ILLINOIS POLLUTION CONTROL BOARD
June 20, 2013

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

OPINION AND ORDER OF THE BOARD (by C.K. Zalewski):

On August 2, 2012, Atkinson Landfill Company (Atkinson) filed a petition (Pet.) for review of a portion of a July 6, 2012 Illinois Environmental Protection Agency (Agency) permit denial. Atkinson seeks review of the determination that Atkinson's September 2, 2011 application for a permit for a landfill expansion was incomplete due to lack of a valid local siting approval under Section 39.2 of the Environmental Protection Act (Act). 415 ILCS 5/39.2(f) (2010). Atkinson had obtained local siting approval for horizontal and vertical expansion of the Henry County Landfill #2 (site or landfill) from the Village of Atkinson, but the Agency determined that the approval expired on September 4, 2011, prior to the application being filed. On October 10, 2012, the Agency filed the Administrative Record (R.) of its determination.

Under the Environmental Protection Act (Act) (415 ILCS 5 (2010)), the Agency is the permitting authority, responsible for administering Illinois' regulatory programs to protect the environment. If the Agency denies a permit or grants one with conditions, the permit applicant may appeal the Agency's decision to the Board. *See* 415 ILCS 5/4, 5, 40(a)(1) (2010); 35 Ill. Adm. Code 105.Subpart D. Atkinson appeals on the grounds that the previous local siting approval decision was still valid and specifically challenges the Agency determination that the permit application was incomplete because of lack of local siting approval.

On March 4, 2013, Atkinson filed a motion for summary judgment. On April 3, 2013, the Agency filed its own motion for summary judgment along with its response to Atkinson's motion for summary judgment. Finally, on April 18, 2013, Atkinson filed its response to the Agency's motion for summary judgment.

For the reasons set out below, the Board finds that there is no genuine issue of material fact, and that Atkinson is entitled to summary judgment as a matter of law. Accordingly, the Board grants Atkinson's motion for summary judgment and denies the Agency's motion. The Board finds that Atkinson "made application" on September 2, 2011, pursuant to Section 39.2(f) of the Act. 415 ILCS 5/39.2(f) (2010).

ATKINSON'S APPLICATION AND AGENGY'S DENIAL

On March 6, 2006, Atkinson submitted an application to the Village of Atkinson seeking siting authorization for horizontal and vertical expansion of the landfill. Am. Pet. at 2. The Village of Atkinson granted siting approval with conditions on August 28, 2006. *Id*. Atkinson appealed the siting approval to the Board on September 28, 2006. *Id*. On September 4, 2008, the Board issued an order granting Atkinson's motion to voluntarily dismiss the siting appeal. Atkinson Landfill Company v. The Village of Atkinson and The Village Board of the Village of Atkinson, PCB 2007-020 (Sept. 4, 2008).

On September 2, 2011, Atkinson submitted an application for a development permit to expand the landfill consistent with the August 28, 2006 siting approval. Am. Pet. at 2. The September 2, 2011 application packet included the 82-page application, four figures, 20 drawings, and appendices A – G. According to the Agency's July 6, 2012 letter denying the development permit (denial letter), the following communications were exchanged between Atkinson and the Agency following submission of the development application:

> The Illinois EPA issued a letter on September 30, 2011 deeming the application to be administratively incomplete. An addendum to the application, dated November 3, 2011, was received by the Illinois EPA on November 4, 2011. The Illinois EPA determined the application, as amended by the first addendum, to be administratively incomplete in a letter dated December 2, 2011 and revised on December 8, 2011. A second addendum, dated January 5, 2012 was received by the Illinois EPA on January 9, 2012. The Illinois EPA issued a letter on February 8, 2012 stating that the application, as amended by its two addenda, was administratively complete. Thus, the application was filed on January 9, 2012, the date that the addendum making it administratively complete was received by the Illinois EPA. Denial Letter at 1.

