BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

D&L LANDFILL, INC.,	)	
Petitioner,	)	
v.	)	PCB 2015-137
	)	(LUST Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

NOTICE OF FILING AND PROOF OF SERVICE

TO: Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 N. Grand Avenue East
P.O. Box 19274
Springfield, IL 62794-9274

Elizabeth Dubats
Assistant Attorney General
500 South Second Street
Springfield, IL 62706

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board, an original and three copies of Petitioner's Response to Motion for Summary Judgment, copies of which are herewith served upon the Hearing Officer and upon the attorney of record in this case.

The undersigned hereby certifies that a true and correct copy of this Notice of Filing, together with a copy of the documents described above, were today served upon the Hearing Officer and counsel of record of all parties to this cause by enclosing same in envelopes addressed to such attorneys and to said Hearing Officer with postage fully prepaid, and by depositing said envelopes in a U.S. Post Office mailbox in Springfield, Illinois on the 15th day of October, 2015.

D&L LANDFILL, INC.

BY: LAW OFFICE OF PATRICK D. SHAW

BY: /s/ Patrick D. Shaw

Patrick D. Shaw
Law Office of Patrick D. Shaw
80 Bellerive Road
Springfield, IL 62704
217-299-8484

THIS FILING SUBMITTED ON RECYCLED PAPER

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

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v.	)	PCB 2015-137
	)	(Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	

PETITIONER'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT

NOW COMES Petitioner, D&L LANDFILL, INC., by its undersigned attorney, pursuant to Section 101.516 of the Board's Procedural Rules (35 Ill. Adm. Code § 101.516), stating as follows:

I. THE LANDFILL'S 15-YEAR POST-CLOSURE CARE PERIOD IS OVER, NOT EVER HAVING BEEN EXTENDED BY ANY FEDERAL OR STATE REGULATION.

The basic rule of statutory interpretation is to give effect the true intent of the legislature, the best evidence of which is "the language used in the statute itself, which must be given its plain and ordinary meaning." Eden Retirement Center v. Department of Revenue, 213 Ill. 2d 273, 281 (2004). The plain and ordinary language of Section 22.17(a) evidences the intention to establish a fixed period of time for post-closure care, which can be extended by state or federal regulation for an additional fixed period of time:

> **(a) The owner and operator of a sanitary landfill site . . . shall monitor gas, water and settling at the completed site for a period of 15 years after the site is completed or closed, or such longer period as may be required by Board or federal regulation.**

(415 ILCS 5/22.17(a) (emphasis added))

A "period" describes a fixed duration of time, usually measured in reference to recurring events, such as hours, days or years. See Merriam Webster's Collegiate Dictionary (10th ed. 1993) ("6 a: a portion of time determined by some recurring phenomenon."); see also Black's Law Dictionary (6th ed. 1990) ("Any point, space, or division of time."). These concepts are further clarified by the related term "periodic." See Black's Law Dictionary ("Recurring at fixed intervals; to be made or done, or to happen, at successive periods separated by determined intervals of time, as periodic payments of interest on a bond, or periodic alimony payments.")

Beyond measurements of teime, there are a variety of alternatives available for identifying when an obligation is complete. In the Board's regulations, an indefinite period is utilized for new landfills. (35 Ill. Adm. Code § 811.319(a)(1)(A) ("Monitoring must continue for a minimum period of 15 years after closure . . .") But it is more precise to describe new groundwater monitoring requirements as performance-based standards, as groundwater monitoring can cease when certain constituency objectives are reached. (Id. § 811.319(a)(1)(C)) Since the subject facility closed before Part 811 regulations applied, this "minimum period" concept that the Illinois EPA seeks to impose on Petitioner is clearly inappropriate.

