BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Complainant,	)	
	)	
v.	)	
	)	PCB No. 11-50
The CITY OF MORRIS, an Illinois	)	
municipal corporation, and	)	(Enforcement-Land)
COMMUNITY LANDFILL COMPANY, INC.,	)	
a dissolved Illinois corporation,	)	
	)	
	)	
Respondents.	)	

NOTICE OF FILING

PLEASE TAKE NOTICE that on September 14, 2020, Complainant filed its Motion to File Reply and Reply to City of Morris's Combined Response to Complainant's Motion to Amend Complaint and Motion to Voluntarily Dismiss Community Landfill Co., a copy of which is attached hereto and served upon you.

PEOPLE OF THE STATE OF ILLINOIS
KWAME RAOUL
Attorney General of the
State of Illinois

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CERTIFICATE OF SERVICE

I, Christopher Grant, an attorney, certify that I caused to be served a copy of Complainant's Motion to File Reply and Reply to City of Morris's Combined Response to Complainant's Motion to Amend Complaint and Motion to Voluntarily Dismiss Community Landfill Co., and Notice of Filing, upon those persons listed below by electronic mail on September 14, 2020

Service List:

For City of Morris
Mr. Richard Porter
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For the Illinois Pollution Control Board
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Respondents.	)	

COMPLAINANT'S MOTION TO FILE REPLY AND ITS PROPOSED REPLY TO CITY OF MORRIS'S COMBINED RESPONSE TO COMPLAINANT'S MOTION TO FILE FIRST AMENDED COMPLAINT AND MOTION TO VOLUNTARILY DISMISS COMMUNITY LANDFILL CO.

NOW COMES Complainant, PEOPLE OF THE STATE OF ILLINOIS, by KWAME RAOUL, Attorney General of the State of Illinois, and Requests leave to file a Reply and submits its proposed Reply to Respondent City of Morris's ("Morris") Response to Complainant's Motions to File First Amended Complaint and to Voluntarily Dismiss Respondent Community Landfill Co. In support of its Motion, Complainant states as follows:

I. MOTION FOR LEAVE TO FILE REPLY

In accordance with 35 Ill. Adm. Code 101.500, a movant is entitled to file a Reply when granted leave by the Pollution Control Board ("Board") to prevent material prejudice. Morris filed its Response on September 11, 2020. The Response includes 19 pages of briefing and 261 pages of exhibits. Some exhibits are the same as those Morris attached to its Answer in the case, which it filed on June 10, 2011. The sheer scope of Morris's Response with its numerous attachments is confusing and a failure to Reply could create material prejudice to Complainant.

Further Morris makes certain new and unsupported claims that conflict directly with

documents already filed in this case. For example, Morris claims that Community Landfill Company ("CLC") is presently the "owner" of the Morris Community Landfill ("Landfill") despite the fact that CLC has not been a legal entity for over 10 years, and despite the fact that the exhibits attached to Morris's Answer clearly show that Morris never conveyed ownership of the Landfill to CLC.

Complainant believes that, in the absence of a Reply, Morris's misrepresentations will create material prejudice to it, and therefore requests that the Board accept and review Complainant's Reply.

II. COMPLAINANT'S REPLY

1. Introduction

The Attorney General, as chief legal officer of this State, "has the duty and authority to represent the interests of the People of the State to insure a healthful environment." *Pioneer Processing, Inc. v. Environmental Protection Agency*, 102 Ill. 2d 119, 138 (1984). Nonetheless, for the second time this year, Morris seeks a finding from the Board to undercut the Attorney General's duty and authority in this enforcement action against Morris for its violations of the Environmental Protection Act ("Act") and Board Waste Disposal Regulations at its Landfill.

First, on February 20, 2020, Morris filed a motion to dismiss for want of prosecution contending that the People did not aggressively prosecute this matter, claiming ". . . Complainant has shown little desire to move this case forward on the merits . . . ." (Morris's Motion to Dismiss for Want of Prosecution at 4). However, the Board found, contrary to Morris' misrepresentations, the People had worked extensively with Morris for at least seven years to resolve this case.

