BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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

NOTICE OF FILING AND PROOF OF SERVICE

To: Carol Webb
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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, pursuant to Board Procedural Rule 101.302 (d), PETITIONER'S POST-HEARING REPLY BRIEF, a copy of which is herewith served upon the attorneys of record in this cause.

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

Respectfully submitted,
ALLEN McAFEE, Petitioner

BY: LAW OFFICE OF PATRICK D. SHAW

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PETITIONER'S POST-HEARING REPLY BRIEF

NOW COMES Petitioner, ALLEN McAFEE, by its undersigned counsel, for his Post-Hearing Reply Brief, states as follows:

I. THE PLAIN LANGUAGE OF THE AMENDMENT ONLY AUTHORIZES PROJECT LABOR AGREEMENTS FOR CORRECTIVE ACTION.

To the extent that People v. Dunlap, 110 Ill. App. 3d 738 (5th Dist. 1982), held that the maxim of *expressio unius est exclusio alteri* can only be applied to ambiguous statutes, it is at odds with the subsequent Illinois Supreme Court decision in Bridgestone/Firestone v. Aldridge, 179 Ill.2d 141 (1997). In that case, the Court found the statute unambiguous, and also relied upon this maxim. Id. at p. 151 (explaining that the maxim is "closely related to the plain language rule in that it emphasizes the statutory language as it is written"). When the legislature identified "corrective action" it did not mean "site investigation." See also Schultz v. Performance Lighting, 2013 IL 115738, ¶ 17 & ¶31 (applying maxim in finding statute unambiguous).

There is, however, reason to believe Dunlap was never an appropriate situation to apply the maxim in the first place. There, the Appellate Court construed a provision of the Controlled Substances Act which criminalized possession of "any material . . . which contains any quantity

of . . . psilocybin" without scenically mentioning mushrooms containing psilocybin. In other words, the accused was attempting to subvert the plain meaning of the language by claiming that "any material" could not mean natural substances like mushrooms unless specifically identified. In contrast, it is the Agency that is seeking to argue that the word "corrective action" in Section 57.7(c)(3) of the Act means not only "corrective action," but also stage 2 and stage 3 site investigation.

The Agency also claims that where different statutes contain general grants of power and specifically enumerated grants of power, the general grant of power should still be given full force and effect, citing Shamel v. Shamel, 3 Ill. 2d 425, 432 (1954). However, the Agency does not identity what general grant of power it believes it is operating under. The Agency as a creature of statute only has the powers that the statute confers. Illinois Bell Telephone Co. V. Illinois Commerce Comm'n, 362 Ill. App. 3d 652, 655 (4th Dist. 2005). Here, the Illinois General Assembly only gave the Agency power to require project labor agreements for corrective action, and there is no authority for the Agency to impose them on any other permit or plan submitted to the Agency.

Petitioner does not understand the significance that the Agency places on the word "plan." In the amendments at issue here, the General Assembly did not use the word "plan." Nor did it use the word "site investigation," but it used the word "corrective action" three times in the amendments to Sections 57.7(c)(3) and 57.8(a)(6)(F) of the Act. If the legislature wanted to authorize the Agency to impose project labor agreements on all plans, it could have done so either by expressly using the word "plan," or implicitly by not specifying "corrective action." It did neither.

The Agency references a definition of "corrective action" which it does not believe applies here. Under Section 57.2 of the Act, "corrective action" means activities associated with early action, site investigation and corrective action. (415 ILCS 5/57.2) The Agency does not appear to take the position that "early action" activities are potentially subject to project labor agreements. (Petitioner's Post Hrg Brief, Ex. B at p. 2) The definition of "corrective action" in Section 57.2 is applicable to general provisions of the Act that authorize payment for whatever work is required under the LUST Program. (E.g., 415 ILCS 5/57.9(b)("the Agency shall approve the payment of costs associated with corrective action after the application of a . . . deductible."); 415 ILCS 5/57.11 (LUST Fund to be used "[f]or payment of costs of corrective action incurred by and indemnification to operators of underground storage tanks as provided in this Title.").

