

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ATKINSON LANDFILL COMPANY)	
Petitioner)	
)	
v.)	PCB 13-8
)	(Permit Appeal)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

NOTICE OF FILING

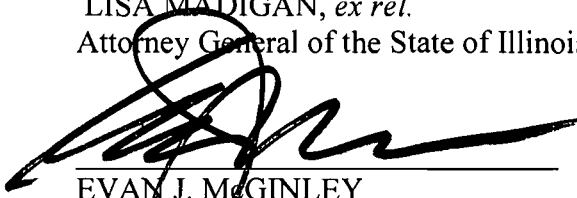
TO: ALL PERSONS NAMED ON THE ATTACHED CERTIFICATE OF SERVICE

Please take note that today November 20, 2012, I filed with the Clerk of the Illinois Pollution Control Board Respondent's Motion to Quash Discovery in the above referenced matter, a copy of which is attached hereto and which is hereby served upon you.

Respectfully Submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

LISA MADIGAN, *ex rel.*
Attorney General of the State of Illinois



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RESPONDENT'S MOTION TO QUASH DISCOVERY

NOW COMES RESPONDENT, the Illinois Environmental Protection Agency, by and through its attorney, LISA MADIGAN, Attorney General of the State of Illinois, who hereby moves the Illinois Pollution Control Board to quash Respondent's, Atkinson Landfill Company, First Set of Interrogatories and to bar all discovery in this action. In support of this Motion, Respondent states as follows:

I.
INTRODUCTION

On October 24, 2012, Petitioner served Respondent with its first set of interrogatories in this matter. Discovery is not warranted in this case. The Pollution Control Board's ("Board") permit appeal cases have held that on an appeal of a permitting decision by Illinois Environmental Protection Agency ("Illinois EPA"), the record before the Board shall consist of the record that was before Illinois EPA at the time its decision was rendered.

Here, the administrative record, which Petitioner thus far has not taken issue with, more than amply demonstrates that the Illinois EPA had a sound basis for denying the Petitioner's application for a permit to expand its existing landfill. The issues which the Board will ultimately be called on to decide in this case are legal, not factual, in nature and as such, no

discovery is warranted and Petitioner's interrogatories should be quashed and Petitioner should be barred from taking any discovery in this appeal.

II.
STATEMENT OF FACTS

Petitioner currently operates a municipal solid waste landfill ("Landfill") in the Village of Atkinson Henry County, Illinois ("Village"). In 1999, Petitioner sought to expand the Landfill and on August 26, 2006, received local siting authority from the Village. (AL 000139-41.) Petitioner subsequently appealed some of the conditions of the Village's local siting authority approval to the Pollution Control Board, in PCB 2007-020, which was terminated on September 4, 2008. (AL 002823.) Thereafter, on September 2, 2011, Petitioner submitted its "Application for Southeastern Landfill Expansion, Atkinson, Henry County, Illinois" ("Application"). (AL 000009-002817.)

During the balance of September 2011, Illinois EPA staff undertook a completeness review of the Application. The Application was reviewed by the Bureau of Land Permit Section's Groundwater Assistance Unit, which determined that the Application contained a number of deficiencies. For example, the Application failed to address several key components of the required groundwater monitoring program. (AL 002847-48.) The Application's Groundwater Impact Assessment was also inadequate, because, due to the Petitioner's intention to seek a vertical and horizontal expansion of the landfill, a new Groundwater Impact Assessment was required, although Petitioner had failed to submit one as part of its Application. (AL 002850.) Illinois EPA ultimately concluded that the Petitioner's Application was "not complete with respect to groundwater issues concerning the Groundwater Impact Assessment." (AL 002851.)

Illinois EPA staff found the Application also failed to include other critical information, as well. For example, Petitioner failed to demonstrate that it was in compliance with the “Prior Conduct Certification of the Chief Operator,” which is required pursuant to Section 745.202 of the Pollution Control Board (“Board”) Regulations, 35 Ill. Adm. Code 745.202. (AL 002925.) The Application also omitted a significant amount of narrative information regarding the Landfill’s location (*See e.g.*, AL 002936-37), or information regarding the geomembranes that would be used in the Landfill’s expansion. (AL 002943). Additionally, the Petitioner failed to include critical information regarding the landfill expansion’s leachate control system, such as the required drawings illustrating piping locations, leachate level monitoring locations, cleanouts, manholes, sumps, leachate storage structures, and other related information, as required by Section 812.307(a) and (c) of the Board Regulations, 35 Ill. Adm. Code 812.307(a) and (c). (AL 002946.)

Petitioner failed to demonstrate that its proposed gas monitoring program for the landfill expansion would detect any gas buildup and/or migration. (AL 002955.) The Application also did not demonstrate that either the necessary assurance standards would be met for the gas collection system and of its all associated equipment (AL 002957), or that the gas collection system would not compromise the integrity of the liner, leachate collection, or cover systems, as required by Section 811.311(d)(9) of the Board Regulations, 35 Ill. Adm. Code 811.311(d)(9). (AL 022959.)

The Permit Application also failed to contain critical information regarding the Landfill’s required Closure Plan. For example, no estimate of expected closure year was included in the Permit Application, as required by Section 812.114(f) of the Board Regulations, 35 Ill. Adm. Code 812.114(f). (AL 002972.) The Permit Application also failed to include other required

information that demonstrated that Atkinson would be able to properly and safely close the landfill, once it had reached capacity. (AL 002974-77.)

