

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

RCH NEWCO II, LLC)	
)	
Petitioner,)	
)	
v.)	PCB 2024-066
)	(Permit Appeal - RCRA)
ILLINOIS ENVIRONMENTAL PROTECTION)	
AGENCY,)	
)	
Respondent.)	

NOTICE OF ELECTRONIC FILING

To: *See Attached Service List*

PLEASE TAKE NOTICE that on August 22, 2024, I caused to be filed with the Office of the Clerk of the Illinois Pollution Control Board by electronic filing the attached Respondent's Response in Opposition to Petitioner's Request for Stay, copies of which are attached hereto and hereby served upon you.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

s/ Kevin Garstka
Kevin Garstka
Assistant Attorney General
Office of the Illinois Attorney General
Environmental Bureau
69 W. Washington Street, 18th Floor
Chicago, IL 60602
(773) 590-7029
Kevin.Garstka@ilag.gov

SERVICE LIST

Don Brown, Clerk of the Board
Illinois Pollution Control Board
60 E. Van Buren St., Suite 630
Chicago, Illinois 60605
Don.Brown@illinois.gov
(by electronic filing)

Bradley Halloran
Illinois Pollution Control Board
60 E. Van Buren Street, Suite 630
Chicago, Illinois 60605
Brad.Halloran@illinois.gov

Jennifer T. Nijman
Kristen L. Gale
Andrew T. Nishoka
NIJMAN FRANZIETTI LLP
10 S. LaSalle Street, Suite 3400
Chicago, IL 60603
jn@nijmanfranzetti.com
kg@nijmanfranzetti.com
dn@nijmanfranzetti.com

CERTIFICATE OF SERVICE

I, Kevin Garstka, an Assistant Attorney General, hereby certify that on the 22th of August 2024, I caused to be served the foregoing Notice of Electronic Filing and Respondent's Response in Opposition to Petitioner's Request for Stay, upon the parties named on the attached Service List via email or electronic filing as indicated.

s/ Kevin Garstka

Kevin Garstka

Assistant Attorney General

Office of the Illinois Attorney General

Environmental Bureau

69 W. Washington Street, 18th Floor

Chicago, IL 60602

(773) 590-7029

Kevin.Garstka@ilag.gov

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

RCH NEWCO II, LLC)	
)	
Petitioner,)	
)	
v.)	PCB 2024-066
)	(Permit Appeal - RCRA)
ILLINOIS ENVIRONMENTAL PROTECTION)	
AGENCY,)	
)	
Respondent.)	

**RESPONDENT’S RESPONSE IN OPPOSITION
TO PETITIONER’S REQUEST FOR STAY**

Now comes Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY (“IEPA”), by KWAME RAOUL, Attorney General of the State of Illinois, and hereby provides its response in opposition to Petitioner’s, RCH NEWCO II, LLC (“RCH Newco”), Request For Stay. In support of this Response, IEPA states as follows:

I. INTRODUCTION

On July 19, 2024, RCH Newco filed with the Illinois Pollution Control Board (“Board”) its Petition to Appeal Illinois EPA’s Final Determination (“Petition”) and Request for Stay. In its Request for Stay, RCH Newco asks the Board to stay the application of Illinois EPA’s March 13, 2024 Final Determination (“the Final Determination”) that requires RCH Newco to extend the post-closure care period and post financial assurance for its hazardous waste landfill located at New Avenue and Ceco Road in Lemont, Illinois (“the Site”), pending a final decision of the Board. Petition at 14¹. Specifically, RCH Newco requests that it should not be required to provide an application for a Resource Conservation and Recovery Act (“RCRA”) post-closure permit within 180 days of March 13, 2024. *Id.* Also, RCH Newco requests that the Board stay the application of

¹ RCH Newco’s Petition and Request are contained in one document and for purposes of citing to it in this Response, it shall be collectively referred to as “Petition.”

the Final Determination, including any modification to the post-closure care plan, and requirements for recalculating financial assurance. *Id.* RCH Newco brings its Request to Stay pursuant to Section 10-65(b) of the Administrative Procedures Act (“APA”), 5 ILCS 100/10-65(b). *Id.* at 14-15. Alternatively, RCH Newco also requests that the Board utilize its discretionary authority to issue a stay of the Final Determination pending a final decision by the Board. *Id.* at 15.

