

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CITY OF JOLIET, )  
)  
Petitioner, )  
)  
v. )  
)  
ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY, )  
)  
Respondent. )

PCB 09-025  
(Permit Appeal-Water)

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MAR 10 2009  
STATE OF ILLINOIS  
Pollution Control Board

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on **March 10, 2009** we filed with the Office of the Clerk of the Pollution Control Board an original and ten copies of the attached **Joliet's Waiver of Statutory Decision Deadline and Petitioner's Motion to Strike Certain Statements in Respondent's Brief That Are Not Supported By Citations To The Record**, a copy of which is served upon you.

Respectfully submitted,

THE CITY OF JOLIET

By: 

One of Its Attorneys

March 10, 2009

Roy M. Harsch, Esq.  
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**JOLIET'S WAIVER OF STATUTORY DECISION DEADLINE**

Petitioner, The City of Joliet (hereinafter, "Joliet"), by and through its attorneys, Drinker Biddle & Reath LLP, pursuant to 35 Ill. Adm. Code § 101.308, hereby waives the statutory decision deadline in this matter. In support thereof, Joliet states as follows:

1. On October 17, 2008, Joliet timely submitted its permit appeal to the Board to review a September 12, 2008 determination of the Illinois Environmental Protection Agency ("IEPA") regarding Joliet's application of sewage sludge from its wastewater treatment operations.
2. A hearing was held in this matter on January 13, 2009 at the Village of Bolingbrook board room.
3. Pursuant to Section 40(a)(2) of the Act (415 ILCS 5/40(a)(2)(2007)), the Board has 120 days after the date on which it received the petition for appeal to make a decision. However, on December 12, 2008, Joliet filed a petition in which it waived the decision deadline in this matter until April 3, 2009.
4. Joliet now wishes to waive the Board's statutory decision deadline in this matter until May 8, 2009.

WHEREFORE, Petitioner, The City of Joliet, hereby waives the statutory decision  
deadline until May 8, 2009.

Respectfully submitted,

THE CITY OF JOLIET

By:

  
One of its Attorneys

March 10, 2009

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v.	)	PCB 09-025
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ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

**PETITIONER'S MOTION TO STRIKE CERTAIN STATEMENTS IN RESPONDENT'S REPLY BRIEF THAT ARE NOT SUPPORTED BY CITATIONS TO THE RECORD**

Petitioner, City of Joliet ("Petitioner" or "Joliet"), by and through its attorneys, Drinker Biddle & Reath LLP, hereby moves to strike certain statements in the Reply Brief of Respondent Illinois Environmental Protection Agency ("Respondent" or "IEPA") to Petitioner's Post-Hearing Brief that are not supported by citations to the record, are plainly wrong and are in contravention of matters addressed in the record. In support thereof, Petitioner states as follows:

**INTRODUCTION**

On February 20, 2009, Petitioner timely filed its Post-Hearing Memorandum, which supported its appeal of IEPA's improper denial of Joliet's request to modify its Land Application of Sewage Sludge Permit (the "Permit") in connection with Joliet's environmentally-beneficial land application of bio-solids as fertilizer on farm fields, rather than disposal of this material in landfills. On February 27, 2009, Respondent filed a Reply to Petitioner's Post-Hearing Brief ("Respondent's Reply Brief").

As set forth herein, there are several sets of statements that are made by Respondent in its Reply Brief that are incorrect, are not supported by citations to the record, and which should not be given weight by the Board in its consideration of this permit appeal. Statements that are not

supported by the record should not be considered by the Board, and should be deemed stricken, so that a reviewing court is clear as to what in the subject brief was considered by the Board and what was not. *See, e.g., Waste Management, Inc. v. Illinois Environmental Protection Agency*, PCB 84-45, 84-61, 84-68, 1984 WL 37589 (November 26, 1984).

In order to allow for reasoned consideration of its Motion to Strike, and to allow for a response by Respondent, Petitioner has concurrently filed a Waiver of the Statutory Decision Deadline, that enlarges the time for the Board to render a decision on the underlying permit appeal until May 8, 2009.