> Since 2013, the People and Morris have negotiated to resolve all disputes between the parties. These negotiations included both violations alleged in this Board case and violations alleged against Morris in the Illinois EPA's 2013 Violation Notice.

(May 21, 2020 Board Order at 5).

The Board held that ". . . dismissal would prejudice the state because it would be deprived of litigating the case because extensive and good faith settlement negotiations simply did not yield an agreement." (May 21, 2020 Board Order at 5).

Morris again improperly seeks to undermine the Attorney General's authority; attempting to prohibit him from carrying out his duty to insure a healthful environment by having Morris address its violations of the Act and Board Waste Disposal Regulations at its Landfill. In sum, after claiming that the State was not "aggressively prosecuting" this case, Morris now seeks to *prevent* the State from "aggressively prosecuting" Morris's ongoing violations, violations which were the subject of the failed settlement discussions, and which Morris has been fully aware since at least 2013. (*See* Response, Ex. A).

Finally, Morris puts the cart before the horse, arguing that the Board should deny leave to amend, because Morris has what it mistakenly believes are defenses that would defeat the amended complaint. Because Morris improperly raises legal arguments that should be made in a motion to dismiss (or as it has already done, as affirmative defenses), and not in response to a motion to amend the People's Complaint to add violations (which Complaint the parties have attempted to settle for seven years), the Board should allow the People to amend the Complaint.

2. The Board Liberally Allows Amended Pleadings.

Amendment of the Complaint in this matter is appropriate under the Board's standard practices. The Board explained its position in *People v. Sheridan Sand & Gravel*, PCB 06-177 (January 26, 2007), 2007 WL 555656, where it stated:

> "In addition, the Board's own practice is to allow amendments to complaint and petitions filed with the Board. *See generally People v. The Highlands, L.L.C. and Murphy's Farm, Inc.*, PCB 00-104 (May 6, 2004) and *People v. 4832 Vincennes, LP and Batteast Construction Co.*, PCB 04-7 (Nov. 6, 2003).

Further, the Board will allow amendment to add *new* violations "on just and reasonable terms". *People v. Petco Petroleum Corporation*, PCB 05-66 (May 19, 2005), 2005 WL 1255250.

3. Complainant's Amendment is Just and Reasonable.

Morris does not and cannot claim surprise by the allegations in the First Amended Complaint. Morris has been fully aware of these ongoing violation at its Landfill since at least 2013. Indeed, as previously described in briefing on Morris's Motion to Dismiss for Want of Prosecution, the parties spent considerable time in settlement discussions seeking to resolve all of Morris's violations, which the Board encourages. (*See* May 21, 2020 Board Order at 5). Accordingly, Morris is not prejudiced by any delay in amending the Complaint. Further, the Board has already agreed with the People that "aggressively litigating this matter, while settlement discussions of this case and the additional violations were ongoing, would have been wasteful of public resources." (*Id.* at 6). Accordingly, allowing the People to amend its Complaint at this time is appropriate.

The need for enforcement of these violations is obvious. As described in Complainant's proposed First Amended Complaint, Morris has essentially abandoned its responsibilities as owner (and from 1970 – 1982 and again since 2010 also as operator) of the Landfill. Neither Landfill parcel has been closed, final cover has not been installed, and numerous operating violations continue. (*See generally* proposed First Amended Complaint). Morris's lessee and the Landfill's former operator Community Landfill Co. ("CLC") has no access to the Landfill and has been a dissolved corporation for over ten years. In its current condition, the Landfill poses an ongoing threat to human health and the environment, and the Attorney General has "an obligation to represent the interests of the People so as to ensure a healthful environment." *People v. NL Industries* 152 Ill.2d 82, 103 (1992).

