the first time on appeal. Reply at 5, citing Young. Petitioner argues that the Agency does not identify any actual prejudice from the official notice, but objects to the Agency's "inability to 'verify unsupported facts'" presented. Reply at 6, quoiting Resp. at 8.

The Board will take administrative notice of the documents, attached to the petitioner's brief. *See generally* Stop The Mega-Dump v. County Board of DeKalb County, Illinois and Waste Management, of Illinois Inc., PCB 10-103 (Mar. 17, 2011); *see also* People v. Young, 355 Ill. App. 3d 317, 321 (2nd Dist. 2005). The documents are all documents created by the Agency and available from the Agency's website. The Board finds that the Agency is not prejudiced by the Board taking official notice of those documents. Those documents will be summarized in the facts below.

FACTS

On July 22, 2014, petitioner submitted an amended Stage 3 site investigation plan and budget to the Agency. R. at 15-190. Prior to the submittal, petitioner performed Stage 3 site investigation work including soil borings and monitoring wells. R. at 21. As a result of these investigations, analytical results identified exceedances of Tier 1 remediation objectives (*see* 35 Ill. Adm. Code 742). R. at 36, 30. Petitioner's consultant determined, based on the analytical results, that additional soil borings and monitoring wells would be necessary to investigate the

full extent of the contamination off-site. R. at 26. The proposed budget for this work was $12,637.43, and that total includes $2,671.24 for drilling. R. at 183.

On September 26, 2014, the Agency approved petitioner's Stage 3 site investigation plan and budget subject to modifications. R. at 1-4, 192-98[1]. The Agency further required that a PLA be included. Pet. at 193. The Agency's denial letter states that the Agency "has determined that the use of a project labor agreement . . . is required, as set forth in Attachment A." *Id*. Attachment A to the denial letter does not discuss a project labor agreement. R. at 197. But the denial letter does refer to a model PLA on the Agency's website. R. at 193. Also included on the Agency's website are two fact sheets, one dated July 2013 and a second revised version dated September 2014. Br. at 2; Attach B and C.

The Fact Sheets explain what Senate Bill 20, which became P.A. 98-109, is generally and explains what a PLA is. Br. at Attach B and C. The July 2013 Fact Sheet explains that corrective action activities that "require" PLAs include excavation, transportation, and disposal of contaminated soil. Br. at Attach B. The revised September 2014 Fact Sheet indicated that activities that "require" a PLA include Stage 2 site investigation fieldwork and Stage 3 site investigation field work as well as corrective action fieldwork. Br. at Attach C.

The Agency's document entitled "Project Labor Agreement Determination" indicated that the Agency determined that "use of a PLA will advance the State's interest in labor continuity and stability in completing the Project work in accordance with the plan approved by" the Agency. R. at 198.[2] The Agency further found that "use of a PLA will advance the State's interest of advancing minority-owned and women-owned businesses and minority and female employment." *Id*. For these reasons the Agency required a PLA. R. at 193.

STATUTORY BACKGROUND

Section 57.2 defines "corrective action" as activities associated with compliance with the provisions of Sections 57.6 and 57.7 of this Title. 415 ILCS 5/57.2 (2014). Section 57.2 defines "site investigation" as activities associated with compliance with the provisions of subsection (a) of Section 57.7. *Id*. Section 57.6 of the Act addresses early action. 415 ILCS 5/57.6 (2014). Section 57.7(a) sets forth requirements for site investigation. 415 ILCS 5/57.7(a) (2014). Section 57.7(b) addresses corrective action. 415 ILCS 5/57.7(b) (2014).

[1] The Board notes that the record includes two letters that differ only slightly. As originally filed, the record includes a letter dated September 26, 2014 to Mr. McAfee with a certified mail number having the last four digits of "8766". This letter makes no mention of the PLA requirement (*see* R. at 1-4). The supplement to the record includes a letter dated September 26, 2014 to Mr. McAfee with a certified mail number having the last four digits of "8773". This letter requires the PLA (*see* R. at 192-98). There is no explanation in the proceeding for the two letters or the differences. However as the letter requiring the PLA is the letter that was attached to the petition for review and the PLA is the subject of controversy the Board looks to the denial letter at R. 192-98.

[2] The Board notes that the supplemental record gives this page number 197; however it is the second page number 197 and the Board will cite it as 198.

Section 57.7(c) provides requirements for Agency review and approval of any plan and budget. 415 ILCS 5/57.7(c) (2014). 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) (2014).

The last sentence of Section 57.7(c)(3) was added by Economic Development Act of 2013 (P.A. 98-0109, eff. July 25, 2013) (EDA).

Section 57.7(c)(5) provides:

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. 415 ILCS 5/57.7(c)(5) (2014).

