ILLINOIS POLLUTION CONTROL BOARD
January 23, 2003

MINERAL SOLUTIONS, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 03-39
	)	(Permit Appeal – Land)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

PATRICK D. SHAW OF MOHAN, ALEWELT, PRILLAMAN & ADAMI APPEARED ON BEHALF OF PETITIONER; and

JOHN J. KIM OF THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY APPEARED ON BEHALF OF THE RESPONDENT.

OPINION AND ORDER OF THE BOARD (by G.T. Girard):

On September 30, 2002, Mineral Solutions, Inc. (Mineral Solutions) filed a petition seeking review of an August 26, 2002 determination by the Illinois Environmental Protection Agency (Agency) to issue a permit with conditions. The Agency approved a temporary suspension of waste permit sought by Mineral Solutions, but the permit was conditioned on Mineral Solutions receiving siting under Section 39.2 of the Environmental Protection Act (Act) (415 ILCS 5/39.2 (2002)) prior to accepting any new or additional waste. The permit concerns the Indian Creek Landfill located in Hopedale, Tazewell County.

On December 9, 2002, hearing was held before Board Hearing Officer Kathleen Crowley. The parties filed simultaneous opening briefs on December 17, 2002 and simultaneous response briefs on December 23, 2002.[1] For the reasons discussed below the Board strikes the contested condition placed on the permit by the Agency.

The Board will first give an overview of the permitting process and then summarize the facts in the proceeding. The Board will then delineate the issue in the appeal and summarize the arguments of the parties. Finally the Board will discuss the reasons for the decision.

THE PERMITTING PROCESS

[1] Mineral Solutions' opening brief will be cited as "Pet. Br. at" and the response brief will be cited as "Pet. Resp. at"; the Agency's opening brief will be cited as "Ag. Br. at" and the Agency's response brief will be cited as "Ag. Resp. Br."; the record filed by the Agency and the agreed supplement to the record will be cited as "R. at."

After the Agency's final decision on a permit is made, the permit applicant may appeal that decision to the Board. 415 ILCS 5/40(a)(1)(2002). The question before the Board in permit appeal proceedings is whether the applicant proves that the application, as submitted to the Agency, demonstrated that no violation of the Act would have occurred if the requested permit had been issued. Panhandle Eastern Pipe Line Company v. IEPA, PCB 98-102 (Jan. 21, 1999); Joliet Sand & Gravel Co. v. PCB, 163 Ill. App. 3d 830, 833, 516 N.E.2d 955, 958 (3rd Dist. 1987), citing IEPA v. PCB, 118 Ill. App. 3d 772, 455 N.E. 2d 189 (1st Dist. 1983). Furthermore, the Agency's denial letter frames the issues on appeal. ESG Watts, Inc. v. PCB, 286 Ill. App. 3d 325, 676 N.E.2d 299 (3rd Dist. 1997).

Section 39(a) of the Act also allows the Agency to impose conditions on permits:

> In granting permits the Agency may impose such conditions as may be necessary to accomplish the purposes of this Act, and as are not inconsistent with the regulations promulgated by the Board hereunder. 415 ILCS 5/39(a) (2002).

Section 40(a)(1) of the Act provides that:

> If the Agency refuses to grant or grants with conditions a permit under Section 39 of this Act, the applicant may, within 35 days, petition for a hearing before the Board to contest the decision of the Agency. 415 ILCS 5/40(a)(1)(2002).

Standard of Review

A petition for review of permit conditions is authorized by Section 40(a)(1) of the Act (415 ILCS 5/40 (a)(1) (2002)) and 35 Ill. Adm. Code Section 105.204(a). The Board has long held that in permit appeals the burden of proof rests with the petitioner. Jersey Sanitation v. IEPA, PCB 00-82 (June 21.2001). The petitioner bears the burden of proving that the application, as submitted to the Agency, would not violate the Act or the Board's regulations. This standard of review was enunciated in Browning-Ferris Industries of Illinois, Inc. v. PCB, 179 Ill. App. 3d 598, 534 N.E. 2d 616, (2nd Dist. 1989) and reiterated in John Sexton Contractors Company v. Illinois (Sexton), PCB 88-139 (Feb. 23, 1989). In Browning-Ferris the appellate court held that a permit condition that is not necessary to accomplish the purposes of the Act or Board regulations is arbitrary and unnecessary and must be deleted from the permit. 534 N.E. 2d 616, 620. In Sexton the Board held:

