

ILLINOIS POLLUTION CONTROL BOARD  
January 21, 2016

D & L LANDFILL, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 15-137
	)	(Permit Appeal - Land)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

OPINION AND ORDER OF THE BOARD (by D. Glosser):

On April 27, 2015, D & L Landfill Inc. (petitioner) timely filed an appeal of a December 19, 2014 determination of the Illinois Environmental Protection Agency (IEPA). The determination concerns petitioner's post-closure care of its landfill in Bond County. On October 1, 2015 both parties filed a motion for summary judgment. The parties have responded and replied to the motions.

For the reasons discussed below, the Board finds that there is no genuine issue of material fact and summary judgment is appropriate. Further, the Board finds that the record supports IEPA's denial of the issuance of a certificate of completion of post-closure care because the record fails to demonstrate that the landfill will not cause future violations of the Act or Board regulations. Therefore, the Board grants IEPA's motion for summary judgment and affirms IEPA's denial of a certification of completion of post-closure care. Petitioner's motion for summary judgment is denied.

**PROCEDURAL BACKGROUND**

On January 15, 2015, the parties requested a 90-day extension of the appeal period pursuant to Section 40(a)(1) of the Environmental Protection Act (Act) (415 ILCS 5/40(a)(1) (2014)). On January 22, 2015, the Board granted the extension until April 28, 2015. *See D & L Landfill, Inc. v. IEPA*, PCB 15-137 (Jan. 22, 2015). On April 27, 2015, petitioner filed a petition for review (Pet.).

Pursuant to a hearing officer order, IEPA timely filed the record on June 12, 2015, and on September 30, 2015, petitioner filed an agreed motion to supplement the record. The Board today grants that motion.

On October 1, 2015, IEPA and petitioner filed motions for summary judgment (IEPA Mot., Pet. Mot.). On October 15, 2015, both parties responded to the motions for summary judgment (IEPA Resp., Pet. Resp.). On October 22, 2015, IEPA filed a reply to petitioner's

response (IEPA Reply) and on October 23, 2015, petitioner filed a reply to IEPA's response (Pet. Reply).

### **PETITION**

Petitioner asserts that its landfill is closed and was certified closed by IEPA on August 31, 1996. Petitioner maintains that the landfill is a "Part 807" landfill and under the rules is required to monitor gas, water, and settling at the landfill for three years after closure under post-closure care. Pet. at 3, citing 35 Ill. Adm. Code 807.318. Petitioner states that the post-closure care period for monitoring was extended by legislation for five years and then 15 years. *Id.*, citing 415 ILCS 5/22.17(a) effective 1986 and 1990.

Petitioner notified IEPA that it intended to close rather than subject the landfill to new landfill regulations adopted in 1990. Pet. at 4. Specifically, on August 7, 1992, petitioner notified IEPA it would close under the provisions of 35 Ill. Adm. Code 814.Subpart E. *Id.* Petitioner explains that the two requirements for closing under Subpart E are that the units are subject to the requirements of Part 807 and the conditions of existing permits. *Id.*, citing 35 Ill. Adm. Code 814.502. Petitioner claims it timely ceased accepting waste, and completed closure in 1996; as a result the fifteen year post-closure care period ended on August 31, 2011.

On December 31, 2012, petitioner submitted "an Affidavit for Certification of Completion of Post-Closure Care for Non-Hazardous Waste Facilities". Pet. at 5. On January 18, 2013, IEPA inspected the landfill, and on February 26, 2013, IEPA issued a draft denial letter citing the need to repair eroded and ponded areas around the landfill and identifying the presence of exceedances in background and groundwater quality standards caused by the landfill. *Id.* Petitioner repaired the eroded and ponded areas around the landfill; however on December 19, 2014, IEPA issued a denial letter stating that certification to end post-closure care was denied.

### **FACTS**

On May 13, 1974, a permit was issued to allow development of a 27-acre solid waste disposal site to handle general municipal waste and a small amount of sludge. R. at 1. Portions of the site had been operated as the city dump and regulated by the Illinois Department of Public Health since 1967. R. at 445, 1357. The landfill operated under the Board's rules at 35 Ill. Adm. Code 807 and thus at all times was a "Part 807" landfill. R. at 430.

In 1990, the Board amended the landfill regulations and enacted new comprehensive regulations for the development, construction, and operation of landfills. Development, Operating and Reporting Requirements for Non-Hazardous Waste Landfills, R88-7 (Aug. 17, 1990) (hereinafter R88-7). Under those new rules, existing facilities could remain open and meet the new requirements or close in a set period of time. On August 7, 1992, petitioner notified IEPA that it intended to close and as a consequence avoid the new landfill requirements. R. at 1294.

On February 15, 1991, IEPA approved the first closure/post-closure plan for the landfill. R. at 2, 1347-89. On August 10, 1992, petitioner submitted a modified closure/post-closure care

plan that included revised cost estimates. R. at 2, 1324-46. IEPA approved that modification on September 18, 1992. Over the next several years IEPA issued other supplemental permits dealing with closure requirements including groundwater monitoring. R. at 2-4. On January 21, 1997, IEPA approved closure activities at the landfill and post-closure began for a “minimum” period of 15 years beginning August 31, 1996. R. at 3, 38.

On December 31, 2012, petitioner filed a supplemental permit application for certification of completion of post-closure care with IEPA. R. at 24-167. The application indicated that the 15-year post-closure care period had been completed and also addressed landfill gas, leachate, groundwater, and stormwater management. R. at 38, 39-40, 42-46. Specifically for landfill gas, the application indicated that the three remaining “passive flares” at the site would be removed and the wells plugged. R. at 38-39. For leachate, the application indicated that leachate collection and disposal would be stopped due to the decreasing volume of leachate. R. at 39-40. Stormwater will continue to be diverted. R. at 46. Concerning groundwater, the application states:

Considering the number of non-detects, the percentage of non-exceedances, the decreasing concentrations of compounds, and the low number of organic exceedances, it appears the facility is not having a negative impact on local groundwater quality. Thus, it is proposed groundwater monitoring associated with the groundwater detection monitoring system at this site be discontinued. R. at 43.

On January 18, 2013, IEPA inspected the site (R. 168) and on February 26, 2013, IEPA issued a draft denial letter (R. at 206-10). The “inspector found several eroded and ponded areas around the landfill”. R. at 207. IEPA also noted multiple groundwater exceedances for parameters of both Part 620 standards and exceedances of background values. *Id.* The parameters for which exceedances of either background values, the Part 620 standards, or both include:

Dissolved Solids, Dissolved Nitrate, Dissolved Barium, Dissolved Boron, Dissolved Iron, Ethyl Ether, Total Organic Halogen, Dissolved Chloride, Dissolved Sulfate, Dissolved Manganese, Dissolved Nickel, Phenols, Oil, Chlorobenzene, Total Ammonia, Total Barium, Total Fluoride, Total Manganese, Total Sodium, Total Arsenic, Total Iron, Total Sulfate, Tetrahydrofuran, Total Chloride, Total Boron, Alkalinity, COD. R. at 207-9.

These exceedances are based on petitioner’s groundwater monitoring data. R. at 41-46, 52-79, 466-1293.

On August 15, 2013, petitioner submitted additional information in response to IEPA’s draft denial letter. R. at 180-429. The submittal indicated that the erosion had been corrected to the satisfaction of IEPA’s inspectors (R. at 185). The submittal addressed the groundwater exceedances and states:

The overall trend of inorganic parameter concentrations at the downgradient detection monitoring well locations is downward. A few organic parameters (TOX, chlorobenzene, ethyl ether, tetrahydrofuron) have been identified at specific well locations. The concentrations of these parameters have generally remained constant and/or have decreased over time. In some areas (*e.g.*, chlorobenzene at G106 and tetrahydrofuron at G112) parameters are either no longer detected or the parameters are not routinely detected at the well locations.

As noted in Section VII above, Class IV groundwater standards were established for this facility by the IEPA. Historical data and corresponding trend analyses suggest groundwater quality at downgradient detection monitoring well locations is generally trending downward, thus constituent concentrations are below existing concentrations of constituents in groundwater. R. at 203.

On December 19, 2014, IEPA issued a denial letter citing the petitioner's failure to provide proof that the permit would not violated the Act. R. at 450. Specifically, IEPA states that it must certify that the post-closure care period has ended upon determination that the landfill will not cause future violations of Part 807 or the Act. *Id.* The letter continues:

35 [Ill. Adm. Code] 807.313 states, no person shall cause or allow operation of a sanitary landfill so as to cause or threaten or allow the discharge of any contamination into the environment. And 35 [Ill. Adm. Code] 807.315 states, no person shall cause or allow the development or operation of a sanitary landfill unless the applicant proves to the satisfaction of the [IEPA] that no damage or hazard will result to waters of the State because of the development and operation of the sanitary landfill. Due to the exceedances described below, the affidavit fails to adequately demonstrate that the D & L Landfill has not impacted the groundwater. Therefore, a determination that 35 [Ill. Adm. Code] 807.313 and 807.315 will not be violated cannot be made. *Id.*

IEPA then lists specific exceedances that had not been addressed. R. at 450-52.