Section 57.8(a)(6)(F) of the Act, which addresses payment from the UST Fund, was amended by the EDA. That amendment provided that "[i]f the Agency determined under subsection (c)(3) of Section 57.7 of this Act that corrective action must include a project labor agreement" a complete application for reimbursement must include:

> 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) (2014).

Section 10 of the Project Labor Agreement Act (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. 30 ILCS 571/10 (2014).

Section 2 of the Prevailing Wage Act also amended the definition of "Public works" by adding that: "'Public works'" also includes any corrective action performed pursuant to Title XVI of the Environmental Protection Act for which payment from the Underground Storage Tank Fund is requested." 820 ILCS 130/2 (2014).

PETITIONER'S ARGUMENTS

Petitioner begins with an explanation of the structure of the leaking UST program and then the labor law amendment of 2013. Petitioner follows with its argument that PLAs are not authorized for site investigation. Petitioner then sets forth an alternative argument that a PLA is not appropriate in this case, even if site investigation is included in the phrase corrective action.

UST Program

Petitioner opines that an explanation of the UST program will "be useful before considering the recent labor amendments". Br. at 3. Petitioner offers that the program began as labor-intensive, dig-and-haul cleanup activities where the tank and soil were removed. *Id*. Because too much soil was being landfilled, changes were made to the law to require "site classification" to differentiate sites that needed additional work or groundwater monitoring. *Id*. In 1997, the Board adopted risk-based cleanup objectives known as Tiered Approach to Corrective Action Objectives (TACO) (35 Ill. Adm. Code 742). Br. at 3-4. The site classification approach was then phased out for the current site investigation program under 35 Ill. Adm. Code 734. Br. at 4.

Part 734 identifies three major steps in cleanup of a leaking UST site. The first step is early action, which requires removal of tanks and visibly contaminated soil and groundwater within four feet of the tank. Br. at 4, citing 415 ILCS 5/57.6 (2014). Early Action must be performed within 45 to 90 days of a confirmed release and no plan or budget is required. Br. at 4. If after early action is completed additional investigation is required, Part 734 provides for site investigation. Br. at 4, citing 415 ILCS 5/57.7(a) (2014). The rules divide site investigation into three stages: Stage 1 gathers information on soil and groundwater contamination; Stage 2 gathers further information on the extent of on-site contamination; Stage 3 gathers information on the extent of off-site contamination. Br. at 4.

After completion of site investigation, if TACO standards are exceeded, the owner or operator must perform corrective action. Br. at 4. Corrective action is designed to mitigate

environmental risks and achieve remediation objectives. Br. at 4-5, citing 415 ILCS 5/57.7(b) (2014).

Petitioner argues that the entire approach is incremental, with careful analysis to determine what if any additional site work is necessary. Br. at 5. Petitioner opines that this case illustrates the process as this is the second Stage 3 site investigation plan and budget and the Agency designated part of the plan contingent on need established by the work. *Id*. If the work is inconclusive, an additional plan and budget may be required. *Id*.

Petitioner notes that a final change in the UST program came in 2006 when the Board adopted maximum payment amounts. Br. at 5, citing 35 Ill. Adm. Code 734.800. Petitioner indicates that those maximum rates were established on the basis that the costs for cleanup at a leaking UST site would be reasonable and not more than what is needed to meet the requirements of the Act. *Id*. The rates establish maximum rates for professional services on an hourly basis, while drilling and monitoring are reimbursed on a linear per foot basis. Br. at 6. Petitioner maintains that there is no indication that the Board considered "prevailing wage" for any class of worker when the maximum payment amounts were established. *Id*.

Labor Law Amendment of 2013

Petitioner points out that the EDA contained many provisions that do not relate to the UST program. Provisions that do relate to the UST program include requiring payment of prevailing wage rates, authorizing the Agency to require PLAs, and increasing resources to the UST fund. Br. at 6. Petitioner claims that the provisions are interrelated. *Id*. The amendatory language of Section 57.7(c)(3) of the Act added: "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) (2014). Petitioner claims that this provision requires the Agency to consider whether a PLA is required for a corrective action, but not site investigation. Br. at 7. Petitioner asserts that "[t]his is no different than numerous provisions in the Act which incorporate by reference other legal provision like the Illinois Groundwater Act or RCRA." *Id*.

Petitioner states that a PLA is a "pre-hire collective bargaining agreement covering all terms and conditions of employment on a specific project . . .," which "can be of particular benefit to complex construction projects." Br. at 7, quoting 30 ILCS 571/1(b) and (g) (2014). Petitioner explains that an agreement can be required if it "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." *Id*., quoiting 30 ILCS 571/10 (2014). Further, the decision to use a PLA must be based upon "a written, publicly disclosed finding by the department, agency, authority, board, or instrumentality, setting forth the justification for use of the project labor agreement." *Id*., quoting 30 ILCS 571/30 (2014).

