BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

A & H IMPLEMENT COMPANY, Petitioner,	)	
v.	)	PCB 12-53
	)	(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 Shaw
Fred C. Prillaman
Mohan, Alewelt, Prillaman & Adami
1 North Old Capitol Plaza, Suite 325
Springfield, IL 62701-1323

PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board an **APPEARANCE**, and a **MOTION TO DISMISS** 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: March 6, 2012

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

A & H IMPLEMENT COMPANY, Petitioner, v. ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	))))))))	PCB 12-53 (UST Appeal)

APPEARANCE

The undersigned, as one of its attorneys, hereby enters her Appearance on behalf of the Respondent, the Illinois Environmental Protection Agency.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

Melanie A. Jarvis
Assistant Counsel
Special Assistant Attorney General
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: March 6, 2012

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

A & H IMPLEMENT COMPANY, Petitioner,	)	
v.	)	PCB 12-53 (UST Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

MOTION TO DISMISS

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, 101.506 and 101.508, hereby respectfully moves the Illinois Pollution Control Board ("Board") to **DISMISS** the above case and in support of said motion, the Illinois EPA states as follows:

I. STANDARD FOR ISSUANCE AND REVIEW

The Board, as well as most courts of original jurisdiction, have consistently ruled that a motion to dismiss a pleading should be granted where the well-pleaded allegations, considered in the light most favorable to the non-movant, indicate that no set of facts could be proven upon which the petitioner would be entitled to the relief requested. (See Uptown Federal Savings & Loan Assoc. v.Kotsiopoulos (1982), 105 Ill. App. 3d 444, 434 N.E.2d 476; People v. Stein Steel Mills Services, Inc., PCB 02-1 (Nov. 15, 2001).) The Board has further reasoned that `"[a] motion to dismiss, like a motion for summary judgment, can succeed where the facts, taken in a light most favorable to the party opposing the motion, prove that the movant is entitled to dismissal as a

matter of law." (BTL Specialty Resins v. Illinois Environmental Protection Agency, (April 20, 1995), PCB 95-98.) Where the Board finds it lacks jurisdiction to hear a case, it must dismiss the matter. WEI Enterprises v. Illinois EPA, PCB 04-22 (February 19, 2004); Mick's Garage v. Illinois EPA, PCB 03-126 (December 18, 2003); Panhandle Eastern Pipe Line Co. v. IEPA, PCB 98-102, slip op. at 30 (January 21, 1999); Kean Oil v. Illinois EPA, PCB 97-146 (May 1, 1997). Challenges to a tribunal's jurisdiction can be raised at any point in the proceeding. Concerned Boone Citizens, Inc. v. M.I.G. Investments, Inc. (2d Dist.1986), 144, Ill.App.3d 334, 494 N.E.2d 180; Ogle County Board v. PCB, 272 Ill. App. 3d 184, 191, 649 N.E.2d 545, 551 (2d Dist. 1995). This motion will demonstrate that the facts taken in favor of Petitioner would not allow the Petitioner to the relief plead and further will demonstrate that no litigable matter is presented for the Board's jurisdiction to hear the case plead. As such, the Board must dismiss the present action.

II. BURDEN OF PROOF

Pursuant to Section 105.112(a) of the Board's procedural rules (35 Ill. Adm. Code 105.112(a)), the burden of proof shall be on the petitioner. In reimbursement appeals, the burden is on the applicant for reimbursement to demonstrate that incurred costs are related to corrective action, properly accounted for, and reasonable. Rezmar Corporation v. Illinois EPA, PCB 02-91 (April 17, 2003), p. 9.

III. FACTS

The Illinois EPA will review and use only those facts presented to the Board within the petitioner's own appeal, and as such, the board can take such facts, for the purposes of this motion, as given and in the light most favorable to Petitioner. Should this matter proceed further, the

Illinois EPA does reserve its right to challenge Petitioner's facts, characterizations of the facts and the ability to offer within its own right.

1. Illinois EPA incorporates the factual statements set forth in Petitioner's Petition for Review.

2. Petitioner seeks the Board's ruling on corrective action costs initially submitted in 2009. Following the submission of numerous documents required under applicable regulations, Petitioner submitted a CAP and budget to the Illinois EPA in March, 2009. It was proposed to conduct further delineation of the soil and groundwater contamination plume. (Exhibit 1)

3. The Illinois EPA rejected the CAP on July 20, 2009 citing that there was already an approved plan for closure and the proposed CAP did not provide a different strategy than what was already approved and, furthermore, additional soil and groundwater sampling is not required in order to complete a TACO evaluation. (Exhibit 2)

4. The Petitioner responded to the July 20, 2009 denial letter on August 5, 2009, by requesting a re-review of the March 2009 CAP and included a Corrective Action Plan Budget to cover the costs for preparation of the response and to reflect the current rate in Subpart H. (Exhibit 3)

