ILLINOIS POLLUTION CONTROL BOARD
March 17, 1994

CITY OF HERRIN,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 93-195
	)	(Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
	)	
Respondent.	)	

STEVEN HEDINGER, OF MOHAN, ALEWELT, PRILLAMAN & ADAMI, APPEARED ON BEHALF OF THE PETITIONERS;

RICHARD WARRINGTON APPEARED ON BEHALF OF RESPONDENT.

OPINION AND ORDER OF THE BOARD (by G. T. Girard):

On October 21, 1993, the Herrin Municipal Landfill (Herrin) filed a petition for review and reversal of the denial by the Illinois Environmental Protection Agency (Agency) of Herrin's application for permit modification for Herrin's site in Williamson County, Illinois. On December 17, 1993, a hearing was held in this matter in Marion, Williamson County, Illinois. Members of the public attended the hearing. Petitioner filed its briefs on January 18 and February 8, 1994. The Agency filed its brief on January 31, 1994.

The Board's responsibility in this matter arises from Section 40 of the Environmental Protection Act (Act). [415 ILCS 5/40 (1992).] The Board is charged, by the Act, with a broad range of adjudicatory duties. Among these is adjudication of contested decisions made pursuant to the permit process. More generally, the Board's functions are based on the series of checks and balances integral to Illinois' environmental system: the Board has responsibility for rulemaking and principal adjudicatory functions, while the Agency is responsible for carrying out the principal administrative duties, inspections, and permitting.

Based on review of the record, the Board affirms the Agency's denial of the City of Herrin's application for permit modification.

REGULATORY FRAMEWORK

Petition for review of permit denial is authorized by Section 40(a)(1) of the Act [415 ILCS 5/40 (a)(1)] and 35 Ill. Adm. Code Section 105.102(a). The Board has long held that in permit appeals the burden of proof rests with the petitioner. The petitioner bears the burden of proving that the application,

as submitted to the Agency, would not violate the Act or the Board's regulations. This standard of review was enunciated in Browning-Ferris Industries of Illinois, Inc. v. Pollution Control Board, 179 Ill. App. 3d 598, 534 N.E. 2d 616, (Second District 1989) and reiterated in John Sexton Contractors Company v. Illinois (Sexton), PCB 88-139, February 23, 1989. In Sexton the Board held:

> ...that the sole question before the Board is whether the applicant proves that the application, as submitted to the Agency, demonstrated that no violations of the Environmental Protection Act would have occurred if the requested permit had been issued.

Therefore, the petitioner must establish to the Board that the permit would not violate the Act or the Board's rules if the requested permit was to be issued by the Agency. In addition, the Agency's written response to the permit application frames the issues on appeal from that decision. (Pulitzer Community Newspapers, Inc. v. Illinois Environmental Protection Agency, PCB 90-142, at 6 (December 20, 1990); Centralia Environmental Services, Inc. v. Illinois Environmental Protection Agency, PCB 89-170, at 6 (May 10, 1990); City of Metropolis v. Illinois Environmental Protection Agency, PCB 90-8 (February 22, 1990).

BACKGROUND

The City of Herrin is the owner and operator of the Herrin Municipal Landfill located southeast of Herrin in Williamson County, Illinois. (Pet. at 1.)[1] The site consists of approximately 70 acres and was originally permitted on September 10, 1975. (Pet. at 1.) In 1988, Herrin requested a development permit from the Agency to move its operations from one location to another within the permitted boundaries of the facility. (Tr. at 11-12.) The Agency denied the request based upon informational deficiencies initially and later denied the resubmitted application on the grounds that Herrin had failed to receive siting approval. (Pet. Exh. 1, 2, 3, 4, and 5; Tr.at 14-18.)

In 1988, the Illinois Attorney General on behalf of the People of the State of Illinois filed an amended complaint

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[1] The Agency record will be cited as "R Vol. __ at __"; the petition for review of permit denial will be cited as "Pet. at __"; petitioner's brief will be cited as "Pet. Br. at __"; petitioner's reply brief will be cited as "Pet. RBr. at __"; respondent's brief will be cited as "Res. Br. at __"; the hearing transcript will be cited as "Tr. at __"; petitioner's exhibits will be cited as Pet. Exh. __.

against the City of Herrin along with a stipulation and settlement agreement in circuit court. (R. Vol. I at 90.) As a part of the settlement agreement Herrin agreed to obtain an operating permit for all portions of the site in which Herrin conducts waste disposal. (R. Vol. I at 97.)

