BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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

NOTICE OF FILING AND PROOF OF SERVICE

TO: Carol Webb
Hearing Officer
Illinois Pollution Control Board
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PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board, PETITIONER'S POST-HEARING REPLY BRIEF, copies of which are herewith served upon the Hearing Officer and upon the attorney of record in this case.

The undersigned hereby certifies that a true and correct copy of this Notice of Filing, together with a copy of the documents described above, were today served upon the Hearing Officer and counsel of record of all parties to this cause by enclosing same in envelopes addressed to such attorneys and to said Hearing Officer with postage fully prepaid, and by depositing said envelopes in a U.S. Post Office mailbox in Springfield, Illinois on the 5th day of October, 2015.

SHARON BURGESS

BY: LAW OFFICE OF PATRICK D. SHAW

BY: /s/ Patrick D. Shaw

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**PETITIONER'S POST-HEARING REPLY BRIEF**

NOW COMES Petitioner, SHARON BURGESS, by its undersigned attorney, for Petitioner's Post-Hearing Brief, states as follows:

## I. PETITIONER'S BURDEN OF PRODUCTION IS MERELY TO PRESENT A PRIMA FACIE CASE ON THE ISSUES RAISED IN THE AGENCY'S DENIAL LETTER.

The full statement of the burden of proof in these proceedings is as follows:

> **To prevail before the Board, Sexton had the burden of establishing that its proposed CPC care plan would not result in any future violations of the Act or the regulations and that the conditions imposed by the Agency were therefore unnecessary to accomplish the purposes of the Act. Once Sexton had established a prima facie case that the conditions were unnecessary, it became incumbent upon the Agency to refute the prima facie case. The ultimate burden of proof that the conditions were unnecessary, however, rested upon Sexton.**

John Sexton Contractors v. Illinois Pollution Control, 201 Ill. App.3d 415, 425-426 (1st Dist. 1990) (emphasis added).

The applicant has the initial burden of producing evidence to establish a prime facie case, which is generally described as "evidence which, when viewed in the light most favorable to the burdened party, is sufficient to enable to the trier of fact to find the issue for him." Anderson v.

Department of Public Property, 140 Ill.App.3d 772 (4th Dist. 1986). The burden of production shifts tp the non-burdened party about presentment of a "prima facie" case, while the ultimate burden of persuasion never shifts. Id.

The legal and evidentiary issues before the Board are established by the denial letter. Illinois Environmental Protection Agency v. Illinois Pollution Control Board, 86 Ill.2d 390, 405 (1981). The denial letter must raise the specific legal provisions that would be violated and what additional information the Agency believes would be necessary to approve the application. (415 ILCS 5/57.7(c)(4)(C) For example, if the Agency believed that competitive bidding was required by law, then the Agency should have cited the relevant legal provisions for that proposition in the denial letter, or identify evidence of competitive bidding as a specific type of information that was required to approve the application. This provides the applicant the opportunity to choose either to supplement the application or appeal to the Board. (415 ILCS 5/57.7(c)(4) ("If the owner or operator elects to incorporate modifications required by the Agency rather than appeal, an amended plan shall be submitted to the Agency within 35 days of receipt of the Agency's written notification.")

## II. THE APPLICANT IS NOT REQUIRED TO CITE LEGAL PROVISIONS IN THE APPLICATION.

The Illinois EPA falsely claims that the "sole justification provided" for exceeding Subpart H rates as 35 Ill. Adm. Code Section 734.875. (Resp. Brief, at p. 9) This is false. The justification given in the application was that "[b]ecause prevailing wage was incurred at the site, and will incur again for further activities, the excavation and backfilling rates have been updated in the budget to match those of the actual costs from early action." (R.308) The Agency, not the

applicant, had the burden of identifying which, if any, legal provisions would be violated if the application were granted, and it did not reference Section 734.875. Illinois Environmental Protection Agency v. Illinois Pollution Control Board, 86 Ill.2d 390, 405 (1981).

The Illinois EPA denied the application primarily on the grounds that it did not have authority to exceed Subpart H rates by virtue of 35 Ill. Adm. Code 734.630(zz), which is patently false. Section 734.860 expressly allows Subpart H rates to be exceeded for unusual or extraordinary circumstances where the owner or operator "incurs or will incur eligible costs that exceed . . . Subpart H." (35 Ill. Adm. Code 734.860) This is clearly the context for seeking approval to exceed Subpart H rates and as the Agency has not drafted a form for "unusual or extraordinary" circumstances (probably because it is a site-specific determination), whether "unusual or extraordinay circumstances" exist must be assessed by the totality of the information submitted in the application.