In Sections 57.7 and 57.8 of the Act, which are at issue here, "corrective action" is used in an expressly more limited sense which is distinct from "site investigation." Section 57.7(a) of the Act defines and describes the requisites of site investigation, (415 ILCS 5/57.7(a), and after completing site investigation, "corrective action" is performed under Section 57.7(b) of the Act, which defines and describes "corrective action." (415 ILCS 5/57.7(b)(2)) The Board's regulations similarly describe and use "site investigation" and "corrective action" as distinct terms. (35 Ill. Adm. Code § 734.310 to § 734.335) Since the legislature amended the procedural provisions of Sections 57.7 and 57.8 of the Act where "corrective action" is distinct from and subsequent to "site investigation," that understanding informs how the term "corrective action" should be interpreted in the amendatory language. The statutes amended to reference project labor agreements all use "corrective action" and "site investigation" as separate activities.

The plain language of the amendment is to authorize project labor agreements only at the corrective action stage. While in exceptional circumstances, the plain language may be disregarded where it appears at odds with what the legislature must have intended, it is entirely reasonable to believe that the legislature did not want disproportionate costs and delays to impede site investigation. If the legislature disagrees, it can amend the statute.

II. THE BOARD MAY TAKE OFFICIAL NOTICE OF INFORMATION ON THE AGENCY'S WEBSITE.

Petitioner asked the Board to take official notice of information available on the Agency website relating to project labor agreements. (35 Ill. Adm. Code 101.630; People v. Young, 355 Ill. App. 3d 317, 321 (2nd Dist. 2005) ("we may take judicial notice of information that the Department of Corrections has provided on its website.")) It is notable that the Agency decision letter directed the recipient to the "Illinois EPA's Leaking UST Program Web site." (R.at 193)

The important issue for official or judicial notice is that an opposing party is given an opportunity to respond; otherwise notice can be taken at any stage of a proceeding. ESG Watts v. Illinois Pollution Control Bd., 282 Ill.App.3d 43, 54 (4th Dist. 1996) (affirming Board's taking of official notice in Agency's post-hearing brief). The Board's rules provide no specific procedure for seeking official notice, other than to follow the practice in the courts and as demonstrated by Young, courts will go so far as take judicial notice of information for the first time on appeal. As a practical matter, a distinction may be drawn between notice of adjudicatory facts that relate to a factual dispute at the center of the case and "legislative facts" which are relevant to "legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by

a judge." People v. Davis, 65 Ill.2d 157, 163 (1976).[1] Thus, for example, in Ashley v. Pierson, 339 Ill. App. 3d 733, 739-40 (4th Dist. 2003), the Appellate Court took judicial notice of information about the state prison population from a state website in crafting its holding. In Young, however, the Appellate Court took notice of a party's sentencing record from a state website, as a fact readily determinable and relevant to ascertaining the applicable statute.

The Agency does not identify any actual prejudice from the official notice. It objects to its inability to "verify the unsupported facts Petitioner presents," (Resp. Brief, at p. 8), but the information here is from the Agency's own website incorporated by reference in its final decision. It suggests the information from the Agency website should be submitted to the Agency prior to the Agency decision, but the Agency changed information on its website just before its decision was issued. These are all general process arguments that don't identify any prejudice to the Agency's ability to determine whether these documents from the Agency's website are what they purport to be, or respond to Petitioner's arguments in the response brief.

CONCLUSION

As a matter of law, Petitioner has made a prima facie case that imposing a project labor agreement condition was not necessary to accomplish the purposes of the Act as the Act does not authorize the Agency to impose project labor agreements for site investigation plans.

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[1] "Another basis for judicial notice, not always recognized and labeled as such, is that the matter is better decided by the judge and better decided by him without the confining limitations of ordinary evidence and the rules governing its admission. Within this aspect fall most matters of law. Within it also falls the factual foundations of rules of decision, including social, scientific, economic, and often political factors, whether or not generally known or readily determinable. Both of these matters . . . [are] collectively referred to as judicial notice of legislative facts." Clearly and Graham's, Handbook of Illinois Evidence, § 201.1 (7th ed. 1999).

Alternatively, there is no basis in the plan and budget for the Agency to conclude that a project labor agreement would serve any justifiable purpose for the site investigation work.

ALLEN McAFEE,
Petitioner

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