Amendment will not prejudice Morris. In addition to the extensive prior discussions referenced above, the principal issues raised in its Response are *already* before the Board in this case. In its original Complaint in this case, the People allege that Morris is the owner and operator of the Landfill. (Complaint, Count I, ¶ 2). Morris has denied ownership in its answer (Morris Answer, June 1, 2011, Count I, paragraph 2; Morris's Answer, Affirmative Defenses numbers 1 through 4 at 17-22). In addition, Morris has also asserted four affirmative defenses denying its status as "operator". Morris has attached as exhibits to its answer the 1982 application for transfer of the "operating" permit for the Landfill (Answer, Ex. A), and its lease with CLC (Answer, Ex. B).

Accordingly, all of the significant issues regarding Morris's status as the owner and operator of the Landfill are now before the Board in this case, even before amendment. Complainant's Amended Complaint includes the violations already before the Board, adds additional facts, and adds additional violations which are also based on Morris's status as permitted owner (and from 1970 – 1982 and again since 2010, operator) of the Landfill. Amendment to add these additional violations is just and reasonable.

Morris relies heavily on the Third district's decision in *City of Morris v. Cmty. Landfill Co.,* 2011 IL App (3d) 090847. Tellingly, Morris ignores a prior Third District decision in *Community Landfill Company and City of Morris v. Pollution Control Board*, 331 Ill. App. 3d 1056, 1058 (3rd Dist. 2002), wherein the Court stated that the "landfill is owned by the City of Morris." The 2002 decision was issued twenty years after Morris entered into its lease with CLC, a lease which Morris now incredibly argues actually transferred ownership of the Landfill. That decision reversed the Board's Order issued on June 18, 2009 in PCB 03-191, and was issued based on facts and circumstances through October 2007 in the administrative record on appeal. That

opinion dealt with the narrow issue of liability for posting financial assurance for Landfill closure. That opinion was issued on a record during the time that CLC remained in existence, and was the permitted operator of the Landfill. Indeed, by the time the Third District issued its 2011 opinion, CLC had been dissolved. Accordingly, the facts and, in part, the applicable law has changed, and thus Complainant denies that the 2011 decision provides any defense to the alleged ongoing violations alleged against Morris. Further, Morris has had *nine years* since the decision was issued to formally raise this decision as a defense in this case, but has failed to do so. The 2011 Appellate Court decision does not provide a bar to filing the First Amended Complaint.

Morris's inappropriate attempt to bar the prosecution of the additional violations alleged in the Amended Complaint should not be allowed, and the Board should grant Complainant's Motion to File First Amended Complaint.

4. Morris's arguments regarding *res judicata*, collateral estoppel, laches, 735 ILCS 5/2-619(a)(3), "statute of limitations", among others are premature and provide no basis to deny granting the People's Motion to File First Amended Complaint.

Morris raises a number of ancillary issues in its Response, including *res judicata*, collateral estoppel, "laches", an inapplicable "statute of limitations" claim, and other matters. None of these legal issues relate to the allowance of the filing of the State's First Amended Complaint and are premature. The Board Procedural Rules also make clear that Morris's arguments are premature. Section 101.100(b) of the Board's Procedural Rules, 35 Ill. Adm. Code 101.100(b), prohibits the Board from looking to the Code of Civil Procedure and the Supreme Court Rules (and cases interpreting them), if a Board Rule addresses the issue.

> Except when the Board's procedural rules provide otherwise, the Code of Civil Procedure [735 ILCS 5] and the Supreme Court Rules [Ill. S. Ct. Rules] do not apply to proceedings before the Board. However, the Board may look to the Code of Civil Procedure and the Supreme Court Rules for guidance when the Board's procedural rules are silent.

The Board's Rules are not silent on this issue. Section 101.506 of the Board Procedural Rules, 35 Ill. Adm. Code 101.506, provides as follows:

> All motions to strike, dismiss, or challenge the sufficiency of any pleading filed with the Board must be filed within 30 days after the service of the challenged document, unless the Board determines that material prejudice would result.

