BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

SHARON BURGESS,	)	
Petitioner,	)	
	)	
v.	)	PCB 2015-186
	)	(UST Appeal)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
Respondent.	)	

NOTICE

John Therriault, Acting Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

Carol Webb, Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P. O. Box 19274
Springfield, IL 62794-9274

Patrick D. Shaw
Law Office of Patrick D. Shaw
80 Bellerive Road
Springfield, IL 62704

PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board a **MOTION TO STRIKE** and **RESPONDENT'S POST-HEARING BRIEF** copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

Melanie A. Jarvis
Assistant Counsel
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)
Dated: September 22, 2015

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MOTION TO STRIKE

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, Melanie A. Jarvis, Assistant Counsel and Special Assistant Attorney General, and, pursuant to 35 Ill. Adm. Code 101.500 and 101.502, hereby requests that the Illinois Pollution Control Board ("Board") strike **facts not in evidence** from the Petitioner's Post-Hearing Brief. In support of this motion, the Illinois EPA states as follows:

The Petitioner, Sharon Burgess, by and through her counsel, filed a Post-Hearing Brief ("PHB") on September 1, 2015. Included in the brief are numerous facts that were never placed in evidence. As such these facts must be stricken and argument based upon such should be disregarded. Specifically, the following facts cannot be found within the administrative record nor hearing record:

1. On Page 2 of its PHB, Petitioner alleges that "[a]t all times relevant hereto, Kankakee County has had prevailing wage rates for truck drivers, laborers, and operators. (R.420-R425). The release involved in this matter was reported on August 14, 2013, and was assigned Illinois Emergency Management Agency incident number 2013-0906, however, the only evidence that Kankakee had prevailing wage rates is a copy

of their 2015 rates. There is no evidence presented, that Kankakee had prevailing wage prior to 2015. This reference must be struck.

2. On Page 3 of its PHB, Petitioner alleges that "[w]ith respect to work requiring the use of drivers, laborers, and operators, the early action costs incurred were far over the maximum allowable reimbursement rates allowed under Subpart H, and accordingly the consultant reduced the reimbursement requests in order to receive payment" While it is represented that the amounts were over the Subpart H amounts for early action and the Petitioner's consultant reduced the amount in order to get paid, the amount that was reduced included payment for equipment, and was not solely for labor as the Petitioner would lead the Board to believe. It is not clear from the record as to whether it was the equipment costs or the labor costs that pushed the total over Subpart H. Granted, a document found at R. at 659 is cited by Petitioner as some basis for Petitioner's claim and argument. However, the Board cannot ignore the fact that this document was not part of the February 2015 Plan and Budget submitted for review by Petitioner. Again, Petitioner could have included such reference within its own February 2015 Plan and Budget, but Petitioner did not. Thus, any responsibility for its failure to be presented during the critical time for review of its documents by Illinois EPA, and subsequently this proceeding, lies only on Petitioner. The Early Action documents, as well as the documents for the Site Investigation, are before the Board solely because the Board has requested that documents relating to an incident should to be included in the record on review. In short, Petitioner should not benefit from fabricating an argument and facts not before the Illinois EPA during its review of Petitioner's own

Corrective Action Plan and Budget. Once again, a review of the record establishes that no proof is offered at all on this issue. More significantly, Petitioner presented no testimony, documentation, or evidence of any kind at hearing to attempt to establish cost that it claims created the overage. The Board cannot base a conclusion upon no factual support within the February 2015 Plan and Budget.

3. On Page 5 of its PHB, Petitioner quotes from its submittal in stating "[b]ecause prevailing wage was incurred at the site, and will incur again for further activities…". Except for this broad self-serving statement, in both the submittal and the brief, no evidence has been presented that Petitioner actually paid prevailing wage. No link has been made to the actual Kankakee Prevailing Wage numbers for 2015 and the corresponding amounts incurred during early action. Without any suggestion of a connection to prevailing wage, the Petitioner cannot establish that prevailing wage was actually paid. This reference must be struck.
4. On page 6, where Petitioner claims "[t]hese figures are for demonstrative purposes based upon a simple comparison of base pay, and does not include non-wage benefits such as insurance, pension, vacation, training and overtime benefits required for the prevailing wage. (R. 421)." However, when you look at the record and page 421, there is nothing that supports this statement. This statement must be struck.
5. On Page 12 of its PHB, Petitioner states that "[t]his appeal deals directly with the prevailing wage rates required by the amendments to the Prevailing Wage Act." The Petitioner talks a lot about prevailing wage, but offers no proof that prevailing wage was actually paid or at issue in this case. This statement must be struck.