In March 1990 siting approval for a vertical expansion of the Herrin facility was granted by the Williamson County Board of Commissioners. (R. Vol. I at 164-167.) In August 1990 an application requesting a supplemental permit for the vertical expansion was filed with the Agency. (Pet. at 2, R. Vol. I at 147.) The August 1990 application "anticipated that closure of the vertical expansion will begin in July 1992 and be closed by November 1992...". (R. Vol. I at 177.) The Agency issued a permit (1990-353-SP) in November 1990 for the vertical expansion. (R. Vol. I at 123-126c.) The November 1990 permit (1990-353-SP) stated that the "facility shall initiate closure no later than September 18, 1992". (R. Vol. I at 126A.) Herrin did not appeal that permit.

Prior to the Agency issuing a permit in response to the August 1990 application the Board's regulations governing landfills were adopted. (See In the Matter of: Development, Operating, and Reporting Requirements for Non-hazardous Waste Landfills, R88-7, 114 PCB 483, (August 17, 1990) (hereinafter cited as "R88-7 at ").) The landfill regulations apply to nonhazardous waste landfills including "municipal" and industrial landfills. (R88-7 at 2.) Existing facilities were divided into three general groups based on the level of compliance the facility could demonstrate with the new regulations. (Id.) Subpart C facilities may remain open for an indefinite period of time beyond seven years and are required to meet the most stringent requirements. Subpart D facilities may remain open for seven years and are required to meet less stringent of requirements, but expansion of the facilities was prohibited. Subpart E facilities must initiate closure within two years or already be scheduled to close. Subpart E facilities were not required to meet any of the closure requirements adopted in R88-7, but were required to close under existing Part 807. (Id.)

In March 1991, Herrin filed with the Agency a PA15 form which is required to be filed pursuant to the Board's regulations (See 35 Ill. Adm. Code 814.103). (Pet. at 3; R. Vol. II at 164-166.) On that form, Herrin indicated that it was a "Subpart D" facility and would "initiate closure by September 18, 1997". (R. Vol. II at 164B.) The Agency took no action in response to the submission of the PA15 form. (Tr. at 116.)

On September 16, 1992, the Agency sent a letter to Herrin indicating that according to Agency records the facility was regulated pursuant to 35 Ill. Adm. Code 814 Subpart E and was scheduled to close by September 18, 1992. (R. Vol II at 166B.)

The letter went on to indicate that Herrin could be subject to enforcement with resulting fines if found in violation of the Board's regulations. (Id.)

Herrin contacted the Agency upon receipt of September 16, 1992 letter. (Tr. at 130-134.) After discussions between Herrin and the Agency, the Agency issued a supplemental permit (1992-271-SP) on September 21, 1992, allowing Herrin to accept waste until October 8, 1993. (R. Vol. II at 167.) However, the supplemental permit still stated that "this facility must begin closure by September 18, 1992 (Subpart E, 814), and may continue to accept waste during closure until October 8, 1993 (807.509)". (R. Vol. II at 167.) The permit included 15 conditions (R. Vol. II at 167-169) and was not appealed by Herrin.

On April 23, 1993, the Agency again wrote Herrin concerning its scheduled date of closure. (R. Vol II at 327.) In response to the April 23, 1993, letter Herrin requested that the Agency consider Herrin a Subpart D facility and allow Herrin to remain open until as late as 1997. (R. Vol. II at 347.) The Agency denied this request on September 16, 1993 and this appeal followed. (R. Vol. II at 329-330.)

DISCUSSION

Request to Strike Portion of Respondent's Brief

As a preliminary matter, the Board notes that in Herrin's reply brief, Herrin asks that a portion of the Agency's brief be stricken. (Pet. RBr. at 3.) Specifically, Herrin asks that the Agency's argument that Herrin is estopped from seeking a change in the permit is not properly before the Board. (Pet. RBr. at 3.) Because the issues in a permit appeal are established by the permit denial letter, Herrin maintains that the argument is an affirmative defense likely to take Herrin by surprise and thus should be stricken. (Pet. RBr. at 4.) The Agency's estoppel argument merely recites facts contained in the record by pointing out that Herrin had not appealed previous permit decisions on the closure date. These facts would be before the Board even if the Board were to strike the portion of the Agency's brief discussing estoppel. Therefore, the Board denies the request to strike.

Herrin's Argument

Herrin argues that the Agency's determination denying Herrin a permit modification should be reversed because the amendments adopted in R88-7 do not apply to Herrin on the theory that this case is controlled by American Fly Ash Co. v. County of Tazewell, (120 Ill. App. 3d 57 (3d Dist. 1983)) (American). (Pet. Br. at 7.) In American, the company had applied for and received (July 22, 1981) a permit to dispose of fly ash and boiler slag prior to the signing of the local landfill siting bill (SB 172). (Pet.