### **STATUTORY AND REGULATORY BACKGROUND**

Section 22.17 of the Act provides:

- (a) The owner and operator of a sanitary landfill site that is not a site subject to subsection (a.5) or (a.10) of this Section 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) (2014).

Section 807.313 of the Board's Solid Waste Regulations provides:

No person shall cause or allow operation of a sanitary landfill so as to cause or threaten or allow the discharge of any contaminants into the environment in any

State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under the Act. 35 Ill. Adm. Code 807.313.

Section 807.315 of the Board's Solid Waste Regulations provides:

No person shall cause or allow the development or operation of a sanitary landfill unless the applicant proves to the satisfaction of the Agency that no damage or hazard will result to waters of the State because of the development and operation of the sanitary landfill. 35 Ill. Adm. Code 807.315.

Section 807.318 of the Board's Solid Waste Regulations provides:

- a) 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.
- b) The owner or operator shall take whatever remedial action is necessary to abate any gas, water or settling problems which appear during the three year period.
- c) The owner or operator shall, upon completion or closure, file a detailed description of the site, including a plat, with the appropriate county land recording authority for the county in which the site is located. 35 Ill. Adm. Code 807.318.

Section 807.524(c) the Board's Solid Waste Regulations provides:

- c) The Agency shall certify that the post-closure care period has ended when it determines:
  - 1) That the post-closure care plan has been completed; and,
  - 2) That the site will not cause future violations of the Act or this Part. 35 Ill. Adm. Code 807.524.

## **PETITIONER'S MOTION FOR SUMMARY JUDGMENT**

### **Petitioner's Arguments**

Petitioner argues that there are no genuine issues of material fact. Pet. Mot. at 6. Rather, petitioner states that the disagreement in this proceeding revolves around the proper legal and regulatory standards that apply to its landfill. *Id.* Petitioner opines that therefore summary judgment is appropriate. *Id.* Petitioner first provides a historical summary of the landfill

regulations and statutes and then addresses the specific denial points from the IEPA's letter. The Board will summarize petitioner's arguments in turn below.

### **Regulatory History**

Petitioner argues that the apparent disagreement with IEPA is "rooted in the issue of anachronism, projecting current laws and environmental understandings to a regulatory program of which they do not belong." Pet. Mot. at 6. Petitioner maintains that when the Board adopted the new landfill regulations in R88-7, there were many existing landfills legally developed and operated under the old standards "that had no hope of compliance". *Id.* at 6-7. Petitioner opines that these existing landfills were to comply with R88-7 rules by closing in order to avoid the new standards. *Id.* at 7. Petitioner asserts that imposing groundwater standards as a precondition to certifying completion of post-closure care for landfills that elected to close under R88-7, is a misinterpretation of the applicable legal and regulatory standards. *Id.* Further, petitioner maintains that this misinterpretation "created absurd outcomes in which landfills closed prior to the application of the new regulation are held to higher requirements than those that remained open." *Id.*

**1973 Landfill Regulations.** Petitioner points out that after the Board was created in 1970, the Board adopted rules in 1973, which were formerly administered by the Illinois Department of Public Health. Pet. Mot. at 7. The Board modified the rules and included post-closure care requirements that according to petitioner remain in effect today. *Id.* The petitioner explained that the three-year post-closure care period would be extended by legislation, but the remaining requirements for post-closure care for Part 807 landfills remain unchanged. *Id.* at 8. The petitioner opines that performing post-closure care is intended to protect against future problems. *Id.*

**Updating Landfill Regulations.** In 1984, the Board opened a rulemaking docket to review the landfill regulations. Pet. Mot. at 8. The Board considered the existing rules out of date and began working on updating the rules. The 1984 docket was closed in 1988, and new regulations were adopted in 1990 (R88-7). Meanwhile, the legislature required landfills to provide adequate financial assurance to perform closure by March 1, 1985. *Id.* at 8-9, citing 415 ILCS 5/21.1(a). As a result, petitioner maintains that the financial assurance rules promulgated in 1985 rely on the then existing closure and post-closure care requirements in Part 807. *Id.* at 9. Petitioner opines that the Board had the opportunity to "reflect upon what was currently required by closure and post-closure care" in 1985 when the Board adopted financial assurance rules. *Id.* Petitioner quotes the Board:

The closure standard requires closure so as to prevent post-closure release of "waste constituents" and "waste decomposition products". This is not to be construed as an absolute prohibition on release of water or gas from the completed landfill. Control is required only "to the extent necessary to prevent threats to human health or the environment."

The closure performance standard, which is a minimal standard to avoid gross pollution, applies to all sites, whether required to have a permit or not (citations

omitted). Pet. Mot. at 9, quoting Financial Assurance for Closure and Post-Closure Care of Waste Disposal Sites, R84-22 slip op. at 15 (Dec. 27, 1984).

Petitioner argues that the term “gross pollution” refers to the common definition of “gross”, which is defined as “visible without the aid of a microscope: large enough to be seen with the naked eye.” Pet. Mot. at 9, quoting *Webster’s Third New International Dictionary*. In support of its position, petitioner also refers to IEPA v. Carlton, PCB 81-145 (July 21, 1982) (“the violations . . . led to *gross pollution* involving the discharge of floating solids, colored, malodorous water and accumulation of sludge banks downstream of the plant.”) and IEPA v. County of DuPage, PCB 72-107 (March 15, 1973) (“*gross pollution* at the outfall which consists of rags, paper and vegetable particles.”) *Id.*

Petitioner maintains that in order to determine when to release financial assurance funds, the rules provided for IEPA to certify that closure and post-closure care have been completed. Pet. Mot. at 10, quoting 35 Ill. Adm. Code 807.254(c). Petitioner opines that “since financial assurance requirements were not intended to change post-closure care requirements, the “minimal standard” of avoiding gross pollution is still the basic requirement.” *Id.* Further, the rule language regarding the length of post-closure care was not changed and remains a period of three years after the site is completed or closed. *Id.*, citing 35 Ill. Adm. Code 807.318(a).

The post-closure care period was extended in 1986 to five years “or such longer period as may be required by the Board or federal regulation”. Pet. Mot. at 10 quoting 415 ILCS 5/22.17(a) and (b), as amended by P.A. 84.1320. Petitioner maintains that the purpose of the amendment was not to make any substantive changes to the post-closure care requirements, but merely to replace the three year requirement with a five year requirement. *Id.* at 11. Petitioner maintains that in 1990, the legislature changed five to fifteen, and preserved the Board’s “right to increase the post-closure care period.” *Id.* However, petitioner argues that the legislature did not make the post-closure care period an indefinite period nor did the legislature authorize IEPA to extend the post-closure care period. *Id.*

Petitioner argues that the Board never increased the post-closure care period for Part 807 landfills, and this landfill is subject to Part 807. Pet. Mot. at 11.

**Updating Groundwater Regulations.** Petitioner points out that similar to the landfill regulations, the Board adopted groundwater regulations from the Sanitary Water Board in 1972. Pet. Mot. at 11. In 1992, the Board repealed those rules and put in place groundwater regulations to protect the sources of groundwater. *Id.* at 12. Petitioner quotes the Board’s opinion:

Point of Application of Standards. It is necessary that the point of application of standards be clearly specified for any standards adopted. This is of particular significance with regard to potential sources of contaminants. For example, existing federal regulations for hazardous wastes and RCRA Subtitle D facilities specify both standards and precisely where those standards are to be met. If these standards differed in any substantial way from general Illinois water quality standards for ambient groundwater, it would be necessary to specify precisely how the transition from one set of standards to the other was to be made.

A major point with regard to where standards are to be applied is whether some type of “mixing zone” or “zone of attenuation” should be allowed in the vicinity of potential sources of contaminants. In the case of such point sources as landfills, such a concept is incorporated into both existing federal and Illinois regulations for hazardous wastes and federal criteria for Subtitle D facilities. Pet. Mot. at 13, quoting A Plan for Protection Illinois Groundwater, R86-08, slip op. at 18-19, (Aug. 26, 1986) (emphasis added).