6. On Page 15 of its PHB, Petitioner states that "[t]he Agency has declined to meet with the LUST Advisory Committee to discuss making Subpart H consistent with prevailing wage (R.308) * * *. In addition, the Agency has not reported to the Board on the sufficiency of Subpart H to meet prevailing market rates (R.308) * * *." No such evidence exists within the record. Moreover, referring to your own self-serving statements in an application under review is not evidence of the statement to prove it is true. Besides making these blanket statements, Petitioner offers no independent evidence to verify its claims. These assertions must be struck.

Petitioner's inclusion of the above facts forces the Board to presume facts not in evidence and will unfairly require the Illinois EPA to respond to such assertions absent proof of their validity. And, citing to your own statement as proof that the statement is true, is not valid evidence, and any question regarding proof of such should be placed upon Petitioner, and deficiencies construed against Petitioner where Petitioner itself held, at all times, solely was responsible for presenting with sufficient support statements and facts that it wished reviewed and relied upon. Moreover, the statements and conclusions that are presented from them prejudice these proceedings and unfairly burden the Illinois. All of the facts above offered by the Petitioner in its PHB, are improperly alleged, and must be struck. In all, Petitioner should not be allowed to benefit from not presenting evidence on facts and arguments upon which it wishes to rely upon. In addition, Petitioner will not be prejudiced by striking these statement and arguments made thereupon since Petitioner itself had the ability to present such within either its February 2015 Plan and Budget or testimony or evidence at hearing. Simply put, Petitioner failed to do so and should not be allowed to do so belatedly. Petitioner's own actions placed Petitioner in this position, and

only Petitioner could correct the issue and allowed the Illinois EPA its procedural rights to object, challenge the evidence or presenting contrary information and testimony.

WHEREFORE, for the reasons stated above, the Illinois EPA hereby respectfully requests that the Board strike all facts not in evidence as well as strike arguments presented thereupon, from the Petitioner's Post-hearing Brief.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

_____

Melanie A. Jarvis
Assistant Counsel
Special Assistant Attorney General
Division of Legal Counsel
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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 Reply Brief and Motion to Strike to the Illinois Pollution Control Board ("Board").

INTRODUCTION

This matter is rather simple; presenting a rather ordinary fact set and nothing atypical relative to procedural considerations. Petitioner submitted a Corrective Action Plan & Budget ("Budget") for incident 2013-906 for a facility (Fleet Fuel, Inc.) located within Kankakee, Illinois.

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** reduced the budget to Subpart H rates 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.

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 ("Record"). Normally the Board would look at the testimony presented at hearing. However, as noted above, testimony was not presented at the hearing.[1]

FACTS

Within Petitioner's February 20, 2015, Corrective Action Plan and Budget, consultant CW3M, Inc., proposed budget reimbursement rates in excess of those found within Subpart H. The Illinois EPA approved the Corrective Action Plan & Budget, modifying it only to allow for a budget that would allow for reimbursement of Subpart H rates. Petitioner appealed the decision to the Board.

FEBRUARY 2015 BUDGET

***i*) Title 35 Ill. Adm. Code Section 734.875**

Subsection 3.4 of Petitioner's Budget provides the basis for which Petitioner presented its contention that it should be allowed to exceed Subpart H rates. The **sole** justification provided was citation to 35 Ill. Adm. Code Section 734.875. The Board will find this argument fails, as did the Illinois EPA when it modified the Budget.

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

Section 734.875 of the Board's regulations provides:

> *Agency Review of Payment Amounts*
> *No less than every three years the Agency must review the amounts set forth in this Subpart H and submit a report to the Board on whether the amounts are consistent with the prevailing market rates. The report must identify amounts that are not consistent with the prevailing market rates and suggest changes needed to make the amounts consistent with the prevailing market rates. The Board must publish notice of receipt of the report in the Environmental Register and on the Board's web page*.
> (35 Ill. Adm. Code 734.875)

First and foremost, the regulation cited to by Petitioner within its Budget requires that the Illinois EPA, at most, at least once every three years, file a report to the Board. That is all. This regulation does not do anything other than require a report. One more time, a 'report' to the Board is required.