Petitioner argues that the EDA substantially modified the existing leaking UST program and includes potential for additional work requirements after the plan and budget have been approved. Br. at 8. Petitioner asserts that finding contractors that will execute PLAs may be

difficult. Further, there could be delays as well as additional costs in cleanups and if there are additional costs, the plan and budget must be amended for re-approval. *Id*. Furthermore, petitioner asserts that if there are costs not accounted for in the maximum rates, the Agency indicates that the project might need to be bid. *Id*. Petitioner claims that bidding is only an option for "corrective action". Br. at 9.

PLAs are not Authorized for Site Investigation

Petitioner asserts that the statutory language in Section 57.7(c)(3) of the Act (415 ILCS 5/57.7(c)(3) (2014)) is clear and provides that PLAs are not required for site investigation. Petitioner argues that the:

> applicable rule of statutory construction is the maxim *expressio unius est exclusion alteri* - "Where a statute lists the things to which it refers, there is an inference that all omissions should be understood as exclusions." Bridgestone/Firestone, Inc. v. Aldridge, 179 Ill.2d 141, 151-52 (1997). "This rule of statutory construction, *expressio unius est exclusio alterius*, is based on logic and common sense. It expresses the learning of common experience that when people say one thing they do not mean something else. The maxim is closely related to the plain language rule in that it emphasizes the statutory language as it is written." *Id*. at 152. Br. at 9.

Petitioner claims that this rule is even more "undeniable" considering that the amendatory language was added to a section of the Act that distinguishes between "site investigation" and "corrective action". Br. at 10. Petitioner maintains that the first sentence of Section 57.7(c)(3) of the Act (415 ILCS 5/57.3(c)(3) (2014)) applies to both site investigation and corrective action; while the second sentence uses only corrective action. Br. at 10. Petitioner asserts that had the legislature intended to authorize PLAs for both corrective action and site investigation, the legislature would have done so, as the legislature did in other sections of the Act. *Id*., citing Bridgestone/Firestone, 179 Ill.2d at 153.

Petitioner opines that the rule of statutory construction can only be "overcome by a strong contrary legislative intent". Br. at 10, citing Bridgestone/Firestone, 179 Ill.2d at 153. Petitioner maintains that the legislative background of the Act and the new amendments refute a claim of contrary legislative intent. *Id*. Petitioner argues that site investigation and corrective action are completely different activities with separate statutory and regulatory considerations, and site investigation is purely analytical. *Id*. Petitioner claims that "almost all" of the site investigation costs are incurred by the professional consultant and the laboratory. *Id*.

Petitioner continues its argument asserting that PLAs seek to address traditional labor costs, not the costs of professionals and laboratories, and the Agency's initial fact sheet reflects that. Br. at 10-11. Petitioner notes that the initial fact sheet states:

> What corrective action activities require a PLA?

> Corrective action activities that require a PLA include, but are not limited to, the excavation, transportation, and disposal of contaminated soil, and backfilling of the excavation; installation/replacement of concrete or asphalt; installation of potable water supply wells; and hookup to municipal water supply. Br. at 11, Attach B.

Petitioner asserts that those activities occur during either early action or corrective action not site investigation. Br. at 11. The modified Agency fact sheet provides:

> What activities require a PLA?
>
> Activities that require a PLA include Stage 2 site investigation fieldwork, Stage 3 site investigation fieldwork, or corrective action fieldwork where the Illinois EPA determines that a PLA shall be included. Generally, the fieldwork activities would be those performed by personnel such as laborers, truck drivers, electricians, plumbers, equipment operators, or mechanics.
> . . .
> What types of activities are not subject to PLAs?
>
> Non-fieldwork activities performed off-site such as laboratory analysis, report preparation, calculation of Tier 2 remediation objectives, negotiation of highway authority agreements, etc., as well as fieldwork performed by professional consulting firm staff such as sample collection, are examples of activities that would not require the use of a PLA. Br. at 11, Attach C.

Petitioner recasts the language of the Fact Sheet stating that "[i]n other words, the labor component for drilling equipment operation require a PLA," although such activities are a small part of site investigation. Br. at 11. Petitioner argues that the legislature determined that site investigation was not a complex construction project and a PLA is not required. Br. at 12.

Agency Decision Should be Reversed

Petitioner argues alternatively that even if the Agency has the authority to require a PLA, the authority is not without conditions and requirements. Br. at 12. Specifically, petitioner asserts that under the PLA Act, the Agency must make a "written, publicly disclosed finding . . . setting forth the justification for use of the project labor agreement." *Id*., citing 30 ILCS 571/30 (2014). Furthermore, petitioner asserts that the Agency is also required by the Act to make "a statement of specific reasons" as to why the Agency determined a PLA is necessary. *Id*, citing 415 ILCS 5/57.7(c)(4). To conclude that a PLA is appropriate, petitioner argues that the Agency must determine that a PLA "advances the State's interests of costs, 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." *Id*., citing 30 ILCS 571/10 (2014).