The Board should deny RCH Newco’s Request for Stay because the plain language of Section 10-65(b) of the APA does not apply to RCH Newco’s July 11, 2022 RCRA Post-Closure Care Request for Modification and Cost Estimate (“Modification Request”), Petition, Ex. O, pg. 1467-1470 and Final Determination. Additionally, the Board should deny RCH Newco’s Request for a Board discretionary stay because the Request for Stay does not pertain to an existing license, and also has a likelihood of environmental harm, including the possible release of hazardous waste into the environment.

II. ARGUMENT

- A. **Section 10-65(b) of the APA Allowing for an Automatic Stay is Inapplicable to this Proceeding.**
 - i. **RCH Newco’s Modification Request is not an “Application for the Renewal of a License or a New License with Reference to any Activity of a Continuing Nature” under Section 10-65(b) of the APA.**

RCH Newco seeks a stay of the Final Determination in its entirety while this proceeding is pending before the Board pursuant to Section 10-65(b) of the APA, 5 ILCS 100/10-65(b). Petition at 14. However, the plain language of Section 10-65(b), which is written to provide license continuity pending final agency decision, does not apply to situations such as this one where a licensee is seeking a modification to discontinue the licensed activity. RCH Newco fails to provide

any support for its claim that Section 10-65(b) applies to the Final Determination requiring RCH to continue post-closure activities.

Section 10-65(b) of the APA provides for an automatic stay in certain limited circumstances, as set forth below:

- (b) **When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature**, the existing license shall continue in full force and effect until the final agency decision on the application has been made unless a later date is fixed by order of a reviewing court.

5 ILCS 100/10-65(b) (2022) (emphasis added).

Illinois law does not support an interpretation of Section 10-65(b) that applies to Illinois EPA's Final Determination to extend the RCRA post-closure care period and post financial assurance. In construing the meaning of a statute, the Illinois Supreme Court explained that the primary objective is to ascertain and give effect to the intention of the legislature, and that all other rules of statutory construction are subordinated to this cardinal principle. *Metzger v. DaRosa*, 209 Ill. 2d 30, 34 (2004). Moreover, the plain language of the statute is the best indicator of the legislature's intent. *Id.* at 34-35. Further, when a statute's language is clear, it will be given effect without resort to other aids of statutory construction. *Id.* at 35. It is axiomatic that if a statute contains language with an ordinary and popularly understood meaning, courts will assume that that is the meaning intended by the legislature. *M.I.G. Investments, Inc. v. E.P.A.*, 122 Ill. 2d 392, 398 (1988). In addition, statutes should be read so as to yield logical and meaningful results and to avoid constructions that render specific language meaningless or superfluous. *Rochelle Disposal Serv., Inc. v. Ill. Pollution Control Bd.*, 266 Ill. App. 3d 192, 198 (2nd Dist., 1994).

To demonstrate the applicability of Section 10-65(b) of the APA, several criteria must be met by RCH Newco, including that RCH Newco (i.e. the "licensee"), 1) has made timely and

sufficient application for either, 2) the renewal of a license, or 3) a new license with reference to any activity of a continuing nature, 4) the existing license shall continue in full force and effect until the final agency decision on the application has been made. Looking to the plain language of Section 10-65(b) of the APA, the statute's language is clear; and thus, it will be given effect without resort to other aids of statutory construction. *Metzger*, 209 Ill. 2d 30, 35 (2004). Section 10-65(b) of the APA also contains language with an ordinary and popularly understood meaning, indicating that courts will assume that it is the meaning intended by the legislature. *M.I.G. Investments, Inc.*, 122 Ill. 2d 392, 398 (1988). In its Request for Stay, RCH Newco fails to demonstrate the plain language applicability criteria included in Section 10-65(b) of the APA.

