

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS, *ex*)
rel. LISA MADIGAN, Attorney General of the)
State of Illinois,)

Plaintiff,)

v.)

COMMUNITY LANDFILL CO., an Illinois)
Corporation, and the CITY OF MORRIS, an)
Illinois Municipal Corporation,)

Defendants.)

PCB 03-191
(Enforcement – Land)

NOTICE OF FILING

TO: SEE ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that on October 26, 2007, we electronically filed with the Clerk of the Illinois Pollution Control Board, City's Response in Opposition to the State's Motion to Strike or Dismiss the Affidavit of Mayor Richard Kopczick, a copy of which is attached hereto and hereby served upon you.

Dated: October 26, 2007

Respectfully submitted,

On behalf of the CITY OF MORRIS

/s/ Charles F. Helsten
Charles F. Helsten
One of Its Attorneys

Charles F. Helsten
Hinshaw & Culbertson LLP
100 Park Avenue
P.O. Box 1389
Rockford, IL 61105-1389
815-490-4900

AFFIDAVIT OF SERVICE

The undersigned, pursuant to the provisions of Section 1-109 of the Illinois Code of Civil Procedure, hereby under penalty of perjury under the laws of the United States of America, certifies that on October 26, 2007, she caused to be served a copy of the foregoing upon:

Mr. Christopher Grant Assistant Attorney General Environmental Bureau 69 W. Washington St., Suite 1800 Chicago, IL 60602	Mark LaRose Clarissa Grayson LaRose & Bosco, Ltd. 200 N. LaSalle, Suite 2810 Chicago, IL 60601
Mr. John T. Therriault, Assistant Clerk Illinois Pollution Control Board 100 W. Randolph, Suite 11-500 Chicago, IL 60601 (via electronic filing)	Bradley Halloran Hearing Officer Illinois Pollution Control Board 100 W. Randolph, Suite 11-500 Chicago, IL 60601
Mr. Scott Belt Scott M. Belt & Associates, P.C. 105 East Main Street Suite 206 Morris, IL 60450	Jennifer A. Tomas Assistant Attorney General Environmental Bureau 69 W. Washington Street, Suite 1800 Chicago, IL 60602

A copy of the same was enclosed in an envelope in the United States mail at Rockford, Illinois, proper postage prepaid, before the hour of 5:00 p.m., addressed as above.



HINSHAW & CULBERTSON
100 Park Avenue
P.O. Box 1389
Rockford, IL 61105-1389
(815) 490-4900

The State subsequently filed a Motion to Strike or Dismiss the Mayor's statement, erroneously asserting that it was not suitable for filing as public comment based on the theory that only participants may submit public comment. In the alternative, the State incorrectly asserts that the statement presents "no argument or comment relevant to the record or legal argument citing legal authority." (State's Motion at ¶ 11). For the reasons set forth below, the State's arguments are without merit and its Motion should accordingly be denied.

ARGUMENT

1. "Any Person" May File Written Statements With the Board During the Public Comment Period

The Board's rules, codified at 35 Ill.Adm.Code 101.202, define "Public Comment" as follows:

"Public comment" means information submitted to the Board during a pending proceeding either by oral statement made at hearing or *written statement filed with the Board*.

35 Ill.Adm. Code 101.202 (emphasis added).

The Environmental Protection Act ("the Act") expressly provides that with respect to hearings conducted pursuant to enforcement actions, "*any person* may submit written statements to the Board in connection with the subject thereof." 415 ILCS 5/32 (emphasis added).

The Board's rules define the term "person" as:

any individual, partnership, co-partnership, firm, company, limited liability company, corporation, association, joint stock company, trust, estate, political subdivision, state agency, or any other legal entity, or their legal representative, agent or assigns.

415 ILCS 5/32.

The Mayor of Morris is a person as defined by 35 Ill. Adm. Code 101.202,¹ and filed a written statement with the Board in connection with the enforcement action in accordance with 415 ILCS 5/32, within the public comment period specified by the Hearing Officer. Therefore, the filing of the Mayor's written statement was authorized by the Act and by the Board's regulations.

2. Parties Are Not Prohibited From Filing Statements During the Public Comment Period

In support of its argument that *parties* are prohibited from filing written statements with the Board during the public comment period, the State relies on 35 Ill. Adm. Code 101.628, which sets forth the rights of *participants* to submit statements. That section is titled, appropriately enough, "Statements from Participants."