Br. at 7-8.) The specific terms of SB 172 stated that it applied to all facilities "initially permitted for development or construction after July 1, 1981". Tazewell County took the position that the new law nullified the Agency issued permit and that American was required to seek local siting approval. (120 Ill. App. 3d at 58; Pet. Br. at 7-8.) The court disagreed stating that "justice, fairness and equity require that persons who comply with the law not as it might be but as it is then is effect, and in this instance obtain the required permit after expenditure of funds, should not have that permit nullified by retroactive application of a statute subsequently enacted." (120 Ill. App. 3d at 59.)

Herrin maintains that it has "fallen victim to not one, but in fact two changes in the law". (Pet. Br. at 8.) Herrin argues that the first change in the law involved a Supreme Court of Illinois decision which required Herrin to seek siting approval in 1988 for the vertical expansion of the facility. (M.I.G. Investments, Inc. v. Environmental Protection Agency, 151 Ill. 2d 122 (1988).) The second more significant change, according to Herrin, was the adoption of R88-7. (Pet. Br. at 9.) Herrin argues that "[t]here was absolutely no means for Herrin to prepare for or anticipate either the effective date of the R88-7 rules or the final content of those rules." (Pet. Br. at 10.) Herrin recites at length the history of the landfill regulations in Illinois, pointing out that at least one docket preceded R88-7 before the Board and that the Board had several opinions and orders in R88-7. (Pet. Br. at 11.) Thus, Herrin argues the history of R88-7 "would not have led any reasonable permit applicant to assume anything with respect to the final effective date or content of those regulations." (Pet. Br. at 10.)

Herrin states that it:

> had the misfortune to have sought its relief from the Agency during a period of regulatory flux. This misfortune has imposed no less than an injustice upon Herrin, and the words of the Court in American Fly Ash are directly applicable here- - 'justice, fairness and equity require that persons who comply with the law not as it might be but as it is then in effect...should not have that permit [request] nullified by retroactive application of a [regulation] subsequently enacted. 120 Ill. App. 3d at 59. (Pet. Br. at 12.)

Herrin argues that "justice, fairness and equity" should intervene to relieve Herrin of the regulatory requirements "which arbitrarily impose a severe burden upon Herrin to Herrin's detriment because of reliance upon the previous regulatory

requirements. . .". (Pet. Br. at 12.) Herrin further maintains that such an outcome is supported by a long history of Illinois case law. (Pet. Br. at 12.) Herrin then cites to two cases which Herrin asserts support its position. Herrin cites to Frank v. State Sanitary Water Board of Illinois, 33 Ill. App. 2d 1, (1st Dist. 1961)(Frank) and Wachta v. Pollution Control Board, 8 Ill. App. 3d (2d Dist. 1972).)

Herrin argues that the doctrine of estoppel should apply in this case. Herrin maintains that the Agency required Herrin to close its facility in 1992, while Herrin now wishes to close its facility in 1995. Absent the application of the R88-7 regulations, such a requirement is not justified, according to Herrin. Herrin argues that it has sufficient capacity to remain open until 1995 and prior to that date would "deprive Herrin of some $430,000". (Pet. Br. at 14.) Finally, Herrin states that "[t]here is no justification for that deprivation, and justice, fairness and equity dictate that result be avoided here." (Pet. Br. at 14.)

Agency's Argument

The Agency maintains that Herrin should be estopped from seeking a different closure date. (Res. Br. at 9.) In support of its position the Agency states that the operating permit which initially called for closure of the Herrin facility by 1992 was a result of an enforcement action brought by the Attorney General. (Res. Br. at 3-4.) The Agency further states that no appeal was taken from that permit. (Id.) The Agency also points out that it issued a modification to that permit on September 21, 1992 allowing the facility to remain open until October 1993 and no appeal was taken from that permit modification. (Res. Br. at 5.) This appeal followed yet another request for modification which the Agency denied. (Id.)

The Agency further maintains that Herrin has no economic argument to support its position that estoppel applies. The Agency states that the testimony regarding costs incurred was specific to the proportions of time used in supervising daily operations and in preparing the application for expansion, including siting. (Res. Br. at 10 citing Tr. at 54.) The Agency argues that operating expenses are not an extraordinary expense made in expectation of future operations and closure plan expenses are an obligation from past landfill use. (Id.) The Agency cites to Land and Lakes v. EPA, PCB 91-217 to support this position. (Id.)