In the Denial Letter, the Agency states that Atkinson "failed to provide proof that granting [the] permit would not result in violations of the [Act]." *Id*. The Agency also included 68 other specific reasons for denial of the permit. *Id*. 1-10. The first specific reason provides,

> [t]he application provides proof that local siting approval for the proposed expansion was granted on August 28, 2006. However, this local siting approval seems to have expired no later than September 4, 2011 (*i.e.*, three years after September 4, 2008, the date that the docket was closed on . . . PCB 2007-020 in which the applicant appealed some of the conditions placed on local siting approval). The permit application . . . was filed on January 9, 2012. Therefore, the Illinois EPA appears to be barred by Section 39(c) of [the Act] from approving this application for a development permit due to the lack of proof that the applicant has obtained local siting approval for this project, which has not expired pursuant to Section 39.2(f) of the Act. Denial Letter at 1-2.

ATKINSON'S PETITION

Atkinson's amended petition contests the Agency's denial of Atkinson's landfill development permit application submitted on September 2, 2011. Am. Pet. at 1. In the amended petition, Atkinson narrows the appeal by stating "[t]his petition does not encompass a review of the entire Permit Denial, but rather only a review of IEPA's determination that it is barred from issuing a development permit unless proof of new local siting approval is provided to IEPA." *Id*.

In its petition, Atkinson argues that, "[t]he only manner provided by statute by which local siting could expire, would be for Petitioner to fail to apply to IEPA for a permit to develop the landfill within three years of the date the Village of Atkinson granted local siting or the conclusion of an appeal." Am. Pet. at 3. Atkinson goes on to state that September 2, 2011 was within the three years allowed for application after the conclusion of a siting appeal and, therefore, "[p]etitioner timely made application to the IEPA for a permit to expand the landfill." *Id*. Atkinson also argues that, "IEPA admitted in the Permit Denial that local siting was set to expire on September 4, 2011 and that Petitioner made application to IEPA on September 2, 2011. The local siting, therefore, has not expired." *Id*. At the close of its amended petition, Atkinson requests that the Board find the September 2, 2011 application for development permit, "tolls the expiration of the Village of Atkinson's siting approval in accordance with 415 ILCS 39.2(f)." Am. Pet. at 4, *citing* 415 ILCS 39.2(f) (2010).

ATKINSON'S MOTION FOR SUMMARY JUDGMENT

In the amended petition for review, Atkinson challenges the Agency's determination that the Agency is barred from issuing a development permit unless proof of new local siting approval is provided by Atkinson. On March 4, 2013, Atkinson filed a motion for summary judgment (Motion) stating that, "there are no genuine issues of material fact in this case and Atkinson is entitled to judgment as a matter of law." Motion at 2. In its motion, Atkinson states that, "[t]he only issue before the Board in this matter is whether local siting approval granted by the Village of Atkinson continues to be valid under Section 39.2(f) of the [Act]." *Id*. at 4, *citing* 415 ILCS 5/39.2(f) (2010).

In support of its motion, Atkinson reiterates the three year period that a siting approval remains current, pursuant to Section 39.2(f), stating that Atkinson "made application to the Agency for a permit to develop the site" within that three year period. Motion at 4, *citing* 415 ILCS 5/39.2(f) (2010). Atkinson cites the plain meaning rule of statutory construction, arguing that the Board must "give effect to the true intent of the legislature," and focus on the plain and ordinary meaning of the language of Section 39.2(f). *Id*., *citing* Paris v. Feder, 688 N.E.2d 137, 139 (Ill. 1997).

Atkinson argues that by making the determination that Atkinson had not "made application" to the Agency before the local siting approval had expired, the Agency ignores the plain meaning of Section 39.2(f) of the Act and reaches an absurd result. Motion at 5. "IEPA would have the Board modify the Act to permit the local siting expiration period to toll *only* in cases where, within that three-year period, an administratively complete application for a permit to develop the site was filed with the Agency," argues Atkinson. *Id*., *referencing* 35 Ill. Adm.

Code 813.103(b). Atkinson opines that, "[t]he filing of an administratively complete application with the Agency is a procedural requirement wholly unrelated to when an applicant makes application to the Agency. An applicant makes application to the Agency once it submits the application to the Agency." Motion at 5, *see* Denial Letter.

