ILLINOIS POLLUTION CONTROL BOARD
December 6, 2001

COMMUNITY LANDFILL COMPANY and CITY OF MORRIS,	)	
Petitioners,	)	
v.	)	PCB 01-170 (Permit Appeal - Land)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

MARK A. LAROSE OF LAROSE & BOSCO, LTD. AND SCOTT M. BELT OF SCOTT M. BELT & ASSOCIATES, P.C., APPEARED ON BEHALF OF PETITIONER COMMUNITY LANDFILL COMPANY;

CHARLES F. HELSTEN OF HINSHAW & CULBERTSON, APPEARED ON BEHALF OF PETITIONER CITY OF MORRIS; and

JOHN J. KIM, ASSISTANT COUNSEL, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by R.C. Flemal):

This matter is before the Board on a permit appeal filed on August 16, 2001, by petitioners Community Landfill Company (CLC) and the City of Morris. The appeal seeks review of the Illinois Environmental Protection Agency's (Agency) denial of petitioners' supplemental permit application for Parcel A of the Morris Community Landfill located on Ashley Road, City of Morris, County of Grundy.

Also pending before the Board are: CLC's appeal of six hearing officer rulings that were made during the three-day hearing held in this matter; CLC's motion for leave to amend its post-hearing brief; the Agency's motion to file both its post-hearing brief and response brief *instanter*; the Agency's motion to supplement the record, and the City of Morris' motion to file its post-hearing brief *instanter*. Disposition of the motions is made below.

For the reasons below, the Board affirms the Agency's denial of petitioners' supplemental permit application.

PROCEDURAL HISTORY

The Morris Community Landfill (site) is owned by the City of Morris and operated by CLC. CLC Br. at 14; Tr. at 9.[1] The site is divided into Parcel A and Parcel B. Tr. at 8. On August 4, 2000, the Agency issued significant modification (sigmod) permits to petitioners which, among other matters, required Parcel B to close and allowed Parcel A to continue to operate under new landfill regulations.[2] CLC Br. at 15. Among the requirements for Parcel A to operate were increased leachate collection and control devices and the installation of a separation layer. Tr. at 628, CLC Br. at 15.

Pursuant to the August 4, 2000 sigmod permits, on November 27, 2000, petitioners filed a supplemental permit application addressing construction of the separation layer for Parcel A. AR at 84-231.

By letter dated May 11, 2001, the Agency denied the supplemental permit application. AR at 1-2. The Agency denied petitioners' permit on two grounds: (1) the financial assurance documents submitted by petitioners did not comply with the requirements of 35 Ill. Adm. Code 811.712(b); and (2) Robert J. Pruim's felony conviction, pursuant to Section 39(i) of the Environmental Protection Act (415 ILCS 5 *et seq*. (2000)).[3] AR at 1-2. It is the denial of the supplemental permit application that is at issue in the instant appeal.

On June 21, 2001, the Board granted petitioners a 90-day extension to appeal the Agency's decision to deny petitioners' supplemental permit application. On August 16, 2001, petitioners filed this permit appeal. CLC appeals both of the grounds cited in the May 11, 2001 Agency denial letter, while the City of Morris only appeals the financial assurance ground. CLC also appeals the Agency's decision on the general ground that the Agency's action amounted to impermissible "enforcement by permitting".

Hearing in this matter was held in Morris on October 15-17, 2001, before Hearing Officer Bradley P. Halloran. Witnesses for the petitioners were Paul Purseglove, section manager of

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[1] Citations to the hearing transcript are referenced as "Tr. at __." Citations to the Administrative Record are referenced as "AR at __." Citations to the exhibits admitted at hearing are referenced as "Exh. __ at __." CLC's post-hearing brief will be cited as "CLC Br. at __." CLC's response brief will be cited as "CLC Resp. Br. at __." The city's post-hearing brief will be cited as "City Br. at __." The city's response brief will be cited as "City Resp. Br. at __." The Agency's post-hearing brief will be cited as "Agency Br. at __." The Agency's response to CLC's brief will be cited as "Agency Resp. to CLC Br. at __." The Agency's response to the city's brief will be cited at "Agency Resp. to city Br. at __."

[2] These sigmod permits were the subject of a separate action recently before the Board in Community Landfill Co. *et al.* v. IEPA, PCB 01-48, 49 (Apr. 5, 2001). There, the Board affirmed in part the Agency's imposition of conditions on the sigmod permits for Parcel A and Parcel B.

[3] Pruim, as president of CLC, signed the permit application. AR at 88; Tr. at 452. Section 39(i), in pertinent part, allows the Agency to deny a permit if the prospective owner or operator has a history of a felony conviction. 415 ILCS 5/39(i) (2000).

field operations at the Agency; Mark Retzlaff, an environmental protection specialist for the Agency; Joyce Munie, permit section manager of the Bureau of Land at the Agency, Christine Roque, permit reviewer at the Agency; Blake Harris, an accountant at the Agency; Christian Liebman, manager of the solid waste unit in the Bureau of Land at the Agency; John Taylor, previously a financial assurance analyst for the Bureau of Land at the Agency; Michael Nechvatal, manager of the division of land pollution control at the Agency; John Enger, city clerk of the City of Morris; Warren Olson, project manager for Chamlin & Associates; and Michael McDermont, of Andrews Environmental Engineering, Inc.. The Agency did not call any witnesses.

On October 17, 2001, the Agency filed a motion to supplement the administrative record. In the motion, the Agency asserts that petitioners are aware of the documents and the Agency's intention to supplement the record with them. Motion at 1. CLC submitted the same motion at hearing and called it "Group Exhibit 81." Tr. at 282. The motion is granted.

On October 30, 2001, Hearing Officer Halloran issued a hearing report stating, among other things, that the credibility of the hearing witnesses was not an issue.

CLC filed its post-hearing brief on November 2, 2001. City of Morris filed its brief, accompanied by a motion for leave to file the brief *instanter*, on November 5, 2001.[4] Similarly, the Agency filed its brief on November 5, 2001, accompanied by a motion for leave to file the brief *instanter*. Both motions are granted. Petitioners filed response briefs on November 6, 2001. Also on November 6, CLC filed objections to the hearing officer's rulings and a motion to amend a page in its brief. The motion to amend is granted. On November 7, 2001, the Agency filed its response brief, accompanied by a motion for leave to file the response brief *instanter*. The Board grants the motion. On November 8, 2001, the Agency filed a response to CLC's objections to the hearing officer's rulings.

CLC specifically appeals six of the hearing officer rulings.[5] In each instance the hearing officer denied admission of certain testimony and documents as evidence, while allowing CLC to make offers of proof on that evidence.

The Board received two public comments in this matter, filed respectively by Stefan S. Sztapka, owner of Nettel Creek Nursery in Ottawa, Illinois, and Robert Snook, owner of Snook Equipment Rental, Inc.

THE PERMITTING PROCESS

[4] An affidavit provided by the city asserts they faxed a copy of the brief to the Board on November 2, 2001. The city used an incorrect fax number, and the brief was erroneously faxed to a different State office.

[5] Citations to CLC's objection to and appeal of hearing officer rulings are cited as "CLC Obj. at __." Citations to the Agency's response to CLC's filing are cited as "Agency Resp. to Obj. at __."

