

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

ATKINSON LANDFILL COMPANY	)	
Petitioner	)	
	)	
v.	)	PCB 13-8
	)	(Permit Appeal)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	

**NOTICE OF FILING**

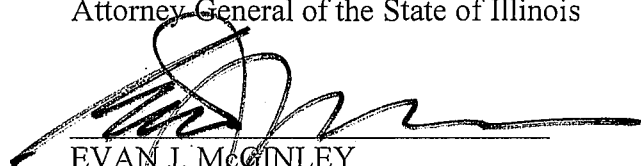
TO: ALL PERSONS NAMED ON THE ATTACHED CERTIFICATE OF SERVICE

Please take note that today April 3, 2013, I filed with the Clerk of the Illinois Pollution Control Board Respondent's Motion for Summary Judgment in the above referenced matter, a copy of which is attached hereto and which is hereby served upon you.

Respectfully Submitted,

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY

LISA MADIGAN, *ex rel.*  
Attorney General of the State of Illinois



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<b>Petitioner,</b>	)	
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<b>v.</b>	)	<b>PCB 13-8</b>
	)	<b>(Permit Appeal)</b>
<b>ILLINOIS ENVIRONMENTAL</b>	)	
<b>PROTECTION AGENCY,</b>	)	
	)	
<b>Respondent.</b>	)	

**RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

NOW COMES Respondent, the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA" or "Agency"), by LISA MADIGAN, Attorney General of the State of Illinois, and moves the Illinois Pollution Control Board ("Board") to grant summary judgment in its favor and against Petitioner, ATKINSON LANDFILL COMPANY("Atkinson"). The Agency states as follows:

**I. STATEMENT OF FACTS**

Atkinson currently operates a municipal solid waste landfill ("Landfill") in the Village of Atkinson, Henry County, Illinois ("Village"). In 1999, Atkinson sought to expand the Landfill and on August 26, 2006, received local siting authority from the Village. (AL 000139-41.)<sup>1</sup> Atkinson subsequently appealed some of the conditions of the Village's local siting authority approval to the Pollution Control Board, in PCB 2007-020; the appeal process terminated on September 4, 2008. (AL 002823.) Thereafter, on September 2, 2011, Atkinson submitted its "Application for Southeastern Landfill Expansion, Atkinson, Henry County, Illinois" ("Application"). (AL 000009-002817.)

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<sup>1</sup> References to the administrative record for this permit appeal are designated as "(AL XXXXXX)."

During the balance of September 2011, Illinois EPA staff undertook a completeness review of the Application. The Application was reviewed by the Bureau of Land Permit Section's Groundwater Assistance Unit, which determined that the Application contained a number of deficiencies. For example, the Application failed to address several key components of the required groundwater monitoring program. (AL 002847-48.) The Application's Groundwater Impact Assessment was also inadequate, because, due to the Atkinson's intention to seek a vertical and horizontal expansion of the landfill, a new Groundwater Impact Assessment was required, although Atkinson had failed to submit one as part of its Application. (AL 002850.) Illinois EPA ultimately concluded that Application was "not complete with respect to groundwater issues concerning the Groundwater Impact Assessment." (AL 002851.)

Illinois EPA staff found the Application also failed to include other critical information, as well. For example, Atkinson failed to demonstrate that it was in compliance with the "Prior Conduct Certification of the Chief Operator," which is required pursuant to Section 745.202 of the Pollution Control Board ("Board") Regulations, 35 Ill. Adm. Code 745.202. (AL 002925.)

The Application also omitted a significant amount of narrative information regarding the landfill's location (*See e.g.*, AL 002936-37), or information regarding the geomembranes that would be used in the Landfill's expansion. (AL 002943). Additionally, Atkinson failed to include critical information regarding the landfill expansion's leachate control system, such as the required drawings illustrating piping locations, leachate level monitoring locations, cleanouts, manholes, sumps, leachate storage structures, and other related information, as required by Section 812.307(a) and (c) of the Board Regulations, 35 Ill. Adm. Code 812.307(a) and (c). (AL 002946.)

