

ILLINOIS POLLUTION CONTROL BOARD
July 18, 1996

C & S RECYCLING, INC.,)	
)	
Petitioner,)	
)	
v.)	PCB 95-100
)	(Permit Appeal - Land)
)	
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

ORDER OF THE BOARD (by E. Dunham):

Motion for Stay

On June 3, 1996, C & S Recycling (C & S) filed a Motion to Stay Proceedings along with its Status Report. C & S has waived the decision deadline until May 1, 1997. The Illinois Environmental Protection Agency (Agency) filed its Status Report and Objection to Petitioner's Motion to Stay Proceedings on June 10, 1996.

C & S requests a stay in this matter until December 1996 while it pursues legislation which may render this proceeding moot. C & S reports that H.B. 1089 which provides an exemption to the setback requirements of Section 22.14 of the Environmental Protection Act (Act) (415 ILCS 5/22.14 (1994)) has passed the Senate and is currently before the Rules Committee of the House of Representatives. C & S intends to pursue passage of the bill during the fall veto session of the 1996 legislature. C & S maintains that passage of the bill would render the permit appeal moot.

The Agency requests that the Motion for Stay be denied and that the Board decide the Agency's Motion for Summary Judgment which is currently pending before the Board. The Agency maintains that even if H.B. 1089 is enacted the petitioner would be required to file a new permit application. The Agency argues that petitioner would not be prejudiced if the Board were to deny the motion to stay. The Agency contends that continuing to stay this matter, especially if the proposed bill is not passed during the fall veto session, would result in a waste of Agency and Board resources. The Agency asserts that it is prepared to move forward on the merits of this case.

The Board has previously granted stays in this matter by order of November 16, 1995 and April 4, 1996 to allow petitioner to pursue changes in the legislation. The Board will not continue to stay this matter since the pending appeal does not affect petitioner's attempts to pursue a change in the legislature.

The Board hereby denies the motion for stay. Having denied the motion for stay the Board will proceed to decide the motion for summary judgment.

Motion for Summary Judgment

On September 15, 1995, the Agency filed a "Motion for Summary Judgment". Petitioner has not filed a response to the motion for summary judgment.¹ Pursuant to 35 Ill. Adm. Code 103.140(c) petitioner is deemed to have waived objection to the granting of the motion, but such waiver does not bind the Board in its determination.

C & S Recycling's petition seeks review of the Agency's February 10, 1995 denial of its application for a permit to develop and operate a solid waste management site in the City of Chicago. On November 18, 1994, petitioner filed an application for a permit to develop and operate a municipal waste transfer station. In its February 10, 1995 denial letter, the Agency states that one reason for denial was that the application failed to demonstrate that the proposed facility is located at least 800 feet from the nearest residence or property zoned for primarily residential uses as required by Section 22.14 of the Act (415 ILCS 5/22.14 (1994)).

The Agency maintains that there is no genuine issue as to any material fact in this matter. The Agency states that Section 39(l) of the Act (415 ILCS 5/39(l) (1994)) prohibits the issuance of a permit for a facility located within the boundaries of any setback zone established by the Act. The Agency contends that petitioner's application states that the facility is approximately 300 feet from the nearest residential district. (Rec. at 42.) The record also states that the facility has been in operation since November 1989. (Rec. at 2 & 108.) The Agency maintains that issuance of the permit would violate Sections 39(l) and 22.14 of the Act (415 ILCS 5/39(l) and 22.14 (1994)).

In its petition, the petitioner asserts that Section 22.14 applies prospectively to permit applications filed on or after the effective date of December 22, 1994. (Pet. at 4.) The Agency contends that when reviewing a permit application the law to be applied is the law that is in effect when the decision is made and not when the application is filed. (Gallatin National Co. v. IEPA (January 18, 1991), PCB 90-183; City of Herin v. IEPA (March 17, 1994), PCB 93-195; Ziffrin v. U.S., 318 U.S. 73, 63 S.Ct. 465 (1943).)

The Board finds that there are no genuine issues of material fact, so the motion for summary judgment is properly before the Board. The Board finds that the law to be applied when reviewing a permit application is the law in effect at the time the decision is made. This finding is supported by the case law cited by the Agency. Therefore, for the Agency to issue the permit in this matter petitioner must show that the proposed facility would not violate the Act in effect on February 10, 1995, the date of the Agency's denial letter. Based on the

¹ Pursuant to 35 Ill. Adm. Code 103.140(c) a party may file a response to a motion within seven days after service of the motion. The time allowed for the filing of a response lapsed prior to the filing of a motion for stay by the petitioner.

application, petitioner admits that the proposed facility does not satisfy the statutorily required setback requirements. (Ag. Rec. at 42, 44 and 45.)

Section 22.14(b) provides an exception to the setback requirement of Section 22.14(a) for facilities used as a garbage transfer station within one year prior to January 1, 1988. (415 ILCS 5/5/22.14(b).) According to the petition for review and documentation submitted in support of the application, petitioner admits that the recycling facility has been in operation at this location since November 1989. (Ag. Rec. at 2 & 108.) The Board finds that the exception to the setback rule does not apply to this facility since it began operation after January 1, 1988. Therefore, issuance of a permit for the proposed facility would result in a violation of the Act.

Petitioner also contends that it is subject only to the home rule requirements of the City of Chicago and not to the setback requirements of Section 22.14. (Pet. at 4.) The Agency maintains that the home rule exemption is not applicable because Section 22.14 is a permit standard and not a siting requirement.

The Board agrees that the home rule exemption does not apply to permitting issues and therefore is not applicable to this appeal.

Petitioner also asserts that Section 22.14 is unconstitutional and deprives petitioner of its rights to due process, equal protection, uniformity of laws and constitutes a taking without just compensation. Having found that issuance of the permit would violate the Act, the Board finds that it is unnecessary to further consider petitioner's constitutional objections to Section 22.14 of the Act. Further, even if the Board found in favor of the petitioner on these arguments, without a legislative change in the Act, issuance of the permit would still result in a violation of the Act.

The Board grants the respondent's motion for summary judgment. The Board affirms the Agency's denial of the permit. This docket is hereby closed.

IT IS SO ORDERED.

Board Member J. Theodore Meyer dissented.

Section 41 of the Environmental Protection Act, (415 ILCS 5/41 (1994)), provides for appeal of final orders of the Board within 35 days of the date of service of this order. The Rules of the Supreme Court of Illinois establish filing requirements. (See also 35 Ill. Adm. Code 101.246, Motion for Reconsideration.)

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