BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

D&L LANDFILL, INC.,	)	
Petitioner,	)	
v.	)	PCB 2015-137
	)	(LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
Respondent.	)	

NOTICE OF FILING AND PROOF OF SERVICE

TO: Carol Webb
Hearing Officer
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PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board, an original and three copies of Petitioner's Reply in Support of Its Motion for Summary Judgment, copies of which are herewith served upon the Hearing Officer and upon the attorney of record in this case.

The undersigned hereby certifies that a true and correct copy of this Notice of Filing, together with a copy of the documents described above, were today served upon the Hearing Officer and counsel of record of all parties to this cause by enclosing same in envelopes addressed to such attorneys and to said Hearing Officer with postage fully prepaid, and by depositing said envelopes in a U.S. Post Office mailbox in Springfield, Illinois on the 22nd day of October, 2015.

D&L LANDFILL, INC.

BY: LAW OFFICE OF PATRICK D. SHAW

BY: /s/ Patrick D. Shaw

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THIS FILING SUBMITTED ON RECYCLED PAPER

BEFORE THE POLLUTION CONTROL BOARD
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	)	(Permit Appeal)
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PETITIONER'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

NOW COMES Petitioner, D&L LANDFILL, INC., by its undersigned attorney, pursuant to Section 101.516 of the Board's Procedural Rules (35 Ill. Adm. Code § 101.516), stating as follows:

INTRODUCTION

Respondent's Response to Petitioner's Motion for Summary Judgment re-states Petitioner's position as four points with a concise statement of authorities that purport to disprove these claims. (Resp at pp. 1-2) Since this Reply seeks to support Petitioner's original motion, Petitioner adopts that format herein, after a brief response about the standard of review, and a merger of points 2 and 4, which appears to be redundant from Petitioner's perspective.

I. THE STANDARD OF REVIEW IS NOT REASONABLENESS.

The Illinois EPA claims that "[t]he standard of review applied by the Board to an Agency permitting decision is that of reasonableness." Resp. Brief, at p. 4 (citing Waste Mgt. v. IEPA, PCB No. 84-45 (Nov. 26, 1984)) It would have been useful had the Illinois EPA provided a pinpoint citation to the source of this claim, as it appears that the Illinois EPA has merely cited its own unsuccessful position in a failed motion for reconsideration. There was a period of time

in which the Illinois EPA sought to enjoy deference in its permit decisions as the initial reviewer of the application. E.g., id. at p. 7. This contention was rejected by the Board and finally put to rest in EPA v. Pollution Control Board , 115 Ill. 2d 65, 70 (1986) ("the Board is not required to apply the manifest-weight test to its review of the Agency's decision denying a permit.") These permitting proceeding operate within an administrative continuum, where the Agency does not make detailed findings of fact or conclusions of law to which deference may apply. EPA v. Pollution Control Board, 138 Ill. App. 3d 550, 552 (3rd Dist. 1985). Conclusions of law, including interpretations of Board regulations, would not be entitled to deference under any circumstance anyway.

II. UNDER THE ACT AND BOARD REGULATIONS, PART 807 LANDFILLS ARE ONLY REQUIRED TO PERFORM MONITORING FOR A PERIOD OF FIFTEEN YEARS (POINT 1).

The plain language of Section 22.17(a) of the Act requires post-closure monitoring for a period of 15 years, which can be extended for a longer period by Board or federal regulation. (415 ILCS 5/22.17(a)) While in the early 90s, the Board and the federal government promulgated such regulations, In re Development, Operating, and Reporting Requirements for Non-Hazardous Waste Landfills, PCB R88-7 (effective date, Sept. 18, 1990); 40 CFR Part 258 (effective date, Oct. 9, 1991, it is undisputed that the subject landfill closed prior to these new regulations and thus it is not subject to the extended periods of postclosure care required by them.

