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 Reply 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 22, 2015.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
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RESPONDENT'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AGAINST D&L LANDFILL, INC.

Introduction

As succinctly explained in the Agency's December 19, 2014 final decision, Petitioner's application to certify the end of post-closure care for the D&L Landfill was denied because Petitioner failed to demonstrate that the Agency's approval of the application would not result in future violations of Sections 807.313 and 807.315 of the Board's Solid Waste Regulations. 35 Ill. Adm. Code 807.313 and 807.315. In support of this conclusion, the Agency cited a list of unaddressed groundwater exceedances, including exceedances of Petitioner's permitted background values and of the Board's Part 620 groundwater quality standards. The existence of these exceedances is undisputed. As a matter of law, the existence of unaddressed groundwater quality exceedances is a reasonable basis for denying certification of the end of post-closure care. None of the arguments raised in Petitioner's Response to Respondent's Motion calls into question the reasonableness of the Agency's final decision. Respondent addressed many of Petitioner's erroneous legal arguments in its Response to Petitioner's Motion for Summary Judgment, which Respondent incorporates by reference. Respondent further states:

I. The 15–Year Post-Closure Period is Not, and Never Was, an Absolute Time Limit.

On its face, Section 22.17 of the Act, 415 ILCS 5/22.17 (2014), allows for extensions of the post-closure care period beyond 15 years "as may be required by Board or federal regulation." The plain meaning of this provision does not require the Board to adopt Petitioner's cribbed interpretation of an invariably 15-year period. Instead, the statute, read in combination with the Board's regulations, reasonably allows the post-closure care period to extend beyond 15 years as necessary to ensure that a landfill does not pose a threat to human health or the environment. It reflects an understanding that issues can arise during the post-closure care period that must be addressed before post-closure care can be ended.

None of the dictionary definitions provided by Petitioner precludes a post-closure care "period" of time that is subject to change, contingent upon other factors. Moreover, other dictionaries also support a reading of "period" that is not necessarily definite. For example, Webster's Collegiate Dictionary includes "2. the interval between certain happenings: a ten-year period of peace" and "3. a portion of time, often indefinite, characterized by certain events, processes, conditions, etc.; stage: a period of change, the present period" among its definitions of "period." WEBSTER'S COLLEGIATE DICTIONARY (5th ed.), *available at* http://www.yourdictionary.com/period#websters#CSOvfccf4hVjdgrk.99 . As explained by Ballentine's Law Dictionary (2010 LexisNexis) (emphasis added):

> The word has its etymological meaning, but it also has a distinctive signification according to the subject in connection with which it may be used. It may mean any portion of complete time, from a thousand years, or less, to the period of a day; and when used to designate an act to be done, or to be begun, **though its completion may take an uncertain time**, as, for instance, the act of exportation, it must mean the day on which the exportation commences, or it would be an unmeaning and useless word in its connection.

While Petitioner interprets "required by Board or federal regulation" narrowly to mean a regulation specifically amending the minimum years required for post-closure care, this interpretation ignores the broader universe of Board and federal regulations that could come into conflict with

Section 22.17(a) of the Act, should a landfill threaten the safety of human health or the environment even after 15 years of post-closure care.

It is a cardinal rule of statutory interpretation that "[s]tatutes should be interpreted to avoid impractical or absurd results" *Commonwealth Edison Co. v. Illinois Commerce Comm'n*, 2014 IL App (1st) 132011, ¶ 26 (2014).To suggest that the 15-year post closure care period is absolute and inflexible would create the unreasonable result of superseding, rather than harmonizing with, the Board's Part 807 landfill regulations. For example, Section 807.524(c)(2) of the Board's Solid Waste Regulations, 35 Ill. Adm. Code 807.524(c)(2), requires that the Agency determine "[t]hat the site will not cause future violations of the Act or this Part [807]" before it can certify the end of post-closure care. Petitioner's reading of Section 22.17(a) of the Act would render this requirement meaningless after the 15-year mark. The Board's intention that the Agency not certify the end of a landfill's post-closure period while the landfill may still pose an environmental threat is clear in the Board's rulemaking. In R84-22, the Board explained (slip op. at 22) Section 807.524 as requiring that:

> The Agency is to certify that the post-closure care period has ended when it determines that the post-closure care plan has been completed and that the site will not cause future violations. The length of the post-closure care period for sanitary landfills is determined from the existing Subpart C rules.

