BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

D&L LANDFILL, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	**PCB 15-137**
	)	**(Permit Appeal- Land)**
	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
	)	
Respondent.	)	

NOTICE OF FILING

Elizabeth Dubats, Assistant Attorney General, hereby certifies that she has served a copy of the foregoing Notice of Filing and Respondent's Response to Petitioner's Motion for Summary Judgment upon:

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by placing a copy of same in the United States Mail in Springfield, Illinois, with postage fully prepaid on October 15, 2015.

Respectfully submitted,

BY: s/Elizabeth Dubats

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RESPONDENT'S RESPONSE TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Respondent, Illinois Environmental Protection Agency ("Agency" or "IEPA"), pursuant to Section 101.516 of the Board's Procedural Rules, 35 Ill. Adm. Code 101.516, Supreme Court Rules 191 and 192, and Section 2-1005 of the Code of Civil Procedure, 735 ILCS 5/2-1005, hereby requests the Board deny Petitioner's motion for summary judgment and grant summary judgment in favor of Respondent, affirming the Agency's denial of Petitioner's supplemental permit application requesting certification to end post-closure care at Petitioner's landfill.

INTRODUCTION

On October 1, 2015, Petitioner and Respondent filed cross motions for summary judgment. In its Motion, Petitioner argues that: 1) Under the Act and Board regulations, Part 807 landfills are only required to perform monitoring and abatement for a period of fifteen years; 2) Part 620 groundwater quality standards do not apply to Part 807 landfills; 3) Sections 807.313 and 807.315 of the Board's Solid Waste Regulations do not apply to Part 807 landfills after closure; and therefore 4) Petitioner is not required demonstrate that certification of the end of

post-closure care would not result in future violations of Part 620 groundwater quality standards or background values established in its permit.

Each and every one of Petitioner's contentions contradicts the plain language of the Act and Board regulations and consistent Board precedent. First, the fifteen-year post-closure care period is a minimum period, not a maximum. *See IEPA v. Jersey Sanitation Corp.*, 336 Ill. App. 3d 582, 592 (4th Dist. 2003); *Coalville Road Enterprises, Inc. v. IEPA*. PCB 10-76 (Apr. 21, 2011). Second, Part 620 groundwater quality standards apply to Part 807 landfills—just as they apply to all groundwaters of the State. *See People v. Jersey Sanitation Corp.*, PCB 97-2 at 21 (Feb. 3, 2005); *Coalville*. Third, Part 807 landfills must comply with Sections 807.313 and 807.315 of the Board's Solid Waste Regulations, 35 Ill. Adm. Code 807.313 and 807.315, after closure. *See Jersey Sanitation*, *Coalville*; *In re Petition of Hayden Wrecking Corporation for an Adjusted Standard from 35 Ill. Adm. Code 620.410(A)*, AS 04-03 (Jan. 6, 2005). Fourth, and finally, operators of Part 807 landfills are required to demonstrate that there will not be violations of groundwater quality standards in order for the Agency to certify the end of post-closure care. *Hayden*.

Instead of citing to relevant Board decisions, Petitioner's twenty-page Motion predominantly relies on misleadingly cited dicta and irrelevant thirty-year-old decisions in an attempt to force ambiguity into the Act and Board's regulations where the plain language of the statute and regulations leave none. This elaborate revisionist history has no bearing on how the Board has interpreted and applied the Act and its Regulations for the past three decades.

BURDEN OF PROOF AND STANDARD OF REVIEW

As articulated in *Jersey Sanitation Corp. v. IEPA*, PCB 00-82 (June 21, 2001), in order to successfully appeal the Agency's determination on a motion for summary judgment the "Board

must determine that as a matter of law [Petitioner] has proven that the application, as submitted to the Agency, demonstrated that no violations of the Act or Board rules would have occurred if the requested permit had been issued." The standard of review applied by the Board to an Agency permitting decision is that of reasonableness. *Waste Mgmt. Inc. v. IEPA*, PCB 84-45, 84-61, 84-68 (Nov. 26, 1984). In this case, the burden is on Petitioner to show, as a matter of law, that its 2012 Application demonstrated no violations of the Act or Board regulations would result from the Agency's certification to end post-closure care for the Site, and that the Agency's denial therefore was unreasonable. Summary judgment is appropriate in this case because Petitioner's objections to the Agency's decision are limited to the legal questions of whether or not the Agency properly applied Sections 807.313 and 807.315 of the Board's Solid Waste Regulations, 35 Ill. Adm. Code 807.313 and 807.315, in denying the certification, and whether or not Part 620 of the Board's Groundwater Regulations apply to Part 807 landfills.

