ILLINOIS POLLUTION CONTROL BOARD
August 1, 1996

CITY OF DEKALB,	)	
	)	
Petitioner,	)	
	)	PCB 96-246
v.	)	(Variance - Public Water Supply)
	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

ORDER OF THE BOARD (by J. Theodore Meyer):

On June 3, 1996 the City of DeKalb (DeKalb) filed a Petition for Variance, requesting the Board to extend a prior variance granted in City of DeKalb v. IEPA (June 20, 1991) PCB 91-34. DeKalb requests an extension of a variance from the provisions of 35 Ill. Adm. Code 602.105(a), "Standards of Issuance", and 602.106(b), "Restricted Status".[1] On June 10, 1996 the Board received an objection to DeKalb's petition for variance and a request for hearing. Accordingly, a hearing is set for August 5, 1996.

The Board recently received three motions to intervene in this matter. The first motion was filed July 17, 1996 by Altheimer and Gray on behalf of Miguel A. Checa, Jeffrey L. Houghtby, and Linda L. Lahey, individually and on behalf of the Citizens Advocacy Network (CAN).[2] The second motion was filed July 22, 1996 by Partridge and Niro on behalf of Dorianne Burg, John T. Hepperly, Jr., Clyde Brown, Maureen Brown, Jonathan Reich, and the Children of DeKalb.[3] The third motion to intervene was filed July 22, 1996, by Altheimer and Gray on behalf of Margaret M. Zonca individually and on behalf of CAN.[4]

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[1] The principle effect of restricted status is that public water suppliers are prohibited from extending water service due to their inability to obtain the requisite Agency permits, unless and until their water meets all of the standards for finished water supplies. A grant of variance from Standards of Issuance and Restricted Status neither absolves the public water supplier from compliance with the drinking water standards at issue, nor insulates a public water supplier from possible enforcement action for violation of those standards. Again, the grant or denial of a variance from Standards of Issuance and Restricted Status controls whether the Agency may issue the requisite permits to extend water service. It does not effect the applicability of the maximum contaminant level of combined radium as set forth in 35 Ill. Adm. Code 611.330(a).

[2] This motion will be referred to as CAN's first motion.

[3] This motion will be referred to as Burg et. al. motion.

[4] This motion will be referred to as CAN's second motion.

On July 30, 1996 the Illinois Environmental Protection Agency (Agency) filed an objection to the motion to intervene.[5] On or about July 25, 1996 DeKalb served a copy of an objection to the motion to intervene on Hearing Officer Deb Frank; however, this motion was not filed with the Board. Thereafter, Hearing Officer Deb Frank authorized a fax-filing of the objection by the City to the Board, which the Board received on July 31, 1996. Also on July 31, 1996 DeKalb fax-filed three amended objections to the motion to intervene.[6]

On July 31, 1996 Hearing Officer Deb Frank authorized Partridge and Niro to fax-file a reply to the objections to the motion to intervene on behalf of their clients. Said reply was received and filed on July 31, 1996.[7] Burg et. al. in their reply request permission to reply. The motion is granted and the reply is accepted. On July 31, 1996, Altheimer and Gray fax-filed a reply to the objections to the motion to intervene.[8] No motion for leave to file the reply was filed; however, the Board on its own motion allows the filing of this reply.

Additional filings have been received in this matter. On July 29, 1996 DeKalb filed a Motion for Expedited Decision. No objection to this motion has been filed. Also, pending before the hearing officer is a motion filed on July 18, 1996 by DeKalb to allow the written testimony of Dr. Richard Toohey. No objection to this motion was filed. Hearing Officer Deb Frank granted this motion in an order dated July 31, 1996.

Motions to Intervene

CAN's first motion to intervene states that the application for intervention is made pursuant to Section 33 of the Environmental Protection Act (Act) (415 ILCS 5/33) and Sections 104.141 and 103.142 of the Board's rules. (35 Ill. Adm. Code 104.141 and 103.142.) The motion argues that Checa, Houghtby, and Lahey are situated in a manner to be potentially affected by a final Board order in this matter. (CAN's first motion at 2.) Additionally, the motion argues that Checa, Houghtby and Lahey have an interest in the proceedings which may affect the right of the public to use municipal water facilities. In support of these arguments, CAN attaches affidavits from each of the people requesting intervention on behalf of themselves and CAN. (Id.)

The Burg, et. al. motion requests intervention status for Dorianne Burg, John T. Hepperly, Jr., Clyde Brown, Maureen Brown, Jonathan Reich, and on behalf of the Children of DeKalb. Children of DeKalb is a group of DeKalb citizens "with an interest in safeguarding the health of the children of DeKalb." (See, Burg Affidavit attached to Burg et. al. motion.) The motion of Burg, et. al. makes the same arguments as CAN's first motion to intervene and attaches affidavits from all people seeking intervention for themselves and on behalf of the Children of DeKalb.