Atkinson failed to demonstrate that its proposed gas monitoring program for the landfill expansion would detect any gas buildup and/or migration. (AL 002955.) The Application also did not demonstrate that either the necessary assurance standards would be met for the gas collection system

and of its all associated equipment (AL 002957), or that the gas collection system would not compromise the integrity of the liner, leachate collection, or cover systems, as required by Section 811.311 (d)(9) of the Board Regulations, 35 Ill. Adm. Code 811.311 (d)(9). (AL 002959.)

The Application also failed to contain critical information regarding the Landfill's required Closure Plan. For example, no estimate of expected closure year was included in the Application, as required by Section 812.1 14(f) of the Board Regulations, 35 Ill. Adm. Code 812.1 14(f). (AL 002972.) The Application also failed to include other required information that demonstrated that Atkinson would be able to properly and safely close the landfill, once it had reached capacity. (AL 002974-77.)

On September 30, 2011, Steve Nightingale, the manager of the Illinois EPA Bureau of Land Permit Section sent a letter to Atkinson's principal, itemizing out the myriad deficiencies that Illinois EPA technical staff had found with the Application. (AL 002902-05.) Atkinson was advised that it could either supply Illinois EPA with the required information or, alternatively, it could petition for a hearing before the Board. (AL 002904.)

On November 4, 2011, Atkinson submitted additional information to Illinois EPA, in order to supplement the Application (AL 002854.) Illinois EPA subsequently reviewed this supplementary material and determined that, even with the submission of additional information, the Application still did not contain all of the required information. (AL 002853-4, 002860-63, and 002906-08.)

On December 2, 2011, Steve Nightingale informed Atkinson by letter, that Illinois EPA had once again reviewed the Application for completeness and found that it still did not contain all of the required information for such permit applications. (AL 002906-08.)

On January 9, 2012, Atkinson submitted its second set of supplementary materials in support of its Application. (AL 002913.) By letter dated February 9, 2012, the Agency informed Atkinson that its Application was now complete and that, in accordance with 35 Ill. Adm. Code 813.103(a), the

Agency would now have until July 7, 2012, by which to complete its review of the Application. (AL 002913.)

On July 6, 2012, Illinois EPA issued a letter to Atkinson ("July 6<sup>th</sup> Letter") informing Atkinson that based upon the Agency's review, it was denying the Application, because the Application, even with the inclusion of the supplementary information, failed to demonstrate that issuance of a permit to Atkinson would not result in a violation of the Environmental Protection Act. (AL 002823.) Additionally, Illinois EPA noted that it appeared that Atkinson's local siting had expired on September 4, 2012. (AL 002823-24.) The July 6<sup>th</sup> Letter then went on to list 67 additional reasons the Application failed to demonstrate that a permit, if granted, would not result in a violation of the Act. (AL 002823-33.)

Thereafter, Atkinson filed its petition for review with the Board.

## II. QUESTIONS ON APPEAL

Whether the Agency's denial of Atkinson's Application was appropriate, in as much as:

1) Atkinson was unable to demonstrate that the permit, if granted by the Agency, would not result in a violation of the Environmental Protection Act ("Act") or the Pollution Control Board Regulations ("Board Regulations"); and, 2) Atkinson's local siting approval had expired.

## III. STANDARD OF REVIEW AND BURDEN OF PROOF

A motion for summary judgment should be granted where the pleadings, depositions, admissions on file, and affidavits disclose 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); *McDonald's Corporation v. Illinois Environmental Protection Agency*, PCB 04-14 (January 22, 2004), p. 2. Summary judgment is an efficient method of disposing of contested issues. *Carroll v. Curry*, 392 Ill. App. 3d 51 (2d Dist., 2009).

Summary judgment is particularly appropriate in this case, where the facts are agreed, and the sole issue before the Board is whether or not Atkinson's local siting approval lapsed prior to having submitted a complete development permit application. Based on the issues presented for decision by this Board, as well as the administrative record which has been filed in this appeal, the Agency is entitled to summary judgment and respectfully requests that the Board enter an order affirming the Agency's decision finding that Atkinson's local siting approval for the project expired, prior to Atkinson's submission of a complete permit application.