On September 30, 2011, Steve Nightingale, the manager of the Illinois EPA Bureau of Land Permit Section sent a letter to Petitioner's principal, laying out the myriad deficiencies which Illinois EPA technical staff had found to exist with the Application. (AL 002902-05.) Petitioner was advised that it could either supply Illinois EPA with the required information or, alternatively, it could petition for a hearing before the Board. (AL 002904.)

On November 4, 2011, Petition submitted additional information to Illinois EPA, in order to supplement the Application (AL 002854.) Illinois EPA subsequently reviewed this supplementary material and determined that, even with the submission of additional information, the Application still did not contain all of the required information. (AL 002853-4, 002860-63, and 002906-08.)

On December 2, 2011, Steve Nightingale informed Petitioner by letter, that Illinois EPA had once again reviewed the Application for completeness and found that it still did not contain all of the required information for such permit applications. (AL 002906-08.)

On January 9, 2012, Petitioner submitted its second set of supplementary materials in support of its Application. (AL 002913.) By letter dated February 9, 2012, Illinois EPA informed Petitioner that its Application was now complete and that, in accordance with 35 Ill. Adm. Code 813.103(a), the Agency would now have until July 7, 2012, by which to complete its review of the Application. (AL 002913.)

On July 6, 2012, Illinois EPA issued a letter to Petitioner informing Petitioner that, based upon the Agency's review ("July 6th Letter"), it was denying the Application because the Application, even with the inclusion of the supplementary information, had failed to demonstrate

that granting of a permit would not result in a violation of the Environmental Protection Act. (AL 002823.) Additionally, Illinois EPA noted that it appeared that Petitioner's local siting had expired on September 4, 2012. (AL 002823-24.) The July 6th Letter then went on to list 67 additional reasons the Application failed to demonstrate that a permit, if granted, would not result in a violation of the Act. (AL 002823-33.)

On August 2, 2012, Petitioner filed its appeal of the Agency's permit denial with the Board. On August 22, 2012, Petitioner filed its amended appeal with the Board.

On October 12, 2012, Respondent, through its counsel, filed the administrative record in this proceeding with the Board. To date, Petitioner has not challenged the contents of the administrative record.

On October 24, 2012, Petitioner served its first set of interrogatories on Respondent.

III. **ARGUMENT**

In a case involving the appeal of Illinois EPA's denial of a permit application, the Board's "review is based only on the materials in the record before the Agency at the time of the permit determination." *Chicago Coke v. IEPA*, PCB 10-75 (Mar. 28, 2012), 2 (emphasis added). The Board "may not be persuaded by new material that was not before the Agency" and which would possibly influence the Board's decision on the appeal. *Joliet Sand and Gravel v. IEPA*, PCB 86-159 (Feb. 5, 1987), 4. The Board will, however, allow the petitioner in a permit appeal to submit information to the Board beyond what was included in the Agency record, if the Agency either relied upon information that it failed to include in the administrative record which it filed with the Board or, alternatively, where it fails to include information in the record that it did not rely on in making its decision, but reasonably should have relied on such information. *Id.* (internal citations omitted.)

The record which has been filed by the Agency relative to the underlying permit appeal clearly demonstrates that the Agency's decision on the Application was almost entirely based on the information contained in the Application - as initially submitted and as subsequently supplemented on two separate occasions - or the lack thereof, and nothing more. As such, the administrative record constitutes the sole set of facts upon which the Board should rely on when reviewing Petitioner's appeal. *Chicago Coke*, PCB 10-75, 2. To allow Petitioner to take discovery raises the prospect of allowing for additional information to be made part of the records in this proceedings, which is impermissible. *Joliet Sand and Gravel* (PCB 86-159), 4.

The issue which raised Petitioner has raised in this appeal is whether Illinois EPA's denial of the Application was erroneously based on the Agency's determination that the Petitioner's local siting authority expired on September 4, 2011. (Amended Petition for Review of Landfill Development Permit Denial, p. 3, ¶ 7. ["Petition"].) In its Petition, Petitioner essentially concedes that the Application that it filed on September 2, 2011, was incomplete. (Petition, p. 4, ¶ 8.) But the fundamental question raised by Petitioner's appeal is legal in nature and turns on a question of statutory interpretation, for which no discovery is required.

Moreover, Petitioner has reductively framed the issues for appeal to ignore the fact that the expiration of local siting authority was but one of the 68 different reasons Illinois EPA denied Petitioner's Application. Given the ample basis contained in the administrative record for Illinois EPA's permit denial, discovery in this matter is not warranted.

WHEREFORE, for the reasons stated herein, Respondent, Illinois EPA, hereby moves the Pollution Control Board to:

1. Quash Petitioner's October 24, 2012 interrogatories;
2. Bar Petitioner from taking any discovery in this cause; and,

3. For such other relief as the Pollution Control Board shall determine to be proper.

Respectfully Submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

LISA MADIGAN, *ex rel.*
Attorney General of the State of Illinois

A handwritten signature in black ink, appearing to read 'Evan J. McGinley', written over a horizontal line.

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CERTIFICATE OF SERVICE

I, EVAN J. MCGINLEY, do hereby certify that, on November 20, 2012, I caused to be served on the individuals listed below, by first class mail, a true and correct copy of


Respondent's Motion to Quash Discovery:

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