The other significant term in Section 22.17(a) is "regulation," which is synonymous with any "agency statement of general applicability that implements, applies, interprets, or prescribes law or policy." (5 ILCS 100/1-70) (definition of "rule"). It is in contrast to adjudicating cases based upon each particular set of facts. Kaufman Grain Co., Inc. v. Director, Dept. of Agriculture, 179 Ill.App.3d 1040, 1047 (4th Dist. 1988). While the Board and the USEPA eventually promulgated regulations that increased the postclosure care period, no such regulations were ever promulgated for Part 807 landfills. Specifically, in 1990 the Board promulgated new, comprehensive landfill regulations, which extended the postclosure care

period for those that remained open. E.g., 35 Ill. Adm. Code § 814.402(b)(4)(B) (for landfills continuing to accept waste between 2 and 7 years, the postclosure care period became three times the number of years open). Then in 1991, the USEPA adopted municipal solid-waste regulations, which extended the post-closure care period for most landfills to 30 years. (40 CFR § 258.61)

The provision cited by the Illinois EPA does not satisfy the plain language and ordinary meaning of Section 22.17 of the Act. First of all, Section 807.524 does not specify a "longer period," or any period for that matter. Secondly, Section 807.524 is being utilized as authority for the Agency to conduct case-by-case adjudications based upon purported future violations.

The legislative history supports this interpretation of the plain language. Section 807.524 predates Section 22.17 of the Act, and the Board explained that Section 807.524 did not change the postclosure care period:

> **The Agency is to certify that the post-closure care period has ended when it determines that the post-closure care plan has been completed and that the site will not cause future violations. The length of the post-closure care period for sanitary landfills is determined from the existing Subpart C rules.**

(R84-22, at p. 20 (Dec. 27, 1984))

Subpart C stated then, as it does now: "The owner or operator of a sanitary landfill site shall monitor gas, water and settling at the completed site for a period of three years after the site is completed or closed." (35 Ill. Adm. Code § 807.318(a)(emphasis added).

When the General Assembly subsequently increased the post-closure care period to five years (P.A. 84-1320, effective date Sept. 4, 1986), and then 15 years (P.A. 85-1240, effective date July 1, 1990), it is reasonable to conclude that it was aware of the lengthy and substantial ongoing rulemakings at the state and federal level. The Board had been working to overhaul

landfill regulations since 1980. The obvious purpose of the provision allowing for a greater post-closure care period was to defer to their anticipated reasoned and scientific judgment.

In summary, Petitioner asked to discontinue monitoring gas, water and settling at the landfill as authorized by Section 22.17(a) of the Illinois Environmental Protection Act (415 ILCS 5/22.17(a)) following a period of 15 years, which has never been extended by Board or federal regulation with respect to landfills such as D&L Landfill.

II. THE ALLEGED VIOLATION OF A PERMIT CANNOT BE GROUNDS TO DENY THE PERMIT APPLICATION.

A. Grounds Not Raised in the Agency's Denial Letter Cannot Be Grounds for Affirmance.

Respondent argues that Petitioner violated Special Condition 8, which it admits was "not specifically cited in the December 19,2014 denial letter." (Respondent's Mot. S.J. at p. 18) This is in turn alleged to be a violation of Section 807.302, which is also not cited in the denial letter. Since the reasons given in Section I.B. of the Petitioner's Motion were not raised in the denial letter, those reasons are waived:

> **[T]he Agency had a duty, reading sections 39 and 40 of the Act together, to specify reasons for the denial, including, if it intended to raise the issue before the Board, the lack of compliance with Rule 203(f), or be precluded from raising that issue.**

Illinois Environmental Protection Agency v. Illinois Pollution Control Board, 86 Ill.2d 390, 405 (1981).

