CLERK'S OFFICE

BEFORE THE POLLUTION CONTROL BOARD OF THE STATE OF ILLINOIS

APR 2 7 2009

IN THE MATTER OF:)	Pollution Control Board
PETITION OF MAXIMUM INVESTMENTS, LLC FOR AN ADJUSTED STANDARD FROM 35 ILL. ADM. CODE 740.210(A)(3) FOR STONEY CREEK LANDFILL IN PALOS HEIGHTS, ILLINOIS))))	AS 09-2 (Adjusted Standard – Land)

NOTICE

John Therriault, Clerk Illinois Pollution Control Board James R. Thompson Center 100 West Randolph Street Suite 11-500 Chicago, IL 60601

Bradley Halloran, Hearing Officer Illinois Pollution Control Board James R. Thompson Center 100 West Randolph Street Suite 11-500 Chicago, IL 60601

Llewellyn Kennedy Weil & Associates 60 Revere Drive, Suite 888 Northbrook, IL 60062

PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board the BRIEF OF ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

William D. Ingersoll

Division of Legal Counsel

1021 North Grand Avenue, East

P.O. Box 19276

Springfield, Illinois 62794-9276

217/782-5544

217/782-9143 (TDD)

Dated: April 23, 2006

BEFORE THE POLLUTION CONTROL BOARD OF THE STATE OF ILLINOIS

CLERK'S OFFICE

APR 2 7 2009

IN THE MATTER OF:)	STATE OF ILLINOIS Pollution Control Board
PETITION OF MAXIMUM INVESTMENTS,)	AS 09-2
LLC FOR AN ADJUSTED STANDARD)	(Adjusted Standard – Land)
FROM 35 ILL. ADM. CODE 740.210(A)(3))	,
FOR STONEY CREEK LANDFILL IN)	
PALOS HEIGHTS, ILLINOIS)	
)	
)	

BRIEF OF ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

This brief is made in response to the Order of the Board dated February 5, 2009 and the related Hearing Officer scheduling Order dated March 3, 2009. The Board's February 5 Order granted Petitioner's Motion to Reconsider and accepted the petition. The Board further directed that the parties respond with briefs on the following issue:

The Board has an additional concern regarding the requested relief. The Board has clear authority to grant adjusted standards to rules of general applicability under Section 28.1 of the Act (415 ILCS 5/28.1 (2006)); however, the Board cannot adjust statutory requirements. See 415 ILCS 5/28.1(a) (2006). In this case, petitioner requests adjustment of a standard adopted in the Board's rules that also appears to be a statutory requirement. See e.g. 415 ILCS 5/58.2 and 58.7 (2006). The Board directs the petitioner and the Illinois Environmental Protection Agency to address this issue in briefs to be filed with the Board. The hearing officer is directed to establish a briefing schedule with the parties.

BACKGROUND

Petitioner, by one of its officers, previously contacted the Illinois EPA regarding the possibility of obtaining a limit of liability for prospective purchasers of real property pursuant to Section 22.2b of the Act (415 ILCS 5/22.2b). Among the several requirements to be satisfied before obtaining such a release is having a response action plan approved by the Illinois EPA. Petitioner was informed that the Agency would only be willing to perform such a plan review if

the site was enrolled in the Site Remediation Program (SRP). See Section 58 et seq. of the Act and related regulations at 35 Ill. Adm. Code 740. This position was taken to assure that funding would be provided by the requester for the review services expected of the Agency. However, Petitioner is apparently unable to satisfy the owner signature requirement to enter the SRP, and here seeks relief from that regulatory requirement in 35 Ill. Adm. Code 740.210(a)(3).

Petitioner alleges that it holds a tax lien on the relevant property, but obviously realizes that it cannot take a deed without disqualifying itself from another requirement in Section 22.2b -i.e., that the person is not otherwise liable under Section 22.2, which would create liability by ownership status. While the Agency cannot confirm all of the factual allegations made by Petitioner, we can assume them to be true for the sake of the issue before the Board in this brief.

DISCUSSION

Petitioner's claims that "the property will forever remain abandoned and off the tax rolls" may be accurate predictions, but are not responsive to the Board's inquiry. Instead, as the Board expressed concern, the definition of "Remediation Applicant" in Section 58.2 and the requirement of owner authorization in Section 58.7(b)(1)(F). So, while the Petitioner sought relief from the regulatory requirement at Section 740.210(a)(3), the regulatory requirement is merely a corresponding requirement contained in the Environmental Protection Act. The Board correctly pointed out that Section 28.1 authorizes it to grant relief from regulations it has promulgated. The legislature did not extend the authority to effectively amend legislation through an adjusted standard process.

There is also a practical limitation on Petitioner's desires here. Even if the relief were granted, the Illinois EPA still would not be required to proceed toward a Section 22.2b release – usually referred to as a Prospective Purchaser Agreement. First, please note that the grant of

such a release is worded in the statute using the permissive "may" rather than "shall." Further, the release is ultimately provided by the State of Illinois. In practice, this means the Agency works out acceptable language and response action approval, and then refers the matter to the Attorney General for final revision and execution. It is believed that the Attorney General must

execute a release since it is from the State of Illinois, rather than just the Illinois EPA.

CONCLUSION

Consistent with the Board's initial concerns and the discussion above, the Illinois EPA contends that the Board is not granted the authority to modify statutory requirements through the adjusted standard process found at Section 28.1 of the Act.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

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CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on April 23, 2009, I served true and correct copies of the BRIEF OF ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, by placing true and correct copies in properly sealed and addressed envelopes and by depositing said sealed envelopes in a U.S. mail drop box located within Springfield, Illinois, with sufficient First Class Mail postage affixed thereto, upon the following named persons:

John Therriault, Clerk Illinois Pollution Control Board James R. Thompson Center 100 West Randolph Street Suite 11-500 Chicago, IL 60601

Llewellyn Kennedy Weil & Associates 60 Revere Drive, Suite 888 Northbrook, IL 60062 Bradley Halloran, Hearing Officer Illinois Pollution Control Board James R. Thompson Center 100 West Randolph Street Suite 11-500 Chicago, IL 60601

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