The "Statements from Participants" Section of the Board's rules authorizes participants to file public comments and amicus curiae briefs. *Id.* at § 101.628(c). It is utterly unremarkable that the provision addressing "Statements from Participants" should be silent with respect to statements from *parties*. It is noteworthy that the "Statements from Participants" section is also silent with respect to non-participating members of the public, although the State presumably does not argue that this silence should be interpreted to mean that non-participating members of the general public are barred from filing written statements during the public comment period. The State's assertion that the Section's silence concerning the right of parties to file written statements should be read to constitute a prohibition against such statements suffers from a logical fallacy: the fact that it shows *participants* are *authorized* to file written statements does not equate with a blanket *prohibition* against the filing of such statements by those who are *not* participants. In fact, to read the regulations this way would completely ignore the legislature's

¹ The State concedes in its Motion that the Mayor is a "person" as defined by the Act. (State's Motion at ¶ 8).

declaration at 415 ILCS 5/32, which unequivocally permits *any* person to file a written statement concerning an enforcement proceeding.

The reading urged by the State would violate well established principles of statutory construction, including the rule that words and phrases must not be construed so as to read into a statute “exceptions, limitations, or conditions that the legislature did not express.” *NDC LLC v. Topinka*, 374 Ill.App.3d 341, 359, 871 N.E.2d 210 (2nd Dist. 2007). Here, the legislature clearly expressed its intent to permit “*any* person” to file written comments with the Board. Interpreting 35 Ill.Adm.Code 101.628(c) to deprive *parties* of a right expressly granted by the legislature would thwart legislative intent.

Even if the Board had intended for its regulations to abrogate the right of certain classes of persons to file statements during the public comment period, it is well established that an administrative body cannot abrogate a statutory provision by the exercise of its rulemaking powers. *Department of Revenue v. Civil Service Comm’n*, 357 Ill.App.3d 352, 364, 293 Ill.Dec. 79, 827 N.E.2d 960 (2005). Administrative rules “can neither limit, enlarge nor amend the scope of the statute beyond the clear import of the legislative language used.” *Illinois RSA No. 3, Inc. v. Department of Cent. Management Services*, 348 Ill.App.3d 72, 77, 809 N.E.2d 137 (Ill.App. 1st Dist. 2004).

Here, the statute expressly permits “any person” to file a written statement with the Board in an enforcement action. 415 ILCS 5/32). If the Board’s rule did, as the State argues, operate to deprive certain persons of the right to file written statements, that limitation would be invalid. As the Illinois Supreme Court recently explained, if an administrative rule cannot be reconciled with the statute under which it was adopted, the rule is simply invalid. *Hadley v. Illinois Dept. of Corrections*, 224 Ill.2d 365, 385, 864 N.E.2d 162, 173 (2007) (citing *Carson Pirie Scott*, 131 Ill.2d 23, 544 N.E.2d 772 (1989) (recognizing that agency action that is inconsistent with the

statute must be overturned). Similarly, the Illinois Appellate Court has uniformly declared that in a conflict between an administrative regulation and a statute, the statute controls. *See e.g. Hawthorne Race Course, Inc. v. Illinois Racing Bd.*, 366 Ill.App.3d 435, 443, 851 N.E.2d 214 (1st Dist. 2006).

Therefore, the only reasonable reading of Section 101.628(c) is that the IPCB did not intend to restrict non-participating members of the public and parties from filing public comment, because the Board was clearly aware of Section 5/32 of the Act. Indeed, if the IPCB had intended to bar the non-participating public and the parties from filing public comment, despite 415 ILCS 5/32 and 35 Ill.Adm.Code 101.202, it would have done so explicitly. Therefore, pursuant to the plain language of the statute and regulations, the State's motion to strike should be denied.

3. The Board has a Long-Standing Practice of Accepting Submissions from Parties During the Public Comment Period

In addition to the legislature's declaration that "*any person*" may file a written statement during the public comment period, the Board has long accepted submissions from parties during public comment, and the Illinois Appellate Court has found there is no reason for the Board not take such submissions. For example, in *Land and Lakes Co. v. Illinois Pollution Control Bd.*, 319 Ill.App.3d 41, 743 N.E.2d 188 (3rd Dist. 2000) the Appellate Court held that there was nothing improper about an applicant's submission of 2,000 pages of written material on the last day of the public comment period. *Id.* Moreover, in 1990, in *Village of Sauget v. PCB*, 207 Ill.App.3d 974, 566 N.E.2d 724 (5th Dist. 1990), the Appellate Court held that a party was improperly "denied an effective opportunity to submit information during the public comment period." *Id.* at 983.

Similarly, the Board itself held in *Waste Management of Illinois, Inc. v. County Bd. of Kane County*, PCB 03-104 (June 19, 2003), that the siting proceedings in that case were not fundamentally unfair, inasmuch as the petitioner, Waste Management, was “afforded an opportunity to be heard, to cross-examine adverse witnesses, and to submit comments during the statutory period.” *Id.* at p. 8 (emphasis added). The fact is, the Board’s files are replete with public comments submitted by parties throughout the years, and the argument proffered by the State that the Mayor’s statement cannot be filed during the public comment period is therefore entirely inconsistent with the Board’s practice, in addition to being contrary to Illinois law.