RCH Newco's Modification Request is not an "application for the renewal of a license" nor a "new license with reference to any activity of a continuing nature" under Section 10-65(b) of the APA. RCH Newco's Modification Request consisted of a letter to Illinois EPA requesting to modify its post closure plan and to provide a cost estimate. Petition, Ex. O, pg. 1467-1470. A modification is not an "application for renewal of a license" or a "new license with reference to any activity of a continuing nature," as set forth in the plain language of Section 10-65(b) of the APA. License under the APA "includes the whole or part of any agency permit, certificate, approval, registration, charter, or similar form of permission required by law." 5 ILCS 100/1-35 (2024). Under the Board's Interim Status Standards for Owners and Operators of Hazardous Waste Facilities, an owner or operator may request amendment of the facility's post-closure care plan at any time during the post closure care period. 35 Ill. Adm. Code 725.218(d). Although an amendment of a post-closure care plan under 35 Ill. Adm. Code 725.218 is "in the nature of a permit amendment" and is considered a permit denial pursuant to 35 Ill. Adm. Code 105, Section 10-65(b) of the APA does not explicitly address amendments or modifications to licenses. Rather, Section 10-65(b) of the APA is explicitly directed to applications for "new" or "renewal" of licenses. *Compare* 35 Ill. Adm. Code 725.218(h) *with* 5 ILCS 100/10-65(b). Thus,

while RCH Newco argues Section 10-65(b) applies because a Modification Request is in the nature of a permit amendment, it does not demonstrate how a modification under 35 Ill. Adm. Code 725.217 and 725.218, which can occur at any time during the life of the plan at the facility's or Agency's request and does not raise the same coverage gap concerns as securing a new or renewal of an expired license for a continuing activity, constitutes a new or renewed license.

ii. RCH Newco Requests a Stay of the Entire Final Agency Action and Not Simply Continuance of its Existing License.

The effect of Section 10-65(b) of the APA is to provide that “the existing license shall continue in full force and effect until the final agency decision on the application has been made” This provision was clearly written to preserve the status quo for facilities with licenses pending appeal of a new license or license renewal. *E.g. Borg-Warner Corp. v. Mauzy*, 100 Ill. App. 3d 862, 870 (3d Dist. 1981) (applying the continuance of existing license provisions of the APA to allow stay of the effectiveness of the new renewal permit pending appeal). However, RCH Newco is not requesting continuation of its obligations under its existing interim status post-closure plan, but instead is requesting stay of Illinois EPA's determination that RCH Newco must continue post-closure care and apply for a RCRA post-closure permit and recalculation of financial assurance. Petition at 14. On February 7, 1996, Illinois EPA determined that post-closure care began at the Site on January 1, 1993, pursuant to the Facility's approved interim status post-closure plan under 35 Ill Adm. Code 725. Petition, Ex. A, pg. 1. The interim status post-closure plan requires post-closure care be maintained for a minimum of thirty years or until at least January 1, 2023. *Id.* On August 29, 1996, Illinois EPA issued a modification to the interim status post-closure plan that included a permit condition stating that the Site must eventually obtain a RCRA post-closure permit, pursuant to 35 Ill. Adm. Code 703.121(b). *Id.* The Site never obtained a RCRA post-closure permit under 35 Ill. Adm. Code 703.121(b), nor has it certified completion of post-closure

care, as required by 35 Ill. Adm. Code 725.220. Thus, it is unclear what the application of a continuation of the existing license would even look like in this context. Continuation of the now allegedly obsolete “existing license”, the only relief provided by Section 10-65(b), would be absurd as RCH Newco is presently petitioning to discontinue that very activity. *Evans v. Cook Cty. State's Atty.*, 2021 IL 125513, ¶27 (“Statutes must be construed to avoid absurd or unjust results”).

In sum, an analysis of the plain language of Section 10-65(b) unambiguously demonstrates that it is inapplicable to the Modification Request and Final Determination. By not providing any support for its Request for Stay, RCH Newco failed to establish the necessary requirements in Section 10-65(b) of the APA that its Modification Request at issue was an “application for the renewal of a license” or a “new license with reference to any activity of a continuing nature”. Furthermore, RCH Newco’s Request for Stay does not pertain to “an existing license,” and even if it did, the interim post-closure care plan would be the activity that would be in place pending the outcome of this Case. Consequently, the Board must deny RCH Newco’s request for a stay under Section 10-65(b) of the APA.