The Board referred to "rules" in the plural; emphasized that the site must not cause future violations; and referenced the entirety of Subpart C, which includes Sections 807.313 and 807.315. Compliance with Section 807.524, in some circumstances, such as those presented by this case, therefore may require a post-closure period longer than 15 years. The qualifier "as may be required by Board or federal regulation" in Section 22.17(a) of the Act allows for a longer post-closure care period in these circumstances.

Even the sole section of Part 807 that Petitioner concedes is relevant to the length of the post-closure care period anticipates that issues may arise during the post-closure care period that must be addressed. Section 807.318(b) requires that the "owner or operator shall take whatever remedial action

is necessary to abate any gas, water or settling problems" that arise during the post-closure period. Even if Section 807.318 were the only section of Subpart C that had any bearing on the length of post-closure care, this Section itself anticipates that issues could arise during the post-closure care period that must be addressed regardless of a fixed minimum time period. Even under Section 807.318, alone, then, the groundwater exceedances identified in the Agency's final decision must be addressed before the Agency could certify the end of post-closure care.

II. Every Time the Board has Addressed Sections 807.313 and 807.315 in the Context of a Part 807 Landfill, Groundwater Exceedances Have been Relevant in Evaluating the Likelihood of Future Violations.

Petitioner's contention that Respondent is "arguing from the point that Petitioner has violated the Act" conflates the Agency's actually stated rationale—that "a determination that 35 Illinois Administrative Code (IAC) 807.313 and 807.315 will not be violated cannot be made" in light of the existence of uncontested groundwater exceedances—with an attempt to improperly use a permit decision as an enforcement tool. Response at 6-7; R. 0450. In *IEPA v. PCB*, 52 Ill. App. 3d 828, 830 (3rd Dist. 1993) ("*ESG Watts*"), the Illinois Appellate Court held the Board was correct in finding the Agency had denied the requested permits solely on the basis of unadjudicated violations of the Act. In *ESG Watts*, the Agency's final decision only cited violations pending enforcement. *Id*. at 829 ("the letters notifying Watts of the Agency's conclusions cited violations of the Act which were identical to the violations listed in the Agency's January 30 pre-enforcement letter"). Conversely, in this instance, the Agency's December 19, 2014 denial letter does not allege any past unadjudicated "violations," but rather, cites ongoing, unaddressed groundwater "exceedances" as the reason it could not determine that there would be no future violations. The existence of these exceedances is uncontested and was in fact disclosed by Petitioner in its 2012 Application. R. 0042-46.

The Board has found that unaddressed and/or inadequately addressed groundwater exceedances are a reasonable basis for denying a supplemental permit, out of concern for future violations of Sections 807.313 and 807.315. *Coalville Road Enterprises, Inc. v. IEPA*, PCB 10-76 (April 21, 2011),

slip op. at 17. *ESG Watts* can also be distinguished because, in *ESG Watts*, the contents of the permit application on its face did not provide evidence of probable future violations. 252 Ill. App. 3d at 830 (1993) ("applications that Watts submitted to the Agency were accompanied by analyses of the concentrations of the various chemical elements and compounds contained in the special waste streams. These analyses determined that the concentrations of each and every substance indicated in the reports were below the maximum allowable regulatory limits.").

It is important to note that, whenever the Board has addressed the question of whether or not a landfill has demonstrated there will not be future violations of Sections 807.313 and 807.315 in the context of a Part 807 landfill, groundwater exceedances have been relevant. Petitioner relies on *Jersey Sanitation Corp. v. IEPA* ("*Jersey Sanitation I*"), PCB 00-82 (June 21, 2001), to support its argument that its landfill does not have to demonstrate its future compliance with Part 620 Groundwater Quality Regulations before the Agency can certify closure. However, *Jersey Sanitation I* is both distinguishable from this permit appeal and less relevant than permit appeals where the Board addressed whether or not a landfill had demonstrated there would be no future violations of Sections 807.313 and 807.315. *Jersey Sanitation I* was not an appeal of a permit denial, and did not address whether the Part 620 groundwater quality standards are applicable to Part 807 landfills. The Agency had granted Jersey Sanitation's permit, but had added substantial new additional groundwater monitoring requirements. *Id*., slip op. at 2-4. The Board found that the additional conditions were not necessary to accomplish the purposes of the Act, and that compliance with a permit absent of those conditions would not result in violations of the Act or Board regulations. The Board noted that Jersey Sanitation had already provided an "extensive" monitoring plan, which was sufficient. *Id*., slip op. at 13-14.