After the Agency's final decision on a permit application is made, the permit applicant may appeal that decision to the Board. 415 ILCS 5/40(a)(1) (2000). The question before the Board in permit appeal proceedings is whether the applicant proves that the application, as submitted to the Agency, demonstrated that no violation of the Environmental Protection Act (Act) (415 ILCS 5 *et seq.* (2000)) or rules under the Act would have occurred if the requested permit had been issued. Panhandle Eastern Pipe Line Company v. IEPA, PCB 98-102 (Jan. 21, 1999); Joliet Sand & Gravel Co. v. PCB, 163 Ill. App. 3d 830, 833, 516 N.E.2d 955, 958 (3rd Dist. 1987), citing IEPA v. PCB, 118 Ill. App. 3d 772, 455 N.E.2d 189 (1st Dist. 1983).

Section 39(a) of the Act states, in pertinent part that:

> When the Board has by regulation required a permit for the construction, installation, or operation of any type of facility, equipment, vehicle, vessel, or aircraft, the applicant shall apply to the Agency for such permit and it shall be the duty of the Agency to issue such a permit upon proof by the applicant that the facility . . . will not cause a violation of this Act or of regulations hereunder. 415 ILCS 5/39(a) (2000).

Section 40(a)(1) of the Act provides that:

> If the Agency refuses to grant or grants with conditions a permit under Section 39 of this Act, the applicant may, within 35 days, petition for a hearing before the Board to contest the decision of the Agency. 415 ILCS 5/40(a)(1) (2000).

Petitioners timely appealed the Agency's decision to deny petitioners' supplemental permit application.

It is well-settled that the Board's review of permit appeals is limited to information before the Agency during the Agency's statutory review period, and is not based on information developed by the permit applicant, or the Agency, after the Agency's decision. Alton Packaging Corp. v. PCB, 162 Ill. App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987). However, it is the hearing before the Board that provides a mechanism for the petitioner to prove that operating under the permit if granted would not violate the Act or regulations. Further, the hearing affords the petitioner the opportunity "to challenge the reasons given by the Agency for denying such permit by means of cross-examination and the Board the opportunity to receive testimony which would 'test the validity of the information (relied upon by the Agency)'." Alton Packaging Corp. v. PCB, 162 Ill. App. 3d at 738, 516 N.E.2d at 280 (5th Dist. 1987), quoting IEPA v. PCB, 115 Ill. 2d 65, 70 (1986).

Typically, evidence that was not before the Agency at the time of its decision is not admitted at hearing or considered by the Board. West Suburban Recycling and Energy Center, L.P. v. IEPA, PCB 95-199 and 95-125 (Oct. 17, 1996); Panhandle Eastern Pipe Line Company v. IEPA, PCB 98-102 (Jan. 21, 1999); Alton Packaging Corp. v. PCB, 162 Ill. App. 3d at 738, 516 N.E.2d at 280 (5th Dist. 1987).

OBJECTIONS TO HEARING OFFICER RULINGS

Before addressing the parties' appeal arguments, the Board will first address CLC's objections to six hearing officer rulings.

Excluded Testimony

CLC objects to the hearing officer's ruling excluding the testimony of City Clerk John Enger, City Engineer Warren Olson, and the admission of Exhibits 49, 57 and 58.[6] CLC makes *laches* and estoppel arguments regarding the permit denial, and contends that these testimonies and exhibits are necessary to assert these claims. CLC Obj. at 1. CLC argues that the hearing officer's ruling was a ruling on the merits, which is prohibited by 35 Ill. Adm. Code 101.502.

CLC further argues that it set forth its *laches* and estoppel claims when it responded to the Agency's "Wells letter"[7] where CLC argued that since Pruim's conviction in 1993, CLC filed numerous permit applications, and the Agency acted on those applications without considering Pruim's plea. CLC Obj. at 4, citing AR at 15-16. CLC also argues that the testimonies of Enger and Olson show the prejudice that the City of Morris would incur if the Agency denied the permit on this basis. CLC Obj. at 5.

CLC argues that in making his ruling, the hearing officer erroneously attempted to distinguish the doctrine of *laches* in an enforcement case from a permit appeal. CLC Obj. at 5.

The Agency responds that the hearing officer correctly prohibited Enger's testimony. Agency Resp. to Obj. at 2. The Agency observes that counsel for CLC admitted that the testimony and the exhibits were not presented as part of the permit application or as information that the Agency considered during its permit review process. Agency Resp. to Obj. at 3, citing Tr. at 590.

Additionally, the Agency argues that nothing in the hearing officer's ruling was legally or factually incorrect. Agency Resp. to Obj. at 4. The Agency disputes CLC's assertion that the hearing officer's ruling was a ruling on the merits. Agency Resp. to Obj. at 4.

The Board finds, that in this instance, the hearing officer should have allowed the disputed testimonies and exhibits. The Board recognizes that the exhibits were not part of the permit application. However, the prohibited information is relevant to CLC's *laches* and estoppel claims, which they did not know they would have to make until after they received the "Wells letter." Because CLC had an extremely short time to respond to the letter (discussed

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[6] Exhibit 49 is CLC's engineering costs since August 1996. Exhibits 57 and 58 are the landfill royalties and landfill taxes paid to the City of Morris since 1998.

[7] A "Wells letter," is a letter that the Agency is required to submit to a permit applicant under certain conditions pursuant to Wells Manufacturing Company v. IEPA, 195 Ill. App. 3d 593, 552 N.E.2d 1074 (1st Dist. 1990). The letter provides the permit applicants an opportunity to respond to potential denial reasons before a denial letter is issued. ESG Watts, Inc. v. IEPA, PCB 94-243, 94-306, 94-307, 94-308, 94-309, 95-133, 95-134 (consolidated) (Mar. 21, 1996). The substance of the parties' "Wells letter" arguments are addressed later in this opinion.

further at pages 17, 22-23), CLC could not be expected to have the disputed documents prepared in its response. Therefore, the Board admits the testimonies of Enger and Olson, as well as Exhibits 49, 57, and 58 solely for the purpose of evaluating CLC's *laches* and estoppel claims.

Hearing Officer Ruling Regarding the June 29, 2001 Permit

CLC objects to the hearing officer excluding the testimony of Munie (permit section manager), Roque (permit reviewer), Liebman (Roque's supervisor) and McDermont (CLC's consultant) regarding the Agency's June 29, 2001 grant of a permit to CLC to install and operate gas probes at the facility, and excluding Exhibits 37 and 73.[8] CLC Obj. at 2. CLC argues that the June 29, 2001 permit is relevant to show that the permit denial in this instance was a means to close down the site and to use permitting as enforcement. CLC Obj. at 2. CLC argues that the documents regarding the June 29, 2001 permit are included in the record and that the application was before the Agency on May 11, 2001. CLC Obj. at 2.

CLC notes that on May 11, 2001, two other permits, log no. 2001-051 and 2001-012 were pending before the Agency. CLC Obj. at 7. CLC argues that these two permits, along with the permit in this case (log no. 2000-438) were all referenced in the same memo from Munie to Roque in which Munie set forth the denial language for the Section 39(i) grounds of the instant permit. CLC Obj. at 7. CLC argues that because Pruim signed log no. 2001-051 and the same disputed financial assurance was posted for log no. 2001-051, the hearing officer should have admitted the testimony and exhibits. CLC Obj. at 7. Because these materials were before the Agency when it denied the petition on May 11, 2001, CLC argues the hearing officer should have admitted them. CLC Obj. at 8.