Section 105.112 of the Board's procedural rules provides that "[t]he burden of proof shall be on the petitioner . . ." 35 Ill. Adm. Code 105.112. Specifically, with respect to the instant appeal, Atkinson has the burden of proving that no violation of the Act or the Board Regulations would have occurred if Illinois EPA had issued the development permit for which it made application. *Browning-Ferris Industries of Illinois, Inc. v. Poll. Cont. Bd.*, 179 Ill.App.3d 598, 602-603 (2<sup>nd</sup> Dist. 1989). Additionally, Atkinson has the burden of proving that it submitted its application prior to the expiration of its local siting approval.

## V. ARGUMENT

### A. **Atkinson's Application Was Properly Denied Because It Could Not Demonstrate That There Would Not Be a Violation of the Act or the Board Regulations if the Development Permit Were Issued**

The Agency was required to deny Atkinson's Permit Application because it failed to provide proof that granting this permit would not result in violations of the Act or the Board Regulations. As the Agency noted in its July 6<sup>th</sup> Letter, the Application was denied because the Atkinson failed to "provide proof that granting this permit would not result in violations of the Act [or the Board's Regulations]." (AL 002823-33.) In total, the Agency found 68 deficiencies with Atkinson's Application, including that Atkinson's local siting approval had expired prior to January 9, 2012, the date on which all information required for consideration in conjunction with

the permit application was finally submitted. Thus, the Agency was required by Section 39(a) of the Act, 415 ILCS 5/39(a) (2012), to deny the requested permit, because Atkinson's application did not satisfy the applicable statutory criteria.

Notably, in its Petition, Atkinson does not challenge the Agency's July 6, 2012, determination that the Application failed to demonstrate that issuing it the Permit would not result in a violation of the Act and the Board Regulations. Accordingly, the Agency's denial of Atkinson's Application was appropriate and the People's Motion is properly granted by the Board.

**B. The Agency Properly Denied the Atkinson's Application for a Development Permit Because the Atkinson Could Not demonstrate That it Still Had Local Siting Approval for the Proposed Expansion of its Landfill.**

Petitioner filed the Application with the Board on September 2, 2011, two days prior to the three year deadline for submission. (Petitioner's Motion for Summary Judgment, ¶ 6.) Petitioner contends in its petition for review that the Agency's determination that local siting approval had lapsed was "unjustified, arbitrary, capricious, and unlawful." (Petition, p.4.) The Agency's position is that its determination that Petitioner's local siting approval had lapsed was in full accordance with the requirements of the law. The Agency's position finds support in the plain language of Section 39.2(f) of the Act, 415 ILCS 5/39.2(f) (2012), and Section 813.103(b) of the Board Regulations, 35 Ill. Adm. Code 812.103(b).

Section 39.2(f) of the Act, 415 ILCS 5/39.2(f) (2012), provides that:

A local siting approval granted under this Section shall expire at the end of 2 calendar years from the date upon which it was granted, unless the local siting approval granted under this Section is for a sanitary landfill operation, in which case the approval shall expire at the end of 3 calendar years from the date upon which it was granted, and unless within that period the applicant has made application to the Agency for a permit to develop the site. In the event that the local siting decision has been appealed, such expiration period shall be deemed to begin on the date upon which the appeal process is concluded.

Section 39.2(f) of the Act does not specify what actions constitute making “application to the Agency for a permit to develop the site.” However, the Board, which pursuant to Section 5(b) of the Act is authorized to adopt regulations which are necessary for the implementation of the Act, 415 ILCS 5/5(b) (2012), *See also Village of Lombard v. Pollution Control Bd.*, 66 Ill.2d 503, 507 (1977), has adopted regulations which regulate the permitting process for the construction and operation of non-hazardous waste landfills in Illinois. PCB R88-7 (Rulemaking), Aug. 17, 1990.

Section 813.101(a) of the Board’s Regulations, which was adopted as part of the same Rulemaking, provides, in relevant part, that the regulations in:

[t]his Subpart A contains the procedures to be followed by all applications and the Agency for applications for permits required pursuant to Section 21(d) of the Act [415 ILCS 5/21(d)] and 35 Ill. Adm. Code 811, 812, 814 and 817. The procedures in this Part apply to applications for a permit to develop and operate a landfill . . .