Petitioner maintains that while the new landfill regulation preceded the new groundwater regulations, the two sets of regulations “were clearly promulgated within a shared context”. Pet. Mot. at 13. Specifically, petitioner argues that both sets of rules were considered “antiquated standards” that required more than incremental change. *Id.* Petitioner asserts that the new landfill regulations “identify what groundwater standards would apply to which existing landfill, how the transition to a new standard would occur, as well as the point those standards applied.” *Id.*

**New Landfill and Groundwater Regulations.** Petitioner opines that from the point of view of landfill owners and operators, the new landfill regulations offered a choice of closing or performing significant updates. Pet. Mot. at 13. Petitioner offers that the new rules divided facilities into three categories and petitioner chose the category requiring it to close pursuant to 35 Ill. Adm. Code 814.Subpart E, which prevented it from becoming subject to any of the new landfill requirements. *Id.* at 14, citing 35 Ill. Adm. Code 814.501. The landfill is subject to the pre-existing requirements and the existing permit. *Id.*, citing 35 Ill. Adm. Code 814.502. Petitioner maintains that the landfill’s existing permit referenced groundwater quality standards as being measured by general use water quality standards. *Id.*, citing R 1344. Petitioner argues that the treatment in the R88-7 rules of groundwater monitoring supports petitioner’s position that compliance with the new groundwater standards is not required. *Id.* Specifically, petitioner maintains that the R88-7 rules established different groundwater monitoring requirements for two of the three types of facilities, but did not specify such requirements for facilities that closed immediately. *Id.* at 15. Petitioner maintains that facilities that closed within two years were not required to transition to a new groundwater protection program, but instead were required to close. *Id.*

Petitioner asserts that the post-closure care standards in Part 807 are not contingent upon meeting the background concentrations, or the Part 620 groundwater standards. Pet. Mot. at 16. Petitioner maintains that Part 807 facilities that closed are subject to minimal standards of gross pollution for which adding a zone of attenuation makes no sense. *Id.*

### **Denial Points**

Petitioner argues that under Section 40 of the Act (415 ILCS 5/40 (2014)) the standard of review before the Board is whether or not the application as submitted to IEPA would violate the Act or Board regulations. Pet. Mot. at 16, citing Illinois Ayers v. IEPA, PCB 03-124, slip op. at 8 (Apr. 1, 2004). Petitioner further argues that the IEPA’s denial letter frames the issue on appeal. *Id.* The petitioner claims that pursuant to Section 57.7(c)(4) of the Act (415 ILCS 5/57.7(c)(4) (2014)), the letter must contain:



- (A) an explanation of the Sections of this Act which may be violated if the plans were approved;
- (B) an explanation of the provisions of the regulations, promulgated under this Act, which may be violated if the plan were approved;
- (C) an explanation of the specific type of information, if any, which the IEPA deems the applicant did not provide the IEPA; and
- (D) a statement of specific reasons why the Act and the regulations might not be met if the plan were approved. *Id.*, citing 415 ILCS 5/57.7(c)(4) (2014).

The petitioner asserts that IEPA has a duty to specify its denial reason and is precluded from raising new issues on appeal. *Id.*, citing IEPA v. IPCB, 86 Ill. 2d 390, 405 (1981).

**Post-Closure Care Period Ended.** Petitioner notes that IEPA’s denial letter states that “[p]ursuant to 807.524” IEPA “must certify that the post-closure care period has ended upon determining that the facility will not cause future violations of 35 Illinois Administrative Code Part 807 or the Act.” Pet. Mot. at 17, quoting R. at 450. Petitioner asserts that the post-closure care period is not determined by IEPA or Section 807.524 (35 Ill. Adm. Code 807.524), but rather by Section 22.17(a) and (b) of the Act (415 ILCS 5/22.17(a) and (b) (2014)). *Id.*

Petitioner maintains that it has monitored gas, water, and settling for 15 years and while the Board has required longer post-closure periods under new landfill regulations, the Board has not applied those periods to Part 807 landfills. Pet. Mot. at 17. Petitioner asserts that it addressed settling problems at the landfill to IEPA’s satisfaction and performed other measures for longterm environmental protection. *Id.*, citing R. at 39-40. Petitioner argues that the supplemental permit requested “how post-closure would be ended (such as how the well holes would be plugged), and certification of completion of post-closure care. *Id.* at 18. Petitioner maintains there “is no factual or legal issue that the 15 year post-closure care period has ended”. *Id.*

**The Part 807 Requirements Cited in the Denial Letter Do Not Apply.** Petitioner maintains that Sections 807.313 and 807.315 (35 Ill. Adm. Code 807.313 and 807.315) by their express terms do not apply to post-closure care. Pet. Mot. at 18. Petitioner argues that the rules address development and operation of a landfill, and a landfill seeking a closure certification is at a different portion of its life. *Id.*, quoting Jersey Sanitation Corp. v. IEPA, PCB 00-82, slip op. at 9 (June 21, 2001), *aff’d IEPA v. Jersey Sanitation*, 226 Ill. App. 3d 582 (4th Dist. 2003). Petitioner claims that the purpose of Sections 807.313 and 807.315 (35 Ill. Adm. Code 807.313 and 807.315) is to provide standards for issuance of development and operation permits, while the post-closure care standards are in Section 807.318 (35 Ill. Adm. Code 307.318). Pet. Mot. at 19.

**Part 807 Does Not Require the Landfill to Meet Part 620 Standards.** While the denial letter cites various exceedances of Part 620 groundwater standards, petitioner maintains that those standards did not exist when the Board developed the new landfill regulations. Pet. Mot. at 19. Further, petitioner argues Part 620 standards apply only to operating landfills, “not those that were ‘encouraged’ to close to avoid these standards and remain governed by Part 807”. *Id.* Petitioner opines that landfills that remained open and became subject to monitoring groundwater for background concentrations were given “zones of concentration”. *Id.* Petitioner further opines that “[r]egulations should be interpreted to avoid absurd outcomes, and requiring a Part 807 facility to meet requirements not imposed on Part 811 facilities is absurd.” *Id.*

Petitioner claims that the Board has found that neither the Act nor Part 807 require a Part 807 facility to meet the Part 620 groundwater standards as a pre-condition to IEPA issuing a certificate that post-closure care is complete. Pet. Mot. at 19, citing Jersey Sanitation PCB 00-82. Petitioner argues that the Board found that monitoring for general use water quality standards and background data to determine if a trend is developing was sufficient under the Act. *Id.*, quoting Jersey Sanitation, PCB 00-82, slip op. at 13. Petitioner maintains that the information submitted on groundwater in this proceeding demonstrates a downward trend and there would be no violation of the Act or Board regulations if the post-closure care certificate were granted. *Id.* at 20.

### **IEPA’s Response**

IEPA asserts that every one of petitioner’s arguments is contradicted by the plain language of the Act and Board regulations. IEPA Resp. at 2. IEPA asserts that the 15-year post-closure period is a minimum not a maximum. *Id.*, citing Jersey Sanitation, 336 Ill. App. 3d at 592; Coalville Road Enterprises, Inc. v. IEPA, PCB 10-76 (Apr. 21, 2011). Further, IEPA claims the Part 620 groundwater quality standards do apply to Part 807 landfills, “just as they apply to all groundwaters of the State”. *Id.*, citing People v. Jersey Sanitation Corp., PCB 97-2, slip op. at 21 (Feb. 3, 2005); Coalville Road, PCB 10-76. IEPA argues that Part 807 landfills must comply with the provisions of Section 807.313 and 807.315 (35 Ill. Adm. Code 807.313 and 807.315), and Part 807 landfills must demonstrate there will be no violations of groundwater quality standards in order for IEPA to certify the end of post-closure care. *Id.*

### **Burden of Proof and Standard of Review**

IEPA notes that the Board has found that in order to prevail, petitioner must prove that the application as submitted to IEPA demonstrates that no violations of the Act or Board rules would occur if the requested permit had been issued by IEPA. IEPA Resp. at 2-3, quoting Jersey Sanitation, PCB 00-82. IEPA argues that the standard of review applied by the Board in reviewing IEPA’s decision is that of reasonableness. *Id.* at 3, citing Waste Management, Inc. v. IEPA, PCB 84-45, 84-61, 84-68 (consld.) (Nov. 26, 1984).

IEPA argues that petitioner must demonstrate that as a matter of law the 2012 application demonstrated that no violations of the Act or Board regulations would result if IEPA issued a certification to end post-closure care. IEPA Resp. at 3. IEPA further argues that summary

judgment is appropriate as petitioner's challenges are legal questions and the facts are not in dispute.

### **Petitioner's Arguments Contradict Board Decisions on Part 807 Landfills**

IEPA opines that the courts have afforded the Board deference in applying the Board's rules and regulations. IEPA Resp. at 3, quoting People et. al. v. Freeman Coal Company, et. al., PCB 10-61, 11-2 (consld.), slip op. at 8 (Apr. 18, 2013). IEPA argues that since the adoption of Part 807, the Board has interpreted and applied the rules in a number of proceedings and yet petitioner relies on only one decision, Jersey Sanitation, PCB 00-82. *Id.* IEPA asserts that Jersey Sanitation, PCB 00-82 does not even address the applicability of Sections 807.313 and 807.315 (35 Ill. Adm. Code 807.313 and 807.315), and petitioner ignores on-point decisions that do address the applicability of Sections 807.313 and 807.315 (35 Ill. Adm. Code 807.313 and 807.315) to landfills in post-closure care. *Id.* at 3-4.

IEPA argues that while petitioner relies on the permit appeal case involving Jersey Sanitation, petitioner does not acknowledge the enforcement action against Jersey Sanitation, where the Board found the operator liable for thirteen years of groundwater violations. IEPA Resp. at 4, citing Jersey Sanitation, PCB 97-2. IEPA claims many of those violations occurred during post-closure care. *Id.* Further, IEPA states:

The Board found violations of both Sections 807.313 and 807.315 and explicitly interpreted Part 807 as "requir[ing] landfill operators to prove that they do not and will not affect the waters of the State" in violation of 35 Ill. Adm. Code 807.313 and 807.315. [Jersey Sanitation, PCB 97-2, slip op. at 21]. The fact that the landfill's post-closure care period had begun on September 30, 1994 did not prevent the Board from finding 807.313 and 807.315 violations took place up to and including 2005. IEPA Resp. at 4.