In that case, the Agency denial letter referenced Rule 203(a), but not Rule 203(f), and therefore the Appellate Court committed reversible erred in ruling that the application should be denied under Rule 203(f). Id. Nor is it any excuse that certain permit conditions were referenced

in the draft denial letter, but eliminated. The denial letter, the Petitioner chooses to appeal "frame the issue of fact or law in controversy in any hearing on a Section 40 petition." Id.[1]

B. Alternatively, Permit Decisions Cannot Be Based upon Alleged Violations of the Act or Board Regulations.

Without waiving the legal irrelevance of Section I.B. of the Respondent's Motion for Summary Judgment, there is clearly an additional problem in arguing from the point that Petitioner has violated the Act. The Agency cannot deny "permits solely on the basis of alleged violations of the Act." E.P.A. v. Pollution Control Bd., 252 Ill.App.3d 828, 830 (3rd Dist. 1993). Enforcement and permitting are different proceedings with different burdens of proof and different legal and evidentiary considerations. Id. An enforcement action is the appropriate forum to find if there is a violation and to craft a remedy. Jersey Sanitation Corp. v. IEPA, PCB 00-82, at p. 11 (June 21, 2001). Cf. Community Landfill Co. v. IEPA, PCB 01-48, at p. 25 (April 5, 2001)(discussing problems inherent in the use of the permit process to accomplish the ends of rulemaking or enforcement actions).

While it is true that one of the provisions identified in the denial letter is the requirement that "the site will not cause future violations of the Act or this Part," (35 Ill. Adm. Code § 807.524(c)(2)), this is merely a restatement of the general framework governing all permitting. 415 ILCS 5/39(a)("it shall be the duty of the Agency to issue such a permit upon proof by the applicant that the facility . . . will not cause a violation of this Act or of regulations hereunder.")

[1] Nor is it relevant what reasoning went into selecting the specific denial reasons. See David P. Currie, "Enforcement Under the Illinois Pollution Law," 70 Nw. U. L. Rev. 389, 478 (1975)("Cross-examination of Agency personnel as to their mental processes should be avoided as burdensome and likely to be unproductive.")

The permitting proceedings are prospective in nature. Use of past alleged violations is entirely inappropriate.

C. Alternatively, Petitioner Submitted an Assessment Report.

The Illinios EPA asserts that "Petitioner never submitted an assessment monitoring plan or assessment report as required by Special Condition 8." (Resp. Brief, at p. 18) Petitioner submitted an assessment report. (R.0184) After receiving the information, the Illinois EPA removed this request from the draft denial letter, along with the demand for cover repairs. The Illinois EPA had a duty, if it needed additional information, to identify the "specific type of information" that the Illinois EPA believed was wanting in the denial letter, or the submittal is deemed complete. (415 ILCS 5/57.7(c)(4)(C)).

III. IN THE JERSEY SANITATION PERMIT APPEAL, THE BOARD RULED THAT MEETING PART 620 GROUNDWATER STANDARDS WERE NOT NECESSARY TO COMPLY WITH PART 807 OR THE ACT.

Both parties have relied upon cases involving Jersey Sanitation, the Illinois EPA relies on the enforcement action (People v. Jersey Sanitation, PCB 97-2), and the landfill relies on the permitting proceeding (Jersey Sanitation v. IEPA, PCB 00-82, aff'd 336 Ill. App.3d 582 (4th Dist. 2003)) Since this proceeding is a permitting action, the permit proceeding is more relevant, but the enforcement action began first.

On July 8, 1996, the People of the State of Illinois filed an eight count complaint against Jersey Sanitation. The complaint alleges that Jersey Sanitation: caused or allowed water pollution, failed to control leachate, had refuse in water, violated the permit, failed to provide

adequate cover on refuse, failed to provide adequate financial assurance, failed to maintain adequate final cover, and caused or allowed open burning. (PCB 00-82, at p. 2)

