

**BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS**

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

NOTICE

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

Carol Webb
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 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: November 13, 2014

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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, 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 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. FACTS

The following facts are presented in the Petitioner's Petition. On September 26, 2014, the Illinois EPA issued the decision letter relating to a Stage 3 Site Investigation Plan and Budget for the above noted facility. The decision letter expressly stated that the plan was conditionally approved with the Illinois EPA's modifications. Modifications were made to the Stage 3 proposed budget under the Illinois Environmental Protection Act. The Petitioner did not appeal any modifications proposed by the Illinois EPA. However, Petitioner takes exception with the Illinois EPA's informing Petitioner that a determination under the Project Labor Agreement Act 30 ILCS571/1 et seq., was made and that a project labor agreement would be required. It is from this determination, and only this determination, that Petitioner appeals.

III. ARGUMENT AND ANALYSIS

The Illinois Pollution Control Board is granted subject matter jurisdiction over contested cases between the Illinois EPA and the regulated community pursuant to Section 40 of the Illinois Environmental Protection Act (415 ILCS 5/1 et seq) ("EPAAct"). However, the Illinois Pollution

Control Board is not granted subject matter jurisdiction over contested cases under the Project Labor Agreement Act ("PLAAct").

According to 2 Illinois Administrative Code 2175.105 the Board's implementation regulations state that the "Board was created pursuant to Section 5 of the Environmental Protection Act (Act) (415 ILCS 5/5). The Board is a quasi-legislative and quasi-judicial administrative agency responsible for adopting environmental regulations and deciding certain environmental disputes and cases brought pursuant to the Act. The Board determines, defines, and implements environmental control standards in accordance with the Act."

Nowhere, in either the PLAAct or the EPAct, is the Board granted jurisdiction by the General Assembly to be the court of initial review for decisions made by the Illinois EPA under the PLAAct. The Illinois EPA is by no means the only State Agency required to make such determinations under the PLAAct.

The express language of Section 57.7(3) of the EPAct is clear; the decision whether the project labor agreements are required is made under the PLAAct and not the EPAct. That Section specifically states:

"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."**
(Emphasis added).

As such, any appeals would be taken under the PLAAct. Illinois EPA would assert that the proper forum for this litigation would be the court of original jurisdiction, i.e., the Circuit Court,

pursuant to the Administrative Review Act, and not the Illinois Pollution Control Board. The Board simply does not have jurisdiction to hear appeals under the PLA Act. Since the Board lacks jurisdiction, this case must be dismissed.

IV. CONCLUSION

For the reasons stated herein, the Illinois EPA respectfully requests that the Board issue an order DISMISSING the above captioned action.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent

Melanie A. Jarvis
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217/782-5544
217/782-9143 (TDD)
Dated: November 13, 2014

This filing submitted on recycled paper.

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on November 13, 2014, I served true and correct copies of a **MOTION TO DISMISS** 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, Clerk
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