

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ATKINSON LANDFILL COMPANY)	
)	
Petitioner)	
)	
v.)	PCB I3-8
)	(Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,)	
)	
Respondent.)	

NOTICE OF FILING

TO: ALL PERSONS ON THE ATTACHED CERTIFICATE OF SERVICE

PLEASE TAKE NOTICE that I have electronically filed with the Office of the Clerk of the Pollution Control Board, Atkinson Landfill Company's **Response to Respondent's Motion for Summary Judgment**, copies of which are herewith served upon you.

ATKINSON LANDFILL COMPANY

By: Joshua R More /km
One of its Attorneys

Dated: April 18, 2013

Joshua R. More
SCHIFF HARDIN LLP
233 South Wacker Drive
Suite 6600
Chicago, Illinois 60606
Tel: 312-258-5769
Email: jmore@schiffhardin.com

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ATKINSON LANDFILL COMPANY)	
)	
Petitioner)	
)	
v.)	PCB 13-8
)	(Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,)	
)	
Respondent.)	

**ATKINSON LANDFILL COMPANY'S
RESPONSE TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

NOW COMES the Petitioner Atkinson Landfill Company ("Atkinson") and submits this Response to the Illinois Environmental Protection Agency's ("IEPA's" or the "Agency's") Motion for Summary Judgment pursuant to the Board's March 25, 2013 order in this matter.

I. ARGUMENT

The only issue before the Board in this appeal is whether local siting approval for Atkinson's proposed facility expansion has expired.¹ It has not.

IEPA's interpretation of Section 39.2(f) of the Illinois Environmental Protection Act (the "Act") to permit the local siting expiration period to toll *only* in cases where *an administratively*

¹ The Agency's Motion for Summary Judgment misstates the Petitioner's burden of proof in this matter. Agency Mot. at 4, 5-6. The only relief which Petitioner has specifically sought in this case is a finding by the Board that Petitioner's September 2, 2011 permit application tolls the expiration of the Village of Atkinson's siting approval in accordance with 415 ILCS 39.2(f). See Petition at 4. Petitioner has not challenged the appropriateness of the Agency's denial of Petitioner's permit application except insofar as that denial was premised upon the expiration of local siting approval. Atkinson stands ready to submit a revised permit application to address the technical issues raised in IEPA's permit denial in a timely manner. It is therefore not incumbent upon Petitioner at this juncture to prove that no violation of the Act or the Board Regulations would have occurred if IEPA had issued the development permit for which Petitioner made application.

complete application for a permit to develop the site was filed with the Agency within three years not only runs contrary to the plain language of the statute, but also contradicts the Agency's prior interpretations of this statutory provision. As such, IEPA's determination that Atkinson's local siting approval has expired is arbitrary and capricious and must be reversed. *See Greer v. Ill. Hous. Dev. Auth.*, 524 N.E.2d 561, 581 (Ill. 1988) (noting that agency action is arbitrary and capricious if the agency "relies on factors which the legislature did not intend for the agency to consider" and that, "[w]hile an agency is not required to adhere to a certain policy or practice forever, sudden and unexplained changes have often been considered arbitrary."); *Alton Pack'g v. Pollution Control Board*, 497 N.E.2d 864, 866 (Ill. App. 5th Dist. 1986) (noting that "administrative bodies are bound by prior custom and practice in interpreting their rules and may not arbitrarily disregard them.").

A. IEPA's Interpretation of Section 39.2(f) is Contrary to the Plain Meaning of the Statute

The Illinois legislature drafted Section 39.2(f) of the Act in such a way as to provide applicants with a definite, predictable deadline to submit permit applications to IEPA. Section 39.2(f) provides that local siting approval for a sanitary landfill operation expires on the third anniversary of the date on which it was granted or, if the local siting decision has been appealed as in this case, the date on which the appeal process was concluded *unless* "within that period the applicant has made application to the Agency for a permit to develop the site." 415 ILCS 5/39.2. Because Atkinson "made application" to IEPA for a permit authorizing an expansion of its landfill on September 2, 2011, local siting approval for the expansion remains valid under Section 39.2(f) of the Act.

