

ILLINOIS POLLUTION CONTROL BOARD
November 21, 1996

SENATOR WILLIAM SHAW, RONNIE)
LEWIS, and JUDITH EVANS,)
)
Petitioners,)
)
v.)
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY, BOARD OF)
TRUSTEES OF THE VILLAGE OF)
DOLTON, ILLINOIS, LAND AND LAKES,)
and MAYOR DONALD HART,)
)
Respondents.)

PCB 97-68
(Landfill Siting Review)

ORDER OF THE BOARD (by J. Yi):

This matter is before the Illinois Pollution Control Board (Board) on an appeal filed pursuant to paragraph (b) of Section 40.1 of the Environmental Protection Act (Act) (415 ILCS 5/40.1 (1994)) on October 8, 1996 by Senator William Shaw, Ronnie Lewis, and Judith Evans (petitioners) from the September 3, 1996 decision of the Village of Dolton, Illinois (Village) granting local siting approval to Land and Lakes Company for a pollution control facility located in Cook County. Several motions and filings are currently pending.

Unless the Board determines that the petition is duplicitous or frivolous, Section 40.1 of the Act requires the Board to hear the instant petition if it has been filed by a third party other than the applicant if a) the party participated in the public hearing conducted by the county board or municipal governing body which granted siting approval, and b) is so located as to be affected by the proposed facility. An action before the Board is duplicitous if the matter is identical or substantially similar to one brought in another forum (Brandle v. Ropp, PCB 85-68, 64 PCB 263 (1985)). An action before the Board is frivolous if it fails to state a cause of action upon which relief can be granted by the Board (Citizens for a Better Environment v. Reynolds Metals Co., PCB 73-173, 8 PCB 46 (1973)).

The Board entered an order on October 17, 1996 finding the petition deficient stating that:

- 1) The petition does not allege that the petitioners participated at the local hearing held by the Village of Dolton. The Board accordingly cannot make the finding required by Section 40.1(b) of the Act that the petitioners participated at the hearing and are so located as to be affected by the facility. Unless both points are alleged in the petition, the Board cannot find that petitioners have standing to appeal.

- 2) The petition fails to contain a copy of the resolution, ordinance, or other official writing which memorializes the Village of Dolton's September 3, 1996 decision. Without this document, the Board cannot determine whether the appeal was in fact filed within 35 days as required by Section 40.1. (The Board must dismiss late appeals.)

The Board required petitioners to file an amended petition curing these deficiencies within 14 days of the date of the order. The order also stated that failure to submit the amended petition would subject the matter to dismissal. As of the date of this order the Board has not received an amended petition.

Deficiency of the Petition

On November 13, 1996, Land and Lakes filed a motion to enforce the Board order of October 17, 1996. Land and Lakes argues that it has been prejudiced by the petitioners' failure to comply with the Board's order. Land and Lake states "[s]ection 40.1 of the Environmental Protection Act (415 ILCS 5/40.1 (1994)) establishes procedures to protect all parties by ensuring prompt resolution of any appeal" and failure to comply with the Board's order denies all parties the protections of Section 40.1 of the Act.

On November 15, 1996, the Village filed a "Motion to Enforce Board Order and Order Directing Petitioners to Pay Cost of Preparing Record." The Village states that petitioners failed to follow the Board's October 17, 1996 order and argues that as a result the petition should be dismissed.

The Board disagrees with Land and Lakes' interpretation of the Act. The pertinent part of Section 40.1 states:

- b) If the county board or the governing body of the municipality as determined by paragraph (c) of Section 39 of this Act, grants approval under Section 39.2 of this Act, a third party other than the applicant who participated in the public hearing conducted by the county board or governing body of the municipality may petition the Board within 35 days for a hearing to contest the approval of the county board or the governing body of the municipality. Unless the Board determines that such petition is duplicitous or frivolous, or that the petitioner is so located as to not be affected by the proposed facility, the Board shall hear the petition in accordance with the terms of subsection (a) of this Section and its procedural rules governing denial appeals, such hearing to be based exclusively on the record before county board or the governing body of the municipality. The burden of proof shall be on the petitioner. The county board or the governing body of the municipality and the applicant shall be named as co-respondents.

The Board shall transmit a copy of its decision to the office of the county board or governing body of the municipality where it shall be available for public inspection and may be copied upon payment of the actual cost of reproduction.