As the Board Rules make clear, the claims made by Morris regarding any potential defects in the Amended Complaint must be raised by Motion, *after* the People's First Amended Complaint is on file. Morris's arguments may not be made prior to the filing of the Amended Complaint. Raising these issues in a Response to Complainant's Motion to File First Amended Complaint is premature and inappropriate. Accordingly, the People's Motion to File First Amended Complaint should be granted, and then Morris can raise its purported defenses thereafter either by motion or as affirmative defenses. However, even if the Board did consider Morris's arguments at this stage, they are all without merit.

A. Neither *res judicata* nor collateral estoppel is applicable to the People's First Amended Complaint.

Morris contends that the People should be barred from amending its Complaint to add Counts I to III and Counts VIII to XIII based on the doctrines of *res judicata* and collateral estoppel. (Response at 5-7). These arguments are without merit and should be rejected.

"The doctrines of *res judicata* and collateral estoppel bar a party from relitigating an issue that has been finally determined by a court of competent jurisdiction." *Schuttler v. Ruark*, 225 Ill. App. 3d 678, 682 (2d Dist. 1992). "*Res judicata* differs from collateral estoppel in that *res judicata* applies to the same parties, or those claiming through them, concerning the same claims or demands or those that could have been raised." *Id.* "In contrast, collateral estoppel arises when a party or someone in privity with a party participates in separate, consecutive causes of action that share a common controlling question of fact." *Id.* 682-683. "A final judgment as to

such question of fact in one cause is dispositive of the same factual question in the other cause." *Id.* At 683. "However, neither *res judicata* nor collateral estoppel applies if the claim asserted is based on a new fact or condition, which changes the basis of the claim." *Id.*; *see also Deutsche Bank Nat. Tr. Co. v. Bodzianowski*, 2016 IL App (3d) 150632, ¶ 19 ("when new facts or conditions intervene before a second action, establishing a new basis for the claims and defenses of the parties', the issues are not the same, and the former judgment cannot be pleaded as a bar in a subsequent action"); *Consiglio v. Department of Financial and Professional Regulation,* 2013 IL App. (1st) 121142, ¶¶ 44, 46 ("change in circumstances can create a new basis for a claim and thus obviate the danger of repetitive litigation" and that "a change in law nullifies the doctrine of *res judicata*"); *Statler v. Catalano*, 293 Ill. App. 3d 483, 488 (5th Dist.1997) ("a change in the law resulting from a judicial decision rendered or a statute enacted subsequent to the adjudication of a case eliminates the controlling effect of that case's judgment on subsequent litigation").

Here, Morris argues that the Appellate Court in *City of Morris v. Community Landfill Company,* 2011 Ill.App.3d 090847, determined that Morris was neither the "owner" nor the "operator" of the Landfill. (Response at 6). However, the Appellate Court's decision was based on facts that were at issue at the time the Board granted the People's motion for summary judgment and then when it received evidence concerning the appropriate remedy in the fall of 2007. *People of the State of Illinois v. Community Landfill Co., Inc. and City of Morris,* PCB 03-191, Slip Op. (June 18, 2009). As discussed at length in Section III below, the circumstances have changed since that time and the applicable law now makes Morris both the "owner" and by operation of Section 810.103, the "operator" of its Landfill. Accordingly, Morris's arguments for *res judicata* and collateral estoppel are without merit, and the Board should grant the Motion to File First Amended Complaint.

B. Laches is not a bar to the People's First Amended Complaint.

Morris contends that the People should not be allowed to amend its Complaint based on the doctrine of laches. (Response at 8-9). However, its contention is without merit. "*Laches* is an equitable doctrine which precludes the assertion of a claim by a litigant whose unreasonable delay in raising that claim has prejudiced the opposing party." *People of the State of Illinois v. Panhandle Eastern Pipe Line Company*, PCB 99-191, Slip Op. at 19 (November 15, 2001. "There are two principal elements of *laches*: (1) lack of due diligence by the party asserting the claim; and (2) prejudice to the opposing party as a result of the delay." *Id.* "As with the equitable doctrine of estoppel, applying *laches* against the government is disfavored and can apply against the State functioning in its governmental capacity only in compelling circumstances." *Id.*