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[5] This response will be referred to as Agency objection.
[6] These responses will be referred to as DeKalb amended objections.
[7] This reply will be referred to as Burg et. al. reply.
[8] This reply will be referred to as CAN reply.

CAN's second motion to intervene requests intervention for Margaret M. Zonca both individually and on behalf of CAN. The second motion makes the same arguments as discussed above and attaches an affidavit from Ms. Zonca.

Objections to the Motions to Intervene

On July 30, 1996, the Agency filed an objection to the motions for intervention. The Agency challenges the motions to intervene on the basis that the Board does not have the authority to grant intervention in this case or in any variance proceeding. (Agency objection at 2.) The Agency argues that Section 37(a) of the Act allows the Board to hold hearings on variance proceedings but does not provide authority for the Board to allow intervention. (Id.) Additionally, the Agency argues and cites to case law supporting its argument that the Board may not adopt and implement rules without statutory authority. (Id.)

The Agency further contends that Section 33(c) of the Act, which allows persons claiming a right to intervene to testify on the social and economic impact of orders and determinations of the Board, is limited to enforcement actions. (Agency objection at 2-3.) Additionally, the Agency contends that nothing in Section 33 or 37(a) of the Act "expressly provides for the application of the Section 33 intervention provisions in variance cases." (Agency objection at 3.) The Agency states that, although Sections 35-38 of the Act allow the Board to grant variances upon a finding of arbitrary and unreasonable hardship and require the Agency to investigate matters in the petition and to make a recommendation on the petition, nothing in those Sections allows for intervention. (Id.) The Agency argues that because the General Assembly has specifically provided for intervention in other provisions of the Act such as in Sections 39.3(d), 40.1(b), 40.2, if they had wished to allow for intervention in variances that they would have specifically done so. (Id.)

The Agency next asserts that the Supreme Court in Landfill Inc. v. IPCB, 74 Il.2d. 541 (1978) stated that when the Board lacks statutory authority to promulgate rules that the rules are void. (Agency objection at 4.) The Agency maintains that since Sections 35-38 of the Act do not provide for intervention, the Board's rule allowing for intervention in variance proceedings is improper because, "the Board lacks express authority under the Act to adopt or permit applicants that are not parties to the case to intervene in a variance proceeding." (Id.) In support of its arguments, the Agency points to Waste Management Inc. v. IEPA, (October 1, 1984) PCB 84-45, PCB 84-61, PCB 84-68 (consolidated), which states that the Board found it lacked the authority to allow intervention in a permit appeal case despite the intervention provisions of 103.142. The Agency maintains that the Board again lacks the specific statutory authority to allow intervention of private citizens in a variance case. (Agency objection at 5.)

Finally, the Agency argues in the alternative that the applications to intervene were not timely filed. The Agency argues that Section 104.141 of the Board's rules require motions to intervene to be filed within 21 days of the filing of the petition. The petition in this case was filed on June 3, 1996 and the motions for intervention were filed on July 17, and July 22, 1996. The Agency contends that in order to be timely they should have been filed on June 24, 1996. (Agency objection at 5.)

In closing, the Agency reminds the Board that denial of the right to intervene does not preclude the citizens from participating in the hearing, specifically, by submitting statements and offering oral testimony in accordance with the Board's rules. Additionally, the Agency contests that Section 104.141 of the Board's rules is linked to the intervention provision and points out that the Section referred to in 104.141 is the default provision of the 103 rules and not the intervention provision. (Agency objection at 6.)

In its objections, DeKalb argues that none of the proposed intervenors listed in CAN's first motion live in an area which would be affected by the new water main extension which is the subject of this proceeding. Additionally, DeKalb contends that CAN's interests are no different than those of the city's general population not within the areas which will be served by the proposed or "reasonably contemplated" new water main extensions. Finally, DeKalb argues that the proceedings will not affect the rights of any of the proposed intervenors to use the water facilities provided by the petitioner. (DeKalb objections at 1.)

Replies to Objections to Intervene

In their reply Burg et. al. argue that the Act authorizes the Board to promulgate procedural rules and that only the courts may invalidate "duly-promulgated rules upon which the public has relied." (Burg et. al. reply at 1.) The reply argues that denying citizens the right to intervene would mean that citizens believing their concerns were not being addressed would have no recourse to an impartial judiciary. Burg et. al. assert that this would have a chilling effect on public participation, and cite case law in support of the idea that a State agency will pay more attention to the comments of parties who can challenge the administrative decision in court than to the comments of people who cannot do so. (Burg et. al. reply at 2.)

Burg et. al. contend that failure to allow intervention may lead to an uneven playing field where the Board may not adequately consider comments of the citizens, a reduction in public participation, and a perception that government is distant and unaccountable. Additionally, they argue that "the lack of public participation increases the likelihood that the Board may issue variances with limits and conditions that are inadequate to protect the environment because it will not have the benefit of the valuable insights and information provided by the public participation." (Burg et. al. reply at 2.)