LEGAL ARGUMENT

A. Petitioner's Arguments Contradict the Board's Decisions on Part 807 Landfills.

It is well established that "the Illinois Appellate Court has long afforded the Board great deference in interpreting and applying its own rules and regulations." *People v. Env'tl Law & Policy Ctr.*, PCB 10-61, at 8 (Apr. 18, 2013). In the decades since Part 807 became a final rule, the Board has had the opportunity to interpret and apply these provisions in a number of contexts. Petitioner's Motion only cites one Board decision and its appeal, *Jersey Sanitation v. IEPA*, PCB 00-82 (June 21, 2001) (holding the landfill had ceased "day to day operations" for the purposes of 35 Ill. Adm. Code 745.181), which did not address the applicability of Section

807.313 or 807.315. Petitioner ignores on-point Board decisions that found Sections 807.313 and 807.315 applicable to landfills in post-closure care.

In fact, while Petitioner relies almost exclusively on a permit appeal proceeding involving Jersey Sanitation, Petitioner failed to acknowledge an enforcement action against the same operator that was pending before the Board at the same time, involving the same landfill, in which the Board found Jersey Sanitation liable for thirteen years of groundwater violations—most of them during post-closure care. *People v. Jersey Sanitation Corp.*, PCB 97-2 at 21 (Feb. 3, 2005). The Board found violations of both Sections 807.313 and 807.315 and explicitly interpreted Part 807 as "requir[ing] landfill operators to prove that they do not and will not affect the waters of the State" in violation of 35 Ill. Adm. Code 807.313 and 807.315. *Id.* The fact that the landfill's post-closure care period had begun on September 30, 1994 did not prevent the Board from finding 807.313 and 807.315 violations took place up to and including 2005.

The Board similarly applied Section 807.313 to the post-closure care period in *Coalville Road Enterprises, Inc. v. IEPA*. PCB 10-76 (Apr. 21, 2011). In *Coalville*, the Board upheld the Agency's denial of a supplemental permit application because the petitioner had "failed to prove that issuing the requested supplemental permit would not result in violations of the Act and the Board's solid waste regulations." PCB 10-76 (Apr. 21, 2011). As is the case here, the Agency denied the supplemental permit because the applicant failed to properly address detected groundwater exceedances. *Id.* at 17-18. Specifically, the Board upheld the Agency's cited rationale for the denial, Coalville's failure to comply with 35 Ill. Adm. Code 807.313 and 807.502(b). *Id.* As is the case here, the Coalville facility was a Part 807 facility that began its fifteen-year minimum post closure care period in the mid-1990s. *Id.* at 2.

Board precedent also specifically supports the applicability of Part 620 groundwater quality standards to Part 807 landfills. The groundwater violations found by the Board in *People v. Jersey Sanitation* included exceedances of Section 620.420, the Class II groundwater standard, most of which occurred during the landfill's post-closure care period. PCB 97-2 at 21. The Board found the presence of unaddressed Part 620 exceedances to constitute a threat to the waters of the State:

> "Jersey Sanitation's groundwater monitoring results actually showed exceedences of Class II standards. Regardless of whether "a trend is believed to be developing," Jersey Sanitation is under an obligation to retain a professional engineering firm to develop future actions or plans for Agency approval. By failing to retain a professional engineering firm to develop future actions and/or plans for Agency approval, the Board finds that Jersey Sanitation operated its landfill in a manner that constitutes a threat to waters of the State. Jersey Sanitation therefore violated Sections 12(a) and (d) of the Act and Sections 807.313 and 807.315 of the Board's regulations."

Id. at 21-22.

Thus, the Board specifically has found that the failure to address groundwater exceedances during post-closure care, including specifically Part 620 exceedances, constitutes a violation of Part 807.313 and 807.315. *See also Coalville*, PCB 10-76 (Apr. 21, 2011) (Part 620 groundwater quality standards still relevant to petitioner's permit post closure). Simply put, Petitioner's elaborate legal arguments have absolutely no basis in the law.

Indeed, the Board has squarely addressed the question of whether the completion of post-closure care can be certified while a facility has ongoing groundwater exceedances, in *In re Petition of Hayden Wrecking Corporation for an Adjusted Standard from 35 Ill. Adm. Code 620.410(A).* AS 04-03 (Jan. 6, 2005). In that case, the Board began its decision by plainly stating:

> "Hayden Wrecking Corporation . . . owns property in St. Clair County on which it operated two landfills for approximately thirty years until 1992. In order to close its landfill site and complete the sale of that property at the contracted price of $475,000,

> Hayden *must demonstrate that groundwater at its site meets Class I groundwater quality standards*. "

Id. (emphasis added). Petitioner fails utterly to acknowledge that its current legal positions are incompatible with Board precedent.

B. The Board's Consistent Interpretations of Part 807 Reflect the Plain Language of the Act and Board Regulations, and Are Embodied in Petitioner's Own Permit.