One of the many new regulations that were adopted during the Rulemaking is now codified as Section 813.103(b) of the Board Regulations, 35 Ill. Adm. Code 813.103(b). Section 813.103(b) of the Board’s Rules provides:

An application for permit pursuant to this Subpart shall not be deemed to be filed until the Agency has received all information and documentation in the form and with the content required by this Part and 35 Ill. Adm. Code 811, 812, and 814. (Emphasis added.)

Courts, when called upon to interpret a regulation, are instructed to use the same rules of construction as are used for the interpretation of statutes. *Kean v. Wal-Mart Stores, Inc.*, 235 Ill.2d 351, 368 (2009). Thus, a court should attempt to give effect to the drafter’s intent when called upon to construe or interpret a given regulation. *Arellano v. Dept. of Human Services*, 402 Ill.App.3d 665, 673 (2d Dist. 2010). As Illinois courts have noted, the best indication of the drafter’s intent with respect to a given regulation is the plain meaning of the regulation’s



language. *Id.* By this standard, the Board's intention in drafting and adopting Rule 813.103(b) very clearly provides that a permit application will not be deemed to have been filed with the Agency until after a complete application has been filed with the Agency. *Id.*

Based upon Section 813.103(b)'s plain meaning, the Application could not be deemed complete until January 9, 2012, when Atkinson submitted its second, and final, set of supplemental information to the Agency. And, because of this, Atkinson's Application was then filed well past the end of the three year time period during which the local siting authority for Petitioner's project expired, as provided for by Section 39.2(f) of the Act, 415 ILCS 5/39.2(f) (2012). As such, the Agency properly determined that it could not issue a development permit to Atkinson and summary judgment in the Agency's favor is warranted.

A plain meaning construction of Section 813.103(b) of the Board's Regulations that a permit application is not deemed to be filed until it is complete is also consistent with the Board's intent in adopting this regulation. The Board's R88-7 rulemaking was the culmination of several years of work by the Board and its staff. *In the Matter of: Development, Operating and Reporting Requirements for Non-Hazardous Waste Landfills* ("Non-Hazardous Landfill Rulemaking"), PCB R88-7, slip op. at 1-2 (Aug. 17, 1990). The Board's Non-Hazardous Landfill Rulemaking was based, at least in part, on the Board's prior efforts to adopt regulations governing the operation of non-hazardous waste landfills within the State of Illinois, such as R84-17, Dockets A through D. *Id.*, at 3.

As part of the Board's prior R84-17 Docket D rulemaking, the Board's scientific and technical staff made a series of recommendations to the Board regarding how the proposed regulations would be implemented. The Board's scientific and technical staff noted that the standards then under consideration would "substantial[] increase the amount and scope of

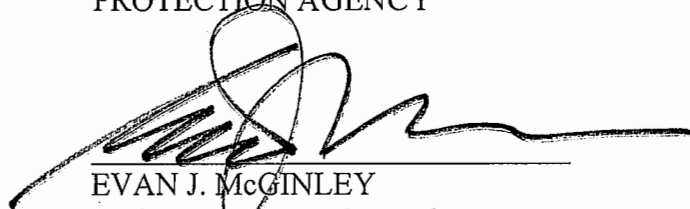
information to be submitted by the applicant.” (Report, p. 97.) Regarding then proposed – now adopted – Rule 803.103, the Board’s staff noted that “the Agency should focus its finite resources to the review of permit applications which contain all of the required information.” (*Id.*) It is clear that the Board was concerned that the adoption of the Non-Hazardous Landfill Regulations would impose significant new burdens on the Agency. With these likely burdens in mind, the Board adopted a regulation – Section 803.103(b) – that places the onus of submitting a complete permit application on the permit applicant. Because the Application that Atkinson filed was not deemed administratively complete until January 9, 2012, the Agency’s permit denial was appropriate, based, at least in part, on the lapsing of Petitioner’s local siting approval.