- Section 734.875 does not grant the Illinois EPA authority to set amounts within Subpart H.
- No authority is conveyed to correct amounts set within Subpart H.
- No mention is made to allowing the Illinois EPA to review costs on a case by case or site by site basis.
- No authority is suggested to allow the Illinois EPA the ability to alter rates already set within Subpart H.
- No mention is made requiring the Board to accept any suggestion proposed by the report.
- No requirement is made upon either the Board or the Illinois EPA to propose amendments to Subpart H.
- The Section does not grant the Illinois EPA authority to use its own judgement to set rates.

- The provision does not allow the Illinois EPA authority to apply rates between the Prevailing Wage Act and Subpart H.
- The provision does not tell the Illinois EPA to look to U.S. Department of Labor statistics, as presented within the Budget at Appendix H.
- Nowhere is it found that the Illinois EPA should consider occupational employment statistics from the U.S. Department of Labor, Bureau of Labor Statistics that pre-date any amendment to the Illinois Prevailing Wage Act.
- The language is silent on the phrase "prevailing wage" providing only that the report review whether amounts in Subpart H are 'consistent' with the prevailing market rate.
- The language does not appear to confer upon the Board the ability to review a finding of the Illinois EPA that a rate limit of Subpart H should be reversed based upon anything within a report.
- Nothing remotely suggests that the failure to file a report alters in any way the Subpart H limits.
- In short, Section 734.875 is not connected in any manner to the issue Petitioner is attempting to tee up (i.e., prevailing wage).

Now, presuming, arguendo, that the Board does look beyond the many issues noted above, the logic behind Petitioner's attempt to extend the basis for the Section falls apart. Petitioner notes that the amendment to the Prevailing Wage Act for which it seeks approval of amounts over those within Subpart H was enacted into law on July 25, 2013. The first six words of Section 734.875 are "*No less than every three years*… ." Simply counting three years from the date of enactment would mean that the Illinois EPA would have at least

three years to consider the issue in the report (July 25, 2016). That date, not having come, cannot provide the rationale for a suggestion that the Illinois EPA is required to do anything yet. The issue of whether or not Illinois EPA filed a report is simply not yet ripe.

Again, the language of Section 734.875 speaks expressly in terms of a review of Subpart H amounts and a determination of 'consistency' with 'prevailing market rates.' In abstract, something may be 'consistent' in the Illinois EPA's opinion and not exact. There may be a difference between a determination that a prevailing market rate is consistent and whether or not prevailing wage applies under the Prevailing Wage Act. No indication is suggested that the two differing terms are intended to mean the same thing. Again, no support for Petitioner's contention can be found within Section 734.875. Further, the Illinois Department of Labor would determine Prevailing Wage for purposes of the Prevailing Wage Act.

***ii*) APPENDICIES H & I**

Finally, even if the Board were to consider the content of Appendices H and I of the Budget, Petitioner does not frame its calculations with enough specificity for a finding on increasing rates for this project. Pages 1, 2 and 3 of Appendix H are meaningless, pointing out only information from the U.S. Department of Labor for rates in 2012 (prior to the enactment of the legislative change Petitioner is pinning its hopes upon). Pages 4, 5, 6 and 7 of the Budget are likewise of little use. These pages presume a prevailing wage margin of 35%. Based upon; Bureau of Labor stats as compared to Prevailing Wage with the 35% margin for 2012. Again, of no help. No indication is presented as to why a 35% rate is presumed or even applicable to this matter. In addition, once again, the information tends to pre-date the very statutory law which is being suggested for review.

Petitioner then provides Illinois Department of Labor rates for all prevailing wage rates for September 2013. Petitioner circles two rates for Truck Driver, one rate for operating engineer and one rate for laborer. These rates are then for some reason set aside from Marion County prevailing wage rates for October 2013. Then, Petitioner follows this up with 2015 rates for Kankakee County, Illinois. This hodgepodge of information is not instructive whatsoever.

Was Petitioner suggesting that the term "prevailing" with the context of "prevailing market rate" should be a consolidation of facts from U.S. DOL, IL DOL and counties around the site? Perhaps, although it certainly is not clear from the appendices or any argument presented within the Budget. At best, when you consider the fact that the definition of the term "prevailing" within Webster's Dictionary, the definition does suggest that the term is analogous to the words "usual" or "common" or "widespread" you might be able to convince yourself that the morass of information had some probative value. However, this 'definition' would contrast greatly from the term as used by the statute and likely ILDOL when you consider that 'prevailing wage' is to be set for the purposes of identifying that rate as it relates to the **locality** for which work is done.