The Agency responds that this information was not before the Agency "in the permit application at the time of that decision." Agency Resp. to Obj. at 5. The Agency also argues that comparing one permit to another is only relevant if the two permits address the same subject matter. Agency Resp. to Obj. at 5. The Agency distinguishes between the permit in this instance, which addresses the approval to dispose of waste in a new cell, from the permit in log no. 2001-051, which addressed pollution control measures. Agency Resp. to Obj. at 5. The Agency argues that different permit applications seeking different forms of approval to do different things at a landfill are irrelevant for comparison. Agency Resp. to Obj. at 6. The Agency notes that disposal of waste in a landfill must comply with Section 811.700(f), and approval for pollution control measures does not. Agency Resp. to Obj. at 6.

The Board affirms the hearing officer's ruling regarding the June 29, 2001 permit. The Board is to base its decision on the record before the Agency. West Suburban Recycling and Energy Center, L.P. v. IEPA, PCB 95-199 and 95-125 (Oct. 17, 1996); Panhandle Eastern Pipe Line Company v. IEPA, PCB 98-102 (Jan. 21, 1999); Alton Packaging Corp. v. PCB, 162 Ill. App. 3d at 738, 516 N.E.2d at 280 (5th Dist. 1987). The Board finds that the hearing officer correctly excluded the evidence relevant to the June 29, 2001 permit. The documents were not

[8] Exhibit 37 is the permit application for log no. 2001-051 and Exhibit 73 is an excerpt from the permit file for log no. 2001-051.

part of the record in this case, and the Board finds no reason to grant an exception to the general rule prohibiting the admission of information outside the Agency record.

Hearing Officer Ruling Excluding Enforcement Memo

CLC objects to the Hearing Officer's ruling excluding a September 7, 1999 site inspection memo that CLC argues shows that the Agency's permit section believed the site should be closed. CLC Obj. at 2. CLC argues the memo supports CLC's theory that denying the permit was a substitute for enforcement. CLC Obj. at 2.

CLC explains that the memo from the site inspector relates to enforcement, but was copied to Munie. CLC Obj. at 9. Therefore, CLC argues that this memo was properly before the Agency when it made its May 11, 2001 decision. CLC Obj. at 9. CLC argues the memo shows the Agency's bias toward the site. CLC Obj. at 9.

The Agency responds that at hearing, the Agency attorney argued that the memo predated the permit application by more than two years. Agency Resp. to Obj. at 6. The Agency further argues that no one from the Agency staff testified that they remembered that document or relied upon it in making their decision. Agency Resp. to Obj. at 6.

The Board affirms the hearing officer's exclusion of the September 7, 1999 memo. This document was not part of the permit application, nor is there any evidence that the Agency considered this memo in any way in making its decision to deny the permit.

Hearing Officer Ruling Excluding Prior Conduct Certifications

CLC appeals the hearing officer's ruling to exclude Munie's testimony and Exhibit 20 regarding the prior conduct certifications for James Pelnarsh. CLC Obj. at 3. CLC argues that the certifications were before the Agency on May 11, 2001, and are relevant as a mitigating factor under Section 39(i).

CLC argues that Pelnarsh has been the day-to-day operator of the site. CLC Obj. at 10. CLC argues that Pelnarsh was both the chief operator and the responsible person with respect to the 35 Ill. Adm. Code 745 regulations as they relate to the prior conduct certifications. CLC argues that in ESG Watts, Inc. v. IEPA, PCB 94-243, 94-306, 94-307, 94-308, 94-309, 95-133, 95-134 (consolidated)
(Mar. 21, 1996), the Board analyzed Section 22.5 of the Act and 35 Ill. Adm. Code 745 as analogous to Section 39(i) of the Act, and suggested the Agency consider this information. CLC Obj. at 10. CLC argues that none of the Agency witnesses said they considered the information, and none knew who submitted the prior conduct certifications. CLC Obj. at 10.

The Agency responds that the hearing officer properly denied the admission of Munie's testimony and Exhibit 20 regarding the prior conduct certifications. Agency Resp. to Obj. at 6. The Agency argues that there is no evidence in the hearing transcript that questions whether Pelnarsh was the individual with prior certification for the landfill. Agency Resp. to Obj. at 7. The Agency further argues that other evidence was admitted at hearing regarding what steps the Agency should have taken in its Section 39(i) analysis. Agency Resp. to Obj. at 7.

The Board affirms the hearing officer's exclusion of Munie's testimony and Exhibit 20, regarding Pelnarsh's prior conduct certifications. The Board finds that this evidence is irrelevant to either ground that is raised in this appeal.

Hearing Officer Ruling Regarding Gonzalez Transfer Station

CLC objects to the hearing officer's ruling excluding Munie's and Liebman's testimonies and Exhibit 75 regarding the Section 39(i) procedures used in a previous case where the Agency granted a transfer station permit to a convicted felon (Gonzalez).[9] CLC Obj. at 3, citing Exh. 75, Tr. 107-08, 142-50, 434-40. CLC argues the evidence should have been admitted for the purpose of showing Munie's and Liebman's inexperience in Section 39(i) issues, and to show that Munie and Liebman knew that Wells required them to provide a "reasonable opportunity" for the applicant to respond to the Section 39(i) issues, and to show that in the Gonzalez case, the field operations section can, should and did initiate a Section 39(i) investigation. CLC Obj. at 4.

The Agency responds that the instant case is factually different from the Gonzalez case. Agency Resp. to Obj. at 8. First, the Agency argues that in Gonzalez, there was no evidence that the manager of the Agency's permit section learned of the felony conviction of the prospective owner or operator less than two weeks before the permit decision was due. Agency Resp. to Obj. at 8. Also, there is no allegation that the felony in Gonzalez was similar in either nature of the crime, the facts surrounding the crime, or the time periods between the conviction and the permit review process. Agency Resp. to Obj. at 8.

The Board finds that the hearing officer properly excluded the Gonzalez evidence. The facts of that case were not part of the record in this case.

Hearing Officer Ruling Regarding Granting Petitioners a Separate Hearing

CLC appeals the hearing officer's ruling denying CLC's request for a separate hearing on issues of fact pursuant to Section 105.214 of the Board's procedural rules. CLC Obj. at 12. Section 105.214(a) of the rules states:

> Except as provided in subsection (b), (c) and (d) of this Section, the Board will conduct a public hearing, in accordance with 35 Ill. Adm. Code 101.Subpart F, upon an appropriately filed petition for review under this Subpart. The hearing will be based exclusively on the record before the Agency at the time the permit or decision was issued, unless the parties agree to supplement the record pursuant to Section 40(d) of the Act. If any party desires to introduce evidence before the Board with respect to any disputed issue of fact, the Board will conduct a separate hearing and receive evidence with respect to the issue of fact.

[9] Exhibit 75 is a "Wells letter" to Gonzalez, where the Agency gave him a week to respond.

CLC disagrees with the hearing officer's ruling denying a separate hearing on the basis that the last sentence in Section 105.214(a) only modified the previous sentence regarding Section 40(d). CLC Obj. at 14, citing Tr. at 235.

The Agency responds that the hearing officer's ruling should be affirmed. Agency Resp. to Obj. at 8. The Agency cites Prairie Rivers Network v. IEPA and Black Beauty Coal Company, PCB 01-112 (Aug. 9, 2001), where the Board discussed Section 105.214(a) of the Board's procedural rules. In that case, the Board stated that reading Section 105.214(a) in conjunction with Section 40(d) applied only to permit reviews for applications pursuant to the Clean Air Act. Prairie Rivers Network v. IEPA and Black Beauty Coal Company, PCB 01-112 (Aug. 9, 2001).