Petitioner asserts that the Agency did not provide justification for the PLA, rather the Agency "simply checked a box on a sheet" to identify the Agency's conclusions. Br. at 12.

Petitioner further asserts that no consideration of the "substantial issue of cost and delays" that could result with the imposition of a PLA was given. And because of the minimal relevant labor costs, a PLA is particularly inefficient in this case. *Id*. Petitioner argues that there is nothing in the record to support the justification for imposing a PLA. Br. at 13.

AGENCY'S ARGUMENTS

The Agency begins its arguments by reminding the Board what the burden of proof and standard of review in this proceeding are. The Agency then turns to its argument related to the Agency's decision to require a PLA for site investigation activities.

Burden of Proof

The Agency notes that Section 105.112(a) of the Board's rules places the burden of proof on petitioner. Resp. at 2, citing 35 Ill. Adm. Code 105.112(a). Specifically, the Agency contends that the applicant for reimbursement must demonstrate that costs are: 1) related to corrective action, 2) properly accounted for, and 3) reasonable. *Id*. at 3, citing Rezmar Corporation v. IEPA, PCB 02-91, slip op. at 9 (April 17, 2003). The Agency asserts that the Board, in permit appeals, stated that the primary focus of the Board is the adequacy of the permit application and the information submitted to the Agency. *Id*., citing John Sexton Contractors Company v. IEPA, PCB 88-139, slip op. at 5 (February 23, 1989).

The Agency argues that the petitioner must demonstrate that the petitioner "has satisfied this high burden" before the Board can reverse the Agency's decision. Resp. at 3. The Agency asserts that petitioner cannot meet this burden "for a number of reasons, but notably based upon the fact that the [Agency] **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." *Id*. (emphasis in original).

Standard of Review

The Agency argues that the Board must decide whether the application, as submitted to the Agency, complies with the Act and Board regulations. Resp. at 3-4, citing Broderick Teaming Company v. IEPA, PCB 00-187 (December 7, 2000). The Agency continues, noting that the Board will not consider new information not before the Agency and the Agency's decision frames the issues on appeal. Resp. at 4, citing Todd's Service Station v. IEPA, PCB 03-2, slip op. at 4 (January 22, 2004); Pulitzer Community Newspapers, Inc. v. IEPA, PCB 90-142 (Dec. 20, 1990). The Agency argues that the Board must look only to the administrative record and testimony at hearing to make a decision. *Id*.

Site Investigation is Included in PLAs

The Agency disagrees with the petitioner's argument that site investigation is exempted from PLAs by the statute. The Agency claims that the petitioner's first argument, relying on the maxim "*expression unis est exclusion alteri*", is "wrong". Resp. at 5. The Agency first argues that the maxim is "merely a rule used to help courts ascertain the intent of legislation", the

maxim is not a rule of law. *Id*., citing People v. the Village of Lisle, 316 Ill. App. 3d 770, 737 N.E.2d 1099 (2nd Dist. 2000). The Agency next claims that the maxim is only useful if the meaning of the statute is ambiguous. Resp. at 6, citing People v. Dunlap *et.al.*, 110 Ill. App. 3d 735, 442 N.E.2d 1379 (5th Dist. 1982). The Agency asserts that the statutory language is clear, and the Board need not avail itself of aids to construction of the statute. *Id*.

The Agency argues that even if the Board does seek aids in interpreting the statute, the maxim relied upon by the petitioner must "give way if clearer expression of legislative intent may be found elsewhere." Resp. at 6, *citing generally* Cremer v. City of Macomb Board of Fire and Police Commissioners, 281 Ill. App. 3d 497, 666 N.E.2d 1209 (3rd Dist. 1996). Also the Agency argues 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. Shamel v. Shamel, 3 Ill. 2d 425, 121 N.E.2d 819 (1954). Resp. at 6.

The Agency opines that the Board should look at the entire UST Title in the Act as well as the specific section and subsection at issue in this proceeding. Resp. at 6. The Agency asserts that Section 57.7(c)(3) is not limiting the term "corrective action" because the subsection applies to any "plan" submitted to the Agency for approval. The Agency quotes and emphasizes that the language provides "[i]n approving **ANY PLAN** . . . the Agency shall determine . . . that the costs associated with **THE PLAN** are reasonable . . .". Resp. at 6, quoting 415 ILCS 5/57.7(c)(3) (2014). The Agency argues that he use of the term "plan" is significant as that term is defined within Section 57.7(c) of the Act (415 ILCS 5/57.7(c) (2014)). *Id*. The Agency notes that Section 57.7(c)(5) states that "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. 415 ILCS 5/57.7(c)(5) (2014).