The Agency also argues that the R88-7 regulations do apply to Herrin and that the Board has already settled that issue. The Agency cites to Ziffrin v. United States (318 U.S. 73, 63 S. Ct. 465 (1943)) for the proposition that "the administrative agency must apply the changed law." (Res. Br. at 6.) The Agency

further cites to two Illinois Appellate court cases that the law in effect at the time of the agency's decision applies. (Illinois Ind. Telephone Association v. Illinois Commerce Commission, 183 Ill. App. 3d 220, 539 N.E.2d 717, 132 Ill. Dec. 154 (1989); Skokie Federal Savings and Loan Assoc. v. Illinois Savings and Loan Board, 61 Ill. App. Ct. 977, 378 N.E. 2d 1090, 19 Ill. Dec. 215 (1978).) The Agency states that the Board "has previously followed this reasoning in Gallatin National Company v. Illinois Environmental Protection Agency," PCB 90-183. (Res. Br. at 7.)

Finally, the Agency argues that the issuance of the requested permit would violate the Board's regulations. (Res. Br. at 11.) The Agency points out that there is no prohibition to continued operation under the new landfill regulations as long as the facility can demonstrate compliance with the applicable regulations. (Res. Br. at 12.) However, the Agency argues Herrin cannot demonstrate that the 1990 permit allowing the expansion is in compliance with the Board prohibition on expansions applicable to Subpart D facilities at 35 Ill. Adm. Code 814.402(b). (Id.) Thus, the Agency maintains that Herrin's activities preclude it from demonstrating compliance with the classification Herrin is seeking. (Id.)

Application of R88-7

Herrin's argument that the R88-7 regulations should not apply is not persuasive. The regulations adopted by the Board in R88-7 specifically applied to "existing" facilities, which are defined as any facility or unit not defined as a new facility. (35 Ill. Adm. Code 810.103.) Part 814 as adopted in R88-7 applied standards to existing facilities and established standards for both new and existing disposal units within the facilities. Section 814.101 specifically states:

> Landfill operators are required to determine the date on which their facilities must begin closure, which is dependent upon the ability of existing units to meet the design and performance standards of this Part.

(35 Ill. Adm. Code. 814.101.)

Thus, the plain language of R88-7 applies the regulations to existing facilities which include Herrin.

Furthermore Herrin's argument that the regulations were applied retroactively and Herrin's reliance on American Fly Ash are not convincing. The R88-7 regulations became effective in September of 1990 and Herrin's permit was issued by the Agency in November of 1990. In American Fly Ash the landfill operator had a permit in hand and the legislation's effective date was

retroactively applied to a date prior to the issuance of the permit. Herrin did not receive a permit until after R88-7 was effective.

In its argument, the Agency properly cited to Gallatin National Company v. IEPA, PCB 90-183, (January 18, 1992) 118 PCB 97 (Gallatin). In Gallatin, the petitioner specifically argued that the R88-7 regulations should not apply retroactively to Gallatin. (Gallatin at 4.) Gallatin, like Herrin, was in the process of applying for a permit for its landfill when R88-7 was adopted. The Agency indicated that it would apply the provisions of R88-7 to Gallatin and Gallatin sought a variance from portions of the R88-7 regulations. (Gallatin at 2.) Gallatin argued against the retroactive application of R88-7 in the variance proceeding. The Board found that Gallatin clearly met the definition of a "new unit" in R88-7 and the regulations applied to Gallatin. (Gallatin at 5.) Thus, the Board has already ruled that a permit applicant who was in the process of applying for a permit during the pendency of R88-7 is subject to the provisions of R88-7 even if the permit is issued after the adoption of R88-7.

The provisions of R88-7 would have applied to Herrin even if Herrin had not been seeking a new permit during the pendency of the rules. The landfill regulations were adopted to protect the environment of the state of Illinois and to insure the safest possible landfill operations. Herrin would have been required to meet the standards of Part 814 if it wished to remain open. The provisions of R88-7 apply to all existing landfills.

Herrin is arguing that it should be allowed to close under Part 814 Subpart D rather than Subpart E. However, Herrin accepted a permit modification in November of 1990 after the adoption of R88-7. The Agency used the provisions of R88-7 and specifically Section 814.Subpart E, in establishing the closure date of September 1992 in the November 1990 permit. Herrin did not appeal that permit and in fact accepted a modification in September 1992 which allowed Herrin to "accept waste during closure until October 8, 1993". (R. Vol. II at 167.) Herrin then sought to modify the November 1990 permit by applying a different portion of the R88-7 regulations. Therefore, the Board finds that Herrin has waived the argument that R88-7 should not apply to the Herrin facility.