The Board affirms the hearing officer's ruling denying a separate hearing on the issues of fact. The Board finds that the hearing officer correctly ruled that the third sentence in Section 105.214(a) pertains to the previous sentence regarding Section 40(d) of the Act.

DENIAL BASED ON FINANCIAL ASSURANCE

Agency Decision

In its May 11, 2001 denial letter, the Agency identifies its reason for denying the permit with respect to financial assurance as follows:

> Pursuant to 35 IAC Section 811.700(f), no person shall conduct waste disposal operation at a MSWLF that requires a permit under Sections 21(d)(1) and 21(d)(2) of the Act unless the person complies with financial assurance requirements of Part 811. The financial assurance documents submitted by Community Landfill Corp. and the City of Morris do not comply with the requirements of 35 Ill. Adm. Code 811.712(b). Effective June 1, 2000, Frontier Insurance Company was removed from the list of sureties that are approved by the U.S. Department of the Treasury as an acceptable surety (acceptable sureties are listed in the U.S. Department of the Treasury's Circular 570). Section 811.712(b) requires, among other things, that the surety company issuing a bond for financial assurance must be approved by the U.S. Department of the Treasury as an acceptable surety. Therefore, this facility is not in compliance with 35 IAC Section 811.700(f). AR at 1-2.

35 Ill. Adm. Code 811.712(b) provides that:

> The surety company issuing the bond shall be licensed to transact the business of insurance by the department of insurance, pursuant to the Illinois Insurance Code [215 ILCS 5], or at a minimum the insurer must be licensed to transact the business of insurance or approved to provide insurance as an excess or surplus lines insurer by the insurance department in one or more states, and approved by the U.S. Department of the Treasury as an acceptable surety. Section 21.1(a.5) of the Act [415 ILCS 5/21.1(a.5)].

BOARD NOTE: The U.S. Department of the Treasury lists acceptable sureties in its Circular 570

CLC Arguments

CLC argues that Frontier Insurance Company's (Frontier) financial assurance bonds complied with the applicable regulations and Act, and therefore the Agency's decision was incorrect. CLC Br. at 45. CLC states that CLC obtained the bonds when Frontier was both licensed by the Illinois Department of Insurance and on the Department of Treasury 570 list (570 list). CLC Br. at 3.[10] CLC also argues that when the Agency "approved" the same bonds for the August 4, 2000 sigmod permits, the Agency knew that Frontier had been removed from the 570 list. CLC Br. at 31. Specifically, CLC notes that on August 3, 2000, the Agency's financial assurance analyst, Taylor, wrote that "Community Landfill has tendered three acceptable performance bonds totaling $17,427,366. The bonds appear to comply with the relevant regulations in all respects." CLC Br. at 31, citing AR at 214.

CLC also argues that there is no law, rule, or regulation that directs or allows the Agency to disapprove of bonds if the surety is removed from the 570 list. CLC Br. at 45. CLC also notes that there is no question that the Frontier bonds are enforceable. CLC Resp. Br. at 12. CLC contends that the language in the bonds that the surety must ". . . pay the penal sum to the IEPA or provide closure and post-closure care . . . . If, during the term of this bond, the principal fails to provide closure and post closure care or corrective action." CLC Resp. Br. at 12, citing Exh. 15, 16 and 70.

CLC further argues that the estoppel doctrine precludes the Agency from denying the permit on this ground. CLC Br. at 12-13. CLC argues that when a party relies on the acts or a permit issued by the state, equitable principles can apply to estop the state from refusing to allow the permitted activity to occur. CLC Br. at 12, citing Kaeding v. PCB, 22 Ill.App.3d 36, 38, 316 N.E.2d 788, 790 (2nd Dist. 1974). CLC notes that an unauthorized or mistaken act of a ministerial officer will not estop the government, unless a party can show an affirmative act induced his actions and without relief he would suffer substantial loss. CLC Br. at 13, citing Metromedia, Inc. v. Kramer, 152 Ill. App.3d 459, 467, 504 N.E.2d 884, 890 (1st Dist. 1987).

In this instance, CLC argues that Munie told Taylor to "find a way to accept the bonds to put the operators on the hook for $17 million." CLC Br. at 13. CLC argues that this affirmative act induced CLC action to tender an additional 15.6 million in financial assurance bonds, and without relief, CLC will have tremendous liability and no ability to operate the site. CLC Br. at 13.

CLC further argues the Agency failed to issue a "Wells letter" regarding Frontier's removal from the 570 list. CLC Br. at 26. CLC contends that although Frontier's removal from the 570 list was a fact the Agency considered outside of the permit application, the Agency failed

[10] CLC obtained the bonds on June 14, 1996 and May 31, 2000. CLC Resp. Br. at 12.

to issue a "Wells letter" on the issue. CLC Br. at 26. As a result, CLC says it had no opportunity to respond to the bond issue. CLC Br. at 27.

City of Morris Arguments

The City of Morris similarly argues that Frontier issued the bonds when it was licensed by the Department of Insurance and included on the 570 list. City Br. at 2. The City of Morris also argues that the Agency approved the same bonds for the sigmod permits issued on August 4, 2000. City Br. at 2. The City of Morris reiterates CLC's argument that neither the Act nor Section 811 directs or allows the Agency to rescind or revoke bonds that were previously approved, based on being removed from the 570 list. City Br. at 3.

Agency Arguments

The Agency argues that the language of 35 Ill. Adm. Code 811.712(b) is clear. Agency Br. at 9. Among other things, the regulation requires that the U.S. Department of the Treasury must find the surety acceptable. Agency Br. at 9. The Agency argues that it is undisputed that Frontier was not an approved surety company as of June 1, 2000. Agency Br. at 10. Therefore, approving the permit application would result in a violation of Section 712(b). Agency Br. at 10. Under Section 39(a) of the Act, the Agency cannot issue a permit if a violation of the Act or regulations would occur. Agency Br. at 10.

The Agency responds to both CLC and the City of Morris' arguments similarly. In its response to the City of Morris, the Agency clarifies that the issue is not that the Agency thought the bonds were insufficient or not in full force and effect. Agency Resp. to city Br. at 1. Rather, the Agency argues that its basis for its financial assurance denial was because the surety that issued the bonds (Frontier) was not, on the date of the permit denial, on the 570 list. Agency Resp. to city Br. at 1. The Agency also argues that granting the permit would violate the regulations, because Frontier was not in compliance with Section 811.712(b), which is a violation of Section 811.700(f).[11] Agency Resp. to city Br. at 2.

The Agency argues that the City of Morris misstates the Agency's decision, because it implied that the Agency unlawfully rescinded or revoked the bonds. Agency Resp. Br. to city Br. at 2. The Agency repeats that it questioned the surety that issued the bonds, not the bonds themselves. Agency Resp. to city Br. at 2.

Regarding CLC's arguments, the Agency states that it did not determine that the bonds did not comply with the regulations. Agency Resp. to CLC Br. at 2. Rather, the Agency's

[11] 35 Ill. Adm. Code 811.700(f) states that:

> On or after April 9, 1997, no person, other than the State of Illinois, its agencies and institutions, shall conduct any disposal operation at an MSWLF unit that requires a permit under subsection (d) of section 21.1 of the Act, unless that person complies with the financial assurance requirements of this Part.

decision was that the surety that issued the performance bonds did not satisfy the applicable regulations. Agency Resp. to CLC Br. at 2.