## VII. CONCLUSION

The record before this Board on the Agency’s summary judgment motion indicates that there are no disputes as to the material issues of this case, namely, that: 1) Atkinson did not submit a complete application for a development permit until January 9, 2012; 2) Even once complete, Atkinson’s permit application did not demonstrate that there would not be any violation of the Act or the Board Regulations if the permit were granted; and, 3) Atkinson’s local siting approval for the project lapsed, as Atkinson failed to submit a complete permit application prior to the September 4, 2011 expiration of that authority. Accordingly, the Agency was required to deny a permit to the Atkinson and the Agency is entitled to summary judgment as a matter of law as to Atkinson Landfill Company’s Petition. Illinois EPA asks the Board to enter an order granting its Motion for Summary Judgment, thus upholding the Agency’s decision on the underlying permitting decision.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY

A handwritten signature in black ink, appearing to read 'Evan J. McGinley', is written over a horizontal line. The signature is stylized and extends to the right of the line.

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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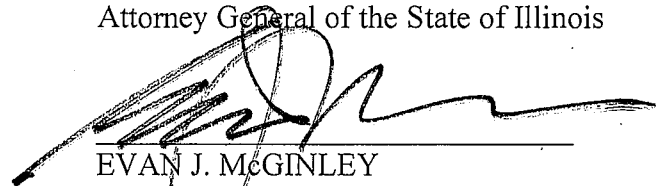
TO: ALL PERSONS NAMED ON THE ATTACHED CERTIFICATE OF SERVICE

Please take note that today April 3, 2013, I filed with the Clerk of the Illinois Pollution Control Board Respondent's Response to Petitioner's Motion for Summary Judgment in the above referenced matter, a copy of which is attached hereto and which is hereby served upon you.

Respectfully Submitted,

ILLINOIS ENVIRONMENTAL  
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LISA MADIGAN, *ex rel.*  
Attorney General of the State of Illinois



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**RESPONDENT'S RESPONSE TO PETITIONER'S  
MOTION FOR SUMMARY JUDGMENT**

NOW COMES Respondent, the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY ("Illinois EPA" or "Agency"), by LISA MADIGAN, Attorney General of the State of Illinois, who herewith files its response to Petitioner's, ATKINSON LANDFILL COMPANY ("Atkinson"), Motion for Summary Judgment ("Motion"). In support thereof, the Agency states as follows:

**I. STATEMENT OF FACTS**

Atkinson currently operates a municipal solid waste landfill ("Landfill") in the Village of Atkinson, Henry County, Illinois ("Village"). In 1999, Atkinson sought to expand the Landfill and on August 26, 2006, received local siting authority from the Village. (AL 000139-41.)<sup>1</sup> Atkinson subsequently appealed some of the conditions of the Village's local siting authority approval to the Pollution Control Board, in PCB 2007-020; the appeal process terminated on September 4, 2008. (AL 002823.) On September 2, 2011, Atkinson submitted its "Application for Southeastern Landfill Expansion, Atkinson, Henry County, Illinois" ("Application"). (AL 000009-002817; *See also*, Motion, p. 3, at ¶¶ 5-6.)

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During the balance of September 2011, Illinois EPA staff undertook a completeness review of the Application. The Application was reviewed by the Bureau of Land Permit Section's Groundwater Assistance Unit, which determined that the Application contained a number of deficiencies. For example, the Application failed to address several key components of the required groundwater monitoring program. (AL 002847-48.) The Application's Groundwater Impact Assessment was also inadequate, because, due to the Atkinson's intention to seek a vertical and horizontal expansion of the landfill, a new Groundwater Impact Assessment was required, although Atkinson had failed to submit one as part of its Application. (AL 002850.) Illinois EPA ultimately concluded that the Atkinson's Application was "not complete with respect to groundwater issues concerning the Groundwater Impact Assessment." (AL 002851.)

Illinois EPA staff also found the Application failed to include other critical information. For example, Atkinson failed to demonstrate that it was in compliance with the "Prior Conduct Certification of the Chief Operator," which is required pursuant to Section 745.202 of the Pollution Control Board ("Board") Regulations, 35 Ill. Adm. Code 745.202. (AL 002925.)

The Application also omitted a significant amount of narrative information regarding the landfill's location (*See e.g.*, AL 002936-37), or information regarding the geomembranes that would be used in the Landfill's expansion. (AL 002943). Additionally, the Application failed to include critical information regarding the landfill expansion's leachate control system, such as the required drawings illustrating piping locations, leachate level monitoring locations, cleanouts, manholes, sumps, leachate storage structures, and other related information, as required by Section 812.307(a) and (c) of the Board Regulations, 35 Ill. Adm. Code 812.307(a) and (c). (AL 002946.)