In its Motion to Dismiss for Want of Prosecution, Morris contended that the People had not been diligent in prosecuting its case, including the violations at issue in the 2013 violation notice. However, the Board found that the "People's level of involvement does not rise to the threshold of 'inexcusable delay' or 'lack of diligence'." (May 21, 2020 Board Order at 5). In addition, the Board found that dismissing the case "would be prejudicial to the People because the People would be deprived of litigating the case because extensive and good faith settlement negotiations simply did not yield an agreement." (*Id.*)

Therefore, laches cannot bar the People's First Amended Complaint, and the Board should grant the Motion to File First Amended Complaint.

C. Morris's reliance on Section 2-619(a)(3) is misplaced.

After the Board denied Morris's Motion to Dismiss for Want of Prosecution "on July 30, 2020 the State, sent an email to the attorneys for the City stating that it intended to file a claim with the PCB against the City, presumably related to the allegations raised in the October 30, 2013

Notice of Violation." (Response, Ex. B. at 6, ¶ 24). Also at that time, the People offered, and Morris agreed to, another opportunity to meet on August 17, 2020 to attempt to resolve the violations prior to seeking to amend the Complaint. However, on August 14, 2020, Morris, without alerting Complainant of its intentions, filed its complaint for declaratory judgment in the Circuit Court for Grundy County.

Now, Morris contends that the Board should look to Section 2-619(a)(3) of the Code of Civil Procedure, 735 ILCS 5/2-619(a)(3), to deny the People's Motion to File First Amended Complaint, because Morris has a pending declaratory judgment action. (Response at 9-10). This claim is without merit for at least two reasons.

First, as discussed above, Section 101.506 of the Board Procedural Rules, 35 Ill. Adm. Code 101.506, governs the timing of motions to dismiss, which Section 2-619 of the Code of Civil Procedure provides. As such, any claim relying on 2-619(a)(3) is premature.

Second, as Morris points out, "[w]hether the City is an 'operator' and/or 'owner' is the critical underlying question regarding the responsibility to maintain and close the Landfill, and that question is already at issue in this case. (*See* Morris's Answer at 2-3, ¶¶ 2, 3). "Where two actions between the same parties, on the same subject, and to test the same rights, are brought in different courts in Illinois having concurrent jurisdiction, the court which first acquires jurisdiction, its power being adequate to the administration of complete justice, retains its jurisdiction and may dispose of the entire controversy to the exclusion of all coordinate courts." *Cousins Club, Inc. v. USA I Lehndorff Vermoegensverwaltung GmbH & Cie*, 39 Ill. App. 3d 227, 228 (1st Dist. 1976). It is undisputed that the Board has concurrent jurisdiction to hear civil environmental enforcement cases. *See* 415 ILCS 5/5(d); *see also Janson v. Illinois Pollution Control Bd.*, 69 Ill. App. 3d 324, 327–28 (3d Dist. 1979). Accordingly, as the Board has had

jurisdiction of the "critical underlying question regarding the responsibility to maintain and close the Landfill," the Board first acquired jurisdiction of this matter, and should continue to maintain its jurisdiction over this lawsuit. Morris recognizes the Board's jurisdiction in its amended complaint for declaratory judgment, where it specifically "prays this Court find and declare that the City of Morris is not liable for violation of any statute or regulation which was raised or could have been raised in . . . PCB 11-050, Violation Notice No. M-2013-0106 . . . ." (Response, Ex. B, at 43).

In Sum, the Board should grant the People's Motion to File First Amended Complaint.