Atkinson continues by stating "equating the date on which Atkinson's permit application was filed under Section 813.103(b) with the date on which Atkinson made application for its permit for purposes of Section 39.2(f) is not logical and creates an absurd and unjust result." Motion at 6. This is because, as put by Atkinson, "under IEPA's interpretation, applicants would, at a minimum, need to submit permit applications at least 30 days prior to the expiration of local siting," pursuant to 813.103(b) as applied to local siting approval. *Id*.

In support of its argument, Atkinson cites to Saline County Landfill v. IEPA and County of Saline, PCB 04-117 (May 6, 2004) (SCLI), "a case in which the Board found that local siting had not expired." Motion at 6, *citing* SCLI, slip op. at 4. In SCLI, the three year period on the local siting approval was set to expire on November 21, 1999. *Id*. Application materials were submitted to the Agency beginning in October 1999 and ending in December 2001. *Id*. at 7. Then, in January 2002, "IEPA denied SCLI's permit application for failure to conform to the design for which SCLI had obtained local siting approval. *Id*. SCLI appealed the permit denial unsuccessfully, and "submitted a new permit application to IEPA on April 4, 2003, three-and-a-half years after the local siting was set to expire (on November 21, 1999)." *Id*.

Atkinson states the issue in SCLI as, "whether the November 1996 local siting approval was expired at the time SCLI submitted its April 4, 2003 permit application." Motion at 7. The Board, in SCLI, found that, "the local siting approval had not expired because SCLI had made its initial permit application to IEPA within the three years of obtaining local siting approval." *Id*. Given the SCLI result, Atkinson argues that "IEPA's unreasonable interpretation of Section 39.2(f) [in Atkinson's case] to include requirements beyond those specified by statute lacks 'justification grounded in the words and policies of the Act.'" *Id*., *quoting* Saline County Landfill, Inc. v. IEPA, PCB 02-108, slip op. at 21 (April 18, 2002).

Atkinson requests that the Board "enter an order (1) finding that IEPA's determination that local siting had expired was incorrect and (2) remanding the permit to IEPA." Motion at 4.

AGENCY'S MOTION FOR SUMMARY JUDGMENT AND RESPONSE

In its motion for summary judgment, filed April 3, 2013 (Agency Motion), the Agency points out that Atkinson's application for a development permit "contained a number of deficiencies." Agency Motion at 2. The Agency specifically listed the following items as insufficient in the application: several key components of the required groundwater monitoring program; the groundwater impact assessment; demonstration that it was in compliance with the "Prior Conduct Certification of the Chief Operator"; narrative information regarding the landfill's location; its proposed gas monitoring program; and the landfill's required closure plan. *Id*. at 2-3.

The Agency argues that, "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." *Id*. at 3, *see* R. at 2902. The Agency notes that a second letter, dated December 2, 2011, also pointed out that "even with the submission of additional information [on November 4, 2011], the application still did not contain all of the required information." *Id*. at 3, *see* R. at 2906.

On January 9, 2012, Atkinson submitted more information to the Agency in response to the aforementioned letters. *Id*. In its motion, the Agency provides that, "[b]y 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." *Id*. at 3-4. The Agency reiterated that Atkinson's application, "failed to demonstrate that issuance of a permit . . . would not result in a violation of the [Act]," and that "Illinois EPA noted that it appeared that Atkinson's local siting had expired on September 4, 2012." *Id*. at 4.

The Agency 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." Agency Motion at 5.

The Agency argues that the local siting approval expired. The Agency, like Atkinson, relies on the plain meaning of Section 39.2(f) of the Act, stating that, "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." *Id*. at 7, *citing* 415 ILCS 5/39.2(f) (2010).

The Agency then turns to Sections 813.101(a) and 813.103(b) of the Board regulations. The Agency states that, pursuant to Section 813.103(b), "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*. at 8. Therefore, the Agency argues, 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. 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. *Id*.

The Agency also examined the docket in the rulemaking that adopted Section 813.103(b). *Id*. at 8-9, *citing* In the Matter of: Development, Operating and Reporting Requirements for Non-Hazardous Waste Landfills, PCB R88-7, slip op. at 1-2 (Aug. 17, 1990). The Agency quotes the Board technical unit as commenting that, "the Agency should focus its finite resources to the review of permit applications which contain all of the required information," because the non-hazardous landfill regulations were anticipated to impose a burden on the Agency. *Id.* Therefore, argues the Agency, "the Board adopted a regulation . . . that places the onus of submitting a complete permit application on the permit applicant." *Id*.

