

ILLINOIS POLLUTION CONTROL BOARD

June 18, 2009

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

ORDER OF THE BOARD (by G.T. Girard):

Maximum Investments, LLC (petitioner) filed a request for an adjusted standard from the Board's rules requiring that a remediation applicant receive written permission from the landowner before acting to clean up a site under the site remediation program. The Board requested that the petitioner and the Illinois Environmental Protection Agency (IEPA) file briefs that addressed the Board's authority to grant the requested adjusted standard. Both the petitioner and the IEPA have filed briefs and after reviewing those briefs, the Board dismisses the adjusted standard petition. As discussed below, the Board finds that the Board lacks the authority to grant an adjusted standard from the rules as requested by petitioner because the rule merely implements statutory requirements.

The Board will first give a procedural history of this proceeding. Next the Board will set forth the rule that petitioner is seeking an adjusted standard from as well as pertinent statutory language. The Board will next summarize the petition and petitioner's briefs. The Board will follow with a summary of the IEPA's brief and then explain the Board's reasoning for dismissing the adjusted standard petition.

**PROCEDURAL HISTORY**

On November 7, 2008, Maximum Investments, LLC (petitioner) filed a request for an adjusted standard from 35 Ill. Adm. Code 740.210(a)(3). On December 18, 2008, the Board found that the petition contained two deficiencies that required the Board to decline to accept the petition and the petition was dismissed. First, the Board found that there was a jurisdictional issue because the Board did not find the proof of newspaper publication in the Board's files. Second, an attorney did not file the petition and had not entered an appearance.

On January 12, 2009, petitioner filed a motion asking the Board to reconsider the December 18, 2008 order and an amended petition (Am.Pet.). On February 5, 2009, the Board granted the motion to reconsider and reinstated the petition. The Board found that the certificate of publication, which had been misfiled and not docketed, had been filed. The Board further found that the notice of the adjusted standard was published on November 18, 2008, within 14 days after the filing of the petition. Therefore, the Board's dismissal on December 18, 2008, for lack of jurisdiction was in error. Additionally in the February 5, 2009 order, the Board found that the filing of an amended petition by petitioner's attorneys cured the second deficiency. The

Board reinstated the petition and accepted the amended petition filed by the petitioner's attorneys.

Also in the February 5, 2009 order the Board stated:

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

On March 3, 2009, the hearing officer entered an order directing the petitioner and the IEPA to file briefs. On March 30, 2009, petitioner filed a brief (Br.). On April 27, 2009, IEPA filed a brief (IEPA Br.). On May 15, 2009, petitioner filed a reply (Reply).

### **STATUTORY AND REGULATORY BACKGROUND**

Petitioner seeks an adjusted standard from Section 740.210(a)(3) of the Board rules concerning the site remediation program (35 Ill. Adm. Code 740.210(a)(3)). Am.Pet. at 2. Section 740.210(a)(3) provides:

- a) The Application shall, at a minimum, contain the following information:
  - 3) For applicants other than the remediation site owner, written permission from the owner, or the authorized agent of the owner, for conducting investigative and remedial activities:
    - A) Where the remediation site extends across property boundaries, written permission must be obtained from the owner of each affected property;
    - B) The written permission shall clearly identify the remediation site for which services are sought;
    - C) The written permission shall contain the original signature of the owner; and
    - D) Where the RA is authorized by law to act on behalf of the owner of the remediation site, the RA shall provide written documentation of that authority. 35 Ill. Adm. Code 740.210(a)(3).

Section 58.2 of the Act defines an remediation applicant as:

any person seeking to perform or performing investigative or remedial activities under this Title, including the owner or operator of the site or persons authorized by law or consent to act on behalf of or in lieu of the owner or operator of the site. 415 ILCS 5/58.2 (2006).

Section 58.7(b)(1)(F) of the Act (415 ILCS 5/58.7(b)(1)(F) (2006)) provides that when reviewing plans and reports the IEPA may require the remediation applicant to demonstrate that the remediation applicant is acting under the authority of the owner. 415 ILCS 5/58.7(b)(1)(F) (2006).