The Agency states that "as such, site investigations are definitely included with the intent of this provision, by definition." Resp. at 7.

The Agency asserts that petitioner's argument must also fail because the remaining content of Section 57.7(c) of the Act supports the Agency's argument that the use of the term "plan" means that site investigation is intended to be included in PLAs. Resp. at 7. The Agency notes that Section 57.7(c)(3), states that any plan pursuant to subsection (a) or (b) of this Section, shall be evaluated and subsection (a) refers to site investigation while subsection (b) refers to corrective action. *Id*. Thus, the Agency asserts that both site investigation and corrective action

are contemplated. Further, the Agency claims that there is no indication that by referencing only corrective action in the PLA sentence, that the statue is not referencing both again given that the General Assembly defined the term "corrective action" at Section 57.2 of the Act. *Id*., citing 415 ILCS 5/57.7(c) and 57.2 (2014).

The Agency quotes that "corrective action" is defined as "activities associated with compliance with the provisions of Sections 57.6 and 57.7 of this Title." Resp. at 8, *quoting* 415 ILCS 5/57.2 (2014). The Agency argues that the term "corrective action" applies to Section 57.7 of the Act and Section 57.7 includes both site investigation and corrective action. *Id*.

Agency Fact Sheets

The Agency takes issue with petitioner's reliance on the Agency Fact Sheets found on the Agency's website.[3] Resp. at 8. The Agency concedes that the Fact Sheets were changed, but the Agency asserts that the change is meaningless. *Id*. The Agency argues that petitioner provides no testimony, explanation or examples for the petitioner's proposition that the labor component of site investigation require a PLA, although the labor component is a small part of site investigations. *Id*.

Agency Decision to Require a PLA is Supported

The Agency argues that its decision requiring the PLA was based on the criteria outlined in the PLA Act (30 ILCS 571/1 *et seq*. (2014)). Resp. at 9. The Agency maintains that it followed the law and used a checklist of reasons when a PLA is required. *Id*. The Agency found that a PLA was required to advance the State's interest in labor continuity and stability in completing the project work in accordance with the plan approved by the Agency. Resp. at 9-10. The Agency further found that the PLA was required to advance the State's interest of advancing minority-owned and women-owned businesses and minority and female employment. Resp. at 10.

Lack of Evidence to Support Petitioner's Arguments

The Agency takes issue with petitioner's argument that the Agency gave no consideration to the issue of cost and delay, and the Agency argues that there is no evidence in the record to support petitioner's claim. Resp. at 10. Further, the Agency asserts that petitioner's argument relative to efficiency and experience of workers is absolutely meritless. The Agency opines that there is no evidence in the record to support this argument. *Id*. Finally, the Agency states that it "objects to allowing the Petitioner, who bears the burden of proof in this matter, to offer argument based upon pure speculation and conjecture." *Id*.

Agency Conclusion

The Agency asks that the Board affirm the Agency's decision as petitioner has not met its burden of proof. Resp. at 11.

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[3] The Agency states it "will **once again** object to the procedural process that is being allowed by the Board in matters where no hearings are being held." Resp. at 8 (emphasis in original).

REPLY

Petitioner takes issue with the Agency's reliance on Dunlap, 110 Ill. App. 3d 738. Petitioner claims that to the extent that Dunlap held that the maxim of *expressio unius est exclusio alteri* can only be applied to ambiguous statutes, Dunlap is at odds with the subsequent Illinois Supreme Court decision in Bridgestone/Firestone. Reply at 2. Petitioner explains that in Bridgestone/Firestone, the court found the statute unambiguous, but also relied on the maxim. *Id*. Petitioner asserts that "there is reason to believe" that Dunlap was not an appropriate situation to apply the maxim in the first place as the accused applied the maxim to subvert the meaning of the statue. Reply at 2-3. In contrast, petitioner contends the Agency is seeking to argue that "corrective action" includes "site investigation". Reply at 3. Petitioner maintains that when the legislature identified "corrective action" it did not mean "site investigation". Reply at 2.

Petitioner also challenges the Agency's reliance on Shamel 3 Ill.2d 425, 432 (1954), as petitioner argues the Agency does not identify the general grant of power the Agency believes it is operating under. Reply at 3. Petitioner asserts that the Agency has only the powers granted to it by the statute and the Agency was only granted the power to require PLAs for corrective action. *Id*., citing Illinois Bell Telephone Co. v. Illinois Commerce Comm'n, 362 Ill. App. 3d 652, 655 (4th Dist. 2005). The petitioner opines that there is no authority for the Agency to impose PLAs on any other permit or plan other than corrective action. *Id*.