Additionally, the Application failed to demonstrate that Atkinson's proposed gas monitoring program for the landfill expansion would detect any gas buildup and/or migration. (AL 002955.) Nor did the Application also did not demonstrate that either the necessary assurance standards would be

met for the gas collection system and of its all associated equipment (AL 002957), or that the gas collection system would not compromise the integrity of the liner, leachate collection, or cover systems, as required by Section 811.311 (d)(9) of the Board Regulations, 35 Ill. Adm. Code 811.311 (d)(9). (AL 022959.)

The Application also failed to contain critical information regarding the Landfill's required Closure Plan. For example, no estimate of expected closure year was included in the Application, as required by Section 812.1 14(f) of the Board Regulations, 35 Ill. Adm. Code 812.1 14(f). (AL 002972.) The Application also failed to include other required information that demonstrated that Atkinson would be able to properly and safely close the Landfill, once it had reached capacity. (AL 002974-77.)

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On January 9, 2012, Atkinson submitted its second set of supplementary materials in support of its Application. (AL 002913.) By letter dated February 9, 2012, the Agency informed Atkinson that its Application was now complete and that, in accordance with 35 Ill. Adm. Code 813.103(a), the

Agency would now have until July 7, 2012, by which to complete its review of the Application. (AL 002913.)

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Thereafter, Atkinson filed its petition for review with the Board.

## **II. QUESTION ON APPEAL**

The question presented by Atkinson's permit appeal is whether the Agency's determination that local siting approval had expired, due to Atkinson's failure to submit a complete permit application within three years following the conclusion of the local siting approval appeal process, was "unjustified, arbitrary, capricious, and unlawful." (Petition for Review, ¶¶ 7-8.)

## **III. STANDARD OF REVIEW AND BURDEN OF PROOF**

A motion for summary judgment should be granted where the pleadings, depositions, admissions on file, and affidavits disclose 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); *McDonald's Corporation v. Illinois Environmental*



*Protection Agency*, PCB 04-14, Jan. 22, 2004, Slip Op. at 2. Summary judgment is an efficient method of disposing of contested issues. *Carroll v. Curry*, 392 Ill. App. 3d 51 (2d Dist., 2009).

Summary judgment is particularly appropriate in this case, where the facts are agreed, and the sole issue before the Board is whether or not Atkinson's local siting approval lapsed prior to having submitted a complete development permit application to the Agency.

Section 105.112 of the Board's procedural rules provides that "[t]he burden of proof shall be on the petitioner . . ." 35 Ill. Adm. Code 105.112. Specifically, with respect to the instant appeal, Atkinson has the burden of proving that no violation of the Act or the Board Regulations would have occurred if Illinois EPA had issued the development permit for which it made application. *Browning-Ferris Industries of Illinois, Inc. v. Poll. Cont. Bd.*, 179 Ill.App.3d 598, 602-603 (2<sup>nd</sup> Dist. 1989). Additionally, Atkinson has the burden of proving that it submitted its Application prior to the expiration of its local siting approval.

Based on the question presented for decision by the Board, as well as the administrative record which has been filed in this appeal, the Agency is entitled to summary judgment and respectfully requests that the Board enter an order affirming the Agency's decision finding that Atkinson's local siting approval for the project expired, prior to Atkinson's submission of a complete permit application.

#### IV. ARGUMENT

##### A. **The Agency's Position That an "Applicant Has Made Application" for Purposes of Section 39.2(f) of the Act Only After the Applicant Has Finally Submitted a Complete Permit Application is Sound**

###### 1. **The Agency's Interpretation of Section 39.2(f) Is Not "Extratextual"**

In its Motion, Atkinson asserts that the Agency's interpretation of Section 39.2(f) of the Act, 415 ILCS 5/39.2(f) (2012), is "extratextual," and not in accordance with the plain meaning of that statutory provision. (Mot. at 5.) Section 39.2(f) provides that:

A local siting approval granted under this Section shall expire at the end of 2 calendar years from the date upon which it was granted, unless the local siting approval granted under this Section is for a sanitary landfill operation, in which case the approval shall expire at the end of 3 calendar years from the date upon which it was granted, and unless within that period the applicant has made application to the Agency for a permit to develop the site. In the event that the local siting decision has been appealed, such expiration period shall be deemed to begin on the date upon which the appeal process is concluded.