The Board's decisions on Part 807, above, are all consistent with the plain language of the Act, the Board Regulations, and even Petitioner's own permit, which all anticipate and allow the extension of a Part 807 landfill's post-closure care period beyond fifteen years if necessary to address current and avoid future violations of the Act and Board Regulations. Section 22.17 of the Act provides:

> (a) The owner and operator of a sanitary landfill site that is not a site subject to subsection (a.5) or (a.10) of this Section shall monitor gas, *water* and settling at the completed site for a period of 15 years after the site is completed or closed, *or such longer period as may be required by Board or federal regulation.*

415 ILCS 5/22.17(a) (emphasis added). The qualifier, "or such longer period as may be required by Board or federal regulation," clearly anticipates that an extension of the 15-year post-closure care period could be necessary to prevent a violation of the Act or Board regulations.

Specifically, Board regulations require that the Agency determine "that the site will not cause future violations of the Act or this Part [807]" before it can certify the end of post-closure care. 35 Ill. Adm. Code 807.524(c). Read together, Board regulation requires post-closure compliance with the requirements of Part 807 before the end of post-closure can be certified. The plain meaning of the requirement "that the site will not cause future violations of the Act or this Part" includes all relevant provisions of Part 807.

Petitioner argues that Section 807.524 is merely a "procedural requirement relevant to release of financial assurance."[1] Mot. at 17. Petitioner argues that the only Part 807 provision relevant to the length of the post-closure care period is Section 807.318(a). Mot. at 10-11. However, this interpretation ignores the fact that Section 807.318 itself requires that the owner/operator of a Part 807 landfill take "whatever remedial action is necessary to abate any gas, water or settling problems which appear during the … period." Section 807.318(b) anticipates problems might appear during the post-closure period that require abatement, regardless of the specified minimum monitoring period, as long as those problems were identified during the post-closure period.

The plain language of the Act and Board precedent so clearly support allowing extension of a post-closure care period beyond fifteen years where necessary to ensure compliance with the Act and Board Regulations, that Section 22.17 of the Act has commonly been summarized as a fifteen year "minimum," even though the word itself does not appear in the provision. Indeed, the very case that Petitioner cites to support the claim that Section 22.17 does not authorize the Agency to extend the post-closure care period explicitly refers to fifteen years as a "minimum." *IEPA v. Jersey Sanitation Corp.*, 336 Ill. App. 3d 582, 592 (4th Dist. 2003) ("The *minimum* 15–year post closure care period began in September 1994.") (emphasis added). *See also Coalville Road Enterprises, Inc. v. IEPA* PCB 10-76 (Apr. 21, 2011) (upholding the 2010 Agency denial

[1] It is worth noting that, as much as Petitioner tries to frame certification of post-closure care under Section 807.524 as merely "a procedural requirement relevant to the release of financial assurance". Mot. at 17. The Petitioner requested substantial modifications to its permit. Petitioner proposed ending leachate collection at the site, even though, as the application stated, 216,000 gallons of leachate had been extracted from the site during 2012. R. 0040. The application also proposed that the Landfill's groundwater monitoring system be eliminated. R. 0046. It has been long established that, in any permit decision, the Agency is required to deny any permit application if approval would result in a violation of the Act. Section 39(a) of the Act, 415 ILCS 5/39 (2104); *Cmty. Landfill Co. v. Pollution Control Bd.*, 331 Ill. App. 3d 1056, 1061(3d Dist. 2002), *as modified on denial of reh'g* (July 17, 2002).

of a supplemental permit on a landfill whose post-closure care period began in 1994). It is evident that fifteen years of post-closure care always has been intended to be a floor, and not a ceiling.

If one needs a clear insight into the contemporary understanding of the meaning of a fifteen year post closure care period, one need not go further in time and deeper into annals of Board history than Petitioner's own supplement to the Record. The understanding that the statutory fifteen-year post-closure care period is a minimum requirement and not a maximum requirement is evident even in the language of Petitioner's permit dating back to 1990 and 1992, before the post-closure care period had even begun. Paragraph 10 of Supplemental Permit No. 1992-227-SP (R.1295) provides, "This site is subject to a *minimum* post-closure care period of fifteen years." (emphasis added). Another portion of the same document notes: "Upon issuance of the Illinois EPA Certificate of Closure, the operator is required to maintain and monitor the closed site for a *minimum* fifteen-year period." R.1342 (emphasis added).