IEPA argues the Board also applied Section 807.313 to the post-closure care period in Coalville Road. IEPA Resp. at 4. IEPA explains that the Board upheld IEPA's denial of a supplemental permit "because the petitioner had 'failed to prove that issuing the requested supplemental permit would not result in violations of the Act and the Board's solid waste regulations.'" *Id.*, quoting Coalville Road, PCB 10-76 (Apr. 21, 2011). IEPA indicates that in Coalville Road, IEPA denied the supplemental permit because the petitioner failed to address groundwater exceedances, and IEPA cited to a failure to comply with Sections 807.313 and 807.502(b) (35 Ill. Adm. Code 807.313 and 807.502(b)). *Id.* IEPA asserts the Board affirmed its denial reason in Coalville Road, and the facility in that case was also a Part 807 facility that began the "minimum" 15-year post-closure care period in the 1990s. *Id.*

IEPA maintains that Board precedent also supports the applicability of the Part 620 groundwater standards to Part 807 landfills. IEPA Resp. at 5. IEPA argues that in Jersey Sanitation, PCB 97-2, the Board found the presence of unaddressed Part 620 exceedances to constitute a threat to the waters of the State. *Id.*, citing Jersey Sanitation, PCB 97-2, slip op. at 21-22. IEPA asserts that the Board specifically found the failure by Jersey Sanitation to address Part 620 groundwater exceedances constituted a violation of Sections 807.313 and 807.315 (35

Ill. Adm. Code 807.313 and 807.315). *Id.* IEPA asserts that based on Board precedent, petitioner’s legal arguments have no basis in law. *Id.*

IEPA notes that the Board has squarely addressed the question of whether or not completion of post-closure care can be certified if there are ongoing exceedances of the groundwater standards. IEPA Resp. at 5. IEPA point to Hayden Wrecking Corporation for an Adjusted Standard from 35 Ill. Adm. Code 620.410(a). AS 04-03 (Jan. 6, 2005). IEPA quotes the Board:

Hayden Wrecking Corporation . . . owns property in St. Clair County on which it operated two landfills for approximately thirty years until 1992. In order to close its landfill site and complete the sale of that property at the contracted price of \$475,000, Hayden *must demonstrate that groundwater at its site meets Class I groundwater quality standards*. *Id.* at 5-6, citing Hayden AS 04-03 (emphasis added).

IEPA asserts that petitioner fails to acknowledge that petitioner’s arguments are contrary to Board precedent. *Id.*

### **Board’s Interpretations of Part 807 are Consistent with the Act and Board Regulations**

IEPA argues that the Board’s decisions are consistent with the plain language of the Act, Board rules, and even petitioner’s permit. IEPA Resp. at 6. IEPA asserts that the Act, Board rules, and petitioner’s permit all “anticipate and allow the extension of the Part 807 landfill’s post-closure care period” beyond 15 years if extension is necessary to avoid current and future violations of the Act or Board regulations. *Id.*

IEPA argues that the language of Section 22.17(a) of the Act (415 ILCS 5/22.17(a) (2014)) includes the phrase “or such longer period as may be required by Board or federal regulation”, which anticipates the extension of the 15-year post-closure care period may be necessary. IEPA Resp. at 6. Furthermore, IEPA argues that the Board’s regulations require IEPA to determine that the site will not cause future violations of the Act or Part 807 before IEPA can certify the end of post-closure care. *Id.* IEPA opines that:

Read together, Board regulation requires post-closure compliance with the requirements of Part 807 before the end of post-closure can be certified. The plain meaning of the requirement “that the site will not cause future violations of the Act or this Part” includes all relevant provisions of Part 807. *Id.*

IEPA disagrees with petitioner that Section 807.524 (35 Ill. Adm. Code 807.524) is merely a procedural requirement and that the only relevant section for post-closure is Section 807.318(a) (35 Ill. Adm. Code 807.318(a)). IEPA Resp. at 7. IEPA asserts that Section 807.318 requires the owner/operator to take remedial action and anticipates that problems might appear during the post-closure care period that requires abatement. *Id.* IEPA claims that the abatement of the problems may be required beyond the specified minimum monitoring period. *Id.*

IEPA opines that the Act and Board precedent “so clearly support allowing extension of a post-closure care period beyond fifteen years where necessary to ensure compliance with the Act and Board regulations” that the fifteen year period codified in the Act is “commonly” referred to as a “minimum”. IEPA Resp. at 7, citing Jersey Sanitation Corp., 336 Ill. App. 3d at 592; Coalville Road PCB 10-76. IEPA further opines that the petitioner’s own permit dating back to 1990 and 1992 supports a finding that the fifteen year period is a minimum period. *Id.* at 8. IEPA argues that in the permit:

Paragraph 10 of Supplemental Permit No. 1992-227-SP (R.1295) provides, “This site is subject to a *minimum* post-closure care period of fifteen years.” (emphasis added). Another portion of the same document notes: “Upon issuance of the Illinois EPA Certificate of Closure, the operator is required to maintain and monitor the closed site for a *minimum* fifteen-year period.” R. at 1342 (emphasis added). IEPA Resp. at 8.

IEPA argues that compliance with the Part 620 groundwater standards “falls within the category” of Board rules that was anticipated by the language “or such longer period as may be required by Board or federal regulation” in Section 22.17(a) of the Act (415 ILCS 5/22.17(a) (2014)). IEPA Resp. at 8. IEPA explains that Section 620.201 (35 Ill. Adm. Code 620.201) breaks “all groundwaters of the State” into four classes for setting groundwater standards and those standards exist independently of Part 807. *Id.* IEPA notes that Section 620.405 (35 Ill. Adm. Code 620.405) states that “No person shall cause, threaten or allow the release of any contaminant to groundwater so as to cause a groundwater quality standard set forth in this Subpart to be exceeded.” *Id.* While petitioner argues that the groundwater standards were adopted after Part 807 and were adopted within a “shared context”, IEPA asserts that the petitioner cannot provide “any explicit, codified exceptions in Part 620 for Part 807 landfills”. *Id.* at 8-9.

### **“Gross Pollution” Standard a Red Herring**

IEPA argues that the “crux” of petitioner’s motion for summary judgment comes from a single sentence of dicta in a Board rulemaking proceeding. IEPA Resp. at 9. IEPA asserts that petitioner “postulates the existence” of a “gross pollution” standard that was never codified in Board regulations or even ever applied to landfills. *Id.* IEPA argues that the same quote relied upon by petitioner also makes clear that Sections 807.313 and 807.315 (35 Ill. Adm. Code 807.313 and 807.315) are specific closure requirements for Part 807 landfills. *Id.* IEPA also claims petitioner attempts “an interpretive sleight of hand in order to round down” Part 807 landfill standards to match standards for facilities that have no permit. *Id.*

IEPA asserts that the phrase “gross pollution” does not appear in the Board’s regulations, and IEPA did not find a single instance where the Board has cited “gross pollution” as a standard for landfills. IEPA Resp. at 9. Further, IEPA has not found a single decision since 1982 where the words “gross pollution” appears. *Id.* at 9-10. IEPA opines that even the passage relied upon by petitioner does not support the existence of a “gross pollution” standard. *Id.* at 10. IEPA maintains that the standard is qualified in the opinion, and the opinion makes clear that Sections

807.313 and 807.315 (35 Ill. Adm. Code 807.313 and 807.315) are supplemental requirements for closure of landfills. *Id.*

### **Petitioner's Reply**

#### **Standard of Review**

Petitioner argues that IEPA's claim that the standard of review is that of "reasonableness" (IEPA Resp. at 4) is not supported by the case cited. Pet. Reply at 2-3. Petitioner asserts that the Board is not required to give deference to IEPA and that conclusions of law would not be entitled to deference under any circumstances. *Id.* at 3, citing IEPA v. PCB, 115 Ill. 2d 65, 70 (1986) and IEPA v. PCB, 138 Ill. App. 3d 550, 552 (3rd Dist. 1985).

#### **Part 807 Landfills Are Required to Monitor for 15 Years under Act and Board Rules**

Petitioner maintains that under the statute, the only way to extend the 15-year post-closure monitoring period is by Board or federal regulation. Pet. Reply at 3. Petitioner asserts that while the Board and federal government promulgated rules in the 1990s, those rules do not apply to Part 807 landfills. *Id.*, citing R88-7 and 40 CFR Part 258.

Petitioner next opines that the cases cited by IEPA do not "contravene this conclusion". Pet. Reply at 3. Petitioner claims that Jersey Sanitation, 336 Ill. App. 3d at 592, merely restates petitioner's interpretation of Section 22.17 of the Act (415 ILCS 5/22.17 (2014)) that only the Board can extend the post-closure care period. *Id.* at 3-4. Petitioner asserts that IEPA is imposing an indefinite monitoring requirement on a case-by-case-basis requiring that landfills continue monitoring as long as constituents have been measured above the Part 620 groundwater quality standards and background levels. *Id.* at 4.

As to Coalville Road PCB 10-76, petitioner asserts that it was "essentially a default judgment" and the case did not involve Section 22.17(a) of the Act (415 ILCS 5/22.17 (2014)). Pet. Reply at 4. Petitioner claims that the opinion indicates only that the landfill has "begun 15 years of post-closure care." *Id.*, quoting Coalville Road, PCB 10-76, slip op at 2.