The Agency further responds that the doctrine of estoppel does not apply to its decision. Agency Resp. to CLC Br. at 22. The Agency argues that Taylor erred when he found the bonds adequate and in compliance with regulations. CLC Br. at 22. The Agency argues that prior erroneous Agency actions are properly remedied by correcting the error, not perpetuating it. Agency Resp. to CLC Br. at 23, citing State Bank of Whittington v. IEPA, PCB 92-152 (June 3, 1993). The Agency contends that no misrepresentation was made to CLC and there was no affirmative act. Agency Resp. to CLC Br. at 23. Additionally, the Agency argues that Taylor testified that he found the bonds acceptable in the summer of 2000 and as of May 11, 2001.[12] Agency Resp. to CLC Br. at 9-10. Regarding what Munie allegedly told Taylor, the Agency responds that even if that is true, it was not conveyed to any CLC representatives, and Taylor testified he took action because he thought it was correct under the regulations. Agency Resp. to CLC Br. at 23.

The Agency also argues that it was not required to send a "Wells letter" regarding the surety issue. Agency Resp. to CLC Br. at 12. The Agency notes that CLC knew that a permit application for the landfill had to comply with all applicable requirements of the Act and regulations. Agency Resp. to CLC Br. at 12. This is not the same situation as the Wells case where the court required the Agency to allow a permit applicant to provide information that it was not a polluter before the Agency denied a permit on those grounds. Agency Resp. to CLC Br. at 12. In this case, all the parties agreed that the regulatory standard of Section 811.712(b) applied. Agency Resp. to CLC Br. at 12.

The Agency further states that this denial point was based solely on the regulatory requirements that petitioners' engineering consultant testified were taken into consideration in preparing the permit. Agency Resp. to CLC Br. at 13. The Agency argues that Wells does not require the Agency to send a "Wells letter" in this instance, since the application information is deemed by petitioners to show compliance with statutory and regulatory requirements. Agency Resp. to CLC Br. at 13.

Discussion and Findings Regarding Financial Assurance

For the reasons that follow, the Board affirms the Agency's decision regarding financial assurance.

CLC's and the City of Morris' primary argument is that CLC obtained the bonds when Frontier was both licensed by the Illinois Department of Insurance and on the 570 list. However, the relevant question is whether Frontier fit both these criteria as required by the regulations at 35 Ill. Adm. Code 811.712(b) when the Agency made its decision. The answer is no. The

[12] The Board notes that Taylor was not employed by the Agency when the May 11, 2001 decision was made, nor was he part of the decision process regarding the May 11, 2001 decision. Tr. at 501.

undisputed facts are that Frontier was removed from the 570 list on June 1, 2000. Because Section 39(a) of the Act prohibits the Agency from issuing a permit if a violation of the Act or regulations would occur, the Agency could not properly grant the permit on May 11, 2001.

The Board also rejects CLC's argument that estoppel precludes the Agency's ruling. In Panhandle Eastern Pipeline Company, Inc. v. IEPA, PCB 98-102 (Jan. 21, 1999), under the doctrine of equitable estoppel:

> an obligation may not be enforced against a party that reasonably and detrimentally relied on the words or conduct of the party seeking to enforce the obligation. *See* Brown's Furniture, Inc. v. Wagner, 171 Ill. 2d 410, 431, 665 N.E.2d 795, 806 (1996). However, the doctrine "should not be invoked against a public body except under compelling circumstances, where such invocation would not defeat the operation of public policy." Gorgees v. Daley, 256 Ill. App. 3d 143, 147, 628 N.E.2d 721, 725 (1st Dist. 1993). As the Illinois Supreme Court has explained, "this court's reluctance to apply the doctrine of estoppel against the State has been motivated by the concern that doing so 'may impair the functioning of the State in the discharge of its government functions, and that valuable public interests may be jeopardized or lost by the negligence, mistakes or inattention of public officials.'" Brown's Furniture, 171 Ill. 2d at 431-432, 665 N.E.2d at 806 (quoting Hickey v. Illinois Central R.R. Co., 35 Ill. 2d 427, 447-448, 220 N.E.2d 415, 426 (1966)).
>
> Consistent with this reluctance, the courts have established several hurdles for those seeking to estop the government. Like all parties seeking to rely on estoppel, those seeking to estop the government must demonstrate that their reliance was reasonable and that they incurred some detriment as a result of the reliance. A party seeking to estop the government also must show that the government made a misrepresentation with knowledge that the misrepresentation was untrue. See Medical Disposal Services, Inc. v. IEPA, 286 Ill. App. 3d 562, 677 N.E.2d 428 (1st Dist. 1997). Finally, before estopping the government, the courts require that the governmental body must have taken some affirmative act; the unauthorized or mistaken act of a ministerial officer will not estop the government. "Generally, a public body cannot be estopped by an act of its agent beyond the authority expressly conferred upon that official, or made in derogation of a statutory provision." Gorgees, 256 Ill. App. 3d at 147, 628 N.E.2d at 725; see also Brown's Furniture, 171 Ill. 2d at 431, 665 N.E.2d at 806 ("The State is not estopped by the mistakes made or misinformation given by the Department's [of Revenue] employees with respect to tax liabilities.").

In this case, CLC argues that the Munie's affirmative act of directing Taylor to find a way to accept the bonds caused them to post the additional bonds. CLC argues that without the permit, it will have no ability to operate the site, and will be liable for $17 million in financial assurance and $1 million in bond premiums. First, the Board accepts the Agency's claim that Taylor made a mistake when he found the bonds acceptable under the regulations. Even if Munie instructed Taylor to find a way to accept the bonds, there is no evidence that the instruction influenced Taylor. Taylor testified that he made the decision based on his

understanding of the regulations. The Board finds that Taylor's mistake does not estop the Agency from denying the permit.[13] Additionally, the Board does not agree that Munie's alleged "affirmative act" induced Taylor to make his decision.

The Board also rejects CLC's argument that the Agency was required to send a "Wells letter" indicating Frontier had been removed from the 570 list. Essentially, a "Wells letter" provides a permit applicant with an opportunity to respond when the Agency seeks information beyond the contents of the permit application. In this case, there is no question that CLC understood the financial assurance requirements of Section 811.712(b) in that CLC needed to provide proof of financial assurance. There is no authority that suggests it is the Agency's responsibility to update permitees of changes in the 570 list. In this instance, the financial information submitted by CLC was the basis for the denial; the Agency did not rely on information outside of the application when it denied the permit on the basis of Frontier being removed from the 570 list.

Although the Board affirms the Agency's denial of the permit application on the basis of noncompliance with Section 811.712(b), in the interest of judicial economy, the Board addresses the Agency's denial based on Section 39(i) below.

DENIAL BASED ON SECTION 39(i)

Agency Decision

In its May 11, 2001 denial letter, the Agency identifies its basis for denying the permit with respect to Pruim's felony record as follows:

> Pursuant to Section 39(i)(2) of the Act [415 ILCS 5/39(i)(2)], the Illinois EPA may deny a permit if the owner or operator has a history of conviction of a felony in federal court. In accordance with Section 39(i) of the Act, the Illinois EPA conducted an evaluation of Community Landfill Corporation's prior experience in waste management operations. Based on the felony conviction of Robert J. Pruim, which is directly related to the management of waste in Illinois, in Illinois EPA, by the authority granted in Section 39(i) of the Act is denying this permit. Mr. Robert J. Pruim was convicted in federal court of a felony in the case of U.S.A. v. Pruim, et al., No. 93-CR-682 (Dist. Ct. N-IL). AR at 2.