B. The Final Determination is not a Permit Condition and a Board Discretionary Stay Would Result in a Significant Likelihood of Environmental Harm.

Secondly, RCH Newco requests that the Board use its discretionary authority to grant a stay of the Final Determination. Petition at 14-15. However, RCH Newco does not qualify for a Board discretionary stay, especially given the likelihood of environmental harm if a stay is granted by the Board. Accordingly, the Board should not grant a stay of the Final Determination’s application using its discretionary authority.

The Board has consistently held that it “has the authority to grant discretionary stays from permit conditions.” *Community Landfill Co. and City of Morris v. IEPA*, PCB 01-48, PCB 01-49 (consol.) (Oct. 19, 2000); see also, e.g., *Hartford Working Group v. IEPA*. PCB 05-74, slip op. at

1 (Nov. 18, 2004). In determining whether a discretionary stay is appropriate, the Board may refer to four factors: (1) a certain and clearly ascertainable right needs protection; (2) irreparable injury will occur without the stay; (3) no adequate remedy at law exists; and (4) there is a probability of success on the merits. *Id.*, citing *Junkunc v. S.J. Advanced Technology & Mfg.*, 149 Ill. App. 3d 114 (1st Dist. 1986). While the Board may consider these four factors, it is not limited to them. *Bridgestone/Firestone Off-Road Tire Company v. IEPA*, PCB 02-31 slip op. at 3 (November 1, 2001)². In deciding whether to grant a discretionary stay, the Board may consider various factors articulated in Illinois case law, such as the avoidance of irreparable harm, but the Board is “particularly concerned about the likelihood of environmental harm if a stay is granted.” *Community Landfill*, PCB 01-48 and 01-49, slip op. at 5., citing *Motor Oils Refining Co. v. IEPA*, PCB 89-116, slip op. at 2 (Aug. 31, 1989).

In its Request for Stay, RCH Newco merely states that the Board should use its discretionary authority to stay the Final Determination because its right to end post-closure care requires protection, it is irreparably harmed by the Final Determination, and it is likely to be successful on the merits. Petition at 15. RCH Newco does not explain why its right to post-closure care requires protection, how it is irreparably harmed, or why it will be successful on the merits. Although RCH Newco claims that irreparable injury would occur without a stay of the Final Determination, the only irreparable harm alleged appears to be financial, which to the contrary, is quite reparable. *Id. See e.g. Waste Management, Inc., v. IEPA*, PCB Nos. 84-45; 84-61; 84-68 (consol.) slip op. at 31 (Nov. 26, 1984) (denying stay weighing harm to the environment over financial consequences). In Addition, RCH Newco does not provide any support for why there is a probability of success on the merits of its appeal.

² Available at <https://pcb.illinois.gov/documents/dsweb/Get/Document-15101>.

In its Request for Stay, RCH Newco did not request a Board discretionary stay from permit conditions. Petition at 15. As a matter of fact, it requests a stay of the Final Determination, final agency action's application, which amongst other things, requires it to obtain a RCRA post-closure care permit. *Id.* at 14. As a result, the Board should not grant a discretionary stay of the Final Determination because RCH Newco does not request a stay from permit conditions. *Community Landfill*, PCB 01-48 and 01-49, slip op. at 5.

RCH Newco also states that "Illinois EPA can only speculate that there might be some unknown future harm." *Id.* However, the RCH Newco Site has a significant likelihood of environmental harm if a stay of the Final Determination is granted. The Site presently includes approximately 2,500 cubic yards of electric arc furnace dust, a listed hazardous waste, and approximately 29,500 cubic yards of non-hazardous slag. Petition, Ex. A, pg. 3. Pursuant to 35 Ill. Ad. Code 721.103(a)(2)(D), when a listed hazardous waste, electric arc furnace dust, is mixed with a non-hazardous waste, slag, the entire 32,000 cubic yards of waste in the landfill becomes a listed hazardous waste. *Id.*