Petitioner maintains that the importance of establishing the post-closure care period is that if the post-closure care period has ended, then no more monitoring is required, and IEPA denial on the exceedances of Part 620 groundwater quality standards is unsupported. Pet. Reply at 4. Petitioner concedes that IEPA initially pointed to several eroded and ponded areas requiring abatement before ending the post-closure care period. *Id.* Petitioner corrected those issues and claims that the questions that remain are how to remove and plug monitoring wells and whether or not certification can be issued. *Id.*

#### **Compliance with Part 620 Groundwater Standards Are Not a Condition of Completing Post-Closure**

Petitioner argues that landfills have various stages of existence and stop being a source of income "long before" the end of all the stages. Pet. Reply at 5. Petitioner notes that financial

assurance requirements first appeared in 1985 to ensure resources remained to monitor and abate any issues over the term of the financial assurance. *Id.* Petitioner concedes that the Board precedent relied upon by both parties deal directly with a landfill at the final stages of existence; however, petitioner argues the permits involving Jersey Sanitation landfills are the most relevant. *Id.*

Petitioner reiterates that Jersey Sanitation, 336 Ill. App. 3d at 594, deals with a landfill changing stages and in the context of past groundwater exceedances. *Id.* Petitioner reminds that Jersey Sanitation is a permitting case wherein the permittee is seeking a change in the regulatory status, *i.e.* the beginning of post-closure care. Petitioner argues that in this case the permittee is also seeking a change in regulatory status, *i.e.* at the end of the post-closure care period. *Id.* Petitioner acknowledges that in Jersey Sanitation the permittee had agreed to monitoring pursuant to Part 620, but when the permittee asked that the requirement be removed, IEPA opposed the removal insisting that removing the Part 620 standards would mean that no groundwater monitoring was required during post-closure care. *Id.*, quoting Jersey Sanitation, PCB 00-82, slip op. at 12.

Petitioner continues its comparison with Jersey Sanitation arguing that the standard of review in both that case and this one is the same. Pet. Reply at 6. Petitioner asserts that the Board specifically rejected the requirement for groundwater monitoring during post-closure care. *Id.*

Petitioner takes issue with IEPA's reliance on Jersey Sanitation, PCB 97-2, which is an enforcement action. Pet. Reply at 6. Petitioner asserts that the Board's findings of violation were made across various stages of the landfill's existence with varied regulatory requirements over those stages. *Id.* Petitioner opines that the Board's findings in the enforcement action are not illuminating as to whether or not IEPA can require Part 620 standards be met before certifying the completion of post-closure care. *Id.* at 7.

The petitioner maintains:

Regulations, like statutes, should be construed as a whole, presuming that it was not intended to produce absurd, inconvenient or unjust results. Brucker v. Mercola, 227 Ill. 2d 502 (2007). The absurdity with the IEPA's position is that it holds landfills closed over 15 years ago under regulations that pre-date Part 620 to a higher standard than new facilities operating today, generating revenue that could afford more stringent standards. Pet. Reply at 7.

Petitioner argues that new facilities can establish a zone of compliance to meet Part 620 standards, but parties agreeing to a compliance boundary is a concept that does not exist in Part 807. *Id.* Petitioner believes that Part 807 facilities were not capable of meeting the new landfill regulations and closed under existing closure/post-closure plans. *Id.*

### **Sections 807.313 and 807.315 do not Apply to Part 807 Landfills After Post-Closure**

Petitioner argues that this is a permitting procedure wherein petitioner is attempting to change the status of the landfill at the close of post-closure. Pet. Reply at 7. Petitioner asserts that the relevant question is whether the change in status would violate the Act or Board regulations. *Id.* at 8. Petitioner asserts that Section 807.313 and 807.315 (35 Ill. Adm. Code 807.313 and 807.315) expressly apply to the “operation of a sanitary landfill” and petitioner claims it is not proposing to operate a sanitary landfill. *Id.*

Petitioner maintains that the cases cited by IEPA overlook the fact that petitioner is not proposing to operate a landfill, and the cases do not “go as far as urged”. Pet. Reply at 8. Petitioner distinguishes its case from Jersey Sanitation, PCB 97-2, Coalville Road, PCB 10-76, and Hayden Wrecking Corp., AS 04-03. *Id.* Petitioner asserts that in Jersey Sanitation, PCB 97-2, the violations included day to day operations and thus Sections 807.313 and 807.315 could have been violated during that time period and not during post-closure. In Coalville Road, PCB 10-76, petitioner explains that the permittee did not oppose a motion for summary judgment and the application of Section 807.313 was never argued. In Hayden Wrecking Corp., AS 04-03, petitioner asserts that Sections 807.313 and 807.315 were not referenced at all. *Id.*

### **Petitioner Completed Its Post-Closure Care Plan**

Petitioner takes issue with IEPA’s claims that the closure/post-closure care plan supports IEPA’s decision. Pet. Reply at 8. Petitioner argues that the same document supports its position as the document requires monitoring for 15 years. *Id.* at 9, quoting R. at 1296. Petitioner opines that failure to complete the post-closure care plan was not raised in the denial letter and in any event “there still can be no claim” that petitioner did not comply with the condition. *Id.*

### **Board’s Regulatory History**

Petitioner agrees that the “gross pollution” standard is not a part of Board “jurisprudence”; however, petitioner argues that this is so because it is not a particularly useful standard. Pet. Reply at 10. Petitioner asserts the standard is enforced, without using the phrase, in administrative citation proceedings pertaining to uncovered refuse and visible discharges of leachate. *Id.*

Petitioner reiterates that Part 807 landfills that could not meet the new landfill standards could stop accepting waste before more stringent requirements applied to the landfill. Pet. Reply at 10. Petitioner claims that as a result, Part 807 landfills “would not need to address the new groundwater quality standards, nor would the regulatory agencies be riddled with the additional time and expense of trying to force compliance when compliance was impossible.” *Id.* Petitioner opines that landfills that were closing did not need a new permit, but were required to “monitor and abate for 15 years”. *Id.* “Petitioner has monitored groundwater for 15 years and the demonstrated trend for constituents is downward, as one would expect at a landfill that ceased operations decades ago.” *Id.*



## **IEPA'S MOTION FOR SUMMARY JUDGEMENT**

### **IEPA's Arguments**

IEPA notes that on February 26, 2013, a draft denial letter was sent to petitioner indicating that the 2012 application was insufficient because the application failed to address ongoing exceedance of Part 620 groundwater quality standards and background values of contamination at the site. IEPA Mot. at 2. IEPA claims that over the next two years, petitioner extended IEPA's review time to allow petitioner to provide additional information. *Id.* at 2-3. IEPA issued its denial letter on December 19, 2014, indicating that the petitioner's "failure to address the landfill's ongoing exceedances" was a reason. *Id.* at 3. IEPA explains that its decision was based on Section 807.524 (35 Ill. Adm. Code 807.524). IEPA argues that at the time of petitioner's application and continuing through IEPA's final decision, the groundwater monitoring data showed measured levels of several contaminants as exceeding permit background levels and the Part 620 standards. *Id.* IEPA asserts that based on these exceedances, it determined that the landfill may violate Sections 807.313 and 807.315 (35 Ill. Adm. Code 807.313 and 807.315) in the future. *Id.*

IEPA maintains that under Section 807.524 (35 Ill. Adm. Code 807.524) it cannot certify end of post-closure care for the landfill unless it can make a reasoned determination that the landfill will not cause future violations of the Act or Board Regulations. IEPA Mot. at 4. Section 12(a) of the Act prohibits causing or threatening to discharge any contaminants so as to cause water pollution in Illinois (415 ILCS 5/12(a) (2014)), and Section 12(d) of the Act prohibits creating a hazard of water pollution to waters of the State (415 ILCS 5/12(d) (2014)). *Id.* IEPA asserts that petitioner's failure to address ongoing groundwater exceedances left the IEPA "with no choice but to deny certification of the end of post-closure care at D&L Landfill." *Id.*<sup>1</sup>

### **Petitioner Failed to Demonstrate the Landfill Will Not Cause Violation of Act or Board Regulations**

IEPA argues that petitioner has not demonstrated that the requested certification of the end of post-closure care at the landfill will not allow future violations of the Act or Part 807 of the Board's Solid Waste Regulations. IEPA Mot. at 15. Further, IEPA contends that petitioner's 2012 Application did not address ongoing groundwater exceedances at the landfill and that the petitioner was unable to address these issues during the two-year period its application was pending before IEPA. *Id.*

IEPA states that it cannot "certify the end of post-closure care unless it has determined that future violations will not occur". IEPA Mot. at 16. IEPA explained that certification would end leachate collection and groundwater monitoring despite documented groundwater contamination in excess of Part 620 groundwater quality standards and background values for the landfill, both of which have the potential to violate the Act and Part 807 regulations. *Id.*

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<sup>1</sup> IEPA set forth an argument on the legal standard for summary judgment, burden of proof and standard of review. These arguments are similar to those presented above in response to petitioner's motion for summary judgment and will not be repeated.