Section 39(i) of the Act provides:

> Before issuing any RCRA permit or any permit for a waste storage site, sanitary landfill, waste disposal site, waste transfer station, waste treatment facility, waste incinerator, or any waste-transportation operation, the Agency shall conduct an evaluation of the prospective owner's or operator's prior experience in waste management operations. The

[13] In Village of Fox River Grove, Illinois v. IEPA, PCB 97-156, (Dec. 18, 1997), the Board found that the Agency's prior actions were not relevant to a permit appeal decision where the petitioner could not prove that granting the permit without conditions would not violate the Act or regulations.

> Agency may deny such a permit if the prospective owner or operator or any employee or officer of the prospective owner or operator has a history of: (1) repeated violations of federal, State, or local laws, regulations, standards, or ordinances in the operation of waste management facilities or sites; or (2) conviction in this or another State of any crime which is a felony under the laws of this State, or conviction of a felony in a federal court; or (3) proof of gross carelessness or incompetence in handling, storing, processing, transporting or disposing of waste.

CLC Arguments

Section 39(i) Investigation

CLC argues that the Agency does not have any policies and procedures to implement Section 39(i). CLC Br. at 2, 37. CLC claims that the lack of policies and procedures resulted in the Agency's failure to conduct a real investigation of the case. CLC Br. at 38. CLC further argues that although Section 39(i) investigations are mandatory, the Agency admits to rarely conducting them. CLC Br. at 38.

CLC argues that the Board has previously recommended that the Agency develop a consistent process and specific standards to evaluate permitees for prior history of violations. CLC Br. at 38, citing ESG Watts, PCB 94-243 (consolidated) (Mar. 21, 1996). CLC complains that the Agency has failed to follow the Board's directives to develop a consistent process for Section 39(i). CLC Br. at 38. CLC also complains that the Agency has not looked to analogous provisions of the Act or regulations for mitigating factors. CLC Br. at 38. CLC alleges that if the Board affirms the Agency's Section 39(i) investigation in this case, it will affirm "an absolutely illegal, improper, unguided and prejudicial Section 39(i) investigation." CLC Br. at 40.

Pruim's Conviction

CLC argues that on March 29, 2001 a reporter called Munie, and told her that Pruim was a convicted felon. CLC Br. at 21, Exh. 74. As a result, Munie requested an investigation be conducted and called a meeting of various Agency employees. CLC Br. at 21, Exh. 74, AR at 14. CLC argues that the employees at the meeting did not know, among other things, the facts of the conviction or Pruim's role at the landfill. CLC Br. at 21-22.

CLC challenges Munie's understanding of Pruim's conviction. CLC observes that Munie's internal Agency memo noted that Pruim's conviction "is . . . directly related to bribing a City official in their capacity as it related to waste management activities," and "Robert J. Pruim pled guilty to violations specifically referencing CLC as related to the hauling company." CLC Br. at 39, citing AR at 13. However, CLC argues that Munie interpreted this information from the criminal complaint filed against Pruim, and the relevant docket sheet. CLC Br. at 39. CLC notes that that language does not appear in either document.

CLC additionally argues that Pruim's guilty plea did not include the facts alleged in the complaint regarding CLC being affiliated with the hauling company, and were not part of the

guilty plea or the facts admitted to by Pruim. CLC Br. at 39. CLC argues that although Robert Pruim was convicted of a felony eight years ago, it was not related to the operation of the landfill, environmental crimes, or anything related to waste disposal or management in Illinois. CLC Br. at 2, 39.

CLC further argues that the Agency admitted it did not consider the plea agreement, because Munie believed she saw the plea agreement, when in fact she only saw the complaint and docket sheet. CLC Br. at 39. CLC also complains that the Agency did not consider any mitigating factors under 35 Ill. Adm. Code 745.141(b), which apply to granting prior conduct certification for waste disposal site personnel. CLC Br. at 40. Specifically, CLC argues that the Agency did not consider the degree of control that Pruim exerted over the site either at the time of his conviction or since then. CLC Br. at 40.

CLC also alleges that Agency employees knew about Pruim's conviction as early as 1993, within days of Pruim's plea. CLC Br. at 19. Specifically, CLC notes that Taylor testified that just days after the conviction, he attended a meeting with other Agency personnel where they discussed the conviction. CLC Br. at 19, citing Tr. 476-77. CLC further argues that Retzlaff (CLC inspector) testified he discussed the Pruim conviction with Cliff Gould of the field operations section in 1993, and further that Retzlaff believed Pruim's conviction was "common knowledge among the Agency." CLC Br. at 19, citing Tr. 110. CLC also argues that certain Agency personnel were present during a 1995 variance proceeding involving CLC, in which they all heard testimony from a witness who referenced Pruim's indictment. CLC Br. at 19, Exh. 19.

CLC contends that prior to April 2001, the Agency never conducted a Section 39(i) investigation of Pruim's conviction. However, CLC argues that it applied for the August 4, 2000 sigmod permits for the landfill between 1996-2000. CLC Br. at 20. During the pendency of those permits, the Agency granted or denied 13 permits to CLC, and Pruim signed all of those permit applications. CLC Br. at 20, AR at 81.

Wells Letter

CLC argues that the Agency failed to comply with its legal obligation under Wells Manufacturing Company v. IEPA, 195 Ill. App. 3d 593, 552 N.E.2d 1074 (1st Dist. 1990). CLC Br. at 4. CLC argues that the Wells court held that when the Agency intends to consider matters beyond the permit application, it must provide the applicant with reasonable notice and reasonable opportunity to respond. CLC Br. at 9. CLC asserts that the Agency sent a "Wells letter" (regarding Pruim's conviction) on April 4, 2001, and demanded a response by 5:00 p.m. on April 9, 2001. CLC Br. at 4, Exh. 12. CLC argues that the letter was not sent to CLC, but rather to its consultant, who faxed the letter to CLC's attorney in the mid-morning of April 9, 2001. CLC Br. at 4. CLC protests only having a few hours to respond to the letter. CLC Br. at 25. CLC also complained of the short response time in its April 9, 2001 response to the "Wells letter". AR at 15.

Laches

CLC argues that the doctrine of *laches* should apply to prevent the Agency from raising Pruim's eight-year-old conviction as reason to deny the permit under Section 39(i). CLC Br. at 42.

CLC argues that *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. CLC Br. at 11, citing Tully v. Illinois, 143 Ill. 2d 425, 432, 574 N.E.2d 659, 662 (1991); City of Rochelle v. Suski, 206 Ill. App. 3d 497, 501, 564 N.E.2d 933, 936 (2d Dist. 1990). CLC notes that *laches* is based on the notion that courts will not readily come to the aid of a party who has "slept on his rights to the detriment of the opposing party." CLC Br. at 11, citing Tully, 143 Ill. 2d at 432, 574. Although applying *laches* to public bodies is disfavored, the Illinois Supreme Court held in Hickey v. Illinois Central Railroad Co., 35 Ill. 2d 427, 220 N.E.2d 415 (1966), that the doctrine can apply to governmental bodies under compelling circumstances. CLC Br. at 11.