Petitioner expresses confusion regarding the Agency's placing significance on the word "plan". Reply at 3. Petitioner asserts that the legislature did not use the word "plan" in the amendments at issue in this proceeding and the legislature did not use "site investigation" in the amendments. *Id*. Petitioner maintains that if the legislature had wanted to authorize the Agency to impose PLAs on all plans it would have done so by using the word "plan". *Id*.

Petitioner notes the Agency's reliance on the definition of "corrective action" at Section 57.2 of the Act (415 ILCS 5/57.2 (2014)); however petitioner asserts that the Agency does not "believe" that definition actually applies here. Reply at 4. Petitioner notes that the Agency does not believe that Early Action pursuant to Section 57.6 of the Act (415 ILCS 5/57.6 (2014)) is subject to PLA agreements, yet the definition at Section 57.2 of the Act includes early action in that definition of corrective action. *Id*. and Br. at Exh. B. Petitioner opines that the definition of corrective action in Section 57.2 is applicable to general provisions of the Act that authorize payment for whatever work is required under the leaking UST Fund, citing Section 57.9 of the Act (the Agency shall approve the payment of costs associated with corrective action after the application of a . . . deductible.") and Section 57.11 of the Act (leaking UST Fund to be used "[f]or payment of costs of corrective action incurred by and indemnification to operators of underground storage tanks as provided in this Title"). *Id*., quoting 415 ILCS 5/57.9 and 57.11 (2014).

Petitioner maintains that the term corrective action is used in a more limited sense in Section 57.7 and 57.8 of the Act (415 ILCS 5/57.7 and 57.8 (2014)) and that usage is distinct from site investigation. Reply at 4. The petitioner notes that Section 57.7(a) of the Act defines and describes the requisites of site investigation, (415 ILCS 5/57.7(a) (2014). Further after

completion of site investigation, "corrective action" is performed under Section 57.7(b) of the Act, which defines and describes "corrective action." (415 ILCS 5/57.7(b)(2)). *Id*. Petitioner offers that the Board's regulations similarly describe and use "site investigation" and "corrective action" as distinct terms. *Id*., citing 35 Ill. Adm. Code 734.310 to 734.335. Petitioner argues that "since the legislature amended the procedural provisions of Sections 57.7 and 57.8 of the Act where "corrective action" is distinct from and subsequent to "site investigation," that understanding informs how the term "corrective action" should be interpreted in the amendatory language." *Id*. Petitioner maintains that the statutes amended to reference PLAs all use "corrective action" and "site investigation" as separate activities. *Id*.

Petitioner asserts that the plain language of the amendment allows for PLAs only at the corrective action stage. Reply at 5. Petitioner concedes that the plain language may be disregarded, but only where the plain language is at odds with what the legislature intended. *Id*. Petitioner opines that "it is entirely reasonable to believe that the legislature did not want disproportionate costs and delays to impede site investigation." *Id*.

STANDARD OF REVIEW AND BURDEN OF PROOF

The Board must decide whether the petitioner's submittal to the Agency demonstrated compliance with the Act and the Board's regulations. *See, e.g*., Illinois Ayers Oil Co. v. IEPA PCB 03-214, slip op. at 8 (April 1, 2004); Kathe's Auto Service Center v. IEPA, PCB 96-102, slip op. at 13. The Board's review is generally limited to the record before the Agency at the time of its determination. *See, e.g*., Freedom Oil, PCB 03-54 (consol.), slip op. at 11; *see also* Illinois Ayers, PCB 03-214, slip op. at 15 ("the Board does not review the Agency's decision using a deferential manifest-weight of the evidence standard," but "[r]ather the Board reviews the entirety of the record to determine that the [submittal] as presented to the Agency demonstrates compliance with the Act").

Further, on appeal before the Board, the Agency's denial letter frames the issue (*see, e.g*., Karlock v. IEPA, PCB 05-127, slip op. at 7 (July 21, 2005)) and the UST owner or operator has the burden of proof (*see, e.g*., Ted Harrison Oil v. IEPA, PCB 99-127, slip op. at 5-6 (July 24, 2003); *see also* 35 Ill. Adm. Code 105.112). The standard of proof in UST appeals is the "preponderance of the evidence" standard. Freedom Oil, PCB 03-54, slip op. at 59; *see also* McHenry County Landfill, Inc. v. County Bd. of McHenry County, PCB 85-56, 85-61, 85-62, 85-63, 85-64, 85-65, 85-66 (consol.), slip op. at 3 (Sept. 20, 1985) ("A proposition is proved by a preponderance of the evidence when it is more probably true than not.").