> That the sole question before the Board is whether the applicant proves that the application, as submitted to the Agency, demonstrated that no violations of the Environmental Protection Act would have occurred if the requested permit had been issued. PCB 88-139

Further, the Illinois Supreme Court has stated that the Board, not the Agency must determine whether a permit should issue in cases where a denial of the permit has been appealed. Environmental Protection Agency v. PCB, 115 Ill. 2d 65, 503 N.E.2d 343 (1986). Thus, the Board must determine whether as a matter of law, Mineral Solutions 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. Further, the Board must also determine whether the contested condition is not necessary to accomplish the purposes of the Act.

FACTS

Indian Creek Landfill is a 260-acre solid waste disposal site located outside of Hopedale, Tazewell County. R. at 0027, 0037. Indian Creek Landfill was originally permitted for development in August, 1980 and received an operating permit in December 1980. R. at 0037. In November 1981, almost a year after Indian Creek Landfill was permitted, the General Assembly passed and the Governor signed into law an amendment to the Act that provided a new mechanism for siting pollution control facilities in Illinois. *See* P.A. 86-682 and 415 ILCS 5/39.2 (2002). Existing facilities were not required to seek retroactive approval and could continue to operate without local siting. In 1984, American Fly Ash Company (American Fly Ash) (which later became Mineral Solutions) acquired the Indian Creek Landfill. R. at 0037.

In 1995, the law in Illinois was changed to encourage the beneficial use of coal combustion waste and to refer to it as "coal combustion by-products" in the statutes. *See* P.A. 89-93 and 20 ILCS 1105/3, 1905/45, 2705/49.33, 415 ILCS 5/3.330 (8), 5/3.535, 5/3.140, 5/3.135, and 5/22.15 (2002). Fly ash is a coal combustion by-product and the new law specifically applied to fly ash used as a substitute for agricultural lime as a soil conditioner. 415 ILCS 5/3.135(6) (2002). American Fly Ash was already using fly ash as an agricultural product in other Midwestern markets and decided that the fly ash from one Tazewell County facility would be suitable for use as an agricultural product. R. at 0166.

In 1995, American Fly Ash contacted the Illinois Department of Agriculture to register a product known as "Nutra-Ash" which recycled the fly ash into a fertilizer supplement. R. at 0177-0181. In a letter summarizing conversations between American Fly Ash and the Agency as well as conversations between Illinois Department of Agriculture and the Agency, American Fly Ash stated that the Illinois Department of Agriculture indicated it would have difficulty registering Nutra-Ash without a "letter of approved use" or a permit from the Agency. R. at 0173. Based on these conversations, the Agency recommended that American Fly Ash apply for a permit for the recycling project. *Id.* American Fly Ash opined that registration was not required under the new law and there was no need for a permit. *Id.* However, American Fly Ash applied for a permit (R. at 0151) and one was granted (R. at 0133).

After receiving the permit, American Fly Ash determined that it would begin a pilot project at Indian Creek Landfill. R. at 0118. American Fly Ash anticipated that at the conclusion of the pilot project, any residue from the recycling project would be disposed of at Indian Creek Landfill. *Id.* Indian Creek Landfill had been "temporarily closed" since November 1994 (R. at 0120), however Trench 1 was expected to receive more waste before final cover (R. at 0118). The recycling operation was placed on Trench 1 (R. at 0118) and in August 1996, Indian Creek Landfill received approximately 3,000 tons of fly ash to begin the pilot project (R. at 0116).

The pilot project was a process whereby fly ash from a specific power plant would be changed physically to make the fly ash easier to handle and market. R. at 0166.

> Changing the physical characteristics of the fly ash consisted of a patented process of mixing water with the fly ash, compacting the resultant mixture, and allowing the product to cure. The curing process is very comparable to the curing phase of concrete. Once cured, for a specified period of time, the stabilized material is then crushed and screened to meet the typical ag-lime specifications. R. at 0166.

