

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

IN THE MATTER OF:)
)
PROPOSED NEW 35 ILL. ADM. CODE 204)
PREVENTION OF SIGNIFICANT)
DETERIORATION, AMENDMENTS TO 35) R19-1
ILL. ADM. CODE PARTS 101, 105, 203, 211,) (Rulemaking – Air)
AND 215)
)

NOTICE OF FILING

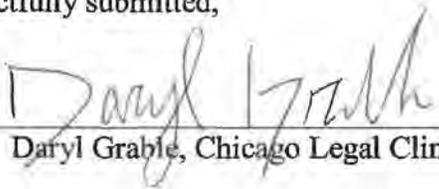
To: Don Brown, Clerk
Illinois Pollution Control Board
100 West Randolph
Suite 11-500
Chicago, IL 60601

And Attached Service List

Please take notice that on the 19th day of April, 2019, I filed electronically Citizens Against Ruining the Environment's Reply Comments with the Office of the Clerk of the Illinois Pollution Control Board.

A copy of this filing is hereby served upon you.

Respectfully submitted,

By: 
Daryl Grable, Chicago Legal Clinic, Inc.

Dated: April 19, 2019

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Citizens Against Ruining the Environment's Reply Comments

Now comes Daryl Grable of the Chicago Legal Clinic, Inc., on behalf of their client, Citizens Against Ruining the Environment, and respectfully submits the following reply comments.

Citizens Against Ruining the Environment ("CARE") is a not-for-profit environmental justice organization based in Will County, representing the interests of, primarily, Will County residents. As the oldest environmental non-profit in Will County, CARE has a longstanding commitment to ensuring that corporate profits do not take precedent over equal access to clean air, clean water, clean soil, and clean food for its members and the public at large. These comments focus on post hearing comments now before the Illinois Pollution Control Board ("Board") submitted by the Illinois Environmental Protection Agency ("IL EPA").

By way of summary, CARE is submitting its reply comments to challenge a claim made by IL EPA in its post hearing comments. Namely, IL EPA misrepresented the relevance of the *In re Chemical Waste Management of Indiana, Inc.* case heard by U.S. EPA's Environmental Appeals Board ("EAB"), and the precedential value it has in the current rulemaking. Although that case was based on a RCRA permit appeal, the portion of the text cited by CARE related to EAB's interpretation of the authority granted to it under 40 CFR § 124.19. These federal regulations

govern the EAB's permit appeals process for both RCRA permits and PSD permits, and thus the interpretation of the authority contained within is directly on point and relevant to the instant rulemaking proceeding.

Beyond that, CARE is confident that the totality of the evidence before the Board clearly establishes that Illinois residents have been allowed to raise environmental justice concerns during PSD permitting appeals before the EAB for over 25 years now. The EAB's expansive reading of 40 CFR § 124.19, language proposed to be adopted by the Board, the broad statutory definition of Best Available Control Technology ("BACT") in the Clean Air Act ("CAA"), and the Illinois Environmental Justice Act all work in conjunction to allow the Board to hear similar claims. IL EPA has conceded the position that it is up to the Board to decide whether environmental justice concerns represent an exercise of discretion or an important policy consideration that the Board, in its discretion, should review. Not only would eliminating this opportunity for accountability remove a layer of protection afforded to Illinois residents for approximately a quarter of century, but it would go against the evidence now before the Board. CARE respectfully urges the Board to make the decision to protect the most vulnerable residents of Illinois from being unfairly burdened by environmental hazards and promote a government that is transparent and accountable to its constituency.

I. IL EPA improperly stated the relevance and precedential effect of CARE Exhibit A, *In re Chemical Waste Management of Indiana, Inc.*

CARE takes issue with IL EPA's framing of the relevancy of the *In re Chemical Waste Management* case as it pertains to its response to question 5b-2. There, IL EPA opined that because the case "involv[ed] a RCRA matter" and "makes absolutely no reference to PSD permitting" that it "is not relevant for this rulemaking as this decision does not address the role of environmental justice in PSD permitting[.]" Ill. EPA Post Hearing Comments, P.C. #2, Ill. EPA, 9:Question

5(b)(2) (IPCB, Apr. 4, 2019). IL EPA is correct in that this case involved a RCRA permit appeal, and CARE never asserted anything to the contrary. However, IL EPA's wholesale dismissal of the case on that basis alone represents, at the very least, a woefully flawed understanding of how 40 CFR § 124.19 operates within both the RCRA and PSD permitting scheme.