## III. THE AGENCY IS CONTINUALLY VIOLATING 35 ILL. ADM. CODE 734.875.

The application sought relief from Subpart H rates because prevailing wages had been incurred at the site and will be incurred again. The unusual and extraordinary circumstance is primarily the prevailing wage requirements that did not exist when Subpart H was passed, but it is also relevant that the Illinois EPA has decided to disregard legal and regulatory requirements that require Subpart H rates to be revised.

As to the triennial report, the only relevant point here is that the Illinois EPA submitted no evidence that it had conducted a review of Subpart H rates, nor submitted a triennial report to the Board. The regulatory requirement is for the Agency to do so at a minimum of over three years, not three years from any particular change. (35 Ill. Adm. Code 734.875 (“No less than

ever three years the Agency must . . . ")) The Board knows whether a report has been received in the last several years.

## IV. PROJECT LABOR AGREEMENTS ARE AN INDEPENDENT ISSUE FROM PREVAILING WAGE REQUIREMENTS.

There are a number of confusing statements regarding project labor agreements, but Petitioner wants to make one point clear in the hope of avoiding any confusion. Project Labor Agreements, as one was not required herein, are not relevant in this appeal. Prevailing Wage requirements are imposed by the Prevailing Wage Act. "Even if a PLA is not required, payment of prevailing wages is required. A contractor or subcontractor is required to pay the prevailing wage to all laborers, workers, and mechanics working on public works projects conducted on and after July 25, 2013." (IEPA Ex. 2, at p. 2)

## V. COMPETITIVE BIDDING WAS NOT REFERENCED IN THE DENIAL LETTER, NOR CAN IT BE COMPELLED.

The Agency referenced two legal provisions in its denial letter: First, that the costs are ineligible because they exceed Subpart H rates as prohibited by 35 Ill. Adm. Code 734.630(zz), and second they are not reasonable as prohibited by 415 5/57.7(c)(3). Neither of these provisions are discussed in the Response Brief.

The Illinois Environmental Protection Act requires that any competitive bidding process be "optional." (415 ILCS 5/57.7(c)(3)(C) Even if the Agency had denied the budget for want of competitive bidding, the reason would be legally insufficient. There are "three methods for determining the maximum amounts that can be paid from the Fund for eligible corrective action

costs." T-Town v. IEPA, PCB 07-85, at p. 9 (April 3, 2008).

The budget forms required by the Illinois EPA require excavation, transportation, disposal and backfilling costs to be proposed on a cost-per-cubic-yard basis, regardless of method used. (R.342) The complaint that costs are not broken down in any particular way cannot per persuasive given that it is a deficiency in the Illinois EPA forms, and alternatively the Illinois EPA could have requested additional information in its denial letter. As a more practical matter, the prevailing wage requirements impose hourly guarantees to workers that more resemble professional service costs. These workers will have to be paid their guaranteed hourly rate regardless of what budget is approved under whichever method. Of the many disadvantages of competive bidding, one is it that it is time-consuming and costly.[1] On the other hand, a site-specific determination could generally be employed throughout the project.

**CONCLUSION**

Petitioner has presented a prima facie case that (a) it has incurred or will incur costs that exceed the Subpart H rates as a result of prevailing wage requirements, and (b) that a reasonable budget has been proposed by extrapolating the actual costs incurred and documented during Early Action for similar work. The Illinois EPA has improperly sought to strike evidence in its own record to obscure these points. Furthermore, the Illinois EPA has sought to modify its own denial letter with new reasons or new demands for information that were not made when they were supposed to be made.

The subject matter is a budget, and necessarily involves predicting future costs based

[1] While this appeal does not seek review of an early action plan, it would be impossible to use competitive bidding for early action given the time restrictions required.

upon current knowledge. The assumptions utilized by Petitioner have been conservative and particularly given the constant increase in prevailing wages, there can be little doubt that the cost to perform corrective action will exceed the proposed budget. It is just hoped that it will not exceed the costs by tens and tens of thousands of dollars.

WHEREFORE, Petitioner respectfully requests that the Agency determination herein be reversed and the Agency be directed to restore the costs removed from the budget, award a reasonable attorney-fee, and for such other relief as the Board deems meet and just.

Respectfully submitted,

SHARON BURGESS,
Petitioner,

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