Tazewell County Public Health inspectors performed inspections under a delegation agreement with the Agency. R. at 0040. Inspections occurred at Indian Creek Landfill in August and December 1996 and then monthly beginning in 1997. *See* R. at 0107-111, 0116-117, 0120-130. During the August 1996 inspection, the source was identified as a "Fertilizer Milling Plant" and the pilot project was explained to the inspectors. R. at 0116. On December 30, 1996, an inspection occurred and the inspection report notes that no evidence of landfilling was observed; however, a portion of the "soil amendment" was stored in the active site. R. at 0120. On January 23, 1997, the inspection report indicated that the pilot project was completed in the fall of 1996 but a "number of tons of the produced soil amendment" are stored in the active trench. R. at 0121. The inspection report also noted that any remaining Nutra-Ash, not utilized, would be landfilled in the active trench. *Id*. From February until August of 1997 the inspection reports indicate no significant change regarding the landfill and the stockpiled soil amendment. R. at 0122-128. On August 19, 1997, the inspection report indicated that American Fly Ash planned to landfill the remaining soil amendment in September or October in conjunction with work on the landfill. R. at 0129. On September 11, 1997, the inspector noted that the soil amendment was being pushed into the active trench at Indian Creek Landfill. R. at 0101.

In 1995, American Fly Ash applied for a permit seeking to significantly modify the landfill by closing Trench 1 under Subpart D of the Board's landfill regulations (35 Ill. Adm. Code Subpart D) and keeping the remaining permitted open under Subpart C (35 Ill. Adm. Code Subpart C). R. at 0182-224. That permit was granted on January 13, 1997. *Id*. On March 29, 2002, Mineral Solutions began submitting documents that comprised the application for a temporary suspension of waste acceptance permit. R. at 0098. Mineral Solutions submitted the last of these documents to the Agency on June 26, 2002. On August 26, 2002, the Agency issued a permit that was conditioned on Mineral Solutions receiving siting approval and a new operating permit. R. at 0003.

STATUTORY BACKGROUND

The following discussion sets forth relevant statutory provisions and the effect of those provisions.

Section 3.535 of the Act defines "waste" in part as:

> Any garbage, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility or other discarded material, . . . but does not

include . . . coal combustion by-products as defined in Section 3.135 [of the Act]. 415 ILCS 5/3.535 (2002).

Section 1.135 of the Act defines "coal combustion by-product" (CCB) in part as:

Coal combustion waste when used beneficially for any of the following purposes:

* * *

(6) CCB used as a functionally equivalent substitute for agricultural lime as a soil conditioner. 415 ILCS 5/3.135 (2002).

Coal combustion waste is defined in part as "fly ash . . . generated as a result of the combustion of coal. 415 ILCS 5/3.140 (2002).

Section 39(c) of the Act provides in pertinent part:

no permit for the development or construction of a new pollution control facility may be granted by the Agency unless the applicant submits proof to the Agency that the location of the facility has been approved . . . in accordance with Section 39.2 of this Act. * * * After January 1, 1994, if a solid waste disposal facility, any portion for which an operating permit has been issued by the Agency, has not accepted waste disposal for 5 or more consecutive calendars years, before that facility may accept any new or additional waste for disposal, the owner and operator must obtain a new operating permit under this Act for that facility unless the owner and operator have applied to the Agency for a permit authorizing the temporary suspension of waste acceptance. The Agency may not issue a new operation permit under this Act for the facility unless the applicant has submitted proof to the Agency that the location of the facility has been approved or re-approved by the appropriate county board or municipal governing body under Section 39.2 of this Act after the facility ceased accepting waste. 415 ILCS 5/39(c) (2002).

A new pollution control facility is defined in pertinent part as:

a pollution control facility initially permitted for development or construction after July 1, 1981. 415 ILCS 5/3.330(b)(1) (2002).