The two cases cited by the Illinois EPA do not contravene this conclusion. The first restates the statute as Petitioner interprets it: IEPA v. Jersey Sanitation Corp., 336 Ill. App. 3d 582, 592 (4th Dist. 2003) ("Section 22.17 of the Act requires a landfill operator to monitor gas,

water, and settling at the site for 15 years after the site is closed or longer as required by the Board.") The Board has not extended the post-closure care period; it is the Agency that is claiming the authority to impose indefinite monitoring requirements on a case-by-case basis. Specifically, the Agency is imposing a requirement that the landfill continue monitoring so long as constituents have been measured above Part 620 groundwater quality standards and background levels, which resembles the standard for Part 811 landfills. (35 Ill. Adm. § 811.319(a)(1)(C))

The second case, essentially a default judgment, did not involve Section 22.17(a) of the Act, nor any issue regarding when post-closure care ends. Coalville Road Enterprises v. IEPA, PCB 10-76 (April 21, 2011).[1] The opinion merely states that the landfill has "begun 15 years of post-closure care." Id. at p. 2.

The importance of the proper post-closure care period is that if, as Petitioner argues, the postclosure care period has ended, and no more monitoring is required, the Illinois EPA's denial on the grounds that all exceedences of Part 620 groundwater quality standards must be eliminated makes no sense. The Illinois EPA initially contended that the landfill had several eroded and ponded areas, which needed to be abated, and repairs were subsequently made to moot this issue. (R.207; R.185) With no further abatement identified and the end of the postclosure care period reached, the initial question presented is whether the approach taken in removing and plugging monitoring wells, etc. is environmentally sound. The second question is whether certification must be made.

[1] Petitioner questions, what if any, precedential or collateral estoppel value can be given to a judgment rendered on an uncontested motion. This appears to be an appeal filed for purposes of seeking a settlement. In any event, the Board in Coalville was not appraised of a single argument being made by Petitioner herein.

III. PART 620 GROUNDWATER QUALITY STANDARDS ARE NOT A CONDITION OF COMPLETING POST-CLOSURE CARE OR RECEIVING CERTIFICATION (POINTS 2 AND 4).

Landfills have various stages of existence as they move from cradle to the grave, and the particular problem of landfills is that they stop being a source of income long before their life-cycle is complete. Thus financial assurance requirements, tied to a period certain, were first required in 1985 to ensure sufficient resources to monitor and abate any problems for the required term. None of the Board precedents raised by the parties deal directly with a landfill at this final stage of its existence, however, the permit appeals involving the Jersey landfill are the most relevant as they deal with a landfill changing stages in the context of past groundwater exceedences. IEPA v. Jersey Sanitation, 336 Ill. App. 3d 582, 594 (4th Dist. 2003).

This is a permitting case, seeking a change in regulatory status -- in this case at the end of the post-closure care period, and in the case of Jersey Sanitation, it was the beginning of post-closure care of the landfill. Jersey Sanitation had agreed in earlier permits to conduct a detailed groundwater monitoring analysis pursuant to Part 620 Class I groundwater standards. Either the Jersey landfill proposed them or acquiesced to their imposition, it does not matter. What matters is that after Jersey landfill was sued for violating the groundwater monitoring requirements of its permit, it asked permission to stop groundwater monitoring pursuant to Part 620. The Agency claimed that Part 807 required an evaluation of Part 620 Class I groundwater standards, and removing this requirement (and replacing it with pre-Part 620 standards) was tantamount to arguing "that no groundwater monitoring is required at all during post-closure care." Jersey Sanitation v. IEPA, PCB 00-82, at p. 12 (June 21, 2001). That is, if the landfill was allowed to stop evaluating pursuant to Part 620, then the Illinois EPA would not know whether the landfill

was complying with Part 620.

