

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 )

DISSENTING OPINION (by T.E. Johnson):

I agree that the Board lacks the authority to award adjusted standard relief from a *statutory* requirement (415 ILCS 5/28.1(a) (2006)). I disagree, however, with the majority’s conclusion that the Board rule here codifies a statutory requirement.

The majority opinion finds that the requirement for landowner written permission is statutory. According to the majority, the requirement comes from a “plain reading” of two provisions of the Environmental Protection Act:

“Remediation Applicant” (RA) means 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) (emphasis added).

(b) Review and evaluation by the Agency.

(1) Except for sites excluded under subdivision (a)(2) of Section 58.1, the Agency shall, subject to available resources, agree to provide review and evaluation services for activities carried out pursuant to this Title for which the RA requested the services in writing. As a condition for providing such services, the Agency *may* require that the RA for a site:

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(F) Demonstrate, if necessary, authority to act on behalf of or in lieu of the owner or operator. 415 ILCS 5/58.7(b)(1) (2006) (emphasis added).

I do not believe that these statutory provisions require landowner written permission. The implicit finding of the majority is that, as used in the Section 58.2 definition, the term “including” means “namely.” The word “including,” however, is more commonly understood to mean that the persons or things thereafter identified constitute illustrative examples, not an exhaustive list. *See People v. Perry*, 224 Ill. 2d 312, 328-31, 864 N.E.2d 196, 207-09 (2007)

(given its plain and ordinary meaning, even in the absence of additional verbiage such as “but is not limited to,” the term “includes” introduces a partial list, not an exclusive one). The Section 58.7(b)(1) provision uses the permissive term “may,” which the majority apparently reads as the mandatory word “must.” See *In re Marriage of Freeman*, 106 Ill. 2d 290, 298, 478 N.E.2d 326, 329 (1985) (“Except in very unusual circumstances affecting the public interest, the legislative use of the word ‘may’ is permissive rather than mandatory.”). I submit that neither of the majority’s statutory interpretations gives a “plain reading” of the Environmental Protection Act.

I believe that because the Board rule from which relief is requested does not reflect a statutory requirement, the Board has the authority to consider the petition for adjusted standard. For these reasons, I respectfully dissent.<sup>1</sup>




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Thomas E. Johnson

I, John T. Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the above dissenting opinion was submitted on June 18, 2009.

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John T. Therriault, Assistant Clerk  
Illinois Pollution Control Board

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<sup>1</sup> It is my position that the definition of “Remediation Applicant” is properly limited to the specific examples given by the General Assembly, *plus* others of like kind. See *City of East St. Louis v. East St. Louis Financial Advisory Authority*, 188 Ill. 2d 474, 484-85, 722 N.E.2d 1129, 1134 (1999) (“The doctrine of *ejusdem generis* provides that when a statute lists several classes of persons or things but provides that the list is not exhaustive, the class of unarticulated persons or things will be interpreted as those ‘others such like’ the named persons or things.”). Further, even if the Board were to ultimately grant the instant adjusted standard request, and the Illinois Environmental Protection Agency were to then accept the resulting Site Remediation Program application, I do not believe that either of those events would convey to petitioner any access rights to, or property interest in, the site.