D. The 5 year statute of limitations does not apply to this case.

Morris argues that the People's First Amended Complaint should be barred by the 5 year statute of limitations pursuant to 735 ILCS 5/13-205. (Response at 10). Morris mistakenly relies on *Union Oil Company of California v. Barge-Way Oil Company, Inc.*, PCB 98-169 (January 7, 1999) to support its argument. (*Id.*) However, in footnote 1 of the *Union Oil* case, the Board reiterated that it "has consistently held that a statute of limitations bar will not preclude any action seeking enforcement of the Act, if brought by the State on behalf of the public's interest. *See Pielet Bros. Trading, Inc. v. Pollution Control Board*, 110 Ill. App. 3d 752, 758 (5th Dist. 1982). The instant case, however, does involve the public interest. There is a strong public interest in a healthful environment, and the Attorney General has the duty and authority, as the State's chief legal officer, to represent the People of the State of Illinois for the protection of that interest. *Pioneer Processing, Inc. v. EPA*, 102 Ill.2d 119, 137 (1984); *see also* Ill. Const.1970, art. 11, § 2 ("Each person has the right to a healthful environment.").

Consistent with the Board's longstanding authority on this issue, Morris's claim is entirely without merit. Therefore, the Board should grant the People's Motion to File First Amended

Complaint.

E. The amendment of Section 21.1 of the Act applies to Morris.

Morris argues that the amendment to Section 21.1 does not apply to it, and that it is a bar to filing the First Amended Complaint. (Response at 11-14). Unsurprisingly, Morris relies on *City of Morris v. Community Landfill Company*, 2011 Ill.App.3d 090847. (*Id.* at 11). However, Morris fails to take into account that the Appellate Court's decision was based on a factual record that was complete in 2007. Circumstances have changed and the violations remain ongoing to this day—there is no retroactive application, because there are present claims against Morris that need redress. The People's present claims include Morris's current and ongoing failure to close parcels A and B of its Landfill and to ensure that there is appropriate financial assurance. As discussed below, since the Appellate Court's decision, Morris is the "owner" and "operator" of the Landfill.

In sum, Morris's argument regarding the amendment of Section 21.1 of the Act is without merit, and the Board should grant the People's Motion to File First Amended Complaint.

F. The State's voluntary dismissal of Morris in a case before the Grundy County Circuit Court (Case No. 06-CH-18) does not bar Complainant from filing its First Amended Complaint.

Morris claims that the People should be barred from filing its First Amended Complaint because it voluntarily dismissed a case that had been pending before the Grundy County Circuit Court. (Response at 14-15). However, as stated above this argument is premature, and the Board should disregard it. Accordingly, the Board should grant the People's Motion to File First Amended Complaint.

III. COMMUNITY LANDFILL COMPANY IS NOT A NECESSARY PARTY.

Morris opposes the State's Motion to Voluntarily Dismiss CLC on the basis that CLC is "the owner of the underlying landfill" and therefore a necessary party. (Response, p. 15). This

extraordinary and unsupported claim is false, and contradicted by 1) Morris's own filings in this case, 2) two appellate Court decisions related to the Landfill, and 3) Morris's representations in previous permit appeals filed with the Board. As shown by these documents, Morris, not CLC, is the "owner" of the Landfill. As of the date of filing this Reply, CLC is neither owner nor operator of the Landfill. Because the Amended Complaint alleges ongoing violations against Morris as the both the owner and operator of the Landfill, CLC is not a necessary party to this case going forward.

Further, as stated in the State's Motion to Voluntarily Dismiss Respondent CLC, CLC is a long-dissolved inactive corporation. (Motion to Voluntarily Dismiss at 1). CLC's lease with the City of Morris expired in 2010 and it is no longer present at the Landfill. (*Id.*; Proposed Amended Complaint, Count I, ¶ 33).

A. Morris's filings in this matter contradict its claim that CLC is the "owner" of the Landfill.

In Morris's Answer in this case, it attached the application for transfer of the operating permit for the Landfill in 1982. (Morris's Answer, Ex. A). This application describes the nature of the requested permit transaction. (Morris's Answer, Ex. A, at 2). Paragraph 7 of the application provided CLC and Morris with three options to lawfully state the ownership of the Landfill:

1) presently owned by applicant,

2) to be purchased by applicant, or

3) to be leased by applicant with the addition "for 17 years". (*Id.*).

Morris checked only option 3, conclusively showing that the requested permit transaction did *not* involve a sale of the Landfill by Morris to CLC. The Application is signed by CLC and the Mayor of the City of Morris. (*Id.* at 3).