CLC argues that the Agency slept on its rights when Gould, Warren Weritz (CLC inspector), Retzlaff and Taylor all knew about Pruim's conviction as early as 1993, and no one initiated a Section 39(i) investigation on any of the other pending 13 permits from 1996 to the present. CLC Br. at 42-43. CLC argues that there is no excuse for the Agency to not have written policies and procedures to institute a Section 39(i) investigation. CLC Br. at 43, citing Tr. at 60, 120.

CLC argues it was prejudiced when the Agency granted or denied 13 CLC permits since 1996, and during that time CLC spent more than $900,000 in engineering costs. CLC Br. at 43. CLC contends that if the Agency had raised a Section 39(i) issue at any time, CLC's consultant (McDermont) would have stopped working and spending money until the issue was resolved. CLC Br. at 43-44. Also, because the Agency issued the sigmod permits in August, 2000, CLC posted an additional $15.6 million in financial assurance. CLC Br. at 44. CLC argues it would not have expended these funds if the Agency had conducted its investigation as early as 1996. CLC Br. at 44. Although high-ranking Agency employees responsible over the site knew about the conviction for many years, the Agency did nothing about it, and CLC incurred substantial additional liability. CLC Br. at 44.

Agency Arguments

Section 39(i)

The Agency admits it does not have formal guidelines or articulated internal policies for addressing a Section 39(i) situation. Agency Br. at 14. However, the Agency notes that Section 39(i)'s language does not require that the Agency implement procedural rules to implement the section. Agency Br. at 15. The Agency further argues that when the appellate court reviewed ESG Watts v. IEPA, PCB 94-243 (consolidated) (Mar. 21, 1996), the appellate court did not disapprove of the Agency's lack of formal rules or procedures for Section 39(i). Agency Br. at 16. Although the Agency acknowledges the Board suggested in Watts that it would behoove the Agency to develop a more consistent process for future Section 39(i) evaluations, the Board also

affirmed the Agency's decision to deny the Watts permit on the basis of Section 39(i). Agency Br. at 15.

The Agency argues that it complied with the mandatory first component of Section 39(i) in evaluating the permit applicant's prior experience, when it considered the "four corners" of the permit application. Agency Br. at 17, citing Tr. at 132, 180. The Agency further argues that after Munie received the phone call from the reporter regarding Pruim's felony conviction, she initiated an investigation into the merits of the information. Agency Br. at 18. The Agency defends this process, arguing that to require the Agency to always perform an investigation or other research beyond the permit applications in every instance would be impossible. Agency Br. at 18.

The Agency defends the investigation it conducted regarding the conviction. It argues that it obtained a copy of the docket in Pruim's case, and the docket revealed that Pruim plead guilty to all counts. Agency Br. at 19, citing AR at 17-27. The Agency argues that the counts made allegations of bribery and fraud between Pruim and a City of Chicago Department of Streets and Sanitation employee. Agency Br. at 19, citing AR at 28-29.

Pruim's Conviction

The Agency argues that Munie received the reporter's phone call regarding Pruim's conviction on Friday, March 30, 2001. Agency Br. at 6, citing Tr. at 125, 169. On Monday, April 2, 2001, Munie decided to conduct an investigation and ordered that a "Wells letter" be sent. Agency Br. at 6, Exh. 74.

The Agency refutes CLC's contention that Pruim's conviction was common knowledge among the Agency. The Agency argues that there was no testimony that the permit reviewer, Roque, nor Liebman (Roque's supervisor) knew about the conviction. Agency Resp. to CLC Br. at 8. The Agency notes that Nechvatal, employed by the Bureau of Land, and the senior manager of the Bureau during Taylor's employment, did not know about the conviction until April, 2001. Agency Resp. to CLC Br. at 8. Additionally, the Agency argues that the only Agency employees that definitely had knowledge of the conviction are Taylor and those employees mentioned in the stipulation from the 1995 variance case. Agency Resp. to CLC Br. at 8, Exh. 19.

The Agency argues that there is no statutory or regulatory requirement for the employees that knew about Pruim's conviction to pass along the information. Agency Resp. to CLC Br. at 9.

Wells Letter

In response to CLC's argument that it did not receive the "Wells letter" from the Agency, the Agency argues that because McDermont sent a copy of the letter to CLC's attorney, CLC received "formal if not actual" notice of the letter. Agency Br. at 19. The Agency cites the Board's decisions in IEPA v. Nesco Steel Barrel Company, PCB 90-37 (May 24, 1990), and IEPA v. Mervis Industries, PCB 88-36 (May 5, 1988), where the Agency argues the Board noted

that if the facts and circumstances demonstrate that the Agency provided actual notice, then that is substantial compliance with the applicable notice provisions. Agency Br. at 19.

The Agency contends that it considered CLC's response to the "Wells letter" before it denied the permit, acknowledging that it would have been preferable for all parties if the Agency and petitioners had more time to respond and consider the response to the letter. Agency Br. at 19, Agency Resp. to CLC Br. at 10. The Agency argues that the timing of receiving of the information and the impending decision deadline forced the tight schedule. Agency Br. at 19.

The Agency also notes that even though the permit decision deadline was extended 30 days, CLC did not submit any further information to the Agency. Agency Br. at 20, Agency Resp. to CLC Br. at 10. The Agency further argues that it issued the "Wells letter" as soon as practicable after it received the inquiry. Agency Resp. to CLC Br. at 20.

Laches

Regarding CLC's *laches* argument, the Agency responds that there is no time limit on when Section 39(i) may be applied. Agency Resp. to CLC Br. at 25. Since Section 39(i) is discretionary, it is difficult to show that an omission or failure to act occurred. Agency Resp. to CLC Br. at 25.

The Agency argues the CLC has failed to show the Agency lacked diligence. Agency Resp. to CLC Br. at 25. CLC did not present any testimony that Munie knew Pruim's conviction history until March, 2001. Agency Resp. to CLC Br. at 25. When she found out, she took the necessary steps to be in a position to possibly apply Section 39(i) of the Act. Agency Resp. to CLC Br. at 25.

The Agency also argues that CLC was not prejudiced when it was receiving the other permits, accepting waste, and generating revenues. Agency Resp. to CLC Br. at 25. Therefore, the Agency concludes that CLC has failed to make a credible case for applying *laches* to this matter. Agency Resp. to CLC Br. at 25.

Discussion and Findings Regarding Section 39(i)

For the reasons that follow, the Board finds that the Agency's decision was improper.