Under the provisions of the Act, a *new* pollution control facility is required to receive siting approval from a local government. However, facilities permitted for development prior to July 1, 1981 are not considered *new* pollution control facilities. Thus, for Indian Creek Landfill siting was not required unless Indian Creek Landfill "has not accepted waste disposal for 5 or more consecutive calendars years" without receiving a temporary suspension of waste acceptance permit.

DISCUSSION

The Board will set forth the issue in this proceeding and then summarize the arguments of the parties. The Board will then discuss the issue and explain the Board's reasoning for the Board's decision to strike the contested condition.

Issue

The only issue raised in this appeal is whether or not Mineral Solutions must obtain local siting approval under Section 39.2 of the Act (415 ILCS 5/39.2 (2002)) before an operating permit can be issued for the Indian Creek Landfill. The Agency issued a permit to Mineral Solutions that "approves the request for temporary suspension of waste" acceptance. R. at 0003. However the Agency conditioned the permit by stating that "Indian Creek Landfill cannot accept any new or additional waste for disposal without a new operating permit" issued by the Agency. *Id.* Mineral Solutions applied for the temporary suspension of waste acceptance permit on June 26, 2002. The Agency determined that the last acceptance of waste was in August 1996; however Mineral Solutions maintains that the last waste was accepted on September 11, 1997. If Mineral Solutions has accepted waste within five years of filing the request for a temporary suspension of waste permit, the Agency may not require siting approval for the Indian Creek Landfill pursuant Section 39(c) of the Act. 415 ILCS 5/39(c) (2002).

Mineral Solutions' Arguments

Mineral Solutions maintains that Indian Creek Landfill last accepted waste in September 1997, not August 1996, as the Agency alleges in the denial letter. Pet. Br. at 12. In support of this position Mineral Solutions raises four arguments to support the request to strike the condition requiring siting approval prior to acceptance of additional waste. First, Mineral Solutions asserts that there is a distinction between "acceptance" of waste versus "receipt" of waste. Pet. Br. at 12. Second, Mineral Solutions maintains that recycling projects generate waste and the residual product became waste only when the product was landfilled. Pet. Br. at 16. Third, Mineral Solutions contends that Mineral Solutions' interpretation of the statute meets the goals and objectives of the Act. Pet. Br. at 18. And finally, Mineral Solutions argues that the right to continue to use the landfill is guaranteed by the constitution. Pet. Br. at 21-22. The Board will summarize each of those arguments below.

Mineral Solutions argues that in determining when waste was "accepted" under Section 39(c) of the Act (415 ILCS 5/39(c) (2002)) a distinction must be drawn between acceptance and receipt. Pet. Br. at 12. Mineral Solutions asserts that the fly ash received in August 1996 was not accepted for waste disposal, but was changed into a product and a portion of the product was disposed of on September 11, 1997. *Id.* Mineral Solutions relies on the definition of "accept" found in the *Black's Law Dictionary* (6th Ed. 1990) and the definition of "receive" in *Merriam Webster's Collegiate Dictionary* (10th Ed. 1993) to support this position. Pet. Br. at 13.

Mineral Solutions asserts that acceptance means something more than receipt of an item. Pet. Br. at 13. Acceptance implies the assumption of a legal responsibility and is the point in time when legal obligations are imposed according to Mineral Solutions. Pet. Br. at 13, citing, Woodliff v. Dol, 139 Ill. App. 3d 539, 487 N.E.2d 645 (2nd Dist. 1985). Mineral Solutions also

maintains that environmental law has many examples of waste being "accepted" for purpose other than disposal. Pet. Br. at 14. For example transfer stations accept waste for temporary storage or consolidation, according to Mineral Solutions. Pet. Br. at 14-15. Thus, Mineral Solutions argues, the fact that a facility accepts waste indicates very little about the facility's obligations regarding that waste. Pet. Br. at 15.

Mineral Solutions next argues that recycling projects generate waste and the residual product becomes a waste only when the product is landfilled. Pet. Br. at 16. Mineral Solutions asserts that the Board has been asked to determine whether a material is a waste or a product in prior cases and cites to Safety-Kleen v. IEPA, PCB 80-12 (Feb. 7, 1980). Pet. Br. at 16. Mineral Solutions argues that the Agency does not dispute that Nutra-Ash was a product exempt from needing a waste permit. Pet. Br. at 16, citing R. at 0143. Mineral Solutions deduces that the question presented in this proceeding deals with the meaning "to be attributed to the recognition that the material is being recycled." Per. Br. at 16.