Section 22.2(b) of the Act (415 ILCS 5/22.2(b) (2006)) is a provision which limits the liability of prospective purchasers of property. Specifically, Section 22.2b(a) provides in part that if certain conditions are met:

The State of Illinois may grant a release of liability that provides that a person is not potentially liable under subsection (f) of Section 22.2 of this Act as a result of a release or a threatened release of a hazardous substance or pesticide . . . 415 ILCS 5/22.2b(a) (2006)

### **PETITION AND AGUMENTS OF PETITONER**

Petitioner seeks an adjusted standard from Section 740.210(a)(3) of the Board's site remediation program rules to allow petitioner to act as a remediation applicant without receiving written permission from the owner of the property. Am.Pet at 2. Petitioner holds a tax lien on the property and the property has been abandoned for several years. *Id.* Petitioner wants "to enroll the property in the Site Remediation Program before acquiring title so as to qualify for exemption as a prospective purchaser under 415 ILCS 5.22.2b." *Id.* Petitioner claims that as there is no property owner, petitioner cannot comply with the standard of general applicability and therefore cannot enroll the property in the site remediation program. *Id.* Petitioner asserts that failure to enroll the property in the site remediation program would result in the property not being returned to productive use or the tax rolls. *Id.*

Petitioner states that on December 21, 2007, petitioner acquired a tax lien on the subject property for the years 1987 through 2005 and property taxes have not been paid since at least 1987. Br. at 1. Petitioner maintains that based on IEPA records, Richard and Bessie Lenz operated the property as a construction debris landfill that closed in approximately 1971. *Id.* The property adjacent is owned by Palos Hills and includes 12 acres that were a part of the landfill. *Id.* Petitioner claims that Mr. Lenz filed for bankruptcy and was deceased prior to 1990 and Ms. Lenz also appears to be deceased but remains listed as the owner of record. *Id.*

On January 14, 2008, petitioner submitted to IEPA a request for release from liability as a prospective purchaser under Section 22.2b of the Act (415 ILCS 5/22.2b (2006)). Br. at 1. Petitioner maintains that the IEPA directed petitioner to apply for the site remediation program. *Id.* Petitioner states that under Section 58.7(b)(1)(F) of the Act (415 ILCS 5/58.7(b)(1)(F)

(2006)) the remediation applicant must demonstrate that the authority to act on behalf of or in lieu of the owner or operator. *Id.* Petitioner also states that Section 22.2b of the Act (415 ILCS 5.2.2b (2006)) provides that a prospective purchaser may request a release from liability if “among other things, ‘the person requests, in writing, that the Agency provide review and evaluation services.’” *Id.* Petitioner maintains that there are no regulations defining the level of review and evaluation to be performed or the application requirements. *Id.*

Petitioner asserts that the lien holder status permits petitioner to act in lieu of the owner in the circumstances here. Br. at 2. Petitioner notes that the property has been abandoned for 20 years and as the holder of the tax lien on the property, petitioner’s lien supersedes all other possible lien holders. *Id.* Petitioner claims that if the Board could alternately specify “review and evaluation” services under the language of Section 22.2b of the Act (415 ILCS 5/22.2b (2006)) that would enable petitioner to obtain the release of liability “that is the ultimate goal of this petition” for an adjusted standard. *Id.*

Petitioner maintains that the failure to adopt one of these alternatives would mean that the property would “forever remain abandoned and off the tax rolls” and such a result is contrary to the statute. Br. at 2. Petitioner is unwilling to move forward with perfecting title to the property without obtaining the release. *Id.*

Petitioner maintains that petitioner is not asking the Board to modify the statutory provisions in the Act, but rather to allow petitioner to act “in lieu of the owner” under appropriate circumstances. Reply at 1. Petitioner argues that the statute differentiates acting in lieu of the owner from acting on behalf of the owner. *Id.* Petitioner asserts that acting on behalf of the owner would mean that the party is a corporate office, attorney or has some form of written delegation agreement. *Id.* Petitioner argues action in lieu of the owner must mean something else and the current circumstances are a proper example of acting in lieu of the owner. *Id.* Petitioner claims that in the circumstances here, where the property is abandoned and petitioner is the lien holder, petitioner can properly act in lieu of the owner. *Id.*

Petitioner also argues that petitioner has provided for an alternative remedy, which the IEPA does not argue is inappropriate or outside the Board’s authority. Reply at 1. Petitioner asserts that the Board can define the review and evaluation services to be performed under Section 22.2b of the Act (415 ILCS 5/22.2b (2006)) to be identical “in all substantive respects” as those in site remediation program but allow lien holders to apply where the property is abandoned or the owner is unable to act. *Id.*