Section 39.2(f) of the Act does not specify what actions constitute making “application to the Agency for a permit to develop the site.” However, the Board, which pursuant to Section 5(b) of the Act, 415 ILCS 5/5(b) (2012), is authorized to adopt regulations which are necessary for the implementation of the Act, 415 ILCS 5/5(b) (2012), *See also, Village of Lombard v. Pollution Control Bd.*, 66 Ill.2d 503, 507 (1977), has enacted regulations which regulate the permitting process for the construction and operation of non-hazardous waste landfills in Illinois. PCB R88-7 (Rulemaking), Aug. 17, 1990.

Section 813.101(a) of the Board’s Regulations, 35 Ill. Adm. Code 813.101(a), which was adopted as part of the Rulemaking, provides, in relevant part:

[t]his Subpart A contains the procedures to be followed by all applications and the Agency for applications for permits required pursuant to Section 21(d) of the Act [415 ILCS 5/21(d)] and 35 Ill. Adm. Code 811, 812, 814 and 817. The procedures in this Part apply to applications for a permit to develop and operate a landfill . . .

One of the many new regulations that were adopted during the Rulemaking is now codified as Section 813.103(b) of the Board Regulations, 35 Ill. Adm. Code 813.103(b). Section 813.103(b) of the Board’s Rules provides:

An application for permit pursuant to this Subpart shall not be deemed to be filed until the Agency has received all information and documentation in the form and with the content required by this Part and 35 Ill. Adm. Code 811, 812, and 814. (Emphasis added.)

Courts, when called upon to interpret a regulation, are instructed to use the same rules of construction as are used for the interpretation of statutes. *Kean v. Wal-Mart Stores, Inc.*, 235

Ill.2d 351, 368 (2009). Thus, a court should attempt to give effect to the drafter's intent when called upon to construe or interpret a given regulation. *Arellano v. Dept. of Human Services*, 402 Ill.App.3d 665, 673 (2d Dist. 2010). As Illinois courts have noted, the best indication of the drafter's intent with respect to a given regulation is the plain meaning of the regulation's language. *Id.* By this standard, the Board's intention in drafting and adopting Rule 813.103(b) very clearly provides that a permit application will not be deemed to have been filed with the Agency until after a complete application has been submitted. *Id.*

Based upon Section 813.103(b)'s plain meaning, Atkinson's Application could not be deemed complete until January 9, 2012, when Atkinson submitted its second, and final, set of supplemental information to the Agency. Thus, Atkinson's Application was, pursuant to Section 813.103(b), filed well after its local siting approval had expired. As such, the Agency properly determined that it could not issue a development permit to Atkinson and the Board should deny Atkinson's Motion.

**2. Atkinson's Interpretation of Section 39.2(f) Would Potentially Lead to Absurd Results**

As part of the Board's R88-7 rulemaking ("*In the Matter of: Development, Operating and Reporting Requirements for Non-Hazardous Waste Landfills*" ["Non-Hazardous Landfill Rulemaking"]), the Board's scientific and technical staff made a series of recommendations to the Board regarding how the proposed regulations would be implemented. Of particular note, for purposes of responding to Atkinson's Motion, was the Board staff's observation that "the Agency should focus its finite resources to the review of permit applications which contain all of the required information." (Recommendations for a Nonhazardous Waste Disposal Program in Illinois and A Background Report to Accompany Proposed Regulations for Solid Waste Disposal Facilities, Part A: Landfills, R84-17, Docket D, p. 97.) It is clear that the Board was concerned

that the adoption of the Non-Hazardous Landfill Regulations would impose significant new burdens on the Agency. With these likely burdens in mind, the Board adopted a regulation – Section 803.103(b) – that places the onus of submitting a complete permit application on the permit applicant. Because the Application that Atkinson filed was not deemed to have been administratively complete until January 9, 2012, the Agency's permit denial was appropriate, based, at least in part, on the lapsing of Atkinson's local siting approval.