The Board previously addressed the nature of review of the Agency's Section 39(i) decisions in ESG Watts, Inc. v. IEPA, PCB 94-243 (consolidated) (Mar. 21, 1996). Section 40 of the Act specifically mandates that the Board review Agency decisions made pursuant to Section 39 of the Act. *Id.* Agency decisions to deny a permit pursuant to Section 39(i) are therefore also reviewable by the Board pursuant to Section 40 and 35 Ill. Adm. Code Section 105.102(a). *Id.* It is the petitioner's burden to prove both that he is entitled to the permit and that the Agency's stated denial reasons are either insufficient or improper. *Id.*

However, as the Board found in ESG Watts:

> Because the information reviewed by the Agency in denying a permit pursuant to Section 39(i) is different from the information considered by the Agency in imposing conditions or denying a permit based on the merits of a permit application, the Board's review of such a denial is necessarily different in certain respects. ESG Watts, Inc. v. IEPA, PCB 94-243 (March 21, 1996). Unlike our review of other permitting decisions where the Board must determine whether there will be prospective compliance with the Act and Board regulations, reviews of Section 39(i) decisions look solely at the operating history of the prospective operator and what has already transpired. *Id*. It is therefore not necessary for the Board to analyze whether issuance of the permit will cause a violation of the Act or Board regulations in relation to a Section 39(i) denial. *Id*.
>
> Additionally, Section 39(i) requires the Agency to conduct an evaluation of the prospective operator's prior experience in waste management operations and to apply the legislatively-defined criteria to the waste management record of the operator. *Id*. Therefore, it is not only the operating history of the permit applicant but the Agency's analysis of the history, which forms the record to review in Section 39(i) decisions. *Id*. In reviewing Section 39(i) decisions, the Board must determine whether the applicant's operating history warrants denial of the requested permit due to: 1) repeated violations of federal, State, or local laws or regulations; 2) conviction of a felony in this or any other state; or 3) proof of gross carelessness or incompetence in handling, storing, processing, transporting, or disposing of any hazardous waste. *Id*. The burden is on petitioners to show that the Agency incorrectly determined that denial of the permit is warranted in considering the above factors. *Id.*

The Board disagrees with CLC's claim that the Agency incorrectly denied the permit due to the lack of Section 39(i) policies and procedures. In the ESG Watts case, the Board stated that the Agency's lack of procedures for Section 39(i) evaluations might lead to an inconsistent application of Section 39(i). *Id.* However, as the Agency correctly notes, Section 39(i) does not require the Agency to have policies and procedures.

The Board finds that the Agency properly conducted a Section 39(i) evaluation in this instance. Munie called a meeting and ordered an investigation into Pruim's history. The Board finds that the problem with the Agency's Section 39(i) decision does not lie in the Section 39(i) evaluation itself, but in the decision to deny the permit based on the evaluation.

The Board finds that the Agency's decision on the basis of Pruim's conviction was insufficient and improper. First, the Board acknowledges that Munie did not know about Pruim's conviction until March 30, 2001. However, given that the permit decision was due on April 12, 2001, the Agency's service of the "Wells letter" on CLC was insufficient. The Agency mailed the letter on April 4, 2001, but CLC did not receive its own copy of the letter. Rather, CLC received the letter from its consultant (McDermont) on the day the response was due, April 9, 2001.[14] The Board understands that the Agency requested such a short response date due to

[14] McDermont received the letter on April 9, 2001. Tr. at 644.

the initial permit decision date, April 12, 2001. However, given the tight schedule, the Board finds the service on CLC was insufficient.

The Agency defends its service on CLC by citing IEPA v. Nesco Steel Barrel Company, PCB 90-37 (May 24, 1990) and IEPA v. Mervis Industries, PCB 88-36 (May 5, 1988). However, the Board notes that those cases addressed the pre-enforcement notice requirements under Section 31(d) of the Act, and in those cases the Board either found that no prejudice occurred or the party had enough time to respond. The instant case is distinguishable because CLC had, at most, an afternoon to respond to the letter. The Board finds that the time allowed to CLC to respond to the letter amounted to no time at all.

The Board rejects the Agency's assertion that CLC failed to provide further information after the deadline was extended for 30 days. The Agency's April 4, 2001 letter to CLC clearly states that CLC had to respond by 5:00 p.m. on April 9, 2001. Exh. 12. Although McDermont extended the due date to April 12, 2001, the extension was for the express purpose of waiting for the Board's decision in Community Landfill Co. *et al*. v. IEPA, PCB 01-48, 49 (Apr. 5, 2001). Nothing indicates that CLC believed it could file more material regarding the "Wells letter" during that time. Due to the insufficient service of the letter, the Board finds the Agency improperly denied the permit based on Pruim's conviction.

ENFORCEMENT BY PERMITTING

CLC argues that the Agency's decision should be reversed because it essentially amounted to an improper mixing of permitting and enforcement. CLC Br. at 47. CLC relies on the testimonies of Munie, Purseglove, Roque, Liebman and Retzlaff, who all believed that CLC had been operating without a permit and should be shut down. CLC Br. at 47. CLC also argues that key enforcement personnel (Purseglove, Agency attorney Bruce Kugler, and Blake Harris), were either directly involved in the permit decision, were brought into meetings, or received copies of documents relating to the permit denial. CLC Br. at 47. Also, Munie was copied on enforcement memos regarding the site being closed down. CLC Br. at 47.

CLC argues that Retzlaff (CLC's inspector) did not know the Agency could not do enforcement through permitting. CLC Br. at 48. CLC challenges Retzlaff's practice of rendering opinions through email regarding his beliefs that CLC ignored regulations and was sloppy is contrary to what the Act and the regulations require the Agency to do – evaluate permits without considering pending enforcement cases or opinions about whether the site should be shut down. CLC Br. at 49. CLC further argues that the Agency did not discourage Retzlaff's practice or told him not to send opinionated emails to attempt to influence the permit decision. CLC Br. at 49.

The Agency responds that the permit denial was not enforcement through permitting. Agency Resp. to CLC Br. at 15. The Agency argues it had no choice but to deny the permit since to grant the permit would violate the financial assurance requirements. Agency Resp. to CLC Br. at 16.

The Agency further argues that no Agency employee indicated that the decision was driven by enforcement concerns, and no Agency permit section employee indicated that they looked at any enforcement-related documents. Agency Resp. to CLC Br. at 17. The Agency also argues that the employees of the permit section all testified that they did not include any non-factual comments from the field operations section in their permit review. Agency Resp. to CLC Br. at 17.

The Board rejects CLC's claim that the denial of the permit was enforcement through permitting. As noted above, there is a legal basis for the Agency's denial of the permit. The Agency cannot grant a permit that will violate the Act or the regulations. The permit submitted by CLC will violate Section 811.712(b) of the regulations. CLC cannot prevail on this argument when the denial is legally legitimate.

CONCLUSION

The Board affirms the Agency's denial of petitioners' supplemental permit application on the basis of petitioners' failure to comply with 35 Ill. Adm. Code 811.712(b). Because the surety company that issued the bonds was not on the Department of the Treasury 570 list, the Agency could not grant the permit when the permit would violate the regulations.

The Board finds that the Agency's denial of petitioners' supplemental permit application on the basis of its Section 39(i) evaluation of Pruim's conviction was improper. The Agency failed to give petitioners sufficient time in which to respond to the "Wells letter". The service of the letter on the date the response was due was insufficient.

This opinion constitutes the Board's findings of fact and conclusions of law.

ORDER

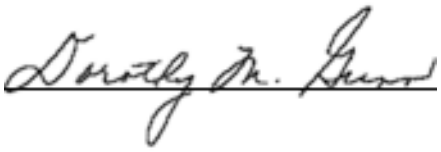
The Board finds that the Illinois Environmental Protection Agency properly denied Application Log No. 2000-438 on the grounds that the petitioners failed to prove that granting the permit would not violate 35 Ill. Adm. Code 811.712(b).

The Board finds that the Illinois Environmental Protection Agency improperly denied Application Log No. 2000-438 pursuant to its discretion under 415 ILCS 5/39(i) (2000).

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) (2000); *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 statute, 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, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on December 6, 2001, by a vote of 5-0.



Dorothy M. Gunn, Clerk
Illinois Pollution Control Board