5. The Corrective Action Plan Budget was denied on December 17, 2009; due to the fact a plan was not approved with which the budget was associated. (Exhibit 4)

6. The Petitioner submitted another CAP and budget which was received on March 15, 2011. The CAP proposed additional investigation to define the plume on-site. The CAP mentioned that with the proposed additional site investigation, it may be possible for the owner to receive a No Further Remediation ("NFR") letter without the need to obtain a Highway Authority Agreement ("HAA"), thereby limiting future liability. (Exhibit 5)

7. The Illinois EPA approved the revised CAP and budget on June 9, 2011. (Exhibit 6)

8. The consultant submitted the budget for personnel costs separately to prepare the reports

which was denied previously in 2009. The budget was dated June 10, 2011 and was received by the Illinois EPA on June 13, 2011. (Exhibit 7)

9. The Illinois EPA made a final decision on the CAP and budget with which these personnel costs are associated with on July 20, 2009. This decision was subject to appeal, but the Owner/Operator never filed an appeal at that time. (See Exhibit 2)

10. The Illinois EPA letter dated September 1, 2011 informed the Petitioner about the final decision which was made in letters dated July 20, 2009 and December 17, 2009, but no new final decision was made in the September 1, 2011 letter. (Exhibit 8)

VII. APPLICABLE LAW

A. ENVIRONMENTAL PROTECTION ACT:

415 ILCS 5/40(a)(1). Appeal of permit denial

a)(1) If the Agency refuses to grant or grants with conditions a permit under Section 39 of this Act, the applicant may, within 35 days after the date on which the Agency served its decision on the applicant, petition for a hearing before the Board to contest the decision of the Agency. However, the 35-day period for petitioning for a hearing may be extended for an additional period of time not to exceed 90 days by written notice provided to the Board from the applicant and the Agency within the initial appeal period. The Board shall give 21 day notice to any person in the county where is located the facility in issue who has requested notice of enforcement proceedings and to each member of the General Assembly in whose legislative district that installation or property is located; and shall publish that 21 day notice in a newspaper of general circulation in that county. The Agency shall appear as respondent in such hearing. At such hearing the rules prescribed in Section 32 and subsection (a) of Section 33 of this Act shall apply, and the burden of proof shall be on the petitioner. If, however, the Agency issues an NPDES permit that imposes limits which are based upon a criterion or denies a permit based upon application of a criterion, then the Agency shall have the burden of going forward with the basis for the derivation of those limits or criterion which were derived under the Board's rules.

B: POLLUTION CONTROL BOARD REGULATIONS:

35 Ill. Adm. Code 105.108 Dismissal of Petition

A petition is subject to dismissal if the Board determines that:

a) The petition does not contain the informational requirements set forth in Section 105.210, 105.304, 105.408 or 105.506 of this Part;

b) The petition is untimely pursuant to Section 105.206, 105.302, 105.404 or 105.504 of this Part;

c) The petitioner fails to timely comply with any order issued by the Board or the hearing officer, including an order requiring additional information;

d) The petitioner does not have standing under applicable law to petition the Board for review of the State agency's final decision; or

e) Other grounds exist that bar the petitioner from proceeding.

35 Ill. Adm. Code 105.206 Time to File the Petition or Request for Extension

a) Except as provided in subsection (b) of this Section, if a person who may petition the Board under Section 105.204 of this Subpart wishes to appeal the Agency's final decision to the Board under this Subpart, the person must file the petition with the Clerk within 35 days after the date of service of the Agency's final decision.

b) If a person with standing as described in Section 105.204(d) of this Subpart, or any third party who is authorized by law to appeal a final decision of the Agency to the Board, wishes to appeal the Agency's final decision to the Board under this Subpart, the person must file a petition for review with the Clerk within 35 days after the date of issuance of the Agency's final decision.

c) Except as provided in subsection (d) of this Section, if a person who may petition the Board under Section 105.204 of this Subpart wishes to request an extension of time to file a petition for review pursuant to Section 105.208(a) of this Subpart, the person must file the request within 35 days after the date of service of the Agency's final decision.

d) If a person with standing as described in Section 105.204(d), or any third party who is authorized by law to appeal a final decision of the Agency to the Board, wishes to request an extension of time to file a petition for review pursuant to Section 105.208(b) of this Subpart, the person must file the request within 35 days after the date of issuance of the Agency's final decision.

VIII. ARGUMENT AND ANALYSIS

A. The Board does not have Jurisdiction to hear this case.

Section 57.8(i) of the Illinois Environmental Protection Act ("Act") (415 ILCS 5/57.8(i)) 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 5/40). Section 40 of the Act, the general appeal section for permits, was enacted by the legislature; and defines the basis and structure of this type of appeal to the Board. Thus, the Act expressly provides that when reviewing an Illinois EPA determinations regarding eligibility for reimbursement from the Underground Storage Tank Fund, the Board must first determine whether or not the application submitted demonstrates compliance with the Act and Board regulations. Rantoul Township High School District No. 193 v. Illinois EPA, PCB 03-42 (April 17, 2003), p. 3.