The Agency response to Atkinson's motion (Agency Response) was filed together with the Agency's motion on April 3, 2013. In its response, the Agency generally reiterates the

arguments made in its motion. Again, the Agency emphasizes Atkinson's failure to include key components of the development application in Atkinson's September 2, 2011 submission. Agency Response at 2. The Agency argues that, "[s]ummary 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." *Id*. at 5.

The Agency repeats its argument regarding statutory interpretation of Section 39.2(f) of the Act and Sections 813.101(a) and 813.103(b) in the response to Atkinson's motion. *Id*. at 6. Then, however, the Agency argues that "Atkinson's interpretation of Section 39.2(f) would potentially lead to absurd results." *Id*. at 7. The Agency states,

> 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. *Id*. at 8.

Next, in its response, the Agency argues that, "the Agency did not act in an 'unjustified, arbitrary, capricious, and unlawful fashion' when it denied Atkinson's permit application." The Agency provides that, "in denying Atkinson's permit application because its local siting approval had expired, [the Agency] was abiding by the plain language of the Act and Section 813.103(b) of the Board regulations. As such, there was nothing arbitrary and capricious about the Agency's actions and its permit denial is properly affirmed by the Board." *Id*. at 8-9.

Finally, the Agency suggests that the Board's decision in the SCLI case supports the Agency's position. The Agency distinguishes the facts of this appeal from SCLI by pointing out that the only reason for the Agency's denial in SCLI was the expiration of the local siting approval whereas in the instant case, the Agency found numerous deficiencies in Atkinson's permit application on top of the expired siting approval. *Id*. at 9. Further, "the most significant difference between the [SCLI] 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." *Id*., *citing* SCLI, PCB 04-117, at 10, 16.

ATKINSON'S RESPONSE

Atkinson begins its response (Atkinson Response) to the Agency's motion by arguing that, "IEPA's interpretation of Section 39.2(f) of the [Act] to permit the local siting expiration period to toll only in cases where an administratively complete application for a permit to develop the site was filed with the Agency within three years not only runs contrary to the plain language of the statute, but also contradicts the Agency's prior interpretations of this statutory provision." Atkinson Response at 1-2. Atkinson, therefore, finds the Agency's determination that Atkinson's local siting approval had expired was arbitrary and capricious and must be reversed by the Board. *Id*.

Atkinson points to the lack of Board regulations interpreting the phrase "made application" in Section 39.2(f) and argues that, absent such regulations, "[t]he plain meaning of Section 39.2(f) is clear, and IEPA's interpretation of this provision to include an additional requirement to file an administratively complete application within the three year period runs contrary to the law." *Id*. at 3. Atkinson explains that "Section 813.103(b) is not applicable to Section 39.2(f) of the Act," and distinguishes between the language of Section 813.103(b) of the Board regulations and Section 39.2(f) of the Act. First, Atkinson says that Section 813.103(b) refers to and cites Section 39 of the Act rather than Section 39.2 of the Act. *Id*. Second, Atkinson argues that, "[b]ecause Section 813.103(b) allows IEPA 30 days after the submission of a permit application to issue a completeness determination, under IEPA's interpretation, applicants would, at a minimum, need to submit permit applications at least 30 days prior to the expiration of local siting." *Id*.

Finally, Atkinson argues that the Agency's interpretation of Section 39.2(f) of the Act in the instant case differs from its interpretation of the same statutory provision in the SCLI case. *Id*. at 3-4. To this end, Atkinson says, "it is clear from the facts of [SCLI], while SCLI had mailed its initial permit application to IEPA within three years of the issuance of local siting approval, SCLI did not submit its complete application until more than two years after the date local siting approval was set to expire." *Id*. at 4. Again, Atkinson points out, in SCLI, the Agency found that local siting approval had not expired.