Unlike in *Jersey Sanitation I*, Petitioner is not challenging added conditions to its permit, but instead is requesting certification to end groundwater monitoring altogether. R. 0042-46. The *Jersey Sanitation I* decision only looked at the sufficiency of a groundwater monitoring plan without

additional terms added by the Agency. In this case, the Agency had to determine whether or not ending the monitoring program entirely would result in future violations of the Act and Part 807 regulations. The Agency therefore cited the landfill's ongoing groundwater exceedances as evidence of probable future violations. There is nothing in *Jersey Sanitation I* that rules out actual groundwater exceedances as evidence of probable future violations, and therefore grounds for an Agency denial.

In fact, even after striking the more stringent monitoring provisions from Jersey Sanitation's permit, the Board found in *People v. Jersey Sanitation Corp.*, PCB 97-2 (Feb. 3, 2005) ("*Jersey Sanitation II*"), slip op. at 21-22, that the Petitioner's Part 807 landfill actually had violated Part 620 groundwater quality standards and, consequently, Sections 807.313 and 807.315 of the Board's Solid Waste Regulations. Quite simply, then, the *Jersey Sanitation* cases cannot, as Petitioner would have it, stand for the proposition that Part 620 groundwater regulations do not apply to Part 807 landfills, because the Board: (1) never held that in *Jersey Sanitation I*, and (2) actually held the opposite to be true in *Jersey Sanitation II*. It was entirely reasonable for the Agency to conclude that unaddressed ongoing groundwater exceedances of Petitioner's permit and of Part 620 standards could result in violations of Sections 807.313 and 807.315.

Petitioner argues that *Jersey Sanitation I* is more applicable than *Jersey Sanitation II*, because the former is a permit appeal and the latter is an enforcement action; however, subsequent permit proceedings before the Board addressing ongoing groundwater exceedances support the Agency's final decision. For example, in *Coalville Road Enterprises, Inc. v. IEPA*, PCB 10-76 (April 21, 2011), slip op. at 17, the petitioner operated a Part 807 landfill at the end of its 15 year-minimum post-closure care period, but the Board still found that unaddressed groundwater exceedances were proper grounds for denial of its supplemental permit application. In *In re: Petition of Hayden Wrecking Corp. for an Adjusted Standard from 35 Ill. Adm. Code 620.410(A),* AS 04-03 (Jan. 6, 2005), the petitioner applied for an adjusted standard specifically because its Part 807 landfills, which had closed in 1992, could not meet the relevant Part 620 groundwater quality standard. In granting the adjusted standard, the Board

noted that: "In order to close its landfill site and complete the sale of that property at the contracted price of $475,000, [the Petitioner] must demonstrate that groundwater at its site meets Class I groundwater quality standards." *Id*., slip op. at 1. If Petitioner truly believes that it is impossible for its Part 807 landfill to comply with Part 620 groundwater quality standards, an adjusted standard may be an option.

III. Respondent Does Not Seek Affirmance Based on Potential Violations of Section 807.302.

To be very clear, Respondent does not seek affirmation of its December 19, 2014 final decision based on any alleged or potential violation of Section 807.302 of the Board's Solid Waste Regulations, 35 Ill. Adm. Code 807.302. See Petitioner's Response at 5 and 7. Indeed, in its Motion for Summary Judgment, Respondent clearly stated that it had not cited Section 807.302 in its December 19, 2014 final decision. Respondent's Mot. at 18. The Agency's December 19, 2014 final decision instead cited numerous "unaddressed" groundwater exceedances. R. 0450. Respondent therefore provided in its Motion for Summary Judgment background information regarding the requirements of Petitioner's permit related to groundwater, and relating to the factual record before the Board. In the course of making its final decision, the Agency found the Petitioner's supplemental filing regarding the landfill's groundwater exceedances (R.182) did not adequately demonstrate that there would be no future violations. Petitioner has not disputed the possibility of future groundwater violations at its landfill, but instead only has claimed erroneously that the landfill is not subject to any groundwater quality standards.[1] Petitioner's failure to adequately demonstrate a lack of future threat to the groundwaters of

[1] To the extent that Petitioner might seek to argue a lack of future violations in its reply brief, that issue already has been waived. *See Stop the Mega-Dump v. County Bd. of DeKalb Cty*., PCB 10-103 (Mar. 17, 2011), slip op. at 11 (holding that a petitioner waives arguments not presented in its opening brief).

the State per Sections 807.313 and 807.315 is, and always has been, the grounds of the Agency's final decision.

Respectfully submitted,

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