Mineral Solutions argues that since the Agency believes waste was last accepted at the Indian Creek Landfill in 1996, the Agency "implicitly believes that the fly ash was a waste at that time." Pet. Br. at 16. Mineral Solutions asserts that materials, which are destined, to be reused are not waste and cites to Safety-Kleen to support the assertion. *Id.* Mineral Solutions maintains that the fly ash was a raw material in the production of Nutra-Ash and the fact that some of the fly ash was ultimately not used is irrelevant. Pet. Br. at 16-17. Mineral Solutions argues that the production of Nutra-Ash should be treated no differently that any fertilizer plant which uses raw materials to produce fertilizer. Pet. Br. at 17.

Mineral Solutions also argues that the approach taken by federal law supports the position that recycling of fly ash is not a disposal operation. Pet. Br. at 17. Mineral Solutions cites to U.S.A. v. Peterson Sand & Gravel, Inc., 806 F. Supp. 1346 (N.D. Ill. 1992). In that case the district court ruled that as a matter of law fly ash, destined to be used as a raw ingredient in road-base manufacturing, that was deposited illegally in a superfund site was a useful product when generated and transported. *Id.* The fly ash did not retroactively become waste once it was discarded. *Id.*

The Mineral Solutions' third argument is that the interpretation of Section 39(c) of the Act (415 ILCS 5/39(c) (2002)) offered by Mineral Solutions meets the goals and objectives of the Act. Pet. Br. at 18. Mineral Solutions asserts that a "central goal" of the Act is to encourage recycling, particularly the beneficial use of coal combustion by-products. Pet. Br. at 18, citing 415 ILCS 5/20(a)(1-3) and 5/3.135. Mineral Solutions argues that the "sole reason" there is confusion over when Indian Creek Landfill accepted waste last is because Indian Creek Landfill was the site of a recycling project undertaken at "great personal expense" by the company. Pet. Br. at 18. Mineral Solutions opines that the fly ash could more easily have been "shoved into the ground" without the additional "permitting hassles, marketing difficulties, and other costs associated" with the recycling project. Pet. Br. at 18. Mineral Solutions argues that given these facts and the environmental policy favoring recycling, the interpretation of Section 39(c) of the Act (415 ILCS 5/39(c) (2002)) advocated by Mineral Solutions should be given "substantial consideration" by the Board. *Id.*

Lastly, Mineral Solutions argues that the constitution guarantees the right to continue to use the landfill. Pet. Br. at 21-22. Mineral Solutions asserts that a landfill, which was approved prior to November 12, 1981 but not grandfathered under the statute "is constitutionally protected from having to seek local siting approval." Pet. Br. at 22, citing American Fly Ash Co. v. County of Tazewell, 120 Ill. App. 3d 57 457 N.E.2d 1069 (3rd Dist. 1983). Mineral Solutions argues that the purpose of applying Section 39(c) of the Act (415 ILCS 5/39(c) (2002)) in this case is to "force the landfill to seek approval of" the current location. Pet. Br. at 24. Mineral Solutions maintains that the due process clause of the constitution protects Indian Creek Landfill from "being deprived of the right to continue to use the property for landfill operations unless the government demonstrates that the property owner intended to abandon or relinquish that right. *Id*.

Agency's Arguments

The Agency argues that the Indian Creek Landfill last accepted waste in August 1996 and therefore the Agency properly applied Section 39(c) of the Act (415 ILCS 5/39(c) (2002)). Ag. Br. at 6. In support of this position, the Agency asserts that the Board need only look to the plain language of Section 39(c) of the Act (415 ILCS 5/39(c) (2002)) and the actions of Mineral Solutions. Ag. Resp. at 2-3. The Agency also maintains that the Agency's interpretation of Section 39(c) of the Act (415 ILCS 5/39(c) (2002)) is not depriving Mineral Solutions of property without due process. Ag. Br. at 9. The following discussion will more fully explain the Agency's arguments.