On June 7, 1999, Jersey Sanitation submitted an application for a supplemental permit which included a certificate of closure and a revised closure-post-closure care plan. Id. The effect of the application was *inter alia* to remove several conditions from its previous permit that were at issue in the pending enforcement action. Id. at p. 7. In particular, the application removed a provision requiring a sophisticated groundwater monitoring program pursuant to Part 620 Groundwater Standards. Id. at pp. 2-3. In its place, the application proposed that "Groundwater monitoring results will be evaluated each quarter against background data, General Use Water Quality Standards, and other historic water analysis information. If a trend is believed to be developing, more frequent sampling (e.g. monthly) may be performed to substantiate or dismiss the likelihood of site impact." Id. at p. 13. The Illinois EPA approved the submittal, but imposed conditions that reimposed the previous rigorous groundwater monitoring program, as well as other conditions that were the subject of the pending enforcement action.

Initially, the Board rejected the Illinois EPA's contention that any objection to these conditions had been waived by not appealing these conditions in prior permits. "[T]he permit being sought is a different type of permit (post-closure care as opposed to the prior closure permit). The facility is at a very different place in its history and a condition that may have been appropriate during the operation of the facility may not be appropriate during the post-closure care period." Id. at pp. 7-8. Turning to what the landfill referred to as a detailed groundwater monitoring plan similar to that required of Part 811 facilities (id. at p. 11), the Board found that such "conditions are not be necessary to accomplish the purposes of this Act and that the permit absent these conditions, will not result in violations of the Act or Board regulations."

Id.at p. 13. The Board's decision was affirmed on appeal, with the Appellate Court agreeing that neither the Act nor the Board's regulations in Part 807 of the Code are violated by evaluating groundwater monitoring results against general water quality standards. Illinois EPA v. Jersey Sanitation, 336 Ill. App.3d 582 (4th Dist. 2003).

Meanwhile, in the pending enforcement case, the Board granted summary judgment for the landfill with respect to portions of the two counts that were based upon violations of the permit conditions (and the related statutory provisions) that the Board had stricken in the permitting proceeding. PCB 97-2 (April 4, 2002) Specifically, the Board struck portions of Count IV (Alleged Permit Violations) and Count IX (prior conduct certification) to the extent they were based upon permit conditions that no longer applied as of October 5, 1999. When the matter went to hearing, the Board reaffirmed its partial summary judgment in favor of the landfill (PCB 97-2, at p. 14 (April 4, 2002)), but because the landfill conceded that "it failed to monitor and sample in accordance with the facility's groundwater monitoring program" under its 1992 permit, the Board found that the alleged permit violations had been proven under that permit. Id. at p. 14-15.

In other words, while these two-related proceedings appear to point in different directions, it is merely that the permit relief obtained in the middle of ongoing enforcement proceedings was insufficient to provide retroactive relief for violating the previous groundwater monitoring requirements. The Board's decision in the permitting action, affirmed by the Illinois Appellate Court, remains the applicable precedent in this permitting proceeding. Neither the Act, nor Part 807, require a Part 807 facility to meet Part 620 standards as a pre-condition to Illinois

EPA issuance of a certificate that post-closure care is completed.[2]

CONCLUSION

For the above reasons, D&L Landfill, Inc. prays that the Board reverse the Agency's denial of the subject permit application, and specifically grant its request to discontinue monitoring gas, water and settling in the manner described in the application, direct the Agency to execute certification of completion of post-closure care, and for such other relief as the Board deems meet and just.

Respectfully submitted,

D&L LANDFILL, INC.,
Petitioner,

BY: LAW OFFICE OF PATRICK D. SHAW

BY: /s/ Patrick D. Shaw

Patrick D. Shaw
Law Office of Patrick D. Shaw
80 Bellerive Road
Springfield, IL 62704
217-299-8484

[2] Nor, for the reasons stated in the previous Part is the Jersey Sanitation enforcement action legal support for the use of permits to impose compliance obligations. The Board's authority to enter such orders derives from Section 33(a) of the Act. (415 ILCS 5/33(a)) ("such final order . . . as it shall deem appropriate under the circumstances."). This is not an enforcement proceeding.