Again, the *Chemical Waste Management* case was an appeal of an issued RCRA permit. In the course of that RCRA permitting process, however, environmental justice issues were raised which required the EAB to analyze its authority to hear such claims. To do that, the EAB looked to the regulations governing its RCRA permit appeal process, found in 40 CFR § 124.19. These regulations do not govern only RCRA permit appeals though; as indicated by its title, 40 CFR § 124.19 is the federal regulations governing "appeal[s] of RCRA, UIC, NPDES, and PSD permits" before the EAB. These regulations establish that administrative review is warranted where any part of the permit decision, regardless of the type of permit at issue, involves "an exercise of discretion or an important policy consideration that the Board should, in its discretion, review." 40 CFR § 124.19(4)(i)(B). This grant of authority applies equally to appeals of NPDES permits, RCRA permits, UIC permits, and PSD permits. As a result, the EAB was interpreting its grant of authority to review environmental justice concerns raised during any of these permit processes—the fact that the permit in that case was a RCRA permit rather than a PSD permit is inconsequential to the underlying grant of regulatory authority.

What does matter, is that the EAB determined that the regulations represented a broad grant of authority, allowing it to "review any condition of a permit decision (or [], the permit decision in its entirety)." CARE Exhibit A, 76, Feb. 26, 2019, R19-1. This permitted the EAB to hear claims of environmental injustice that arose during the permitting process, regardless of whether it was a RCRA permit appeal or a PSD permit appeal.

Further, the exact language contained in 40 CFR § 124.19 also appears in Illinois' Environmental Protection Act, 415 ILCS 5/40.3(a)(2)(iii), and in IL EPA's proposed amendments to 35 Ill. Adm. Code § 105.608(a)(5)(B). As such, according to IL EPA, "the EAB's historic interpretation of regulatory language in 40 CFR 124, which largely mirrors the statutory verbiage of Section 40.3(a)(2)(iii) of the Act, is directly on point and relevant" to the interpretation of Board authority contained in proposed section 105.604(c). Ill. EPA Post Hearing Comments, P.C. #1, Ill. EPA, 9: Question 3(b)(i) (IPCB, Jan. 24, 2019)(emphasis original).

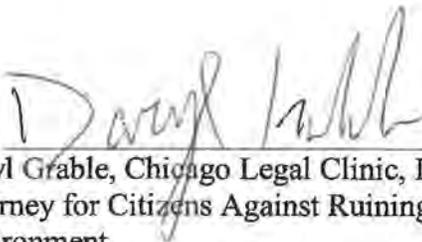
Thus, IL EPA can take environmental justice concerns into consideration during the PSD permitting process as a result the state-wide adoption of the Illinois Environmental Justice Act and, according to U.S. EPA's Office of General Counsel OGC, through the CAA requirements and the broad statutory definition of BACT. *See* CARE Exhibit B, 12, Feb. 26, 2019, R19-1 (declaring that "the CAA requirement to consider alternatives to the proposed source, and the broad statutory definition [] of BACT, provided *ample opportunity for consideration of environmental justice in PSD permitting*")(emphasis added). Then, the Board, through proposed 35 Ill. Adm. Code § 105.608(a)(5)(B), which mirrors the statutory language in 40 CFR § 124.19, has the authority to adjudicate environmental justice claims pertaining to the procedure behind issuing the PSD permit that is the subject of a PSD permit appeal.

II. Conclusion

For the foregoing reasons, Citizens Against Ruining the Environment urges the Illinois Pollution Control Board to follow the reasoning provided by EAB in the *Chemical Waste Management* case, and formally recognize its authority to adjudicate environmental justice claims in PSD permitting appeals. CARE respectfully asserts that this is the only way the Illinois Pollution

Control Board can act consistently with the evidence presented in the record, in accordance with legal requirements, and in the best interests of the Illinois residents it protects.

By:


Daryl Grable, Chicago Legal Clinic, Inc.
Attorney for Citizens Against Ruining the
Environment

Dated: April 19, 2019

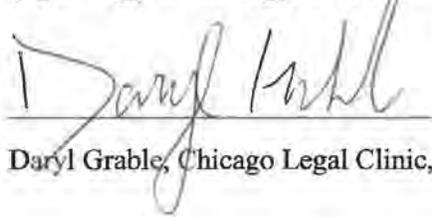
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CERTIFICATE OF SERVICE

I, Daryl Grable, the undersigned attorney, hereby certify that I served upon the individuals named on the attached Service List a true and correct copy of the eight page document-

Citizens Against Ruining the Environment's Reply Comments

-by email on April 19th, 2019, before the hour of 5:00 p.m., from my email address (dgrable@clclaw.org) at the email address provided on the attached Service List.

A handwritten signature in cursive script, appearing to read "Daryl Grable", is written over a horizontal line.

Daryl Grable, Chicago Legal Clinic, Inc.

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