The Agency argues that the plain language of Section 39(c) of the Act (415 ILCS 5/39(c) (2002)) supports the Agency's position that Indian Creek Landfill last accepted waste in August 1996. Ag. Resp. at 3. The Agency argues that the parties do not seem to disagree with the meaning of the second sentence in Section 39(c) (415 ILCS 5/39(c) (2002)). Ag. Resp. at 3. Further, the parties agree on the definition of "accept" in the briefs. Ag. Resp. at 4. The only language the parties disagree on is the application of the phrase "has not accepted waste disposal for 5 or more consecutive calendar years" (415 ILCS 5/39(c) (2002)) according to the Agency. Ag. Resp. at 4. The Agency maintains that the Board should acknowledge that to "accept" an item means that first that item has been received. *Id*. The Agency asserts that because the parties agree Section 39(c) (415 ILCS 5/39(c) (2002)) of the Act has clear meaning and imposes a consequence on a solid waste disposal facility, the Board should apply the facts of this case to Section 39(c) (415 ILCS 5/39(c) (2002)) and affirm the Agency. Ag. Resp. at 4-5.

The Agency's second argument is that the actions of Mineral Solutions establish that Section 39(c) of the Act (415 ILCS 5/39(c) (2002)) was appropriately interpreted and applied by the Agency. The Agency states that the term "accept" can be interpreted in different ways and the Agency cites to the *American Heritage Dictionary* (2nd Ed. 1991) and *Black's Law Dictionary* (5th Ed. 1979). Ag. Br. at 7. The Agency asserts that under either definition the actions of Mineral Solutions resulted in waste last being accepted in August 1996. *Id*. The Agency concedes that the fly ash was used as a component in the production of Nutra-Ash. Ag. Br. at 7. However, the Agency argues, the fly ash was piled in an active disposal area and Indian Creek Landfill had been accepting fly ash for disposal for a number of years. *Id*. The Agency also points out that even though the fly ash was used as a component in the Nutra-Ash, Mineral

Solutions always intended that the fly ash not utilized and the remaining Nutra-Ash would be disposed of at Indian Creek Landfill. Ag. Br. at 8. Thus, the Agency asserts, Mineral Solutions intended, when the fly ash was accepted, to dispose of the remnants from the Nutra-Ash project.

The Agency also urges the Board to consider the effect of accepting Mineral Solutions' interpretation of Section 39(c) of the Act (415 ILCS 5/39(c) (2002)). Ag. Br. at 9. The Agency asserts that under Mineral Solutions' interpretation a landfill could simply keep a pile of fly ash on-site for an indefinite period of time and still be considered to be operating. *Id*. However, the Agency argues the clear purpose of Section 39(c) of the Act (415 ILCS 5/39(c) (2002)) is to require landfills not actively accepting waste for five calendar years to undergo siting approval under Section 39.2 of the Act (415 ILCS 5/39.2 (2002)). *Id*. The Agency maintains that the interpretation by Mineral Solutions would allow a landfill to avoid the requirement for siting by focusing on when a material is actually disposed. *Id*.

The Agency asserts that the application of Section 39(c) of the Act (415 ILCS 5/39(c) (2002)) in this proceeding does not deprive Mineral Solutions of property without due process. Ag. Resp. at 9. The Agency notes that the General Assembly is presumed to have acted in a constitutional manner and the failure to accept waste is the trigger for requiring local siting approval under the statute. *Id*. The Agency asserts that Mineral Solutions is arguing for more work and effort on the part of the Agency before the application of Section 39(c) of the Act (415 ILCS 5/39(c) (2002)) even though the statute does not require such a burden. *Id*.

Board Discussion

Section 39(c) of the Act (415 ILCS 5/39(c) (2002)) requires a landfill to seek siting approval for the facility if the facility "has not accepted waste disposal for 5 or more consecutive calendars years." The only exception to that requirement is if the facility applied for a temporary suspension of waste acceptance permit from the Agency. The Board finds that the facts of this case establish that Mineral Solutions applied for the temporary suspension of waste acceptance within five years from the last accepted waste disposal. And for the reasons discussed below, the Agency condition requiring siting approval should be stricken.