As such, the dearth of information submitted falls short of any meaningful basis to support any approval of such suggested overage costs. Moreover, as demonstrated above, the documents certainly were not presented to the Illinois EPA in any coherent fashion. And, Petitioner's attempt to re-argue the figures it presented in the Budget by way of its pleading before the Board is even more tangentially connected to its claim that a prevailing wage was somehow presented and requested.

POST HEARING BRIEF

Now, how does Petitioner frame the issue before the Board? Within the Petitioner's Post Hearing Brief ("PHB"), Petitioner attempts to argue statutory provisions not presented within its Budget to the Illinois EPA. The Board should note that Petitioner conjures up quite of few ghost figures in its attempt to explain itself and the documents submitted for Illinois EPA review. But, each figure is not fully defined and frankly they only cast a longer shadow on the issue Petitioner claims is at hand (i.e., prevailing wage).

Take for instance the various 'rates' Petitioner raises within its PHB, including, but likely not limited to: prevailing wage rates, actual costs, allowed subpart H costs, fractions of actual costs, maximum amounts, maximum allowable reimbursement rates, half prevailing wage rates, average wages, re-imposed subpart H maximum rates, unit rates, mean rates, median rates, average private rates, average public rates, public sector rates, Marion County rates, Kankakee County rates, Bureau of Labor Statistical rates, U.S. Department of Labor rates and so on.

While Petitioner is attempting to require the Illinois EPA to approve a rate higher than Subpart H, Petitioner itself can't seem to focus on which of the many rates/wages/costs are appropriately representative of the prevailing wage for the locality.

And, most significantly, Petitioner within its Budget proposed only a rate based upon what it expended during Early Action. Again, the rate proposed is **NOT** the prevailing wage rate for a locality, but instead is a rate that Petitioner extrapolated from what the Petitioner claims was paid in Early Action. The rate requested represents a division of tonnage from total costs of Early Action activities (no review of prevailing wage for the locality).

So, all of the focus on the Prevailing Wage Act and discussion of such a wage is simply smoke and mirrors, when Petitioner itself doesn't identify what prevailing wage it claims should have been approved. At best, Petitioner only sought to conjure a wage based upon its own private contract(s) to conduct work under Early Action at the site. And, the Board must recognize that the Petitioner itself did not request reimbursement for Early Action costs at what Petitioner claims were "actual" costs. Petitioner reduced the amount within Petitioner's own request for reimbursement for such costs, reducing claims to Subpart H figures.

Petitioner frames the issue in a very dramatic way to the Board. Petitioner is required to pay "prevailing wage" and the Illinois EPA has failed to consider this fact and is forcing costs upon it. The bright light of responsibility is again shined by Petitioner upon the Illinois EPA within its Petition to the Board which notes conspicuously that an Illinois EPA fact sheet on Project Labor Agreements (Exhibit A) provides that Public Act 98-109 (the Economic Development Act of 2013) answers the question "Am I require to comply with prevailing wage provision? Yes." Forget for a moment that the fact sheet is designed to deal with Project Labor Agreements, or even that the sheet expressly provides that "this fact sheet is for general information only and is not intended to replace, interpret, or modify laws, rules, or regulations." And, of course, please forget the fact that the fact sheet is incorrect as based upon the Board's recent ruling in *McAffee v. Illinois EPA*, PCB 2015-084 (March 5, 2015), as it relates to inclusion of PLA's at the site investigation stage. What the Illinois EPA would request the Board to consider is the fact that the fact sheet provides nothing, other than a brief discussion of a common questions and the Illinois EPA's thought on that matter, and is truly concerned with the requirement that the Illinois EPA make a

Project Labor Agreement determination. As such, the document provides little if any probative value to the discussion.

UNUSUAL OR EXTRAORDINARY CIRCUMSTANCES

Title 35 Ill. Adm. Code Section 734.860

Petitioner next attempts to offer that Section 734.860 of the regulations allows the Illinois EPA the ability to determine maximum payment amounts for the costs on a site-specific basis and that this Section should have been used. This regulation was not noted within the Petitioner's February 2015 Budget. And, the Petitioner never asked for an unusual or extraordinary determination from the Illinois EPA. The Illinois EPA, apparently, should have been a mind reader and presumed what further arguments that Petitioner may make in the future (like within its initial pleading and Post Hearing Brief) and acted upon something not requested. But, that is where we are at, reviewing and assessing Petitioner's claims, most which were belatedly penned by Plaintiff as arguments for consideration, in particular, seeking review of the Illinois EPA decision to apply Subpart H limits.