In this instance, the Agency's denial letter requires the petitioner to provide a PLA for site investigation activities. The petitioner challenges the Agency's authority to require a PLA and argues that the statute intends for PLAs to be used only for corrective action and not site investigation. The challenge in this proceeding is a legal issue for the Board to consider.

DISCUSSION

The Board will first address the Agency's challenge to the Board's jurisdiction in this matter and then discuss whether or not the Agency's decision to require a PLA is appropriate.

Jurisdiction

The Agency renews its objection to the Board's jurisdiction over the subject matter of this proceeding. *See* Resp. at 2. The Agency incorporates its prior arguments in its brief. On December 4, 2014, the Board ruled on the Agency's motion to dismiss asserting that the Board lacked subject matter jurisdiction in this appeal. The Board found that:

> 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) (2014)) this review is within the Board's authority. Allen McAfee v. IEPA, PCB 15-84, slip op. at 7 (Dec. 4, 2014).

The Board is not persuaded that its December 4, 2014 order was incorrect. The Board will not repeat the decision in its entirety here, but the Board reaffirms its December 4, 2014 order.

Project Labor Agreement

Whether or not a PLA can be required for site investigations under the UST program is a question of statutory interpretation. Section 57.7(c)(3) of the Act (415 ILCS 5/57.7(c)(3) (2014)) provides that the "Agency shall also determine, pursuant to the Project Labor Agreements Act, whether the corrective action shall include a project labor agreement." *Id*. The Board must determine whether the Agency may require a PLA for site investigation based on the language of Section 57.7(c)(3) of the Act (415 ILCS 5/57.7(c)(3) (2014)).

The petitioner asserts that the legislature's use of the phrase "corrective action" in the last sentence of Section 57.7(c)(3) demonstrates that the legislature did not intend to include "site investigation" in "corrective action". This is especially true because Section 57.7 of the Act distinguishes between "site investigation" or "corrective action" and both phrases are used in the first sentence of Section 57.7(c)(3). Furthermore, the petitioner argues that the statute distinguishes early action (Section 57.6 of the Act), site investigation (Section 57.7(a) of the Act), and corrective action (Section 57.7(b) of the Act) and therefore, petitioner argues site investigation is not the same as corrective action in this context.

Conversely, the Agency argues that Section 57.2 of the Act (415 ILCS 5/57.2 (2014) defines corrective action "as activities associated with compliance with the provisions of Sections 57.6 and 57.7 of" the Act. *Id*. The Agency believes that the general definition applies and "site investigation" is included in the phrase "corrective action" as "corrective action" is used in the last sentence of Section 57.7(c)(3). The Agency relies on the use of the word "plan" in Section 57.7(c)(3) and the fact that Section 57.7(c)(5) defines plan to bolster its argument.

The Board finds, as an initial matter, that the use of the phrase "corrective action" in the amendments to the PLA Act is ambiguous as those amendments relate to the UST program. While the Agency is correct that Section 57.2 of the Act defines corrective action broadly, the Agency itself concedes that early action is not subject to a PLA, basing its argument on the word

"plan" in Section 57.7(c)(3). However, a strict reading of Section 57.2 clearly includes "early action" in the phrase "corrective action". Further, a strict reading of Section 57.2 would also include other subsections of Section 57.7 such as Agency review and approval of plans as a part of corrective action. *See* 415 ILCS 5/57.7(c) (2014). The Board is convinced that the legislature did not intend to include requirements for PLAs in either early action or the Agency's review and approval of plans. Thus, the use of the phrase "corrective action" must be examined.

In construing a statute, the Supreme Court states, "a court should construe a statute, if possible, to give effect to each paragraph, sentence, clause, and word. A court should construe a statute, if possible, so that no term is rendered superfluous or meaningless. People v. Lutz, 73 Ill.2d 204, 212, 383 N.E.2d 171 (1978); accord Hernon v. E.W. Corrigan Construction Co., 149 Ill.2d 190, 195, 595 N.E.2d 561 (1992). The Supreme Court further held that where a word is used in different sections of the same statute, the presumption is that the word is used with the same meaning throughout the statute, unless a contrary legislative intent is clearly expressed. *Id*. The Board has examined the EDA, which included amendments to the PLA Act and the Act. In examining those amendments and looking to the language of Section 57.7(c)(3), the Board is convinced that in adopting the EDA, the legislature did not intend for the phrase "corrective action" to be given general definition in Section 57.2 of the Act (415 ILCS 5/57.2 (2014)).