The fly ash delivered in August 1996 was to be put to beneficial use in the production of Nutra-Ash. Thus the fly ash delivered in August 1996 to Indian Creek Landfill was a coal combustion by-product, not a waste. *See* 415 ILCS 5/3.135(6) and R. at 0116. The record indicates that Mineral Solutions used some of the fly ash to start a pilot project manufacturing Nutra-Ash. R. at 0116. The record establishes that Nutra-Ash was then stored on site until September 11, 1997, when the Nutra-Ash and the remaining fly ash were disposed of in Trench 1. R. at 0101, 0120, 0121, 0122-128, 0129. The Agency's interpretation of these facts is that the last accepted waste disposal at Indian Creek Landfill was August 1996. The Agency makes this conclusion based on Mineral Solutions actions and the plain language of Section 39(c) of the Act (415 ILCS 5/39(c) (2002)). Ag. Resp. at 2-3. The Board disagrees with the Agency's interpretation of the facts.

Mineral Solutions concedes that any material remaining unused from the pilot project was to be disposed of at Indian Creek Landfill. However, the Board finds that the fly ash was

accepted, not for disposal, but to be put to a beneficial use. The fly ash was delivered in August 1996 to be used in the production of Nutra-Ash as a soil amendment and was not intended for immediate disposal in 1996. The Board further finds that Nutra-Ash remained on site until at least September 1997 when the remaining Nutra-Ash was disposed. Therefore, the Board finds that Indian Creek Landfill's last "accepted waste disposal" was not in August 1996, but on September 11, 1997 when the remaining fly ash and Nutra-Ash were disposed of in Trench 1.

The inspection reports produced by the Tazewell County Public Health inspectors support the Board's factual finding. During the August 1996 inspection, the facility was identified as a "Fertilizer Milling Plant" and the pilot project was explained to the inspectors. R. at 0116. Later inspections noted that the soil amendment was stored on site and that no evidence of landfilling was observed. R. at 0120, 0121, 0122-128, 0129. Then on September 11, 1997, the remaining Nutra-Ash was being pushed into the active trench at Indian Creek Landfill and disposed of at the site. R. at 0101. Clearly the last date Indian Creek Landfill "accepted waste disposal" was the date that the remainder of the Nutra-Ash was disposed of at the facility on September 11, 1997. Therefore, since Mineral Solutions applied for a temporary suspension of waste acceptance permit before September 10, 2002 (within 5 years of waste disposal), the Agency improperly conditioned the permit by requiring Mineral Solutions to receive local siting approval prior to the acceptance of additional waste.[2]

CONCLUSION

The Board finds that Indian Creek Landfill had "accepted waste disposal" within "5 or more consecutive calendars years" of Mineral Solutions applying for a temporary suspension of waste acceptance permit. Therefore, Mineral Solutions is not required to seek local siting approval pursuant to Section 39.2 of the Act (415 ILCS 5/39.2 (2002)) before accepting additional waste at the site. The Board strikes the condition requiring local siting approval from the permit as the condition is not necessary to meet the purposes of the Act (415 ILCS 5/1 *et seq.* (2002)).

This opinion and order constitutes the Board's findings of facts and conclusions of law.

ORDER

The Board directs the Illinois Environmental Protection Agency to strike the condition that requires Mineral Solutions Inc. to submit proof of local siting approval pursuant to Section 39.2 of the Act (415 ILCS 5/39.2 (2002)). The Board remands the permit back to the Illinois Environmental Protection Agency to issue the permit consistent with this opinion and order.

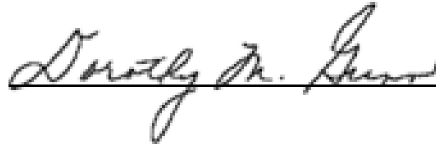
IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the

[2] Because the Board has ruled in favor of Mineral Solutions, the Board need not discuss the constitutional arguments raised by Mineral Solutions.

order. 415 ILCS 5/31(a) (2002)); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on January 23, 2003, by a vote of 6-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board