Section 734.860 provides:

Unusual or Extraordinary Circumstances

> *If, as a result of unusual or extraordinary circumstances, an owner or operator incurs or will incur eligible costs that exceed the maximum payment amounts set forth in this Subpart H, the Agency may determine maximum payment amounts for the costs on a site-specific basis. Owners and operators seeking to have the Agency determine maximum payment amounts pursuant to this Section must demonstrate to the Agency that the costs for which they are seeking a determination are eligible for payment from the Fund, exceed the maximum payment amounts set forth in this Subpart H, are the result of unusual or extraordinary circumstances, are unavoidable, are reasonable, and are necessary in order to satisfy the requirements of this Part.*
> Source: Amended at 36 Ill. Reg. 4898, effective March 19, 2012

Although this is not a denial point in the Illinois EPA's decision letter and thus not an issue upon review, let's discuss this regulation. The regulation is permissive. It does not require the Illinois EPA to approved rates in excess of Subpart H. In this matter, the Illinois EPA did not approve limits above Subpart H. Put simply, the excavation, transportation, disposal and backfilling in this matter are typical activities to almost all sites under the program, as such; the activities at issue are typical as opposed to being somehow unusual or extraordinary.

The authority within Section 734.860 is expressly limited to unusual or extraordinary circumstances. No matter how this case is presented or looked at, these factors do not exist within this matter. Petition did not suggest any unusual or extraordinary circumstances within the Budget and Petitioner did not present any evidence whatsoever at hearing. No opening statement. No witness. No closing statement. No exhibits. Nothing at all was presented at 'hearing.'

Petitioner thus, at very best, relied upon the record – which would be only Petitioner's application submitted in February 2015 for Illinois EPA review. Within that submittal, Petitioner claims certain costs in Early Action and extrapolated a $/unit rate based thereupon and sought approval of that rate as opposed to the rate within Subpart H. Prevailing wage is left to exhibits and argument that such should be paid, but never truly tied to the request.

Also, and this is the significant point of this matter, there is no evidence provided to demonstrate that the rate that Petitioner claims it paid in 2013 is prevailing wage for 2015. **There is NO EVIDENCE to demonstrate that the rate that Petitioner claimed it paid is the prevailing wage. NONE.** Again, Petitioner is proposing a unit rate that it allegedly

paid in 2013 as prevailing wage for its application in 2015. This is no more evident than when Petitioner's PHB cites to supporting information for its claim to a higher rate citing to documents within Petitioner's request for reimbursement of Early Action costs. (PHB at 3) Petitioner apparently cites to its Early Action budget from 2013 in support of its February 2015 budget costs. The Illinois EPA will remind the Board that the application for the 2015 Budget is silent to these facts absent a lone reference to "early action" at page 342 of the record.

For that matter, closer review will show that there is no proof presented by the Petitioner that a unit rate was paid to any subcontractors, which rate was, in fact, the prevailing wage rate for the locality.

Frankly, any reviewer must presume/surmise/conjecture/speculate that a private contractual rate (paid some two years prior to a request for review of a budget rate) somehow is the prevailing wage rate.

Even then the Illinois EPA and the Board in this matter must take the further logical leap of faith and find that the prevailing wage rate for the locality should be fairly represented as the dollar per cubic yard rate as opposed to an hourly rate.

Then, the Illinois EPA and Board are left to navigate the information within the February 2015 Budget, Appendix H, which is not presented in any clear, logical form whatsoever. For example, at R. at 414 and R. at 415, there is information which purports to detail the Marion County, Illinois Prevailing Wage Rates. This document is not identified as to who generated it, from what source or indeed even for what purpose. Apparently, the document shows a calculation for May 2012 and leaves for the reader to figure out what to do with the apparent amendment to that document which included a number of undefined

terms such as "IEPA max," "estimated overage" and "Project Increase" figures. This document cannot credibly be relied upon to demonstrate anything of substance relative to an Illinois EPA's review of a February 2015 Budget and a request to exceed Subpart H rates in Kankakee County, which is a couple hundred miles away. Petitioner took no steps to provide further enlightenment of the documents origin, authorship, basis for information contained therein at 'hearing' or truly even within its brief to tie the information to 'prevailing wage.'