The Board makes this finding based on the plain language of both Section 57.2 and 57.7. As noted above, if "corrective action" was intended to be the general phrase defined in Section 57.2, then PLAs could be required for early action and Agency review and approval of plans. Clearly the legislature did not intend such a result. In Section 57.7 of the Act (415 ILCS 5/57.7 (2014)), the legislature uses the phrase "site investigation" and the phrase "corrective action" denoting two separate types of work in a UST cleanup. Within Section 57.7(c)(3), where the PLA requirement was added, the legislature used both phrases, stating that the Agency must determine that costs "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 the Act. 415 ILCS 5/57.7(c)(3) (2014). Further, even where "plan" is defined in Section 57.7(c)(5) of the Act (415 ILCS 5/57.7(c)(5) (2014)), the language distinguishes between "site investigation" and "corrective action". Thus, in Section 57.7 of the Act (415 ILCS 5/57.7 (2014)), the plain language of the statute differentiates between the phrases "site investigation" and "corrective action". Were the Board to find that the phrase "corrective action", as used in Section 57.7, should be given the general meaning from Section 57.2 of the Act (415 ILCS 5/57.2 (2014)), the phrase "site investigation" would have no meaning and would be superfluous in Section 57.7.

The Board finds further support for this position in a review of the PLA Act. PLAs are required for public works projects, which are defined to include "any corrective action performed pursuant to Title XVI of the Environmental Protection Act for which payment" from the UST Fund is sought. 30 ILCS 571/10 (2014). In this context "corrective action" could also still refer to "early action" but not to Agency review and approval of plans. Once again creating an ambiguity in the use of the term "corrective action" and reinforcing the need to read Section 57.7 to give meaning to each phrase "corrective action" and "site investigation".

The Board also relies on the well-settled axiom of statutory interpretation that the general must yield to the specific. *See* Illinois Bell Telephone, 362 Ill. App. 3d at 661, 840 N.E.2d at 713 ("If a general statutory provision and a specific statutory provision relate to the same subject, the specific provision prevails"). In this instance, Section 57.2 of the Act is a general definition of the phrase "corrective action" as that phrase is used in the leaking UST program. However, within the leaking UST program provisions, a more specific use of that term is included at Section 57.7, which also separates "site investigation" into its own category. The treatment of "corrective action" and "site investigation" as two separate distinct steps is continued in the Board's rules. *See* 35 Ill. Adm. Code 732 and 734. Thus, while a general definition of "corrective action" was included in the Act, a more specific meaning is provided in Section 57.7.

The Board reviewed the parties' arguments and examined the PLA Act, the EDA, and the Act. Based on a review of the provisions of those statutes, the Board finds that under Section 57.7 of the Act "corrective action" and "site investigation" are separate phrases and both must be given meaning. The plain language of Section 57.7(c)(3) of the Act provides that "[t]he 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 UST Fund is sought. 415 ILCS 5/57.7(c)(3) (2014). The Board finds that as the phrase is used in the last sentence of Section 57.7(c)(3), corrective action does not include site investigation and therefore Section 57.7(c)(3) of the Act does not authorize the Agency to require a PLA for site investigation. The Board strikes the requirement for a PLA in the Agency's denial letter and remands the Stage 3 site investigation plan and budget to the Agency to issue its decision.

Legal Fees

Petitioner asks that the Board award attorney's fees to petitioner. Section 57.8(l) of the Act provides that corrective action excludes "legal defense costs," which include "legal costs for seeking payment . . . unless the owner operator prevails before the Board in which case the Board may authorize payment of legal fees." 415 ILCS 5/57.8(l) (2014). The Board has required the reimbursement of legal fees from the UST Fund where the petitioner has prevailed in appealing the Agency's rejection of a budget. *See* Illinois Ayers Oil Co. v. IEPA, PCB 03-214 (Aug. 5, 2004).

Petitioner seeks legal fees for prosecuting this appeal. Pet. at 4. The amount of legal fees incurred by petitioner, however, is not presently in the record. The Board therefore reserves ruling on the issue of legal fees. Petitioner is directed to file a statement of its legal fees that may be eligible for reimbursement and its arguments why the Board should exercise its discretion to direct the Agency to reimburse those fees from the UST Fund. Petitioner must file its statement by March 23, 2015, which is the first business day following the 30th day after the date of this order. The Agency may file a response within 14 days after being served with petitioner's statement.

ORDER

1. The Board strikes the requirement that a project labor agreement (PLA) be used for site investigation activities from the Illinois Environmental Protection Agency's (Agency) denial letter. The Board remands the matter to the Agency to

issue a decision on the Stage 3 site investigation plan and budget that does not include a requirement for a PLA.

2. Petitioner must file a statement of legal fees and its argument as to why the fees are eligible for reimbursement by March 23, 2015. The Agency may file a response with 14 days after being served with petitioner's statement.

IT IS SO ORDERED.

Board Member J. D. O'Leary dissents.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on March 5, 2015, by a vote of 3-0.

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John T. Therriault, Clerk
Illinois Pollution Control Board