The Board's standard of review with regard to the modified groundwater monitoring proposal is the same as it is here, *i.e.*, whether or not "violations of the Act or Board rules would have occurred if the requested permit had been issued." Id. at 12. Had compliance with any Part 620 groundwater standards been required by Part 807 during postclosure, the Board would have had to affirm the Agency's decision because the only way to know whether the landfill was complying with Part 620 groundwater standards would have been to test and analyze the constitutions under Part 620.[2]

The reference to the related enforcement action does not alter the fact that within the permitting context, the Board specifically rejected the requirement for groundwater monitoring during post-closure be sufficient to evaluate compliance with Part 620 groundwater standards. Petitioner will not re-argue the differences between permit procedures and enforcement actions herein.

However, it does wish to contest the Illinois EPA's gloss on the enforcement action. People v. Jersey Sanitation, PCB 97-2, at p. 21-22 (Feb. 3, 2005) In Count I of the Complaint, Jersey Sanitation was found to have violated groundwater quality standards since 1990, id. at p. 18, which is the year before Part 620 was promulgated and two years before it stopped accepting waste. Id. at p. 5. Thus, in finding that the landfill had violated groundwater quality standards for 12 years id. at p. 22, the Board made findings across various stages of the landfill's existence, from active day-to-day operations through 1992, to obtaining a certificate of closure in 1999. Furthermore, this necessarily entailed regulatory compliance issues that varied over time,

[2] Petitioner is uncertain which Part 620 standard the Illinois EPA believes applies to the subject landfill, it appears that Class I, II & IV have been referenced in its briefs.

including requirements that existed prior to Part 620, requirements under an earlier permit that expressly incorporated Part 620, and requirements after removal of references in Part 620 in the relevant permitting appeals. None of which sheds light on whether Part 620 standards must be met for the Illinois EPA to certify post-closure care, but nonetheless, the Illinois EPA is drawing a number of conclusions without recognizing the different stages and different legal framework during the 12 years of groundwater monitoring exceedences in Jersey Sanitation.

Regulations, like statutes, should be construed as a whole, presuming that it was not intended to produce absurd, inconvenient or unjust results. Brucker v. Mercola, 227 Ill.2d 502 (Ill. 2007). The absurdity with the Agency's position is that it holds landfills closed over 15 years ago under regulations that pre-date Part 620 to a higher standard than new facilities operating today, generating revenue that could afford more stringent standards. New facilities can establish zones of compliance 100 feet from the facility to meet Part 620 standards. When asked about what kind of compliance boundary a Part 807 facility enjoys, the Illinois EPA informed petitioner that such concepts "do not exist under the framework provided in 35 IAC 807." (R.456) Petitioner agrees, but reach a different conclusion therefrom. Part 807 facilities that were not capable of meeting the new landfill and the forthcoming groundwater quality standards were required to stop accepting waste and close under their existing closure/post-closure care plan.

IV. PARTS 807.313 AND 807.315 DO NOT APPLY TO PART 807 LANDFILLS AFTER THE POST-CLOSURE CARE PERIOD. (POINT 3)

This is a permitting procedure, by which Petitioner seeks to change the status of the landfill at the close of post-closure care. The relevant regulations for post-closure care are found

in 35 Ill. Adm. Code § 807.318, as substantially codified in 415 ILCS 5/22.17. The relevant question is whether the change in status would violate the Act or Board regulations, and as such the focus is on the future state. In IEPA v. Jersey Sanitation Corp., 336 Ill. App. 3d 582 (4th Dist. 2003), the landfill was seeking approval of a post-closure care plan for which the Board and Appellate Court determined a certified operator was no longer necessary at that stage. Sections 807.313 and 807.315 expressly pertain to "operation of a sanitary landfill," and Petitioner is not proposing to operate a sanitary landfill.