IEPA further argues that Section 22.17 of the Act allows for a post-closure care period to exceed 15 years “if necessary to ensure compliance with Board regulations”. IEPA therefore concludes that certification would leave ongoing groundwater quality issues unaddressed. These unaddressed issues require that the minimum 15-year post-closure care period to be extended until IEPA determines that ending post-closure care will not result in additional violations of the Act or Part 807 regulations. *Id.*

According to IEPA, petitioner failed to address groundwater exceedances in violation of its permit. IEPA Mot. at 17. Special Condition 8 of petitioner’s permit requires that “any significant change in groundwater quality, as defined by Special Permit Conditions Nos. 6a and 6b, be addressed by submitting an assessment monitoring plan, followed by an assessment report 90 days after IEPA’s approval of the monitoring plan”. *Id.*, citing R. at 10-11. Special Condition 8 also requires that the permittee “propose a corrective action plan if assessment monitoring indicates that the facility has impacted the groundwater”. *Id.*

IEPA provided details of the review it conducted of petitioner’s reported groundwater data from January of 2010 through February 2014 and found exceedances of background values for a list of constituents. IEPA Mot. at 17, citing R. at 170-73. IEPA’s review also found violations of Part 620 of the Board’s Groundwater Regulations for well samples exceeding Class IV groundwater standards for dissolved boron, total boron, total organic halogen, and phenols. *Id.* IEPA stated that its draft denial sent to petitioner on February 26, 2013 noted the requirements of Special Condition 8 that are triggered by the detection of any “significant change” in groundwater quality, which is defined by Special Conditions 6a and 6b. *Id.* Despite being notified of these exceedances, petitioner failed to submit both an assessment monitoring report and a corrective action plan required by Special Condition 8 of its permit. *Id.* at 18.

IEPA argues that petitioner’s failure to address ongoing groundwater exceedances demonstrates a high probability of there being future violations of the Act and Part 807 Regulations. IEPA Mot. at 18. Further, IEPA states that there are no “genuine issues of material fact regarding the existence of unaddressed exceedances”. *Id.* at 19. Petitioner does not deny that six down-gradient wells have detected “significant, long-term, and ongoing exceedances of both Class IV groundwater standards and permit background values”. IEPA also notes that petitioner does not claim that these exceedances were caused by any source other than the D&L Landfill. *Id.* IEPA explains that the Board “has found unaddressed groundwater exceedances of background values and Part 620 Class values to be Part 807 violations”. *Id.*, citing Jersey Sanitation, PCB 97-2.

Lastly, IEPA argues that ending post-closure care would end all groundwater monitoring at the site, thereby leaving existing exceedances unaddressed and any future exceedances unmonitored. IEPA Mot. at 20 and 21. IEPA asserts that ending post-closure care without a clear demonstration by petitioner that the landfill is not impacting groundwater is “dangerous because such an approval would remove the very tools the Agency needs to assess the Landfill’s impact”. *Id.* at 21.

## **Petitioner's Response**

### **15-Year Post-Closure Care Period Was Not Extended**

Petitioner argues that the “plain and ordinary language” of Section 22.17(a) of the Act (415 ILCS 5/22.17(a) (2014)) establishes a fixed time for post-closure care that can only be extended by state or federal regulation. Pet. Resp. at 2. Petitioner maintains that no such regulation has been adopted. *Id.* at 3. Petitioner also notes that the Board’s regulations provide that an indefinite period of groundwater monitoring may be required for new landfills; however petitioner opines that the groundwater standards are performance-based standards as monitoring may cease when certain objectives are met. *Id.* Petitioner maintains that since the D & L Landfill closed before the new requirements were adopted, the “minimum period” concept IEPA seeks to impose is inappropriate. *Id.*

Petitioner argues that the provision cited by IEPA in its denial letter “does not satisfy the plain language and ordinary meaning” of Section 22.17(a) of the Act (415 ILCS 5/22.17(a) (2014)). Pet. Resp. at 4. Petitioner opines that Section 807.524 (35 Ill. Adm. Code 807.524) does not specify a time period, and IEPA is using Section 807.524 as “authority” for IEPA to “conduct case-by-case adjudications based upon purported future violations.” *Id.* Petitioner explains that Section 807.524 predates the adoption of Section 22.17(a) of the Act (415 ILCS 5/22.17(a) (2014)), which increased the post-closure care period. *Id.* Petitioner argues that it is “reasonable to conclude” that the General Assembly was aware of the regulations at the State and federal level. *Id.* Petitioner opines that the “obvious purpose” of the phrase “or such longer period as may be required by Board or federal regulation” was to defer to the “reasoned and scientific judgment” of the Board. *Id.* at 4-5.

### **Alleged Violations of a Permit Not Grounds to Deny Permit Application**

Petitioner argues that IEPA cannot now assert new reasons for denial of the application, and thus any reasons not included in the denial letter are waived. Pet. Resp. at 5, citing IEPA v. IPCB, 86 Ill. 2d at 405. Furthermore, petitioner maintains that IEPA cannot deny permits based solely on alleged violations of the Act. *Id.* at 6, citing IEPA v. IPCB, 252 Ill. App. 3d at 828, 830 (3rd Dist. 1993). Petitioner continues by noting that permitting and enforcement are different proceedings with different burdens of proof and evidentiary standards. *Id.* Petitioner opines that permitting proceedings are prospective and use of past alleged violations is inappropriate. *Id.* at 7. Petitioner argues that it provided an assessment report to IEPA and if IEPA needed additional information, IEPA should have asked for more information. *Id.*, citing IEPA Mot. at 18; R. at 184.

### **Meeting Part 620 Standards not Necessary to Comply with Part 807 or the Act**

Petitioner notes that both parties rely on cases involving Jersey Sanitation landfills. Pet. Resp. at 7. Petitioner relies on the permit appeal (Jersey Sanitation, PCB 00-82), and IEPA relies on the enforcement (Jersey Sanitation, PCB 97-2). *Id.* Petitioner asserts that since this is a permitting proceeding, the former case is more relevant. *Id.* Petitioner summarizes the cases and then argues that while the cases “appear to point in a different” direction, the difference is merely

that Jersey Sanitation obtained relief from the contested conditions during the enforcement action but that permit relief was not sufficient to provide retroactive protection for groundwater violations. *Id.* at 8-9. Petitioner asserts that the Board's decision in the permitting action remains applicable precedent and that finding does not require a Part 807 facility to meet Part 620 groundwater standards as a pre-condition to issuance of a certificate that post-closure care is complete. *Id.* at 9-10.

### **IEPA's Reply**

IEPA restated its argument that the 15-year post-closure period is not an absolute time limit. IEPA Reply at 2. Instead, IEPA explained that "read in combination with the Board's regulations, reasonably allows the post-closure care period to extend beyond 15 years as necessary to ensure the landfill does not pose a threat to human health or the environment". IEPA stated that issues can arise in the post-closure care period that must be addressed before post-closure care can end. *Id.*

According to IEPA, Section 807.524(c)(2) (35 Ill. Adm. Code 807.524(c)(2)) requires that IEPA determine that the site will not cause future violations of the Act or Part 807 before it can certify the end of post-closure care. IEPA Reply at 3. Section 807.318 (35 Ill. Adm. Code 807.318) requires that the owner or operator take whatever remedial action is necessary to address problems that arise during the post-closure period. *Id.* at 4. IEPA argues that this section alone supports its decision to require the petitioner to address groundwater exceedances before it can certify the end of post-closure care. *Id.*

IEPA refuted petitioner's argument that IEPA was attempting to use a permit decision as an enforcement tool by stating that its decision was made on the basis that petitioner could not demonstrate that there would be no future violations of the Act or Part 807 given the existing groundwater exceedances. IEPA Reply at 4. IEPA explained that its denial letter did not allege any past unadjudicated violations, but did cite ongoing, unaddressed groundwater exceedances. These exceedances, IEPA reminds, were uncontested and even disclosed by the petitioner in its 2012 Application. *Id.* IEPA explains that the Board has found that unaddressed groundwater exceedances "are a reasonable basis for denying a supplemental permit, out of concern for future violations of Section 807.313 and 807.315." *Id.*, citing Coalville Road PCB 10-76.

IEPA counters petitioner's argument that its landfill does not have to demonstrate future compliance with Part 620 before IEPA can certify closure. IEPA Reply at 5. IEPA argues that Jersey Sanitation PCB 00-82, which is used by the petitioner to support its argument, was not an appeal of a permit denial and did not address whether Part 620 groundwater quality standards are applicable to Part 807 landfills. IEPA explains that in Jersey Sanitation PCB 00-82 the Board found the permit conditions added by IEPA were not necessary to accomplish the purposes of the Act and that issuing the permit without these conditions would not result in violations of the Act.