STATUTORY AND REGULATORY PROVISIONS

Section 101.516(b) of the Board's procedural regulations provides that, "[i]f the record, including pleadings, depositions and admissions on file, together with any affidavits, show that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law, the Board will enter summary judgment." 35 Ill. Adm. Code 101.516(b).

Section 39.2(f) of the Act provides:

> (f) 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. 415 ILCS 5/39.2(f) (2010).

Section 813.103(b) of the Board regulations provides:

> (b) 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. 35 Ill. Adm. Code 813.103(b). . . . The applicant may treat the Agency's

notification that an application is incomplete as a denial of the application for the purposes of review pursuant to Section 813.106.

DISCUSSION

The sole issue before the Board is whether Atkinson "made application" pursuant to Section 39.2(f) with its September 2, 2011 submission to the Agency. The Agency, in its Motion for Summary Judgment asked the Board to consider whether Atkinson was able to demonstrate that the permit would result in a violation of the Act or Board Regulations. Agency Motion at 4. The petitioner has not challenged, and the Board will not consider, the appropriateness of the Agency's other stated reasons for denial of Atkinson's permit application.

The following discussion will first clarify what deference the Board will afford the Agency's interpretation of Section 39.2(f) of the Act (415 ILCS 5/39.2(f) (2002)) and whether summary judgment is appropriate. Then the Board will delineate the reasons for the finding that Atkinson "made application" pursuant to Section 39.2(f) of the Act and therefore local siting approval did not expire.

Standard of Review and Deference for Motion for Summary Judgment

The Board's standard of review in a permit appeal is a preponderance of the evidence. Specifically, the Board must find that petitioner has demonstrated that the permit, if issued, would not violate the Act or Board regulations. 415 ILCS 5/40 (2010). Section 40(a)(1) of the Act and Section 105.112(a) of the Board regulations place the burden of proof on the petitioner in permit appeals. 415 ILCS 5/40(a)(1) (2007); Browning-Ferris Industries of Illinois, Inc. v. PCB, 179 Ill. App. 3d 598, 534 N.E. 2d 616 (2d Dist. 1989).

The Board's opinion in SCLI provides "[i]n reviewing the Agency's decision on a permit appeal, the courts have held that the Board does not review the Agency's decision using a deferential manifest-weight of the evidence standard." SCLI, PCB 04-117, slip op. at 15, (May 6, 2004). The Board's decision, in this case, hinges on the interpretation of Section 39.2(f) of the Act. Therefore, as in SCLI, the Board will consider the Agency's arguments on statutory construction, but the Agency's arguments are not considered with any greater or lesser weight than Atkinson's arguments. *Id*., *citing* Village of Fox River Grove v. Pollution Control Bd., 299 Ill. App. 3d 869, 878, 702 N.E.2d 656, 662 (2nd Dist. 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." Dowd & Dowd, Ltc. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998). 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." *Id*., *citing* Purtill v. Hess, 111 Ill. 2d 299, 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).

Summary judgment "shall be rendered without delay if the pleadings, depositions, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." 735 ILCS 5/2–1005(c). The Board finds that summary judgment is particularly appropriate in this case, where the facts are agreed upon and the sole issue before the Board is whether Atkinson "made application" pursuant to Section 39.2(f) with its September 2, 2011 submission to the Agency.

Interpretation of Section 39.2(f) of the Act

When considering a term in the Act, the plain meaning of the Act prevails. The United States Supreme Court has explained,

> It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms.
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> . . .
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> Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion. Caminetti v. U.S., 242 U.S. 470, 485, 37 S.Ct. 192, 194 (1917).

As the Board stated in SCLI, "[t]he law is well settled that the plain language of a statute should be given the common meaning of the language." SCLI, slip op at 15, *citing* Pioneer Processing, Inc. v. IEPA, 111 Ill. App. 3d 414, 444 N.E.2d 211 (th Dist. 1982). Illinois courts have stated, "[t]he best indication of legislative intent is the statutory language, giving the words their plain meaning and construing them in context." People v. Single Story House, 2012 Ill. App. 110562, 978 N.E.2d 1094, 1097 (5th Dist. 2012). The Courts have also held that the same "plain meaning rule" applies when interpreting regulations. Kean v. Walmart Stores, Inc., 235 Ill. 2d 351, 368, 919 N.E.2d 926, 936 (2009).