In short, in this matter, Petitioner claims to be aggrieved by the September 2011 letter issued by the Illinois EPA. However, as is evident from the facts, this letter post dates prior letters which encompass the final determination on the issue the Petitioner seeks to have reviewed. The board in reviewing its jurisdiction to hear a matter must consider whether the Petitioner can appeal from a letter that merely gives them notice of two prior final decisions issued by the Illinois EPA that they failed to appeal at the time. It is clear that the answer is NO.

The law is very clear on this issue. Reichhold Chemicals, Inc. v. PCB (3d Dist.1990), 204 Ill.App.3d 674, 561 N.E.2d 1343, held that the Illinois EPA has no statutory authority to reconsider a permit decision. Further, it is well established that an administrative agency has no inherent authority to amend or change its decision and may undertake reconsideration only where authorized by statute. (Pearce Hospital v. Public Aid Commission (1958), 15 Ill.2d 301, 154 N.E.2d

691;Reichhold Chemicals Inc. v. PCB (3d Dist.1991), 204 Ill.App.3d 674, 561 N.E.2d 1343.) Although the Board possesses such power, the appellate court has held that the Illinois EPA has no such reconsideration powers. (Reichhold, 561 N.E.2d 1343.) In general, finality, as it pertains to administrative agency decisions, is a decision which "fully terminates proceedings before an administrative body." Taylor v. State Universities Retirement, 111 Ill. Dec. 283;512 N.E.2d 399 (Ill.App. 4 Dist.1987) The Board found in Mick's Garage v. Illinois EPA, PCB 03-126 (December 18, 2003) that it lacked jurisdiction to review the Illinois EPA's February 7, 1992 deductibility determination. The Board stated that it "has held that a condition imposed in a permit, not appealed to the Board under Section 40(a)(1), may not be appealed in a subsequent permit. Panhandle Eastern Pipe Line Co. v. IEPA, PCB 98-102, slip op. at 30 (Jan 21, 1999)".

In Kean Oil v. Illinois EPA, PCB 97-146 (May 1, 1997), the Board held that it was concerned that there was "an attempt by petitioner to misuse the submittal process in order to remedy its failure to properly appeal the first decision by the Agency concerning this matter. The board cannot allow the potential misuse of the reimbursement system and as the Agency has properly identified, it does not have the authority to reconsider a final determination." A similar situation is found in this case.

The Illinois EPA issued final, appealable, decisions on July 20, 2009 and December 17, 2009. The Illinois EPA does not have statutory authority to reconsider its final decisions. See, Reichhold Chemicals. The letter sent on September 1, 2011 merely told the Petitioner that these two decisions were final and that the Illinois EPA could not reconsider them. The September 1, 2011 letter in and of itself is NOT an appealable final decision of the Illinois EPA. The Board does not have jurisdiction to hear this case. See, Mick's Garage.

B. Estoppel cannot be held against the Illinois EPA based on statements by a project manager.

The Illinois EPA believes it is necessary at this juncture to discuss the estoppel argument in the Petitioner's Petition for Review. The Petitioner contends that it relied upon conversations between the Illinois EPA project manager and the Petitioner's consultant. Even assuming that the facts are as represented by the Petitioner, the case law is very clear on discussion between project managers and consultants. Under the doctrine of equitable estoppel, an obligation may not be enforced against a party that reasonably and detrimentally relied on the words or conduct of the party seeking to enforce the obligation. See Brown's Furniture, Inc. v. Wagner, 171 Ill. 2d 410, 431, 665 N.E.2d 795, 806 (1996). However, the doctrine "should not be invoked against a public body except under compelling circumstances, where such invocation would not defeat the operation of public policy." Gorgees v. Daley, 256 Ill. App. 3d 143, 147, 628 N.E.2d 721, 725 (1st Dist. 1993). As the Illinois Supreme Court has explained, "[t]his court's reluctance to apply the doctrine of estoppel against the State has been motivated by the concern that doing so 'may impair the functioning of the State in the discharge of its government functions, and that valuable public interests may be jeopardized or lost by the negligence, mistakes or inattention of public officials.'" Brown's Furniture, 171 Ill. 2d at 431-432, 665 N.E.2d at 806 (quoting Hickey v. Illinois Central R.R. Co., 35 Ill. 2d 427, 447-448, 220 N.E.2d 415, 426 (1966); see also Tri-County Landfill Co. v. Illinois Pollution Control Board, 41 Ill. App. 3d 249, 353 N.E.2d 316 (2d Dist. 1976) (refusing to estop the Agency from enforcing the Act against various landfills that it had previously approved on the grounds that to do so would violate public policy).