Section 40.1(b) of the Act does not set forth procedures for petitioners to follow. Instead Section 40.1(b) of the Act establishes certain determinations which must be made by the Board prior to proceeding to hearing. The only prejudice which may result is if the Board fails to make those determinations prior to proceeding to hearing. Therefore if the Board can make those determinations no prejudice will result. However another prejudice may result in that the Board has a 120-day decision period in this matter which started with the filing of the petition. As a result, petitioners' failure to file an amended petition with the required information has caused this matter to proceed under a tight timeline which may result in prejudice to the parties. Land and Lakes controls the timeline and may waive the decision due-date if it is being prejudiced. Any prejudice to petitioners is due to their failure to respond to the October 17, 1996 Board order.

On November 7, 1996 the Village of Dolton (Village) filed and certified the record on appeal.¹ Contained in the Record is the transcript from the hearings before the Village. From those transcripts the Board is able to determine that Senator Shaw testified at the hearing held on June 25, 1996 starting at 7:00 p.m. and that he is a resident of the Village.² (Record, Group Exh.#1 at 270-279, 272.) Additionally, the Board can discern from the transcripts that both Mr. Lewis and Mrs. Evans testified at the June 26, 1996 hearing starting at 7:00 p.m. and are residents of the Village. (Record, Group Exh. #1 at 405-424.)

Furthermore the Board requested petitioners to amend their petition by incorporating a copy of the Village ordinance which they are appealing. The table of contents supplied with the Record states that the ordinance is included on pages C261-264.³ However, the ordinance was inadvertently not included with the November 7, 1996 filing. The Village is directed to supplement the Record by filing the ordinance. The Village states in its motion for costs that the Village voted on or about September 3, 1996.

As examination of the Record makes clear that petitioners have standing to bring this action, the Board will not dismiss the petition due to its noted deficiencies. Therefore, the Board will not grant either Land and Lakes' or the Village's motion to enforce the Board's prior order. However, in so ruling we note that we cannot allow any additional failure on the part of either parties to comply with future Board or hearing officer orders. Such failure will subject the parties to sanctions pursuant to 35 Ill. Adm. Code 101.Subpart J or any other appropriate sanctions as established by case precedent. Sanctions may include but are not limited to dismissal of this case, limitation of rights to participate at hearing, or payment of various costs.

Frivolous and Duplicitous Determination

¹ The certified record of the proceedings before the Village will be referenced to as the "Record".

² The transcript for the hearing below will be referenced as "Group Exh.#1 at ".

³ The "C" indicates the Village's page numbers.

As noted above, unless the Board determines that the petition is duplicitous or frivolous, Section 40.1 of the Act requires the Board to hear the instant petition if it has been filed by a third party other than the applicant if a) the party participated in the public hearing conducted by the county board or municipal governing body which granted siting approval, and b) is so located as to be affected by the proposed facility. An action before the Board is duplicitous if the matter is identical or substantially similar to one brought in another forum (Brandle v. Ropp, PCB 85-68, 64 PCB 263 (1985)). An action before the Board is frivolous if it fails to state a cause of action upon which relief can be granted by the Board (Citizens for a Better Environment v. Reynolds Metals Co., PCB 73-173, 8 PCB 46 (1973)).

The Board has already determined that petitioners have standing therefore the Board must determine whether the action is frivolous or duplicitous. The Board finds that there is nothing in the record that indicates that the petition is either duplicitous or frivolous and therefore we will proceed with hearing in this matter.

The Agency's Motion to be Dismissed as a Party

On October 28, 1996 the Illinois Environmental Protection Agency (Agency) filed a motion to dismiss itself from this matter. The Agency states that "it is clear that none of the factual matters alleged or represented in any way involve, either directly or indirectly, the Illinois EPA." (Mot. at 3.) The Agency goes on to explain its role in the permitting process and that it has no role in the local siting process. (Mot. at 3-5.) Therefore the Agency requests the Board to dismiss it as a party in the proceeding. (Mot. at 5.) No response has been filed by petitioners as of the date of this order.

The Board grants the Agency's motion to dismiss itself as a party in this matter. The Agency does not have any authority or other statutory duty or involvement in the local siting process which the petition is requesting review. (See 415 ILCS 5/39.2 (1994).) Additionally, the Agency is not necessary for the full litigation of this matter. The Agency is dismissed as a respondent in this matter and there shall be no reference to the Agency in future captions.