Section 39.2(f) of the Act sets the deadline by which an applicant must file a permit application with the Agency once siting is approved by the local siting authority. Therefore, the Board must contemplate and give full meaning to Section 39.2(f) of the Act (415 ILCS 5/39.2(f)(2002)) which provides in part:

> 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 develop the site. 415 ILCS 5/39.2(f)(2010). (emphasis added)

Section 39.2(f) of the Act is silent concerning the specific question here, where an application has been timely applied for, but rejected as incomplete or denied by the Agency. Therefore, as both parties agree, the Board must determine whether Atkinson "made application" pursuant to Section 39.2(f) with its September 2, 2011 submission to the Agency.

Prior to SCLI, the Board had not interpreted the meaning of "made application" under Section 39.2(f), except for finding that a "sham application" or "mothball siting" will clearly not suffice.[1] *See* SCLI, PCB 04-117, slip op. at 16.

The Agency argues that the Board must consider Section 813.103(b) of the Board's landfill permitting regulations (35 Ill. Adm. Code 813.103(b)) when determining whether application was made pursuant to Section 39.2(f) of the Act. Agency Motion at 6. The Board acknowledges that Section 813.103(b) of the Board regulations is relevant in this discussion. However, the Board does not find the Agency's interpretation of Section 39.2(f) of the Act and Section 813.103(b) of the Board regulations persuasive.

The Board has reviewed the administrative history of Section 813.103(b) and notes that the rationale for this provision is addressed at page 97 of the Board's Scientific and Technical Staff (STS) Background Report to R84-17(D). In the Matter of: Development, Operating and Reporting Requirements for Non-Hazardous Waste Landfills, R88-07, (August 17, 1990) (Appendix A1: Recommendations for a Non-Hazardous Waste Disposal Program in Illinois and a Background Report to Accompany Proposed Regulations for Solid Waste Disposal Facilities). While minor changes were made to Part 813 when Docket R84-17(D) was incorporated into Docket R88-7, the intent of the current Section 813.103(b) is discussed in the STS Report. The relevant discussion states:

> Section 813.103 Agency Review for a Complete Filing
>
> The development of a new, comprehensive set of standards also necessitates a reevaluation of the procedures to obtain a permit. Several standards in Part 811 require other government agencies to make determinations prior to review by the Agency. Part 811 also substantially increases the amount and scope of information to be submitted by the applicant. The Agency should focus its finite resources to the review of permit applications which contain all of the required information. To address these two issues we recommend the adoption of a two phase review. The first phase is a review by the Agency to determine whether all

[1] The Board does not agree with Atkinson's interpretation of ESG Watts, Inc. v. IEPA, (PCB 95-133, May 18, 1995 order, slip op. at 2) that "the Board appears to have determined that a permittee 'made application' for a renewal permit on the date that the application was mailed to the IEPA, despite the fact that the permittee allegedly failed to designate an appropriate 'Land Disposal Restricted Waste Code' on the permit renewal application indicating that the application itself was not complete." Atkinson Motion at 7. In the ESG Watts case, the Board did not issue a finding on whether the applicant sufficiently "made application" so as to preserve the application date to the Agency under Section 39.2(f) the Act. 415 ILCS 5/39.2(f) (2010).

> the elements required in Part 812 are included in the permit application. The second is a review of the information for compliance.
>
> Section 813.103 contains a new procedure requiring the Agency to find an application "complete" or "incomplete" within 45 days of filing. The Agency must inform the applicant of all incomplete items, all other items not addressed by the Agency are assumed to be complete. The applicant will then have an unspecified time period in which to gather all of the necessary information and amend the application. Upon filing this new information the Agency has 45 days to make a finding of completeness. If the application is still incomplete the Agency notifies the applicant and the process begins again, with a (presumably) shorter list of incomplete items. Each time an amended application is filed the 90 or 180 day "clock" starts again, from zero. Once the Agency finds an application complete only the applicant can waive the deadline for the Agency decision. *Id*. at 97.