Finally, Burg et. al. request that, if the Board determines that intervention should have been sought within 21 days of the filing of the petition, the Board waive the requirement. In support of this Burg et. al. urge that their request for hearing was timely made and that the parties have not argued that they have been prejudiced by the date of filing of the request for intervention. (Burg et. al. reply at 2.)

In its reply, CAN argues that Section 33 of the Act specifically allows for public intervention when the proceedings before the Board may affect the public's use of water facilities owned by a municipality. (CAN reply at 2.) CAN contends that each and all of the

applicants for intervention (and his or her children) are so situated as to be affected by the public water supplying their homes, places of business and schools. Additionally, CAN argues that if the variance is granted, the City may use public funds to expand the public water system instead of attaining compliance with the Radium standards. (CAN reply at 2 and 3.)

As for the Agency's argument that the Board's rules at 104.141(a) do not refer to the intervention section in 103 but instead refer to the default provisions, CAN argues that this is clearly a typographical error. CAN argues that because 104.141(a) specifically states that "Such objection may or may not be accompanied by a petition to intervene in accordance with Section 103.220", that the correct reference is clearly to 103.142(d) which contains the language on intervention. (See, 35 Ill. Adm. Code 103.220, 103.142, and 104.141(a).) (CAN reply at 3.)

CAN also argues that Section 37 of the Act provides that hearings shall be held in accordance with the rules prescribed in Sections 32 and 33(a) of the Act. CAN states that Section 33 allows intervention; thus, CAN reasons, the Board has authority to promulgate procedural rules allowing for intervention. (CAN reply at 3.)

Finally, CAN points out that, while Section 104.141 of the Board's rules allows a person to accompany an objection to a variance request with a petition to intervene, the 21 day requirement applies only to the filing of the objection, and not to the motion for intervention. Additionally, CAN contends that the petition for intervention is not required to be filed with the objection. In fact, CAN argues, Section 103.142 of the Board's rules specifically allows petitions to intervene to be filed up to 48 hours prior to the date set for hearing. (CAN reply at 4.)

Discussion

The Board finds that the Act does not give the Board authority to grant intervention in variance proceedings. Section 33(c) of the Act, which provides for intervention to allow testimony only on the social and economic impact of Board orders, is found in Title VIII of the Act, titled "Enforcement". (415 ILCS 33(c).) Sections 35-38 in Title IX of the Act, titled "Variances", set forth the procedures by which variances can be issued, and these sections provide no express right to intervene.

Section 37 of the Act states that hearings shall be conducted "under the rules prescribed in Sections 32 and 33(a) of this Act". (415 ILCS 5/37 (emphasis added).) The proposed intervenors argue that this statement includes Section 33(c) which, by its very terms, it clearly does not.

Section 103.142 of the Board's procedural rules does not specifically address variance proceedings as the proposed intervenors argue. Section 103.101, "Applicability", states that "the rules in this Part apply where applicable". (35 Ill. Adm. Code 103.101 (emphasis added).) In order for Sections 103.101 and 103.142 to be read consistently with the Act, Section 103.142 can only refer to those types of proceedings which the Act expressly grants

the right to intervene. Section 33(c) of the Act applies only to enforcement actions under Title VIII of the Act. As such, Section 103.142 necessarily excludes variance proceedings. Therefore, the Board denies all motions to intervene in this matter.

That said, we feel it imperative to remind all parties and the public that interested individuals and groups can still have an impact on the proceedings in this case. Indeed, section 37(a) of the Act requires the Agency to consider the views of persons who might be adversely affected by the grant of a variance. Section 32(a) of the Act, which does expressly apply here as stated in Section 37(a), allows interested parties the chance to present oral comments at hearing, and written comments throughout the pendency of this matter. Contrary to the arguments set forth in the Burg et. al. reply, these public comments are seriously considered by the Board in its determination of the case. Therefore, the Board encourages all interested parties to prepare and submit comments, either at hearing, or by written statement to the Board. These comments will be addressed in the written opinion of the Board decision pursuant to Section 35(a) of the Act.

Motion for Expedited Decision

In its Motion for Expedited Decision, DeKalb stated that the city and its residents will suffer financial and personal hardship if a decision is not made sooner than the September 19, 1996 meeting because various commercial and residential development projects may be delayed in opening or being occupied. Therefore, DeKalb requests that the petition for variance be considered at the Board's meeting on September 9, 1996.

The Board grants the motion and notes that Board meetings which occur between the hearing scheduled August 5, 1996 and the actual statutory decision due date of October 1, 1996 are as follows: August 15, September 9 and September 19. We acknowledge DeKalb's offer to incur the cost of an expedited hearing transcript and any other costs associated with an expedited decision. A decision will be reached in this matter as soon as Board resources allow, consistent with the Board's receipt of the transcripts, expiration of any post-hearing briefing schedule or comment period which may be established, and the Board's need to fully consider the record and prepare a written opinion.

Conclusion

The Board hereby denies the motions to intervene and grants DeKalb's motion for expedited decision.

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 _____.

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Dorothy M. Gunn, Clerk