IEPA argues that petitioner is not challenging conditions added to a permit, but is requesting certification to end groundwater monitoring. IEPA Reply at 5. IEPA asserts that it had to determine whether ending the groundwater monitoring program would result in future violations of the Act and Part 807 regulations. *Id.* at 6. IEPA concluded that there is nothing in

Jersey Sanitation PCB 00-82 “that rules out actual groundwater exceedances as evidence of probable future violations, and therefore grounds for an Agency denial”. *Id.*

According to IEPA, the petitioner argued that Part 620 groundwater regulations do not apply to Part 807 landfills. IEPA Reply at 6. IEPA refutes this argument by stating that the Board ruled in Jersey Sanitation PCB 97-2 that the petitioner’s Part 807 landfill did violate Part 620 groundwater regulations, and therefore Sections 807.313 and 807.315 (35 Ill. Adm. Code 807.313 and 807.315). IEPA argues that it “was entirely reasonable” for IEPA “to conclude that unaddressed ongoing groundwater exceedances of petitioner’s permit and of Part 620 standards could result in violations of Sections 807.313 and 807.315.” *Id.*

IEPA also addresses petitioner’s argument that Jersey Sanitation PCB 00-82 is more applicable than Jersey Sanitation PCB 97-2 because the former is a permit appeal, and the latter is an enforcement action. IEPA Reply at 6. IEPA notes that in subsequent permit proceedings, the Board supported IEPA’s final decision in this case. In Coalville Road PCB 10-76, the Board ruled that unaddressed groundwater exceedances were proper grounds for denial of petitioner’s supplemental permit application. *Id.*

IEPA closes by stating that it “does not seek affirmation of its December 19, 2014 final decision based on any alleged or potential violation of Section 807.302 of the Board’s Solid Waste Regulations”. IEPA Reply at 7. Rather, IEPA asserts that its final decision cited numerous unaddressed groundwater exceedances, and petitioner’s supplemental filings regarding these exceedances did not demonstrate that there would be no violations of Sections 807.313 and 807.315. IEPA argues that petitioner did not dispute the possibility of future groundwater violations at its landfill, claiming that the landfill is not subject to any groundwater quality standards. Therefore, IEPA concludes by stating petitioner’s “failure to demonstrate a lack of a future threat to the groundwaters of the State per Sections 807.313 and 807.315 is, and always has been, the grounds of the Agency’s final decision.” *Id.* at 7 and 8.

## **LEGAL STANDARD**

### **Standard of Review for Summary Judgment**

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998). In ruling on a motion for summary judgment, the Board “must consider the pleadings, depositions, and affidavits strictly against the movant and in favor of the opposing party.” *Id.* Summary judgment “is a drastic means of disposing of litigation,” and therefore it should be granted only when the movant’s right to relief “is clear and free from doubt.” Dowd & Dowd, Ltd., 181 Ill. 2d at 483, 693 N.E.2d at 370, citing Purtill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on the pleadings, but must “present a factual basis which would arguably entitle [it] to judgment.” Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

Here the parties agree that no issue of fact is presented to the Board. Rather the parties argue the denial of certification of completion of post-closure was based on implementation of the Act and Board regulations. Therefore, the issue presented to the Board is a question of law, and the Board finds that summary judgment is appropriate.

### **Burden of Proof in Permit Appeal**

In Illinois, IEPA is the permitting authority responsible for administering regulatory programs to protect the environment. If IEPA denies a permit or grants one with conditions, the permit applicant may appeal IEPA's determination to the Board. 415 ILCS 5/4, 5, 39, 40(a)(1) (2014); 35 Ill. Adm. Code 105, 301, 304, 309. The petitioner has the burden of proof on appeal. 415 ILCS 5/40(a)(1) (2014); 35 Ill. Adm. Code 105.112(a). More specifically, the petitioner bears the burden of proving that the application, as submitted to the IEPA, would not violate the Act or the Board's regulations. Jersey Sanitation, PCB 00-82, slip op. at 6. 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. IEPA, PCB 88-139 (Feb. 23, 1989). In Sexton the Board stated:

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. Joliet Sand & Gravel Co. v. IPCB, 163 Ill. App. 3d 830, 833, 516 N.E.2d 955, 958 (3rd Dist. 1987); Browning-Ferris v. IEPA, PCB 84-136 (May 5, 1988); PCB 88-139 slip op at 6.

Further, IEPA's denial letter frames the issue on appeal. Rock-Ola Manufacturing Corporation v. IEPA, PCB 90-24, slip op. at 10 (May 19, 1994) *see also* Pulitzer Community Newspapers v. IEPA, PCB 90-142, slip op. at 6 (Dec. 20, 1990) (citations omitted) (denial letter frames issues on appeal).

### **DISCUSSION**

The issue as set forth in IEPA's denial letter is whether or not IEPA's denial of petitioner's certification to end post-closure care was appropriate. IEPA denied the certification stating that petitioner failed to prove that the permit would not result in violations of the Act and Board regulations. R. at 450. Specifically, IEPA indicated that pursuant to Section 807.524, IEPA must certify "that the post-closure care period has ended upon determining that the facility will not cause future violations" of Part 807. *Id.* IEPA stated that Section 807.313 (35 Ill. Adm. Code 807.313) "states, no person shall cause or allow the development or operation of a sanitary landfill unless the applicant proves to the satisfaction" of IEPA that "no damage or hazard will result to waters of the State because of the development and operation of the sanitary landfill." *Id.* IEPA continues that "due to the exceedances" detailed in the denial letter, "the affidavit fails to adequately demonstrate that the D & L Landfill has not impacted the groundwater." *Id.* IEPA stated that a determination that Section 807.313 and 807.315 will not be violated cannot be made. *Id.*

Both parties rely on Board precedent and the language of the statute to support their positions that summary judgment should be granted in their favor. Below, the Board will briefly offer a summary of the cases and then address the issue.

### **Jersey Sanitation PCB 00-82**

On June 7, 1999, Jersey Sanitation submitted an application for a supplemental permit that included a certificate of closure, revised final contours with siting approval certification, and a biennial revision of the closure and post-closure care plans and cost estimates. PCB 00-82, slip op. at 2. On October 5, 1999, IEPA granted a supplemental permit with conditions to Jersey Sanitation. *Id.* On November 18, 1999, Jersey Sanitation timely appealed IEPA's decision challenging several separate conditions. *Id.* Included in the challenged conditions were specific requirements for groundwater monitoring during post-closure care. *Id.* at 2-4, 9. Jersey Sanitation argued that the conditions were not necessary to meet the requirements of Part 807 or the Act. *Id.* at 7.

The Board agreed with Jersey Sanitation that the closure and post-closure care of its facility was governed by 35 Ill. Adm. Code 807, and the Board reviewed the permit in light of the post-closure care requirements of Part 807. PCB 00-82, slip op. at 7. As to the conditions regarding groundwater monitoring, the Board noted that the post-closure plan is a condition to the site permit and a groundwater monitoring plan was included in the post-closure care plan. Thus, a condition of the permit was groundwater monitoring. *Id.* at 12-13. The Board found the conditions should be stricken, stating:

The Board is persuaded that these conditions are not 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. Section 22.17 of the Act (415 ILCS 5/22.17 (2000)) does require monitoring for gas, water and settling at a closed landfill for 15 years. However, neither the Act nor the Board's regulations at 35 Ill. Adm. Code 807 provide any additional specificity. Jersey Sanitation has provided a plan for monitoring groundwater, as well as gas and settling, at the facility. R0294-0297. The parameters to be monitored are extensive and must be compared against background and General Water Quality Standards. The Board also notes that the list of parameters to be monitored is the same list of parameters monitored for in Permit No 1992-350-SP. R0140-0141, 0296. The Board finds that the plan as submitted was sufficient and these challenged conditions are not necessary. The Board finds that Conditions B.6, C.1, C.2, C.3, and C.4 should be stricken. *Id.* at 13-14.

### **Jersey Sanitation PCB 97-2**

The Board found that over a 12-year period, Jersey Sanitation, the same facility addressed above in PCB 00-82, caused exceedances of Class II groundwater quality standards. PCB 97-2 slip op. at 22. The Board noted that Part 807 requires landfill operators to prove that they do not and will not affect the waters of the State (35 Ill. Adm. Code 807.313 and 807.315), and that Jersey Sanitation's permit required monitoring. *Id.* at 21.

### **Hayden Wrecking Corporation AS 4-3**

Hayden Wrecking Corporation (Hayden) owns property in St. Clair County on which it operated two landfills for approximately thirty years until 1992. AS 4-3 slip op. at 1. The Board stated that “[i]n order to close its landfill site and complete the sale of that property . . . Hayden must demonstrate that groundwater at its site meets Class I groundwater quality standards.” *Id.* The Board cited to Sections 805.508 and 807.524 (35 Ill. Adm. Code 805.508 and 807.524) in support of its statement. *Id.* at 3.

### **Discussion of Issues**

Petitioner’s arguments that IEPA should have issued a certificate that post-closure care had ended are grouped around three related topics. Petitioner argues that because it closed under Part 807, the Part 620 groundwater standards do not apply to D & L landfill. The next topic under which petitioner argues IEPA’s decision is incorrect is that the facility is in post-closure, which differs from operating, and therefore Sections 807.313 and 807.315 (35 Ill. Adm. Code 807.313 and 807.315) do not apply to petitioner. Finally, petitioner argues that the statutory language provides for a 15-year post-closure care period, and no rule has been adopted extending that period. The Board will discuss each of these topics below.

#### **Applicability of Part 620**

Petitioner argues that the adoption of the new landfill regulations in R88-7 and the groundwater standards in Part 620 were adopted at about the same time and replaced outdated rules. Petitioner maintains that electing to close the landfill under the rules adopted in R88-7 means that petitioner is not subject to more stringent requirements including the Part 620 standards. Petitioner argues that it is only subject to the General Use Water Quality standards as those standards are referenced in the D & L landfill permits.