The completeness review was a tool created for the Agency to "focus its finite resources to the review of permit applications which contain all of the required information." *Id*. The completeness review takes place after an application has been "made," but before it is "filed" so the Agency does not devote resources to review an incomplete permit application.

The completeness review under Section 813.103(b) welcomes ongoing communication between the applicant and the Agency until the Agency finds the application "complete" under that section. Section 813.103(b) does not limit the number of times the Agency can request additional information before it finds the application complete, nor does it intend for the applicant to anticipate how many rounds of completeness reviews the Agency will require until the Agency finds the application administratively complete. If this burden were placed on the permit applicant, an applicant would have to submit the application 30, 60, 90 or more days in advance to ensure the Section 39.2(f) expiration deadline is met. In other words, the applicant would be placed in the impossible position of putting itself in the shoes of Agency permit reviewers to anticipate how long the completeness review(s) will take.

One need look no further than the language chosen in Part 813 to determine that Section 813.103(b) contemplates Section 39 of the Act (stating "an application for permit pursuant to this Subpart shall not be deemed to be *filed*") rather than 39.2(f) (stating "within that period the applicant has *made application* to the Agency"). The term "filed" was intentionally chosen by the Board instead of "made." This interpretation is consistent with the language of Part 813 as a whole. While Section 813.102 discusses how, "[a]ll permit applications shall be *made*," Section 813.103 addresses the next step in the process using language such as, "If there is no final action by the agency within 90 days after the *filing* of the application," and the language relied on by the Agency in its various filings before the Board, "[a]n application for permit pursuant to this Subpart shall not be deemed to be *filed* until the Agency . . ." 35 Ill. Adm. Code 813.102 and 813.103(b) (emphasis added).

As stated above, the Board finds that making application, pursuant to Section 39.2(f), is a prerequisite to an Agency determination that an application is filed, pursuant to Section

813.103(b) of the Board regulations. Therefore, an administratively complete application in the form and to the completeness of the Agency's determination is not required for an applicant to have "made application." 415 ILCS 5/39.2(f) (2010). The Board must then determine whether Atkinson "made application" with its September 2, 2011 filing, applying the facts to the language of 39.2(f).

The Board finds that Atkinson provided enough information to the Agency in its September 2, 2011 application to allow the Agency to conduct a meaningful initial completeness review of the application. While not administratively complete, per the Agency's September 30, 2011 analysis, the September 2, 2011 application included the 82-page application, four figures, 20 drawings, and appendices A – G which included, for example: the IEPA permit application forms (Appendix A); location standards documentation (Appendix B); and a 46-page hydrogeologic site investigation supplemented by nine figures and six appendices (Appendix C). The Agency was able to initiate a productive completeness review of the application from this information as illustrated by its letters dated September 30, 2011, December 2, 2011, December 8, 2011, and February 8, 2012.

Accordingly, the Board finds that Atkinson sufficiently "made" application on September 2, 2011 and therefore the local siting approval did not expire under Section 39.2(f) the Act. The Board denies the Agency's motion for summary judgment, but grants summary judgment in favor of Atkinson. The permit is remanded to the Agency as requested in Atkinson's motion.

CONCLUSION

The Board finds that there is no genuine issue of material fact, and that Atkinson is entitled to summary judgment as a matter of law. Further, the Board finds that Atkinson sufficiently "made" application on September 2, 2011, and therefore the local siting approval did not expire under Section 39.2(f) of the Act.

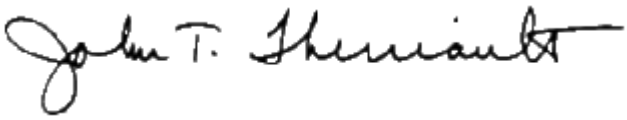
ORDER

The Board grants Atkinson's motion for summary judgment and remands the case to the Agency for consideration on the merits of the permit application. The Agency's motion for summary judgment is denied.

IT IS SO ORDERED.

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) (2010); *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 statue, 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, and 102.702.

I, John Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on June 20, 2013, by a vote of 5-0



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John T. Therriault, Clerk
Illinois Pollution Control Board