The Part 620 Groundwater Quality Standards were promulgated by the Board pursuant to Section 8 of the Illinois Groundwater Protection Act, 415 ILCS 55/8(b) (2014). As such it falls within the category of Board regulations anticipated by Section 22.17(a)'s "or such longer period as may be required by Board or federal regulation." Section 620.201 of the Board's Groundwater Regulations breaks down "All groundwaters of the State" into one of four classes for the purposes of setting groundwater standards. The requirements of Part 620 exist independently of Part 807. The plain language of Section 620.405 requires that "No person shall cause, threaten or allow the release of any contaminant to groundwater so as to cause a groundwater quality standard set forth in this Subpart to be exceeded." While Petitioner emphasizes that the Board's landfill and groundwater regulations were "clearly promulgated within a shared context", and

notes the new landfill regulations "preceded the new groundwater regulations adopted in 1991", Petitioner cannot provide any explicit, codified exceptions in Part 620 for Part 807 landfills. Mot. at 13. If the Board had intended to provide these exceptions, it could have easily done so.

C. Petitioner's "Gross Pollution" Standard is a Red Herring and the Agency's Final Decision is Consistent with the 1984 rulemaking

The crux of Petitioner's Motion for Summary judgment comes from a single sentence in the Board's rulemaking proceeding: "The Closure performance standard, which is a minimal standard to avoid *gross pollution*, applies to all sites, whether required to have a permit or not." Mot. at 9-10; R84-22 at 17 (emphasis added). From this single sentence of dicta from the Board's 1984 rulemaking, Petitioner postulates the existence of a "gross pollution" standard for Part 807 landfills that was never codified in the Board regulations, nor ever applied by the Board to landfills. The very same passage from which Petitioner selectively quotes makes clear that the Board also contemplated that Sections 807.313 and 807.315 are specific closure requirements for Part 807 landfills. Furthermore, in framing "gross pollution" as the definitive standard of post-closure care for Part 807 landfills, Petitioner attempts an interpretive sleight of hand in order to round down the standards of Part 807 landfills to match facilities for which no permit at all is required.

The term "gross pollution" does not appear anywhere in the Act or Board Regulations. As a standard, it was never defined in the Board's final rulemaking order, nor was it ever codified in the final rule. Moreover, the Agency has been unable to locate a single instance in the thirty years of landfill regulation since Board approval of this final rule on which the Board cited "gross pollution" as an applicable standard for landfills. In fact, the Agency has been unable to locate a single Board decision since 1982 in which the words "gross pollution" appear and no

cases whatsoever in the context of a landfill. The bottom line is that, despite ruling on a number of Part 807 supplemental permit appeals addressing the requirements of closure and post-closure care, *see e.g. Section A, above,* the Board has not once referenced or applied Petitioner's "gross pollution" standard. It simply does not exist as a legally relevant concept in the Board's jurisprudence.

Even the passage that Petitioner cites does not support the existence of the "standard." Petitioner's Motion glosses over the qualifier at the end of the only sentence in which "gross pollution" is mentioned. That "standard" is qualified with "whether required to have a permit or not." R84-22 at 17. On the very same page of the very same rulemaking order, the Board lists "specific closure requirements" that apply to sanitary landfills to "supplement[]" the general standard which applies to all landfills regardless whether or not a permit is required. The sections listed include: 807.305, 807.313, 807.314(e), 807.315, 807.316, and 807.318. In omitting these supplemental requirements, and failing to account for the fact that the minimal standard was explicitly intended to be minimal enough to include unpermitted landfills, Petitioner misleadingly rewrites history by rounding the standard down to the lowest common denominator.

R84-22 also provides further support for post-closure applicability of Sections 807.313 and 807.315 and the Board's intention to set a minimum length of time for the post-closure care period. Petitioner points out that in the 1984 Rulemaking, the Board noted in the explanation of this section that "The length of the post-closure care period for sanitary landfills is determined from existing Subpart C rules." R84-22 at 22. While Petitioner chooses to interpret this as being limited to Section 807.318, the Board does not cite to this single rule, but instead cites the entire Subpart C, which includes Sections 807.313 and 807.315. This interpretation fits with the

Board's explanation of the Section 807.502 Closure standard, which it describes as a "general requirement" preventing future harm to human health and the environment, which "is supplemented by the specific closure requirements for sanitary landfills which are listed below." This list explicitly includes Sections 807.305, 807.313, 807.315, and 807.316 together with 807.318. R84-22 at 17. It makes perfect sense that, in writing a rule that is contingent upon compliance with the Act and Part 807, the Board would note that multiple Subpart C rules will ultimately come to bear on the length of the post-closure period. The Board clearly intended Sections 807.313 and 807.315 to apply to Petitioner's landfill, and intended to set a minimum post-closure care period. The Agency has properly applied the Board's rules, and its decision must be upheld.

CONCLUSION

As there are no genuine issues of material fact that the Petitioner's application failed to demonstrate that there would be no future violations of the Act or Part 807 of the Board's Solid Waste Regulations if the Agency certified the end of post-closure care at D&L Landfill, the Board should grant summary judgment for Respondent and against Petitioner.

Respectfully submitted,

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