The cases cited by the Illinois EPA overlook this point, and do not go as far as urged anyway. As previously mentioned, the People v. Jersey Sanitation, PCB 97-2 (Feb. 3, 2005) involved a landfill with groundwater violations that began during active day-to-day operations, and thus would have violated Sections 807.313 and 807.315 during at lest a portion of the time. Also, the case involved an enforcement action. Compare with IEPA v. Jersey Sanitation Corp., 336 Ill. App. 3d 582 (4th Dist. 2003). The Coalville case involved an unopposed motion for summary judgment in which the landfill waived any right to granting of the motion. While the Agency referenced 35 Ill. Adm. Code § 807.313 in its denial letter, the landfill never argued that the provision did not apply to its post-closure activities, nor was it seeking to enter the stage after post-closure. Finally, In re Petition of Hayden Wrecking Corp. Vor an Adjusted Standard from 35 Ill. Adm. Code 620.410(A), AS 04-03 (Jan. 6, 2005), neither Sections 807.313 or 807.315 were referenced at all.

V. PETITIONER COMPLETED ITS POST-CLOSURE CARE PLAN.

The Illinois EPA cites to the closure/post-closure care plan which Petitioner closed under for support for its position that the post-closure care period is indefinite. That same document

supports Petitioner's interpretation as well:

> **13. The owner and operator shall monitor gas, water and settling at the completed site for a period of fifteen (15) years after the site is closed and shall take whatever remedial action is necessary to abate any gas, water or settling problems which appear during that time. Post-closure groundwater monitoring shall be conducted and reported to the Agency on a quarterly basis for 15 years.**

(R.1296)

The Agency's permit condition is consistent with the groundwater monitoring plan submitted by the Petitioner: "Sampling of the wells will be conducted quarterly for fifteen years, and the results will be submitted to the Illinois EPA. . . . If adverse trends are developing or if parameters exceed general use water quality standards, the Agency will be notified in writing and further investigation will be performed." (R.1344)

While failure to complete the post-closure care plan was not raised in the denial letter, there still can be no claim that the Petitioner failed to monitor the site for the "period of fifteen (15) years" as required in the Agency approval.

VI. THE BOARD'S REGULATORY HISTORY IS USEFUL GUIDANCE TO THE MEANING OF BOARD REGULATIONS.

The Board and parties frequently cite Board rulemaking opinions to help interpret regulations. E.g., Jersey Sanitation Corp. v. IEPA, PCB 00-82, at p. 4 (June 21, 2001). Their use is not misleading or elaborate revisionism. The Board generally provides detailed explanations and justifications for the rule, including consideration of cost-benefit concerns. These are the

remedy against anachronism.

The Illinois EPA complains that the "gross pollution" standard has no existence in the Board's jurisprudence. There is some truth to this, but that is because it was not a particularly useful standard. The Board inherited a number of environmental regulations, which needed to be overhauled. Regulatory bodies, as well as regulated entities, often prefer quantitative standards that are clear to apply and enforce. This is why the Illinois EPA wants to impose Part 811 standards or some form of them, on landfills that were not developed and operated under Part 811. But it is not true that such standards were not enforced, though the term may not have been used. Most administrative-citation cases against landfills involve "gross pollution" issues pertaining to uncovered refuse and visible discharges of waste-filled leachate, though not described as such. Within a three-year period, what else could be observed at a landfill?

Part 807 facilities that could not meet the new landfill and groundwater requirements had a fairly simple and direct environmental response to be taken: stop accepting more waste. They would not need to address the new groundwater quality standards, nor would the regulatory agencies be riddled with the additional time and expense of trying to force compliance when compliance was impossible. That may not seem to the Illinois EPA to be the best approach today, but back when the Part 811 standards were being promulgated the Agency complained that it lacked the resources to properly oversee landfills. Thus, landfills that were closing were not required to get new permits and provide further burdens, they were simply to close under their existing closure/ post-closure plan and monitor and abate for 15 years. Petitioner has monitored groundwater for 15 years and the demonstrated trend for constituents is downward, as one would expect at a landfill that ceased operations decades ago.

CONCLUSION

For the above reasons, D&L Landfill, Inc. prays that the Board reverse the Agency's denial of the subject permit application, and specifically grant its request to discontinue monitoring gas, water and settling in the manner described in the application, direct the Agency to execute certification of completion of post-closure care, and for such other relief as the Board deems meet and just.

Respectfully submitted,

D&L LANDFILL, INC.,
Petitioner,

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