As discussed earlier, the Final Determination requires RCH Newco to continue its post-closure care for an additional 30 years and to post financial assurance. *Id.* at 1. Post-closure care requires that the integrity and effectiveness of a viable cover be adequately monitored and maintained, preventing leachate generation and ultimately, a release of contaminants from the Site. *Id.* In 2023, vegetation with well-established tap roots were found to have been growing on the clay landfill cover and adjacent to the Site, which threatens the effectiveness of the cover and risks leachate generation and a release of hazardous contaminants from the Site. *Id.* In fact, on March 27, 2023, Illinois EPA issued RCH Newco a Violation Notice for its lack of cover maintenance at the Site in violation of RCRA post-closure care requirements. Record, R 4-17. Specifically, in the

Violation Notice, Illinois EPA noted that the final cover over the landfill has been neglected, including a general lack of maintenance for the vegetative cover where there are multiple bare spots and growth of woody shrubs with one of many large ruts present in the cover. *Id.* The Final Determination requires RCH Newco to determine the extent of liquids that may have penetrated the compromised cover system during the post-closure period. Petition, Ex. A, pg. 3. Additionally, RCH Newco's Site does not have a leachate collection or monitoring system, which serves as the most effective way of examining the integrity of the Site, according to 2016 U.S. EPA Guidance. Record, R 111-129. Since RCH Newco has chosen to not utilize a leachate collection/monitoring system, it is not known if leachate is present within the landfill, nor can it determine the extent of liquids that may have penetrated the compromised cover system during the post-closure period, as required by 35 Ill. Adm. Code 725.410(a)(1) & (5), 725.410(b), and 725.217(a)(1). Petition, Ex. A, pg. 3.

As stated in the Final Determination, the establishment and maintenance of physical and legal controls at the Site are necessary to prevent unacceptable exposure to the hazardous waste and hazardous constituents abandoned within the landfill. *Id.* at 4. In the absence of long-term monitoring including maintenance of the cover systems and groundwater monitoring systems, control of any leachate at the Site, and restrictions of future land uses must be placed on the Site to minimize future exposures and potential hazardous waste release. *Id.* at 4.

If the Board utilizes its discretionary authority to grant a stay, RCH Newco would not be required to do anything at the Site, including critical monitoring and leachate control, to minimize the risk of release of hazardous waste into the environment. *Id.* at 3-4. As mentioned above, operation of a stay of the Final Determination would relieve RCH Newco of the requirements to

submit an application for a RCRA post-closure permit, maintain financial assurance, and continue post-closure care at the Site.

In *Aqua v. Illinois EPA*, in which the Board granted an unopposed request for a discretionary stay of contested permit conditions, the Board noted that, “. . . a stay of the contested conditions would not result in an increased likelihood of environmental harm, as Aqua will continue to operate the UP System in compliance with the Lead and Copper Rule and with the remaining conditions of the 2022 Permit.” PCB 23-12, slip op. at 5 (Aug. 11, 2022). However, RCH Newco’s Request for Stay is not limited to any particular “condition,” and if granted, would potentially allow RCH Newco to avoid the requirements of a RCRA post-closure permit entirely and allow post-closure care at the Site to cease without certification of its completion. This outcome could lead to violations of the Act and Board Regulations and would pose a substantial risk of environmental harm, as observed by Illinois EPA’s March 27, 2023 Violation Notice alleging violations related to maintenance of the Facility’s cap. Record, R 4-17. Consequently, Illinois EPA strongly recommends that the Board not grant a discretionary stay of the terms of the Final Determination.

III. CONCLUSION

The Board should deny RCH Newco’s Request for Stay because the plain language of Section 10-65(b) of the APA does not apply to RCH Newco’s Request to Modify. The Board should also deny RCH Newco’s Request for a Board discretionary stay because it does not pertain to an existing license, and also, may lead to a significant likelihood of environmental harm, including the possible release of hazardous waste into the environment.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION
AGENCY

BY: /s/ Kevin Garstka
Kevin Garstka
Molly Kordas
Justin Bertsche
Assistant Attorney General
Environmental Bureau
69 W. Washington St., 18th Floor
Chicago, Illinois 60602
(773)-590-7029
(773)-590-7047
Kevin.Garstka@ilag.gov
Molly.Kordas@ilag.gov
Justin.Bertsche@ilag.gov