Also included in Morris's Answer is the ground lease under which CLC operated the

Landfill that was also signed by the Mayor of Morris. (Answer, Ex. B at 23). Nowhere in the lease does it indicate any *intent* to transfer or any *actual* transfer of ownership of the Landfill. Rather, it indicates only that CLC was to lease and operate the Landfill until 1999.[1]

B. Two Appellate Court cases identify Morris as "owner" of the Landfill.

First, in *Community Landfill Company and City of Morris v. Pollution Control Board*, 331 Ill. App. 3d 1056 (3rd Dist. 2002), Morris and CLC appealed the Board's denial of an operating permit for the Landfill on the basis of faulty financial assurance. In that case, the Court noted that "Community Landfill Company is the operator of a landfill located in Morris, Illinois. The *landfill is owned by the City of Morris*." *Id.* at 1058 (emphasis added).

Second, in *City of Morris v. Community Landfill Co.*, 2011 IL App (3d) 090847, ¶ 2, the Court stated that Morris "…retained ownership of the land on which that Landfill was situated".

Further, there is also no dispute that Morris has continuously owned the land on which the Landfill is located. (Response at 1). Morris cites to the Third District's opinion, where the Court stated that Morris "owned the land beneath the landfill." (*Id*. citing *City of Morris v. Cmty. Landfill Co.*, 2011 IL App (3d) 090847). This fact by itself makes Morris the "owner" of the Landfill, as that term is defined in 35 Ill. Adm. Code 810.103. Section 810.103 of the Board Waste Disposal Regulations, 35 Ill. Adm. Code 810.103, provides, in pertinent part:

Section 810.103 Definitions

* * *

> "Owner" means a person who has an interest, directly or indirectly, in land, including a leasehold interest, on which a person operates and maintains a solid waste disposal facility. The "owner" is the "operator" if there is no other person who is operating and maintaining a solid waste disposal facility.

"Rules and regulations validly promulgated by an administrative agency have the force and

[1] The lease attached is incomplete as it does not include amendments extending the Lease until 2010.

effect of law, and like statutes, rules are presumed valid." *Celotex Corp. v. Pollution Control Bd.*, 94 Ill. 2d 107, 126 (1983). "An administrative agency has the power to construe its own rules and regulations to avoid absurd or unfair results." *Vill. of Fox River Grove v. Pollution Control Bd.*, 299 Ill. App. 3d 869, 880 (2d Dist. 1998). Courts "give statutory language its plain and ordinary meaning, and where a statute is clear and unambiguous, it must be enforced as written without resort to further aids of statutory construction. *U.S. Steel Corp. v. Illinois Pollution Control Bd. Illinois Envtl. Prot. Agency,* 384 Ill. App. 3d 457, 462–63 (5th Dist. 2008) citing *Town & Country Utilities, Inc. v. Illinois Pollution Control Board,* 225 Ill.2d 103, 117 (2007). A "court may not depart from the statute's plain language by reading into it exceptions, limitations, or conditions not expressed therein." *Id.* "Because the Board is responsible for administering the Act, its interpretation of a regulation or statute is entitled to deference." *Central Illinois Public Service Co. v. Pollution Control Board,* 116 Ill. 2d 397, 409 (1987).

In *Environmental Site Developers v. White & Brewer Trucking*, Slip Op. PCB 96-180 (November 20, 1997), the Board faced a similar situation to the one at issue here. The Petitioner had operated the landfill and subsequently sold it to Respondent. *Id.* at 4. The Board held that the Respondent was the "owner" of the landfill and also the "operator" by operation of 810.103:

> White & Brewer has missed no opportunity in these proceedings to point out to the Board that all waste in Cell D of the landfill was placed there by ESDI, not White & Brewer, and that Cell D of the landfill was closed prior to White & Brewer's purchase of the landfill. White & Brewer likewise has asserted on a number of occasions, including in the "Introduction" section of its Response, that it never operated Cell D of the landfill. Res. at 1. As the Board noted, however, in its order of July 10, 1997, *as owner of the landfill (including Cell D), White & Brewer is the operator of the landfill (including Cell D) and has been since its purchase of the landfill. This is by operation of 35 Ill. Adm. Code 810.103, which provides as part of the definition of "owner" that "[t]he 'owner' is the 'operator' if there is no other person who is operating and maintaining a solid waste disposal facility."*

Id. at 11 (emphasis added).