The interpretation of Section 39.2(f) advanced by Atkinson would potentially mean that a party seeking a permit could submit an application that failed to include a substantial amount of the necessary information required for Agency review without consequence to the applicant. Thus, the Agency would be faced with exactly the same situation that arose in this case, namely, that it took several months of the Agency's time and resources to finally elicit a complete and reviewable permit application from the applicant. This is precisely the same situation that the Board's technical staff was concerned about in the Non-Hazardous Landfill Rulemaking, namely, the imposition on scarce Agency resources by permit applicants who do not file complete permit applications for review.

**3. The Agency did Not Act In An “Unjustified, Arbitrary, Capricious, and Unlawful Fashion” When It Denied Atkinson's Permit Application**

An Agency's actions will be deemed to be arbitrary and capricious when it fails to follow the regulations which govern how that Agency is to conduct its work. *Marion Hosp. Corp. v. Ill. Health Facilities Bd.*, 324 Ill. App.3d 451, 455 (1<sup>st</sup> Dist. 2001). Here, the Agency, in denying Atkinson's permit application because its local siting approval had expired, was abiding by the plain language of the Act and Section 813.103(b) of the Board's Regulations. As such, there was

nothing arbitrary and capricious about the Agency's actions and its permit denial is properly affirmed by the Board.

**B. The Board's Decision in *Saline County Landfill, Inc.* Supports the Agency's Position**

In its Motion, Atkinson argues that "circumstances of this case are similar to those of *Saline County Landfill* decision. (Mot. at 6.) This assertion is fundamentally at odds with the facts of that case. In *Saline County Landfill, Inc. v. Illinois Environmental Protection Agency*, PCB 04-117, May 6, 2004, petitioner, Saline County Landfill, Inc. ("SCLI"), filed a permit appeal with the Board after the Agency denied its permit application for the sole reason that SCLI's local siting authority had expired. *Id.* at 4. By comparison, the Agency cited 68 separate reasons for its denial of Atkinson's permit application in the present permit appeal. (ALC 002823-33.)

But the most significant difference between the *Saline County Landfill* permit appeal and the present permit appeal is that SCLI filed a complete permit application with the Agency before its local siting approval had lapsed. PCB 04-117, at 10, 16. By comparison, Atkinson's September 2, 2011 initial filing with the Agency – filed two days before its local siting approval was set to expire – was not a complete permit application. (AL 002902—05.) Thus, the Board's *Saline County Landfill* opinion should be seen as support for, not rejection of, the Agency's denial of Atkinson's permit appeal on the grounds that local siting authority had expired.

**V. CONCLUSION**

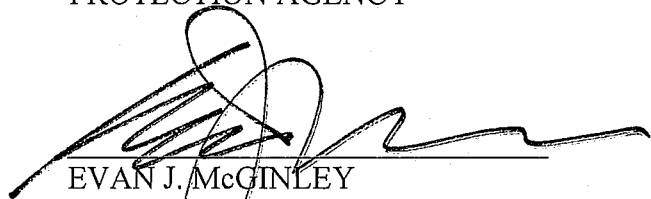
Based on the record before this Board on the Atkinson's Motion, and the legal issue framed by Atkinson's Motion, it is not entitled to summary judgment. There is no question that Atkinson's initial filing with the Agency on September 2, 2011 was incomplete. There is also no question that Atkinson's local siting approval expired on September 4, 2011. And, finally, there

is no question Atkinson needed to make two supplemental filings in support of its Application before the Agency deemed it to be complete on January 9, 2012.

Given the Agency's adherence to the requirements of both Section 39.2(f) of the Act, as well as Section 813.103(b) of the Board Regulations, the Agency's denial of Atkinson's Application was not in any way arbitrary or capricious. Atkinson's Motion is, therefore, properly denied by this Board.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL  
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**CERTIFICATE OF SERVICE**

I, EVAN J. MCGINLEY, do hereby certify that, on April 3, 2013, I caused to be served on the individuals listed below, by first class mail, or, where indicated, by email, a true and correct copies of Respondent's Motion for Summary Judgment and Respondent's Response to Petitioner's Motion for Summary Judgment on:

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