## ARGUMENT

### **I. Respondent's Unsupported Speculation That Moving Radium-containing Soils May Increase Concentration Levels Is Unsupported and Should Be Deemed Stricken**

As the first of several statements lacking support in the record, Respondent asserts that soils containing radium that are removed from underneath the site of houses to be built slab-on-grade could be "consolidated thus increasing the concentrations to even greater levels." (Respondent's Reply Brief, at 2). Aside from lacking any citations to the record, Respondent's argument is speculative, and devoid of any sound scientific reasoning. Simple common sense tells one that simply moving soils around a site cannot increase the concentrations of any constituents in soils on a volumetric basis. In addition, there is no showing by Respondent based on anything in the record that such an issue had any relation to the denial of Joliet's requested Permit modification by IEPA.

As set forth in Petitioner's Memorandum, the only concern at issue in this appeal is whether it was proper for IEPA to deny the requested Permit modification based on the disagreement between IEPA and Joliet regarding the appropriateness of Joliet's assumption that radium-containing soils would be removed from underneath slab-on-grade residences, thereby

reducing or eliminating potential exposure to radon gas due to the radioactive decay of radium in such soils. (Petitioner's Memorandum, at 15-25). The red herring that IEPA offers up, namely the specious concern regarding where such removed soils would end up, and any potential to thereby increase soil concentrations of radium elsewhere (but not underneath buildings), is not relevant and unsupported in the record in any case. Thus, for these reasons, the Board should strike the last two sentences of the subsection of Respondent's Reply Brief entitled "Building Codes," on page 2 of Respondent's Reply Brief.

**II. The Issue With Land Application of Radium-containing Sludge Did Not First Arise When Joliet Began Removing Radium As Part of Its Water-Treatment Efforts**

In the subsection entitled "Application of the MOA" of Respondent's Reply Brief, Respondent makes the unsupported assertion that the issue of radium levels in Joliet's bio-solids first arose when the city made the decision to begin removing radium from its drinking water and, therefore, the first time that radium limits were included in Petitioner's Permit by IEPA was in 2006. (Respondent's Reply Brief, 2-3). Respondent's argument seems designed as an excuse or explanation as to why the Joliet's 2006 Land Application Permit was the first permit that included a radium limitation, despite the fact that IEPA and the Illinois Emergency Management Agency ("IEMA") signed the Memorandum of Agreement ("MOA") that Respondent relies heavily upon for authority as to the basis for the radium limit of 0.1 picoCuries per gram (pCi/g). (See Respondent's Reply Brief, at 3). Nowhere, however, does Respondent cite to any facts in the record to support its assertion.

To the contrary, the record reflects that the level of radium in Joliet's bio-solids was most likely the same during the period before Joliet began its water treatment program as they were after such treatment began. (Hearing Testimony dated January 13, 2009, of D. Duffield, 15:10-24, Exhibit 4, at 3). The simple reason for that is that essentially the same water from the public

water supply would have been used by the populace before the radium was removed from drinking water as after; the only difference was that before the radium was removed by treatment, such radium was passed back through the system after the water was used and returned via the sewer system (eventually to wind up in the sludge), and afterwards, the radium was removed first and added directly to the sludge without being sent to users first. (*Id.*) As Mr. Duffield testified, “The radium removed by the water supply treatment could also be discharged to the sanitary sewer. The total amount of radium pumped from the deep wells would reach the wastewater treatment plant unchanged using either approach.” (*Id.*)

Respondent’s unfounded and unsupported inference is also directly at odds with statements in the Clark Dietz report, which is a part of the record. The Clark Dietz report states that “[t]he proposed water treatment technology is not expected to increase the amount of radium in the sludge.” (R86). Further, the report states, “[s]ince the mass loading of radium is not expected to change, the quantity of radium in the waste sludge from the plant is not expected to change from the current levels. Therefore, the amount of radium currently being applied with the biosolids to farm fields will not be increased due to the installation of new water treatment technology.” (*Id.*)

In this same subsection is another related, unsupported assertion that the sludge issue first arose with Joliet’s decision to begin treatment to remove the radium from its drinking water in the early 2000s. Respondent provides no cite to the record for this statement, and it is simply wrong. While the record does not give an exact date, the Clark Dietz Report dated August 2004 refers to Joliet having under consideration or evaluating processes to treat water. (R286). Mr. Duffield’s letter to Mr. Al Keller of IEPA dated 2/28/05 stated that Joliet has raised the issue because it is in the process of selecting treatment options. (R105). Thus, Joliet did not begin

water treatment in the early 2000s, but rather later, after 2005, and the treatment did not impact the radium concentration in the sludge.

