

FEB 14 2013

STATE OF ILLINOIS
Pollution Control Board

ILLINOIS POLLUTION CONTROL BOARD
February 14, 2013

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

HEARING OFFICER ORDER

On November 20, 2012, the respondent Illinois Environmental Protection Agency (Agency) filed a motion to quash discovery (Mot.). On November 29, 2012, the petitioner Atkinson Landfill Company (Atkinson) filed its response (Resp.) to the Agency's motion. The Agency has not filed a reply.

For the reasons discussed below, the Agency's motion is granted.

Procedural History

On September 6, 2012, the Board accepted Atkinson's amended petition for hearing. Atkinson Landfill Company v. IEPA, PCB 13-8 (Sept. 6, 2012). The Board found that:

In this case, the Agency denied Atkinson's permit request, finding the permit was incomplete because Atkinson's siting approval had expired. Atkinson appeals on the grounds that the previous local siting approval decision was still valid and challenges the Agency determination that the permit application was incomplete because of a lack of local siting approval. *Id.* slip op. at 1.

Agency's Motion To Quash Discovery

It appears that the Agency's motion includes four contested interrogatories.¹ The four contested interrogatories are set forth below:

¹ The Agency did not include the contested interrogatories with its motion. The interrogatories were attached to Atkinson's response. Presumably, Atkinson served the Agency with only four interrogatories.

Interrogatories

Interrogatory No. 1: Has the Agency ever denied an application for a permit to develop a pollution control facility or landfill on the grounds that because the application was administratively incomplete the application for purposes of meeting section 39.2(f) of the Illinois Environmental Protection Act was not made and as such the local siting approval expired? If yes, please identify the name of the entity that applied for the development permit and the date the application was submitted to the Agency.

Interrogatory No. 2: Please identify all Persons with knowledge of any facts relating to any instances where [sic] the Agency denied an application for a permit to develop a pollution control facility or landfill on the grounds that because the application was administratively incomplete the application for purposes of meeting Section 39.2(f) of the Illinois Environmental Protection Act was not made and as such the local siting approval expired.

Interrogatory No. 3: Has the Agency ever issued a permit to develop a pollution control facility or landfill where additional information was provided to the Agency in connection with the application to develop the facility after the local siting approval would have expired? If yes, please identify the Persons involved with issuing the permit, the name of the entity that applied for the development permit and the date the application was submitted to the Agency.

Interrogatory No. 4: Since January 1, 2002, what percentage of applications for a permit to develop a pollution control facility or landfill is found to be administratively incomplete?

The Agency correctly states that review in permit appeals is normally based exclusively on the materials in the record, however, review may be enlarged to include information that was relied on by the Agency and not included in the record on review or information that was before the Agency at the time of the denial which it reasonably should have relied upon. Mot. at 5. (citations omitted). The Agency further states that “expiration of the local siting authority was but one of the 68 different reasons Illinois EPA denied Petitioner’s Application.” Mot. at 6. Finally, the Agency argues that “the fundamental question raised by Petitioner’s appeal is legal in nature and turns on a question of statutory interpretation, for which no discovery is required.” *Id.*

Atkinson’s Response

In its response, Atkinson states that:

[t]he only issue before the Board in this matter is whether local siting approval granted by the Village of Atkinson continues to be valid under

Section 39.2(f) of the Environmental Protection Act...[where] IEPA issued a denial of permit finding, among other things, that...it was barred from granting a development permit to expand the landfill unless Atkinson provides proof of new local siting approval.” Resp. at 1.

Atkinson agreed with the Agency that the issues to be decided by the Board are legal, rather than factual in nature, stating that Atkinson is prepared to “submit a revised permit application addressing those technical issues [cited in the denial letter] in timely fashion. Resp. at 1. Atkinson goes on to note that, in Saline County Landfill, Inc., v. IEPA, PCB 04-117, slip op. at 14 (May 6, 2004), the Board held that IEPA’s interpretation of Section 39.2(f) of the Act was due no greater weight than any other party in that case. Atkinson goes on to state that, if the Agency will stipulate that the Agency’s interpretation is not entitled to deference, that Atkinson would withdraw the discovery request. But, Atkinson stated that if the Agency planned to argue that the Agency interpretation is entitled to deference, Atkinson requests denial of the motion to quash. Resp. at 2

Discussion And Ruling

In pertinent part, Section 101.616 (a) of the Board’s procedural rules states that “[a] ll relevant information and information calculated to lead to relevant information is discoverable, excluding those materials that would be protected from disclosure in the courts of this State pursuant to statute, Supreme Court Rules or common law”. Additionally, the Board may look to the Code of Civil Procedure and the Supreme Court Rules for guidance where the Board’s procedural rules are silent. *Id.*