Take also for example the review presented in the PHB, at page 6, where Petitioner claims "[t]hese figures are for demonstrative purposes based upon a simple comparison of base pay, and does not include non-wage benefits such as insurance, pension, vacation, training and overtime benefits required for the prevailing wage. (R. 421)" When you look at the record and page 421, there is nothing that supports this statement. And, recall once again, that the information which is used to form the basis of a great deal of the argument that is now presented apparently relates to the calendar year 2012, somewhere in Marion County (not Kankakee) and was based upon "typical" presumptions for which the basis of such assumptions are never presented.

For what purpose and in what ways do "mean hourly wages" of BLS May 2012 and "median hourly wages" of 2012 and Kankakee Prevailing Wages for 2015 relate? Granted, there is a presentation of Pages 420 to 425 as a discussion of Prevailing Wages for Kankakee, but nowhere are they connected to the dollar per cubic yard rate Petitioner sought. Assuming, only for purposes of debate, that the Board does look to the Kankakee figure for Prevailing Wage in Petitioner's PHB at page 6, the Illinois EPA would respectfully request the Board note that the rate identified is a wage per hour and the Subpart H rate is

a rate per cubic yard – for which Petitioner presents no review, choosing only to proclaim that the Subpart H rate "… would be insufficient to pay average wages, let alone prevailing wages."

Further, take for instance the fact that, at very least; the dollar per cubic yard rate includes some equipment cost. How do equipment costs relate to prevailing hourly wage rates? Once more, the Illinois EPA and Board must fill in the analysis for the basis of Petitioner's claim and both are left without any testimony whatsoever to identify the source, origin or veracity of the calculations and indeed even the theory presented.

The owner or operator holds the burden of demonstrating that the costs sought are eligible and, for purposes of this discussion, would be the result of circumstances that are unusual are unavoidable are reasonable and are necessary in order to satisfy the requirements of the Part. Petitioner fails to clear any of these hurdles. Firstly, Petitioner does not meet a burden of demonstrating that the costs it seeks are eligible. In this case, Petitioner claims only that the Illinois EPA should have higher rates in Subpart H and really nothing more. Moreover, Petitioner does not present anything within the February 2015 Plan or Budget to suggest that Petitioner is in an unusual situation. In fact, Petitioner made no such showing of fact whatsoever. Petitioner merely claims that its payment of a unit rate higher than Subpart H is evidence that it should be paid that rate during corrective action.

Finally, Petitioner does not demonstrate that it could avail itself to a finding that its request are necessary since it claims only a right to payment of an average cost it paid in Early Action as opposed to prevailing wage rate. In fact, prevailing rate is not even

presented in this matter other than as a justification for payment of a unit rate based upon Early Action 'costs' which Petitioner claims it paid.

Just to close the door on Petitioner's argument, suppose, just for arguments sake, that there was a site adjacent to Petitioner's site. And, presume that 'prevailing wage' is indeed at issue, which the Illinois EPA does not concede in this matter. The adjacent site presents the same facts, i.e., same number of tank and volumes, same type of release and so on. The only differences would be the adjacent street address, a differing owner/operator and different IEMA number.

Would the Prevailing Wage Act apply? Perhaps.

Suppose the facility was across town. Would the Prevailing Wage Act Apply? Perhaps.

As such, nothing site specific, unusual or extraordinary is offered for review in this matter.

Particularly nothing unusual or extraordinary is offered relative to prevailing wages applicability.

And, if indeed Petitioner is correct in providing that the prevailing wages rate is required by law (PHB at 4 – which the Illinois EPA does not take a position on for this review) then it is not conceptually logical to proclaim that something which is required by law is now an unusual or extraordinary event. These two concepts just are not the same. So, Petitioner's attempt to, once again, blame the Illinois EPA for not approving rates above Subpart H is baseless.