The State erroneously cites *American Bottom Conservancy, et al. v. Village of Fairmont City, et al.*, PCB No. 01-159, p. 7 (Oct. 18, 2001) (“ABC”), as providing support for its motion. (State’s Motion at ¶ 8). As a threshold matter, the language from *ABC* which is quoted by the State is mere dicta, and appears after the Board already declared its holding: that the challenged Landfill Capacity Report in that case was not part of the record before the siting authority, and therefore was not a part of the record on appeal. As a result, the Board held it could not consider the report in its review of the underlying siting hearing. The “off-hand comment” appeared only *after* the PCB had held that the report was stricken because it was not part of the underlying record. No analysis or reasoned discussion was had on this issue, and the PCB has allowed public comment by parties on numerous occasions since the *ABC* case.

Furthermore, in contrast with the Board’s role in the present case, which is an enforcement action, in *ABC* the Board sat as a reviewing body, charged with deciding whether the siting authority’s decision was based on sufficient evidence to establish that all of the statutory landfill siting criteria were met. This case is not an appeal from a siting hearing in which the Board must limit its review to the underlying record on appeal. Rather, it is an

enforcement action: a primary, fact-finding proceeding governed by 415 ILCS 5/32, which expressly permits anyone to file written statements concerning the action with the Board.

Finally, it should be noted that a prior determination by an administrative body is not *res judicata* in subsequent proceedings, because an administrative body has the power “to deal freely with each situation as it comes before it, regardless of how it may have dealt with a similar or even the same situation in a previous proceeding.” *Hawthorne*, 366 Ill.App.3d at 443. Thus, dicta in a 2001 appeal of a siting hearing does not bind the Board in this case.

4. The Mayor’s Statement Presents Comment Concerning the Proceeding

The State further asserts that even if the Mayor’s statement can be filed during public comment, the statement is not “appropriate” because it does not “make reference to the record of this proceeding or present legal argument citing legal authorities.” (State’s Motion at ¶ 10). Although the State apparently wishes to dictate its own requirements for public comment, the dictates it seeks to impose are inconsistent with the Environmental Protection Act and the Board’s own rules.

The Act provides that in an enforcement action, “any person may submit written statements to the Board *in connection with the subject thereof.*” 415 ILCS 5/32 (emphasis added). The rules provide that Public Comment consists of “*information submitted to the Board during a pending proceeding either by oral statement made at hearing or written statement filed with the Board.*” 35 Ill.Adm.Code 101.202 (emphasis added). Even the provision of the rules which governs statements made by *participants* requires only that the statements be “*based on evidence contained in the record.*” 35 Ill.Adm.Code 101.628(c)(2).

The Mayor’s statement is based upon and comments directly on the core issue at the center of the Board’s hearing: the Financial Assurance requirements and mechanisms concerning

the Morris Community Landfill. Therefore, the State's argument that the Mayor's statement fails to meet the relevance requirement is disingenuous.

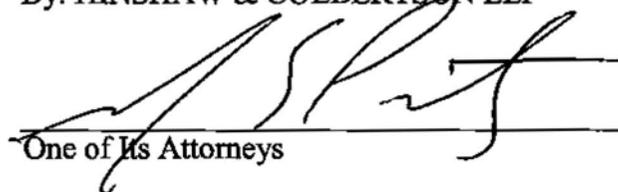
CONCLUSION

The Hearing Officer in this case set October 9, 2007 as the deadline for the public comment period, during which written statements could be filed with the Board in the enforcement action against the City of Morris. Pursuant to the legislative declaration that "any person" may file written statements with the Board concerning enforcement actions, a statement in this case was timely filed in which the Mayor of the City of Morris commented on the action. Because the Mayor's statement was filed in accordance with Illinois law, there is no basis whatsoever for striking the Mayor's statement, and the State's Motion should accordingly be denied.

WHEREFORE, for the reasons set forth above, the Defendant, CITY OF MORRIS, a Municipal Corporation, respectfully requests that this Board deny the State's Motion to Strike and Dismiss the Affidavit of Mayor Kopczick, and grant such other and further relief as the Board deems appropriate.

CITY OF MORRIS, Defendant

By: HINSHAW & CULBERTSON LLP



One of Its Attorneys

Charles F. Helsten
Hinshaw & Culbertson LLP
100 Park Avenue
P.O. Box 1389
Rockford, IL 61105-1389
815-490-4900

Scott M. Belt & Associates, P.C.
105 East Main Street #206
Morris, IL 60450
(815) 941-4675