### **ARGUMENTS OF IEPA**

IEPA agrees that petitioner contacted the IEPA regarding the possibility of obtaining a limit of liability for prospective purchasers pursuant to Section 22.2b of the Act (415 ILCS 5/22.2b (2006)). IEPA Br. at 1. The IEPA states that among the requirements to be satisfied before a limit of liability is granted is that a response action plan must be approved by IEPA. *Id.* IEPA states that “[p]etitioner was informed that the IEPA would only be willing to perform such a plan review if the site was enrolled in the Site Remediation Program.” IEPA Br. at 1-2. IEPA maintains that this position was taken to ensure that funding would be provided to IEPA for the

review. IEPA Br. at 2. IEPA notes that petitioner holds a tax lien, and opines that petitioner “obviously realizes” that petitioner cannot take a deed without disqualifying petitioner from the requirement in Section 22.2b of the Act (415 ILCS 5/22.2b (2006)), that the person is not otherwise liable under Section 22.2 of the Act (415 ILCS 5.22.2 (2006)). *Id.* IEPA asserts that ownership status would create liability under Section 22.2 of the Act (415 ILCS 5.22.2 (2006)). *Id.*

IEPA concedes that petitioner’s claims that “the property will forever remain abandoned and off the tax rolls” may be accurate predictions. IEPA Br. at 2. However, IEPA notes that predictions are not responsive to the Board’s order as the Board’s concern is the definition of “Remediation Applicant” in Section 58.2 of the Act (415 ILCS 5/58.2 (2006)) and the requirement of owner authorization in Section 58.7(b)(1)(F). *Id.* The IEPA goes on to state:

So, while the Petitioner sought relief from the regulatory requirement at Section 740.21 0(a)(3), the regulatory requirement is merely a corresponding requirement contained in the Environmental Protection Act. The Board correctly pointed out that Section 28.1 authorizes it to grant relief from regulations it has promulgated. The legislature did not extend the authority to effectively amend legislation through an adjusted standard process. *Id.*

IEPA asserts that there is a practical limitation to petitioner’s request because the IEPA is not required to proceed with a release from liability under Section 22.2b of the Act (415 ILCS 5/22.2b (2006)). IEPA Br. at 2. IEPA notes that the language of Section 22.2b of the Act (415 ILCS 5/22.2b (2006)) uses the permissive “may” and not the mandatory “shall” when providing for issuance of a release from liability. IEPA Br. at 2-3. IEPA goes on to explain that in practice the Attorney General develops the final release and executes the release for the State of Illinois after IEPA has worked out language acceptable to IEPA. IEPA Br. at 3.

The IEPA concludes that “consistent with the Board’s initial concerns” and based on the issues discussed above, the IEPA contends that “the Board is not granted the authority to modify statutory requirements” through the adjusted standard proceedings. IEPA Br. at 3.

## **DISCUSSION**

Petitioner is seeking an adjusted standard from language in the Board’s rules on the site remediation program, but petitioner seeks this change so that ultimately petitioner can receive a release from liability as a prospective purchaser under Section 22.2b of the Act (415 ILCS 5/22.2b (2006)). *See* Br. at 2. Clearly, the Board has authority to adjust a standard adopted in the Board’s rules. Section 28.1 of the Act (415 ILCS 5/28.1 (2006)) provides:

After adopting a regulation of general applicability, the Board may grant, in a subsequent adjudicatory determination, an adjusted standard for persons who can justify such an adjustment consistent with subsection (a) of Section 27 of this Act. 415 ILCS 5/28.1(a) (2006).

However, in this case, petitioner requests adjustment of a standard adopted in the Board's rules that are also a statutory requirement and the Board cannot adjust statutory requirements.

Specifically, in this petition, the petitioner is seeking to act as a remediation applicant and undertake remediation without written permission from the landowner. Under Section 740.210(a)(3), remediation applicants who are not the owner, must have written permission from the owner. Section 740.210(a)(3) implements the language found in the statutory provisions adopting the site remediation program and more specifically Section 58.2 of the Act (415 ILCS 5/58.2 (2006)) which defines a remediation applicant.