LEGISLATIVE DEBATE

Petitioner offers that "… the legislative history is clear about what amendments were intended to accomplish and how they would be addressed…". (PHB at 13) If true, then the Illinois EPA questions why Petitioner failed to recognize that within the very same floor debate Senator Murphy and Senator Hutchinson both provided that prevailing wage would not be required "… in smaller cases, that a contractor can be hired without having to go to a PLA that makes it more expensive." (R. at 436) Senator Munoz also stated that "…there are ways to get around the PLA agreement. So, I - - yes, I do share that legislative intent." (R. at 437) Later, Senator Murphy asks whether the PLA costs reimbursable from the LUST Fund proceeds? To which, the answer from Senator Hutchinson was, Yes. (R. at 437) Thereafter, Senator Hutchinson provided that the bill itself did not expressly provide for PLA costs to be reimbursable, but '[i]t is part of what you certify to in order to be reimbursed." (R at 437 and 438)

So, only after all of the discussion relative to a PLA does the reimbursement of prevailing wage occur. All of the discussion tended to center upon a PLA determination being integral to the discussion as a whole. In this matter, the Illinois EPA did **NOT** make a determination that a PLA would be required. What is included within the record is the Project Labor Agreement Determination form which concluded that "[b]ased upon the above determination(s), the Project work: shall not include a PLA." (R. at 296)

BIDDING - AS AN ALTERNATIVE TO SUBPART H MAXIMUMS

Title 35 Ill. Adm. Code Section 734.855

Petitioner never recognizes an ability to seek an alternative to the maximum payment amounts set forth within Subpart H is provided for within the regulations.

Section 734.855 states:

> *"[a]s an alternative to the maximum payment amounts set forth in this Subpart H, one or more maximum payment amounts may be determined via bidding in accordance with this Section."*

But, the owner or operator must demonstrate that corrective action cannot be performed for amounts less than or equal to maximum payment set forth within that Part.

So, the owner or operator has, at its discretion, the ability to bid and establish a rate above Subpart H, assuming such is indeed demonstrable.

Could Petitioner in this case have demonstrated this? We will not know since Petitioner did not avail itself to this express statutory ability to seek higher rates.

Petitioner never mentions this statutory provision, nothing within their Budget, nor within their Pleadings to the Board. Further, Petitioner did not even acknowledge this statutory authority which is conspicuous on the Illinois EPA's web site, where, ironically, the link to Petitioner's Exhibit A is found.

Respondent's Exhibits 1, 2 and 4 demonstrate that the Illinois EPA's website notes:

> *"Prevailing Wages"*
> *…*
> *To date, the payment of prevailing wages has not affected the UST owner's or operator's ability to perform corrective action work for the Subpart H maximum payment amounts. However, please be advised that, if corrective action work cannot be done for the Subpart H maximum payment amount, then the maximum payment amount may be determined via bidding (Section 57.7(c)(3)(B) and (C) of the Environmental Protection Act and 35 Ill. Adm. Code 734.800(a)(2)."*

Nothing at all is presented from Petitioner regarding bidding under express provisions within the regulations. No mention. No reference to it as being suggested by the Illinois EPA. No assessment. No acknowledgement of the regulation whatsoever. No reasoning as to why bidding cannot be done in this case.

CONCLUSION

This matter presents the Board with no new issues and no basis for reversing the Illinois EPA's determination. Petitioner requested a rate higher than allowable pursuant to Subpart H. Petitioner claimed that a provision which mandates a report be submitted, every so often, to the Board, somehow, provided the Illinois EPA with the authority to approve higher dollar per cubic yard rates. Petitioner attempts now, though pleading, to hang its hopes on the fact that it must pay prevailing wages under the Prevailing Wage Act. Yet, Petitioner does not present a prevailing wage rate for review, nor did Petitioner do so when the February 2015 Budget was before the Illinois EPA for review. Petitioner chooses to calculate a new dollar per cubic yard rate based solely upon its own private contract rate that Petitioner claims was paid during Early Action. This rate, being above the rate within Subpart H, was modified to the applicable rate. Petitioner fails to meet its burden of proof in this matter.

WHEREFORE: for the above noted reasons, the Illinois EPA respectfully requests the Board **AFFIRM** the Illinois EPA's March 19, 2015, decision.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent

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Melanie A. Jarvis
Assistant Counsel
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544, 217/782-9143 (TDD)
Dated: September 22, 2015

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on **September 22, 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:

John Therriault, Acting Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

Carol Webb, Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P. O. Box 19274
Springfield, IL 62794-9274

Patrick D. Shaw
Law Office of Patrick D. Shaw
80 Bellerive Road
Springfield, IL 62704

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

_____

Melanie A. Jarvis
Assistant Counsel
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)