Consistent with this reluctance, the courts have established several hurdles for those seeking to estop the government. Like all parties seeking to rely on estoppel, those seeking to

estop the government must demonstrate that their reliance was reasonable and that they incurred some detriment as a result of the reliance. A party seeking to estop the government also must show that the government made a misrepresentation with knowledge that the misrepresentation was untrue. See Medical Disposal Services, Inc. v. Illinois Environmental Protection Agency, 286 Ill. App. 3d 562, 677 N.E.2d 428 (1st Dist. 1997). Finally, before estopping the government, the courts require that the governmental body must have taken some affirmative act; the unauthorized or mistaken act of a ministerial officer will not estop the government. "Generally, a public body cannot be estopped by an act of its agent beyond the authority expressly conferred upon that official, or made in derogation of a statutory provision." Gorgees, 256 Ill. App. 3d at 147, 628 N.E.2d at 725; see also Brown's Furniture, 171 Ill. 2d at 431, 665 N.E.2d at 806 ("The State is not estopped by the mistakes made or misinformation given by the Department's [[of Revenue] employees with respect to tax liabilities."). See, Panhandle Eastern Pipeline Company v. IEPA, PCB 98-102 (January, 21, 1999).

In Panhandle, the Petitioner alleged that it reasonably relied on Illinois EPA staff representations during meetings and teleconferences that it could revise its. Before the permit denial, however, the Illinois EPA sent Panhandle formal letters (March 20, 1997 violation notice and June 18, 1997 notice of incompleteness) that stated that Panhandle had exceeded the PSD major modification threshold for NO_x and needed to satisfy PSD permit application requirements. In light of the Illinois EPA letters, the Board held that it was unreasonable for Panhandle to rely on the Illinois EPA's express or implied statements. See People v. Chemetco, Inc. (February 19, 1998), PCB 96-76, slip op. at 11-12 (party unreasonably relied on an Agency employee's alleged statements about not having to meet certain monitoring requirements in part because the party received a letter from the Illinois EPA stating that the party must meet the monitoring

requirements). See, Panhandle Eastern Pipeline Company v. IEPA, PCB 98-102 (January, 21, 1999).

In White and Brewer Trucking v. IEPA, PCB 96-250 (March 20, 1997), White & Brewer claimed that it submitted its sig mod application in reliance on an Illinois EPA permit reviewers statements and that the Illinois EPA then changed its position and rejected the application as incomplete. White & Brewer argued that the Illinois EPA should be estopped from rejecting the application as incomplete. The Board presumed that White & Brewer's assertions were true. The Board held that White & Brewer's estoppel claim failed on several grounds. First, its reliance on an Illinois EPA permit reviewer's statements was not reasonable. In advising White & Brewer that it could ignore the plain language of the regulations, the permit reviewer acted beyond his authority, and such acts cannot estop the Illinois EPA. See, Metromedia, Inc. v. Kramer et al., 152 Ill. App. 3d 459, 467, 504 N.E.2d 884, 889 (1st Dist. 1987) In White & Brewer, the Board held that any mistaken advice that the permit reviewer gave, while regrettable, could not estop the Illinois EPA. A permit reviewer is not the Illinois EPA and the Illinois EPA took no official action until it issued the first denial letter to White & Brewer on February 22, 1996.

Likewise, in this case, the Illinois EPA made final decisions, whether the project manager made representations to the consultant is irrelevant. The Petitioner knew about those final decisions issued to it, and those final decisions of the Illinois EPA could not be reconsidered, as discussed above. Therefore, the Petitioner's estoppel argument does not meet the high standard when a governmental agency is involved.

X. CONCLUSION

For the reasons stated herein, the Illinois EPA respectfully requests that the Board dismiss this action against the Illinois EPA for lack of jurisdiction.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent

Melanie A. Jarvis
Assistant Counsel
Special Assistant Attorney General
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: March 6, 2012

This filing submitted on recycled paper.

CERTIFICATE OF SERVICE

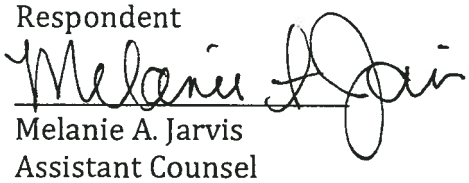
I, the undersigned attorney at law, hereby certify that on March 6, 2012, I served true and correct copies of an **APPEARANCE**, and a **MOTION TO DISMISS** by placing true and correct copies thereof in properly sealed and addressed envelopes and by depositing said sealed envelopes in a U.S. Mail drop 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 Shaw
Fred C. Prillaman
Mohan, Alewelt, Prillaman & Adami
1 North Old Capitol Plaza, Suite 325
Springfield, IL 62701-1323

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)