Here, similar to *Environmental Site Developers*, the plain language is unambiguous and by virtue of Morris's ownership of the land upon which the Landfill sits, and capacity to lease the land under the Landfill, Morris is the "owner" of the Landfill as that term is defined in 35 Ill. Adm. Code 810.103. In addition, because CLC, a long-dissolved inactive corporation whose lease with Morris expired in 2010 is no longer present at the Landfill, Morris is also the "operator" of the Landfill.

C. Morris is bound by its previous representations to the Board.

The status of Morris as owner and CLC as operator was admitted by Morris in multiple filings before the Board. Between October 5, 1999 and the present, Morris and CLC filed with the Board six permit appeal cases against the Illinois EPA. Morris filed cases numbered PCB 00-65 and PCB 00-66 on October 15, 1999; case number PCB 00-118 on January 12, 2000; cases numbered PCB 01-48 and PCB 01-49 on September 7, 2000; and case number PCB 01-170 on August 16, 2001. In each matter, Morris and CLC challenged conditions of the Landfill operating permits issued by the Illinois EPA. In each of the six Board cases, Morris identified itself as the "permitted owner of the Morris Community Landfill." Morris and CLC appealed the decision in PCB 01-170 to the Appellate Court, Third District, resulting in the opinion cited above in *Community Landfill Company and City of Morris v. Pollution Control Board,* 331 Ill. App. 3d 1056, 1058 (3rd Dist. 2002) (the "landfill is owned by the City of Morris").

Morris is now judicially estopped from denying its ownership of the Landfill. Judicial estoppel prevents litigants from deliberately shifting positions "to suit the exigencies of the moment". *Barack Ferrazzano Kirschbaum Perlman & Nagelberg v. Loffredi*, 342 Ill. App. 3d 453, 460 (1st Dist. 2003). The elements of judicial estoppel are 1) the party to be estopped must have taken two positions 2) that are factually inconsistent 3) in separate judicial or quasi-judicial

administrative proceedings 4) intended for the trier of fact to accept the truth of the facts alleged, and 5) succeeded in the first proceeding and received some benefit. *Brummel v. Grossman,* 2018 IL App (1st) 170516, ¶ 70. In each of the Board permit appeals cited above, Morris represented itself as the "permitted owner" of the Landfill. In each case, it received the benefit of being granted standing to challenge various terms and conditions of the Illinois EPA-issued permits under which operations of the Landfill were conducted.

Morris now attempts to change its position based on the "exigencies of the moment". The Landfill is no longer generating revenue, and its former operator partner, CLC, has left the Landfill. However, having represented itself as "permitted owner" in numerous Board filings, and having been granted standing to litigate over the conditions governing operation of the Landfill, Morris is Judicially Estopped from either denying ownership of the Landfill or claiming that CLC is the "owner of the underlying landfill".

Morris's admissions in these Board filings are binding. Morris cannot now claim that CLC is the owner of the Landfill without showing evidence of a subsequent conveyance of either the Landfill or the land under the Landfill. Consequently, the Board must reject Morris's unconvincing claim that CLC is a necessary party and grant Complainant's Motion to Voluntarily Dismiss Respondent CLC.

WHEREFORE, Complainant, PEOPLE OF THE STATE OF ILLINOIS, respectfully requests that the Board accept this Reply and grant Complainant's Motion to File First Amended Complaint. Complainant also respectfully requests that the Board grant its Motion to Voluntarily Dismiss CLC, as CLC is no longer necessary to the final resolution of this case.

RESPECTFULLY SUBMITTED

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