The Board has not issued any regulations which bear on the question of what it means to “make application” for purposes of Section 39.2(f) of the Act.² But even if it had, “the best evidence of legislative intent is the language used in the statute itself, which must be given its plain and ordinary meaning.” *Paris v. Feder*, 688 N.E.2d 137, 139 (Ill. 1997) (internal citations omitted). The plain meaning of Section 39.2(f) is clear and IEPA’s interpretation of this provision to include an additional requirement to file an administratively complete application within the three year period runs contrary to the law.³

B. IEPA’s Interpretation of Section 39.2(f) in this Case Contradicts its Prior Interpretations of the Same Provision

IEPA’s insertion of a “completeness” requirement into Section 39.2(f) of the Act contradicts the Agency’s prior interpretation of this provision. The Agency has distinguished *Saline County Landfill, Inc. v. Illinois Environmental Protection Agency*, PCB 04-117, May 6, 2004, from the case at hand because Saline County Landfill, Inc. (“SCLI”) had filed a *complete*

² Section 813.103 of the Board’s rules, “Agency Decision Deadlines,” interprets and implements Section 39 of the Act, which provides that a permit will be deemed to be issued if IEPA fails to act on a permit application within 90 or 180 days after the “filing” of a permit application. Petitioner does not dispute the meaning of that Rule, but notes that the Rule has no bearing on Section 39.2(f) of the Act. That Section 813.103 in its entirety interprets Section 39, rather than Section 39.2(f), is clear from the fact that 813.103(a) quotes directly from and cites to Section 39 of the Act. Section 813.103 is not applicable to Section 39.2(f) of the Act.

³ As Petitioner has previously noted (Pet. Mot. at 6), to equate the date on which Atkinson’s permit application was *filed* under Section 813.103(b) with the date on which Atkinson *made application* for its permit for purposes of Section 39.2(f) would create an absurd and unjust result. Because Section 813.103(b) allows IEPA 30 days after the submission of a permit application to issue a completeness determination, under IEPA’s interpretation, applicants would, at a minimum, need to submit permit applications at least 30 days prior to the expiration of local siting. Moreover, given the likelihood that IEPA might find the application to be incomplete and the inability of the applicant to guess exactly how long it might take to collect any additional required application materials and submit them to IEPA, applicants would potentially need to submit their permit application to IEPA years in advance of the local siting expiration date. There is no evidence that the legislature ever contemplated such a ludicrous result.

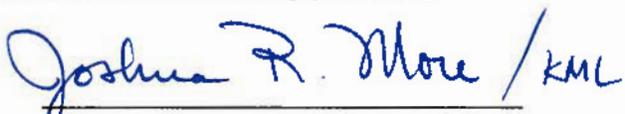
permit application with the Agency before its local siting had lapsed. However, it is clear from the facts of that case that, while SCLI had mailed its initial permit application to IEPA within three years of the issuance of local siting approval, SCLI did not submit its complete application until more than two years after the date local siting approval was set to expire. *Id.*, slip op. at 4. Nevertheless, in that case, IEPA agreed that SCLI had satisfied the requirement to “make application” for a permit within the three-year local siting expiration period. *Id.*, slip op. at 16. IEPA has offered no explanation as to why it has taken a contradictory position in this case under what appear to be remarkably similar circumstances. Given the foregoing, IEPA’s arbitrary determination that Atkinson’s local siting approval has expired must be reversed. *See Greer*, 524 N.E.2d at 581; *Alton Pack’g*, 497 N.E.2d at 866.

II. CONCLUSION

WHEREFORE, for the reasons set forth above in addition to the legal and factual bases previously set forth in the Petitioner’s motion and supporting memorandum, Atkinson respectfully requests that the Board deny IEPA’s Motion for Summary Judgment.

Respectfully submitted,

ATKINSON LANDFILL COMPANY

By:  / KML
One of its Attorneys

Joshua R. More
SCHIFF HARDIN LLP
233 South Wacker Drive, Suite 6600
Chicago, Illinois 60606
Phone: 312-258-5769
jmore@schiffhardin.com

Dated: April 18, 2013

CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 18th day of April, 2013, I have served by first class mail the attached **RESPONSE TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT** upon the following persons:

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

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph, Suite 11-500
Chicago, Illinois 60601

Michelle Ryan
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276

Evan J. McGinley
Office of the Illinois Attorney General
69 West Washington Street, Suite 1800
Chicago, Illinois 60602

 / EMC

Joshua R. More

Joshua R. More
SCHIFF HARDIN LLP
233 South Wacker Drive, Suite 6600
Chicago, Illinois 60606
Phone: 312-258-5769
Fax: 312-258-5500
jmore@schiffhardin.com