The Board is unconvinced by these arguments. First, the Board notes the adoption of groundwater quality standards in Part 620 occurred after adoption of R88-7, as petitioner acknowledges. *See* Pet. Mot. at 17. In adopting the groundwater quality standards the Board specifically stated in Section 620.130 that:

Groundwater is not required to meet the general use standards and public and food processing water supply standards of 35 Ill. Adm. Code 302.Subparts B and C. 35 Ill. Adm. Code 620.130.

Section 620.201 also states that “all groundwaters of the State” are designated in one of four classes of groundwater. 35 Ill. Adm. Code 620.201. Class IV groundwaters include “groundwater within a zone of attenuation as provided in 35 Ill. Adm. Code 811 and 814”. 35 Ill. Adm. Code 620.240(a). However, nothing in those four classes exempts groundwater that may be impacted by a Part 807 facility. Thus, nothing in Part 620 provides an exemption from the standards in Part 620 for Part 807 landfills. Clearly the Board was aware of facilities that



were closing under Part 807 when the Board adopted the groundwater quality standards and yet the Board did not exempt those facilities from Part 620.

To support its position, petitioner relies on Jersey Sanitation PCB 00-82 arguing that the Board found that neither the Act nor Part 807 required a Part 807 facility to meet the Part 620 groundwater standards as a pre-condition to IEPA issuing a certificate that post-closure care is complete. Pet. Mot. at 19, citing Jersey Sanitation PCB 00-82. However, the Board disagrees that the finding was that comprehensive in Jersey Sanitation PCB 00-82. In reviewing that decision and the facts surrounding the facility, at issue in both Jersey Sanitation cases, the Board struck groundwater monitoring conditions in appeal of a permit for post-closure care. However, the Board did so because the post-closure care plan included groundwater monitoring. Under the facts of PCB 00-82, the landfill would be required to monitor groundwater and report the findings. The Board found that comparing parameters to General Water Quality Standards was sufficient in that case. Thus, a groundwater monitoring program was a part of the landfill's post-closure permit, and the Board found the additional conditions imposed by IEPA unnecessary to meet the requirements of the Act and Board regulations. Jersey Sanitation, PCB 00-82, slip op. at 13.

In Jersey Sanitation PCB 97-2, the enforcement case, the Board specifically found violations over a 12-year period of the Part 620 groundwater quality standards. The complaint was originally filed in 1996 and the violations began as early as 1994. The violations continued until 2002, after the Board had ruled on the challenged permit conditions in PCB 00-82.

After reviewing both Jersey Sanitation cases, the Board finds that those do not support petitioner's arguments. In the permit appeal, the Board found that groundwater monitoring would occur as a part of closure, and additional requirements were not necessary to meet the requirements of the Act and Board regulations; while in the enforcement case the Board specifically found violations of groundwater quality standards. The Board finds that in reading those cases together, it is clear that the Board intended for groundwater monitoring, sufficient to establish if exceedances might occur, be a requirement of the permit. Further, the Board found that if exceedances of the groundwater quality standards did occur, it is a violation of the Act. It should be noted that both cases referred to the other in the opinions drafted by the Board, thus the Board was aware and acknowledged that the cases were linked.

The Board finds support for its finding that Part 620 is applicable in the Board's statements in Hayden Wrecking AS 4-3. In that case the Board specifically found that the landfill must demonstrate compliance with Class I groundwater standards. Hayden Wrecking, AS 4-3 slip op. at 1. Therefore, the Board finds unpersuasive petitioner's arguments that Part 620 groundwater standards do not apply to Part 807 landfills. Stated differently, the Board finds that Part 620 groundwater standards do apply to Part 807 landfills

### **Applicability of Sections 807.313 and 807.315**

The IEPA's denial letter states that IEPA must certify that post-closure care has ended upon determining that the facility will not "cause future violations of the Act and this Part". R. at 450; 35 Ill. Adm. Code 807.524(b). The letter continues that IEPA cannot determine that

Sections 807.313 and 807.315 (35 Ill. Adm. Code 807.313 and 807.315) will not be violated. *Id.* Petitioner maintains that Sections 807.313 and 807.315 (35 Ill. Adm. Code 807.313 and 807.315) are inapplicable as both refer to “developing” or “operating” a landfill and the landfill is closed. Petitioner relies on Jersey Sanitation 00-82 for the concept that the landfill is at a very different point than an operating landfill and thus is not subject to the same requirements.

The Board agrees that it distinguished the stages of a landfill’s life in PCB 00-82; however, that distinction recognized that conditions on the permit that were appropriate during closure and during the period that the landfill accepted waste, may not be appropriate during post-closure care. Jersey Sanitation, PCB 00-82, slip op. at 7-8. That is not the case that the Board faces in this proceeding. At issue here, is whether IEPA can certify that the facility’s post-closure care activities may end, when the record contains evidence of exceedances of both background concentrations and groundwater standards.

Sections 807.313 and 807.315 refer to operation and development. But unlike Jersey Sanitation PCB 00-82, where the issue was related to conditions in a permit during post-closure care, here the issue is that the groundwater monitoring results taken during post-closure care demonstrate exceedances of both background concentrations and the groundwater quality standards. The Board finds that while the facility may not be “operating”, the operation of the landfill during the life of the landfill has resulted in exceedances. Therefore, the Board finds that it is possible to potentially violate the Sections 807.313 and 807.315, even if the facility has ceased accepting waste and is not “operating”.

Section 807.524 cited in IEPA’s denial letter, provides a two prong test for IEPA to use before issuing a certification: 1) whether the post-closure plan has been completed, and 2) that the site will not cause future violations of the Act or this Part. 35 Ill. Adm. Code 507.524. As discussed above, the Board is convinced that the prior operation of the landfill, based on the monitoring data, resulted in exceedances of the groundwater quality standards and as a result, future violations of Part 807 are possible. Furthermore, as IEPA correctly pointed out, Section 12 of the Act prohibits any person from causing or allowing the discharge of contaminants into the waters causing water pollution or a water pollution hazard. 415 ILCS 5/12(a) and (d) (2014). Based on the monitoring reports provided as a part of the request for certification, exceedances are occurring in the monitoring wells. Therefore, the Board finds that future violations of the Act or Part 807 are possible.

### **15 Year Post-Closure Care Period Has Ended**

Petitioner argues that under the statute and Board rules the 15 year post-closure care period may only be extended as “may be required by Board or federal regulation”. 415 ILCS 5/22.17(a) (2014). Petitioner argues that there has been no amendment to the Board’s rules or adoption of a federal regulation to extend the post-closure care period. Therefore, petitioner argues, IEPA must issue a certificate that post-closure care is complete.

The Board is not persuaded by petitioner’s attempts to read the clause “or such longer period as may be required by Board or federal regulation” (415 ILCS 5/22.17(a) (2014)) to

mandate that IEPA issue a certificate that post-closure is complete at the end of 15 years under any circumstance. The plain language of Section 22.17 of the Act states:

- (a) The owner and operator of a sanitary landfill site that is not a site subject to subsection (a.5) or (a.10) of this Section 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) (2014).

The Board agrees that there has been no specific amendment stating that post-closure care extends beyond 15 years; however, the Board does not read the statute that narrowly. The clause “or such longer period as may be required by Board or federal regulation” does not mean a single regulation but rather any regulation that would require further monitoring beyond 15 years. In reading the Board’s rules as a whole it is clear that the 15-year period is a minimum period. Section 807.524 specifically builds in a requirement that IEPA establish that no future violations of the Act or Part 807 will occur, before IEPA can issue a certificate that post-closure care is complete. Nothing in Section 807.524 indicates that at the end of 15 years, IEPA must issue the certificate even if IEPA believes that future violations may occur. Furthermore, the Board is unconvinced that the legislature intended to require IEPA to issue a certificate of completion of post-closure care, when potential violations of the Act existed. Therefore, the Board finds that the statutory 15 year post-closure care period is a minimum period.

### **Finding**

There are no issues of genuine fact in this proceeding, and the Board finds that summary judgment is appropriate. As stated previously, the petitioner bears the burden of proving that the application, as submitted to IEPA, would not violate the Act or the Board’s regulations. Jersey Sanitation, PCB 00-82, slip op. at 6. A review of the record establishes that reports from groundwater monitoring indicate that the groundwater has exceedances of both background concentrations and groundwater quality standards. Furthermore, nothing in the record offers any indication that the contamination indicated in the monitoring wells is from a source other than the landfill. Based on the exceedances found in the monitoring wells, the Board finds that petitioner has not met its burden. The record supports IEPA’s denial of the issuance of a certificate of completion of post-closure care because the record does not demonstrate that the landfill will not cause future violations of the Act or Board regulations. Therefore, the Board grants IEPA’s motion for summary judgment and affirms IEPA’s denial of a certification of completion of post-closure care.

### **ORDER**

The Board grants the motion filed by the Illinois Environmental Protection Agency for summary judgment. The Board denies the petitioner’s motion for summary judgment. As a result the Board affirms the Illinois Environmental Protection Agency’s denial of a certification of completion of post-closure care.

IT IS SO ORDERED.

I, John T. Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on January 21, 2016, by a vote of 5-0.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal stroke at the end.

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John T. Therriault, Clerk  
Illinois Pollution Control Board