Estoppel

Herrin argues that "justice, fairness and equity" require the application of the doctrine of estoppel in this case. The Agency argues that Herrin should be estopped from seeking relief. The Board has applied the doctrine of equitable estoppel in very rare instances. In In the Matter of: Pielet Brothers' Trading, Inc., AC 88-51, 101 PCB 131 (July 13, 1989), Pielet deposited

waste by an area method rather than by trench method pursuant to its permit. Pielet argued that, under the common law principles of estoppel, the Agency should be estopped from punishing it for changing its operations from a trench fill to an area fill because it allowed the change. The evidence revealed that Pielet had several meetings with the Agency and provided documentation indicating that it was operating as an area fill, and that the Agency did not inform Pielet that its activities could be a violation of the Act for which an administrative citation could be issued. The Board found that the Agency was estopped from finding Pielet in violation of the Act based on its belief that "the record reveals that the Agency, through its representatives, made representations to Pielet Brothers upon which Pielet Brothers could reasonably have believed allowed it to deposit waste by the area fill method in certain portions of the landfill in addition to those permitted". (Id. p. 9, 101 PCB at 140). Also, in IEPA v. Jack Wright, AC 89-227 (August 30, 1990), the Agency issued an administrative citation against Mr. Wright for an open dumping that resulted in litter. The Board concluded that statements made by an Agency field inspector led Mr. Wright to believe that no administrative citation would be filed if he took remedial action to clean up his facility and that, as a result, the Agency improperly issued the administrative citation against Mr. Wright.

There are also court cases which are relevant to this argument. In Modine Manufacturing Co. v. PCB, 176 Ill. App. 3d 1172 (1988) (an unpublished order that was discussed in Modine Manufacturing Co. v. PCB, 193 Ill. App. 3d 643, 549 N.E.2d 1379 (2nd Dist. 1990)), the Appellate Court found that the Agency's agreement not to institute enforcement proceedings for emission violations barred an enforcement action brought by the Agency, but that no such agreement existed with respect to certain permit violations cited by the Agency. It then dismissed the action for the emissions violations and remanded the case to the Board to set the penalty on the permit violations. (see Modine, 549 N.E.2d at 1381, 140 Ill. Dec. 509).

In this case, the Board finds that the doctrine of estoppel should not apply. Herrin had previously accepted a closure date consistent with the decision by the Agency in this case. (See November 1990 permit, R. Vol. I at 126A.) In fact, the date originally accepted by Herrin has already been extended. (September 1992 supplemental permit, R. Vol. II at 167.) Although Herrin has expended funds, the record does not indicate that the expenditures were greater than those necessary to operate and expand the facility. Herrin's only step to notify the Agency that it wished to change its status was the filing of a PA15 form. (R. Vol. II at 164-166.) On that PA15 form, Herrin indicated that it desired to be classified as a Subpart D facility and initiate closure by September 18, 1997. (R. Vol. II at 164A.) The PA15 form was required by Board regulations and

the Agency was not required to respond to the filing of the form. The record does show that the Agency may have responded to some of the filings. However, the record does not indicate that the Agency, as a standard practice, responded to the form.

Violation of Board regulations

The Board finds that the record is clear that extending the closure date and allowing Herrin to close as a Subpart D facility would result in violation of the Act. Section 814.402(b)(1) (Subpart D) specifically prohibits expansion beyond the area included in a permit prior to the effective date of this part. Herrin received a permit to expand its facility in November 1990 two months after the effective date of R88-7. The permit stated that the facility would initiate closure no later than September 18, 1992. (R. Vol. I at 126A.) Herrin did not appeal the permit. Therefore, granting Herrin the modification to close under Subpart D would violate the Board's regulations.

CONCLUSION

The Board finds that Herrin has not shown that the issuance of a permit modification allowing Herrin to close its facility pursuant to 814.Subpart D would not violate the Board's regulations and the Act. The Board further finds that the doctrine of estoppel does not apply in this case.

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

ORDER

The denial by the Illinois Environmental Protection Agency of a permit application for amendments to existing permits requested by the City of Herrin is affirmed.

IT IS SO ORDERED.

Section 41 of the Environmental Protection Act (415 ILCS 5/40.1) provides for the appeal of final Board orders within 35 days of service of this decision. The Rules of the Supreme Court of Illinois establish filing requirements. (But see also, 35 Ill. Adm. Code 101.246, Motions for Reconsideration.)

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, hereby certify that the above opinion and order was adopted on the 17th day of March, 1994, by a vote of 6-0.

Dorothy M. Gunn

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board