

BEFORE THE POLLUTION CONTROL BOARD  
OF THE STATE OF ILLINOIS

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	Melanie Jarvis
Hearing Officer	Assistant Counsel
Illinois Pollution Control Board	Division of Legal Counsel
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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 RESPONSE TO MOTION TO STRIKE, 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 5<sup>TH</sup> day of October, 2015.

SHARON BURGESS

BY: LAW OFFICE OF PATRICK D. SHAW

BY: /s/ Patrick D. Shaw

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THIS FILING SUBMITTED ON RECYCLED PAPER

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SHARON BURGESS,	)	
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**PETITIONER’S RESPONSE TO MOTION TO STRIKE**

NOW COMES Petitioner, SHARON BURGESS, by its undersigned attorney, for  
Petitioner’s Response to Motion to Strike, states as follows:

Respondent seeks to strike six statements from Petitioner’s Brief, each of which will be  
addressed in turn, following a complete recitation of the statement in question.

**1. “At all times relevant hereto, Kankakee County has had prevailing wage  
rates for truck drivers, laborers, and operators. (R.420 - R.425)”**

The proposed budget submitted in February of 2015 stated that during early action  
“prevailing wage was incurred at the site, and will incur again for further activities.” (R.308)  
Attached to the proposed budget were printouts of the Kankakee County Prevailing Wage for  
February 2015. (R.420 - R.425)

It is not clear what materiality the Illinois EPA places on this fact. If the Illinois EPA  
believed that prevailing wage rates could not have been incurred at some relevant point in the  
past and this was a reason for denying the application, it was incumbent upon the Agency to  
specify that as a denial reason in its letter, otherwise it is waived. Illinois Environmental

Protection Agency v. Illinois Pollution Control Board, 86 Ill.2d 390, 405 (1981). If there was any “specific type of information” that the Illinois EPA believed was wanting in the submittal, the Illinois EPA was required to identify it, or the submittal is deemed complete. Id.; (415 ILCS 5/57.7(c)(4)(C))

In any event, the Illinois EPA cannot as a matter of law plead ignorance of whether or not there were prevailing wage rates at any particular time in Kankakee County, since the Illinois EPA, as a public body, has a duty to regularly “investigate and ascertain the prevailing rate of wages.” (820 ILCS 130/9) Even it that merely means, looking at the Illinois Department of Labor website: <https://www.illinois.gov/idol/Laws-Rules/CONMED/Pages/Rates.aspx>. One of the exhibits the Illinois EPA admitted into evidence actually referenced this website. (IEPA, Ex. 4; see also McAfee v. IEPA, PCB 15-84, at p. 2 (March 5, 2015)(official notice may be taken of materials on official websites))

2. **“With 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:**

<b>Early Action</b>	<b>Actual Costs</b>	<b>Deductions</b>	<b>Allowed by Subpart H</b>
<b>UST Removal</b>	<b>\$14,952.09</b>	<b>(\$7,448.63)</b>	<b>\$7,503.46</b>
<b>Excavation, Transportation &amp; Disposal of Contaminated Soil</b>	<b>\$42,648.51</b>	<b>(\$11,974.45)</b>	<b>\$30,674.06</b>
<b>Backfilling the Excavation</b>	<b>\$19,279.77</b>	<b>(\$5,413.19)</b>	<b>\$13,866.58</b>
<b>Total</b>	<b>\$76,880.37</b>	<b>(\$24,836.27)</b>	<b>\$52,044.10</b>

**(R.659 - R.661)”**

The Illinois EPA concedes that there is “some basis” for Petitioner’s claim at R.659, but it was not part of the submittal and Petitioner “could have included such reference within its own February 2015 Plan and Budget, but Petitioner did not.” (Resp. Brief, at p. 3) The February 2015 Plan and Budget expressly referenced the Early Action plan as the source of these figures: “The actual early action costs were documented in a reimbursement claim received by the Agency on January 3, 2014.” (R.308) In order to be reimbursed for early action, the applicant must document those costs, even though, the applicant reduces the amount requested for reimbursement.

If the Agency needed a copy of the early action plan, or any additional information about early action, it had a duty to identify the “specific type of information” that the Illinois EPA believed was wanting in the denial letter, or the submittal is deemed complete. Illinois Environmental Protection Agency v. Illinois Pollution Control Board, 86 Ill.2d 390, 405 (1981); (415 ILCS 5/57.7(c)(4)(C)).

**3. “Because 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.”**

This sentence is taken from the application under review. The question for the Board is whether or not the application as submitted to the Agency would violate the Act and Board regulations. Illinois Ayers v. IEPA, PCB 03-214, at p. 8 (April 1, 2004). Asking to strike a portion of the application is a nonsensical request that illustrates the paucity of the Agency’s position.

4. **“These 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)”**

The Illinois EPA claims that the referenced portion of the record does not support this statement. Preceding this sentence is a chart that includes summaries of base pay figures published for Kankakee County located in the record at R.420 - R.425. The specific reference to R.421 is to the “key” to the published figures, which separate base pay from overtime, health and welfare insurance, pension, vacation, and training are separate items from base pay. (R.421) The point being made is a comparison based upon base pay is conservative and will not include other costs imposed by the Prevailing Wage Act, depending on various factors.

5. **“This appeal deals directly with the prevailing wage rates required by the amendments to the Prevailing Wage Act. (820 ILCS 130/2 (adding Leaking Underground Storage tank work to definition of “public works”))”**

This statement in the legal argument section of the brief identifies the source of a legal requirement. The Illinois EPA has already conceded that there is “some basis” for prevailing wages being incurred on this project, but if additional information was needed, the Illinois EPA had a duty to identify the "specific type of information" that the Illinois EPA believed was wanting in the denial letter, or the submittal is deemed complete. Illinois Environmental Protection Agency v. Illinois Pollution Control Board, 86 Ill.2d 390, 405 (1981); (415 ILCS 5/57.7(c)(4)(C)).

6. **“The Agency has declined to meet with the LUST Advisory Committee to discuss making Subpart H consistent with prevailing wage (R.308) . . .” and “In addition, the Agency has not reported to the Board on the sufficiency of Subpart H to meet prevailing market rates (R.308) . . .”**

These statements are supported by the record, and the objection that the evidence in the record is “self-serving” is not a recognized legal objection. The point of a brief is to identify points of law and evidence in the record that serve to support ones position. Again, if the Agency disputed these claims made in the application, because it had met with the LUST Advisory Committee or reported to the Board, then the Agency’s proper response would have been to state so as a denial reason in its final decision. Illinois Environmental Protection Agency v. Illinois Pollution Control Board, 86 Ill.2d 390, 405 (1981).

### CONCLUSION

In summary, the Illinois EPA complains about information in the record, which it now wishes to dispute, but did not preserve these issues for review in its denial letter. It therefore seeks to shift the burden back to the Petitioner by complaining that no evidence or testimony was given at hearing. There is no requirement to present evidence at hearing. PAK-AGS v. IEPA, PCB 15-14 (March 5, 2015). Had Petitioner submitted additional evidence at hearing, the Agency would have objected that “the Agency’s review is generally limited to information submitted by the petitioner.” Piasa Motor Fuels v. IEPA, PCB 14-131, at p. 31 (Dec. 4, 2014) The motion to strike is thus a transparent evasion of the evidence in the record.

WHEREFORE, Petitioner respectfully requests that the Agency's motion to strike be denied, and for such other and further relief as the Board deems meet and just.

Respectfully submitted,

SHARON BURGESS,  
Petitioner,

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