It is well settled that the Board’s review of permit appeals is based exclusively on the record before the Agency at the time the Agency issued its permit decision. Accordingly, though the Board hearing affords petitioner the opportunity to challenge the validity of the Agency’s reasons for its decision, information developed after the Agency’s decision typically is not admitted at hearing or considered by the Board. See Alton Packaging Corp. v. PCB, 162 Ill App. 3d 731, 738, 516 N.E.2d 275, 280 (5th Dist. 1987); Community Landfill Co. & City of Morris v. IEPA, PCB 01-170 (Dec. 6, 2001), *aff’d sub nom*; Community Landfill Co. & City of Morris v. PCB & IEPA, 331 Ill. App. 3d 1056, 772 N.E. 2d 231 (3rd Dist. 2002). “Additionally, if there was information in the Agency’s possession upon which it reasonably should have relied, the applicant may also submit such information to the Board for the Board’s consideration”. Joliet Sand and Gravel Company, v. IEPA, PCB 86-159, slip op. 5 (February 5, 1987). Finally, the scope of discovery in a permit appeal is in part, “controlled by the general issue presented”. Owens – Illinois, Inc. v. IEPA, (PCB 77-288), slip op. 1 (February 2, 1978). “It is proper to inquire, and discovery should be allowed, to insure that the record filed by the Agency is complete and contains all of the material concerning the permit application that was before the Agency when the denial statement was issued”. *Id.* at 1.

In pertinent part, the Agency’s denial letter states that:

- 1) The application provides proof that local siting approval for the proposed expansion was granted on August 28, 2006. However, this local siting approval seems to have expired no later than September 4, 2011 (i.e. three years after September 4, 2008, the date that the docket was closed on Illinois Pollution Control Board case No. PCB 2007-020 in which the applicant appealed some of the conditions placed on local siting approval). The permit application (Log No. 2011-406) was filed on January 9, 2012. Therefore, the Illinois EPA appears to be barred by Section 39(c) of the Environmental Protection Act, 415 ILCS(the Act) from approving this application for a developmental permit due to the lack of proof that the applicant obtained local siting approval for this project, which has not expired pursuant to Section 39.2(f) of the Act. Petition Ex. 1.

The Agency argues that the issue on appeal “turns on a question of statutory interpretation.” Mot. at 6. Atkinson is in agreement, and that is why it maintains that the Agency needs to be responsive with its interrogatories so that some light might be shed on any prior permitting decisions the Agency possibly relied upon in making its determination.

Examination of the rationale behind the Board’s Saline County holding makes the hearing officer’s ruling in this case clear:

In reviewing the Agency’s decision on a permit appeal, the courts have held that the Board does not review the Agency’s decision using a deferential manifest-weight of the evidence standard. IEPA v. PCB, 115 Ill. 2d 65, 70, 503 N.E.2d 343, 345 (1986).

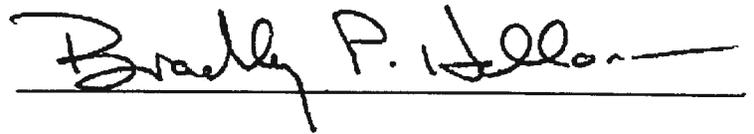
Given the Board and Agency responsibilities in a permit appeal, the Board finds that the Agency’s interpretation of Section 39.2(f) of the Act (415 ILCS 5/39.2(f) (2002)) prior to this appeal is not relevant to the Board’s decision. Further, as the Board must decide whether or not the application as submitted demonstrates that no violation of the Act would occur if the permit is issued, the Board is not bound by the Agency’s interpretation of Section 39.2(f) of the Act (415 ILCS 5/39.2(f) (2002)). The Board will consider the Agency’s arguments on statutory construction; however, the Agency’s arguments are not considered with any greater or lesser weight than SCLI’s arguments or Saline County’s arguments. In taking this view of the Agency’s interpretation of Section 39.2(f) of the Act (415 ILCS 5/39.2(f) (2002)), the Board is consistent with both the Board’s and court’s decisions in Fox River Grove, (*see* Fox River Grove 702 N.E.2d at 662 and PCB 97-156, slip op. at 8). Saline County, *supra*, slip op. at 15.

The cases cited above make clear that Board is not required to give deference to prior Agency permitting decisions in addressing purely legal questions coming to the Board for the first

time. Accordingly, any information produced in response to the challenged interrogatories will not lead to the discovery of any information relevant to the Board's consideration of the purely legal issue posed. The Agency's motion to quash discovery is therefore granted.

The parties are reminded that the Board's procedural rules provide that the parties may seek Board review of discovery rulings pursuant to 35 Ill. Adm. Code 101.616 (e). Filing of any such appeal of a hearing officer order does not stay the proceeding.

IT IS SO ORDERED.

A handwritten signature in black ink, reading "Bradley P. Halloran", is written over a solid horizontal line.

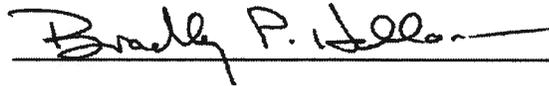
Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center Suite 11-500
Chicago, Illinois 60601
312.814.8917

CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were mailed, first class, on February 14, 2013, to each of the persons on the service list below.

It is hereby certified that a true copy of the foregoing order was hand delivered to the following on February 14, 2013:

John T. Therriault
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph St., Ste. 11-500
Chicago, Illinois 60601



Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, Illinois

SERVICE LIST

PCB 2013-008
Joshua R. More
Schiff Hardin, LLP
6600 Willis Tower
233 S. Wacker Drive
Chicago, IL 60606-6473

PCB 2013-008
Evan J. McGinley
Office of the Attorney General
69 W. Washington Street
Suite 1800
Chicago, IL 60602

PCB 2013-008
Division of Legal Counsel
IEPA
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276