Section 58.2 of the Act defines an remediation applicant as:

any person seeking to perform or performing investigative or remedial activities under this Title, including the owner or operator of the site or persons authorized by law or consent to act on behalf of or in lieu of the owner or operator of the site.  
415 ILCS 5/58.2 (2006).

Thus, by definition a remediation applicant either is an owner or operator or is authorized to act by the owner or operator. In addition, Section 58.7(b)(1)(F) of the Act (415 ILCS 5/58.7(b)(1)(F) (2006)) further specifies that when reviewing plans and reports the IEPA may require the remediation applicant to demonstrate, if necessary, that the remediation applicant is acting under the authority of the owner. 415 ILCS 5/58.7(b)(1)(F) (2006). The statute again makes clear that the remediation applicant must demonstrate that the remediation applicant is acting under the owner's authority.

Furthermore, when adopting Section 740.210(a)(3), the Board's opinion specifically addressed concerns that the provision created new substantive rights in an adjacent property owner and that the section could impose remedial action or restrictions on adjacent owners. The Board found that these concerns were not warranted because the requirement in the Board's rules for written permission from the owner ensures that the remediation applicant respects the owner's existing property rights. *See Site Remediation Program and Groundwater Quality (35 Ill. Adm. Code 740 and 35 Ill. Adm. Code 620) (Feb. 6, 1997), R97-11, slip op. at 16.*

Here, petitioner argues that petitioner would be acting "in lieu of the owner" and thus, the requested adjusted standard would only be to the rule and not the statutory language. This argument however parses out only the words "in lieu of the owner" and ignores the introductory clause "authorized by law or consent to act" under Section 58.2 of the Act (415 ILCS 5/58.2 (2006)) and "authority to act" under Section 58.7(b)(1)(F) of the Act (415 ILCS 5/58.7(b)(1)(F) (2006)). The petitioner makes several broad statements that as a tax lien holder, superseding all other lien holders, petitioner can act as the owner; however, there is no accompanying citation to law for these broad statements. Furthermore, while on the one hand petitioner wishes to be allowed to act as an owner, on the other hand petitioner is seeking a release from liability available only to a prospective buyer. The Board cannot reconcile these two positions.

Based on a plain reading of the statute the Board finds that the Site Remediation Program requires that an owner must grant approval to a remediation applicant before a site can be

enrolled in the Site Remediation program. The Board specifically stated this requirement in Section 740.210(a)(3) based on the statutory language in Section 58.2 of the Act (415 ILCS 5/58.2 (2006)). Because the requirement is statutory, the Board finds that the Board does not have authority to grant an adjusted standard to Section 740.210(a)(3).

Petitioner offers an alternative position in the briefs. *See e.g.* Br. at 2 and Reply at 1. This alternative would have the Board define “review and evaluation” services under the language of Section 22.2b of the Act (415 ILCS 5/22.2b (2006)). This language is found at Section 22.2b(a)(3) of the Act (415 ILCS 5/22.2b(a)(3) (2006)) and is one of four requirements in Section 22.2b(a) which must be met before the State of Illinois “may” grant a release of liability. 415 ILCS 5/22.2b(a) (2006). Petitioner’s request for alternative release is not supported by the arguments. Petitioner’s seeks an adjusted standard from Section 740.210(a)(3) and “defining review and evaluation” is more properly done as a rulemaking because there is no standard to adjust. Therefore, the Board finds granting the alternative relief sought by petitioner is not supported and the Board declines to do so.

### CONCLUSION

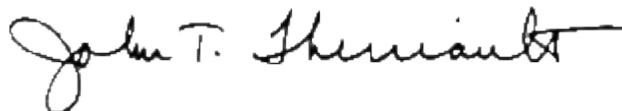
The Board finds that petitioner seeks an adjusted standard from a provision in the Board’s rules (35 Ill. Adm. Code 740.210(a)(3)) that adopts language quoting statutory requirements (*see* 415 ILCS 5.58.2 and 58.7 (2006)). The Board does not have authority to change statutory language. Therefore, the Board finds that granting an adjusted standard is not appropriate and the petition for adjusted standard is dismissed.

IT IS SO ORDERED.

Board Member Thomas E. Johnson dissented.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2006); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board’s procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on June 18, 2009, by a vote of 4-1, Member Johnson dissented.




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John T. Therriault, Assistant Clerk

Illinois Pollution Control Board