Again, Respondent's attempt to create a believable explanation for why the radium level limitation for land treatment was added in the 2006 Permit falls short of the mark. Respondent makes the remarkable, and unsupported, statement that the MOA "has been applicable to the Petitioner's activities since 1984," but that "the Illinois EPA's initial understanding was that the regulation of radium was outside the Agency's jurisdiction." (Respondent's Reply Brief, at 3). Respondent contends that it was U.S. EPA's final determination on drinking water standards on December 7, 2000, which caused IEPA to "revisit this issue beginning immediately thereafter. As a result of reassessing the issue, the Illinois EPA included radium limits in the Petitioner's 2006 permit." (*Id.*) Respondent provides no citation to the record as support for any of these statements.

In sum, Respondent's tortured explanation of why the 1984 MOA between IEPA and IEMA was never used as authority for imposing a radium restriction on Joliet's Land Application Permit before 2006 is unsupported by citations to the record, not to mention being contrary to the unrebutted evidence in the record in any case. Therefore, the Board should specifically strike the entire subsection of Respondent's Reply Brief entitled "Application of the MOA," which appears on pages 2-3 of the Reply Brief.

### **III. Respondent Asserts That IEMA Has Made Determinations On the Health Effects and Bioaccumulative Properties of Radium But Gives No Citations to the Record**

Finally, Respondent also makes the unsupported assertion that "IEMA's department of nuclear safety has made determinations on the health effects and bioaccumulative properties of radium." (Respondent's Reply Brief, at 5). This statement, which appears in the subsection of Respondent's Reply Brief entitled "Impermissible Rulemaking," should also be stricken. There



is no information in the record regarding IEMA's research into radium issues or related determinations that would have any bearing on IEPA's decision to deny its requested permit modification. The lack of citations to the record to support this statement is a fatal flaw that compels striking it from Respondent's Reply Brief.

### CONCLUSION

Respondent's Reply Brief is rife with drive-by assertions of fact that have no basis of support in the record, nor does Respondent attempt to provide any citations to support such assertions, in clear violation of the proper standard for arguing before the Board. All such unsupported statements, as identified above, should therefore be stricken.

Unlike in *Waste Management*, where the Board granted the movant's motion to strike, but declined to specify on a line-by-line basis what specific portions of the brief should be stricken due to movant's failure to identify specific objectionable portions of the brief at issue, here, Petitioner has identified with particularity those portions to be excised.

Thus, the specific portions of Respondent's Reply Brief that have been identified above should be deemed stricken, and given no weight by the Board in its deliberations as to the instant permit appeal.

**WHEREFORE**, for all of the reasons set forth above, Petitioner, The City of Joliet, respectfully requests that the Board grant its Motion to Strike, and grant such further relief as the Board deems necessary and appropriate.

Respectfully submitted,

THE CITY OF JOLIET

By. 

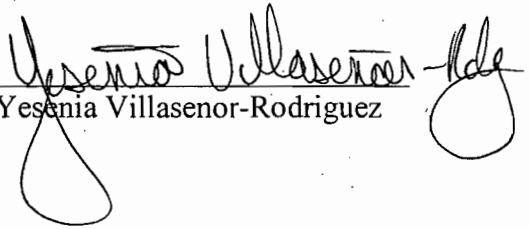
One of Its Attorneys

Dated: March 10, 2009

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**CERTIFICATE OF SERVICE**

I, the undersigned, certify that I have served the attached **Joliet's Waiver of Statutory Decision Deadline and Petitioner's Motion to Strike Certain Statements in Respondent's Brief That Are Not Supported By Citations To The Record**, by First Class Mail, postage pre-paid on Tuesday, March 10, 2009. See Attached List.

  
Yesenia Villasenor-Rodriguez

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