Village's Motions to Waive Filing Requirements and to Assess Costs

On November 7, 1996 the Village filed several motions along with the Record.⁴ The Village motioned the Board to allow the filing of one copy of the oversized exhibits and a motion for order directing the petitioners to pay costs of preparing the Record. The Board grants the Village's motion to file one copy of the oversized exhibits.

As to costs, the Village argues pursuant to Section 39.2(n) of the Act that petitioners should reimburse the Village for its costs of preparing and certifying the Record. Section 39.2(n) of the Act provides in pertinent part:

⁴ As noted above the Village also filed a "Motion to Enforce Board Order and Order Directing Petitioners to Pay Costs of Preparing Record" on November 15, 1996. That filing does not raise any new arguments from those raised in the November 7 filing and was discussed previously.

In any review proceeding of a decision of the county board or governing body of a municipality made pursuant to the local siting process, the petitioner in the review proceeding shall pay to the county or municipality the cost of preparing and certifying the record of proceedings.

In the event the Petitioner is a citizens' group that participated in the siting proceeding and is so located as to be affected by the proposed facility, such petitioner shall be exempt from paying the costs of preparing and certifying the record.

On June 22, 1989, Senator Doris Karpziel sponsored an amendment on 3rd reading to House Bill 98 to exempt citizens' groups from the fee payment at issue here. Prior to the vote on the bill, Senator Karpziel stated in pertinent part:

And if you will bear with me, I have told the Pollution Control Board that I would read into the record the meaning of "citizens groups." It means a group of individual citizens that have joined together to participate in a regional pollution control facility siting hearing. This group may be a voluntary association that is formed on an ad hoc basis that may or may not have a name or bylaws. It also can be a group that has incorporated. It cannot be a husband and wife or a family. It does not include the -- local Chamber of Commerce, labor organizations, or township board of trustees. It also does not include persons owning or operating a nearby competing landfill facility, or units of local governments acting alone. It has to be a true citizens group, such as the Citizens Against the Bartlett Bale Fill in my district. (State of Illinois 86th General Assembly Regular Session Senate Transcript, 52nd legislative day, June 22, 1989.)

In Alice Zeman, Tony Berlin, Richard Zilka, Michael Turlek, Kevin Greene v. Village of Summit and West Suburban Recycling and Energy Center, Inc. and Donna Quilty v. Board of Trustees and Mayor of the Village of Summit and West Suburban Recycling and Energy Center, Inc (December 17, 1992), PCB 92-174 and PCB 92-177 (Consolidated), the Board found that the petitioners were a "citizen's group" for the purposes of determining whether costs should be assessed for the preparation of the record. We see no reason at this time to interpret the statute or our case law differently regarding this group of otherwise unrelated petitioners. Therefore the Village's motion for costs associated with the preparation and filing of the Record is denied.

Scheduling and Conduct of the Hearing

The Board stated in its October 17, 1996 order that "[t]he hearing must be scheduled and completed in a timely manner, consistent with Board practices and the applicable statutory decision deadline, or the decision deadline as extended by waiver (the siting applicant may file a waiver of the statutory decision deadline pursuant to 35 Ill. Adm. Code 101.105)". A hearing officer has been assigned to conduct hearings consistent with this order.

The assigned hearing officer shall inform the Clerk of the Board of the time and location of the hearing at least 40 days in advance of hearing so that public notice of hearing

may be published. After hearing, the hearing officer shall submit an exhibit list, a statement regarding credibility of witnesses and all actual exhibits to the Board within five days of the hearing.

Since petitioners did not file an amended petition as requested and the Board is only ruling on the petition today absent any future waivers of the decision deadline, the statutory decision deadline is now February 5, 1997 (120 days from October 8, 1996); the Board meeting immediately preceding the decision deadline is scheduled for January 23, 1997. Therefore the assigned hearing officer should disregard the previous order and set the hearing consistent with this order. This may result in the Board not having the usual thirty days to review the record in this matter and/or receive briefs absent a waiver from the applicant for siting in this matter.

If after appropriate consultation with the parties, the parties fail to provide an acceptable hearing date or if after an attempt the hearing officer is unable to consult with the parties, the hearing officer shall unilaterally set a hearing date in conformance with the schedule above. The hearing officer and the parties are encouraged to expedite this proceeding as much as possible.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above order was adopted on the _____ day of _____, 1996, by a vote of _____.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board