

ILLINOIS POLLUTION CONTROL BOARD
June 17, 1993

CITIZENS UTILITIES COMPANY)
OF ILLINOIS AND VILLAGE OF)
PLAINFIELD,)
)
Petitioner,)
)
v.) PCB 93-101
) (Permit Appeal)
)
ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY AND VILLAGE)
OF BOLINGBROOK,)
)
Respondent.)

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

On May 13, 1993, Citizens Utilities Company of Illinois and Village of Plainfield filed a petition for review of the issuance of an NPDES permit to the Village of Bolingbrook. On May 26, 1993, Bolingbrook filed a "Response of the Village of Bolingbrook to the Joint Petition for Review" and on May 28, 1993, the Agency filed a motion to dismiss for lack of subject matter jurisdiction. On June 2, 1993, petitioners filed an objection to the motion to dismiss.

The petition for review sets out eleven reasons for objecting to the issuance of the permit as well as asserting that both petitioners participated in the proceeding before the Agency by filing comments and objections to the permit application. (Pet. at 3.) The petition also asserts that the petitioners requested a hearing on the issuance of the NPDES permit, which the Agency denied. (Pet. at 3.) Those eleven reasons are:

- a. The Agency erroneously denied the separate requests by Citizens and the Village of Plainfield for a public hearing before the Agency regarding Bolingbrook's request for the subject permit. Both requests demonstrated a substantial public interest which justified a hearing. The failure to hold a hearing prevented the Agency from having an evidentiary record which would show that the proposed permit is not necessary, proper or in the public interest.
- b. There is no need for the proposed Bolingbrook STP #3 because Plainfield together with Citizens have available plant capacity to serve the alleged service area of the proposed plant.

- c. Plainfield and Citizens have a cost-effective regional plan for the disputed area, which would render Bolingbrook's proposed STP #3 unreasonable, unnecessary, not cost-effective, and moot.
- d. Bolingbrook's proposed STP #3 is contrary to the public interest, because it contributes to the proliferation of small, inefficient wastewater treatment plants and fails to provide for the utilization of existing available plant capacity or the phase-out of smaller plants.
- e. Bolingbrook's proposed STP #3 would be contrary to sound regional planning.
- f. Bolingbrook's proposed STP #3 will not be cost-effective.
- g. There is no legal authority or factual justification for the subject permit, or construction and operation of the proposed STP #3, because there has been no final adjudication that the proposed service area of the plant properly should be within the Bolingbrook FPA and that the proposed plant properly should be included in Bolingbrook's facility plan.
- h. The proposed Bolingbrook STP #3 is not properly within Bolingbrook's FPA and is not within a properly approved facility plan for Bolingbrook.
- i. A substantial portion of the proposed Bolingbrook STP #3 is to be physically located within the FPA of Plainfield and is contrary to the facility plan of Plainfield.
- j. The proceedings before the Northeastern Illinois Planning Commission and the Agency respecting Bolingbrook's proposed STP #3, including the request to include the plant within Bolingbrook's facility plan and to include the proposed service area of the plant within Bolingbrook's FPA were defective, invalid and contrary to law.
- k. The proposed location for Bolingbrook's proposed STP #3 is not appropriate and is contrary to sound regional planning.

(Pet. at 5-6.)

The May 26 filing by Bolingbrook asserts that the parties, including the petitioners, were given adequate opportunity to state their positions before the Agency. Bolingbrook also asserts that the Agency, after full consideration, made its decision. (May 26 at 1-2.) Bolingbrook also asserts that the Board does not have jurisdiction on this matter as third party appeals of a permit are improper under Landfill, Inc. v. PCB, 74 Ill.2d 541, 387 N.E.2d 258, 25 Ill.Dec 602 (1978). (May 26 at - 23.)

The May 28 filing by the Agency asserts that the only issues raised by the petitioners in the petition are related to the fact that the Agency approved in part Bolingbrook's application to revise the Illinois Water Quality Management Plan (WQMP) and that the arguments put forth do not challenge the validity of the permit. (May 28 at 3.) The Agency further asserts that the Board does not have the authority to review decisions by the Agency on the Illinois WQMP and that the proper forum is before the USEPA. (May 28 at 4-5.)

The June 2, 1993, filing by petitioners asserts that there is no basis in law for the Agency's motion to dismiss. (June 2 at 2.) Petitioners deny that they are challenging the Agency's decision regarding Bolingbrook's request to revise its facilities planning area (FPA) and maintain that they are challenging the "Agency's decision to issue the disputed NPDES permit". (June 2 at 3.) Petitioners further maintain that there is no appeal to the USEPA and that the Board does have jurisdiction to review the FPA under the decision in Jurcak v. IEPA, 161 Ill.App.3d 48, 513 N.E.2d 1007, 112 Ill.Dec. 398, (1st Dist. 1987).

The Board notes that it has previously decided similar issues as those raised in this proceeding. In the Village of Gilberts v. Holiday Park Corporation and the IEPA, 65 PCB 283, PCB 85-96 (August 15, 1985), the Board dismissed a third party appeal of an NPDES permit. In that case the Board upheld the rights of third parties to appeal a NPDES permit; however, the Board held that it "lacks jurisdiction under the Act" to review the Illinois WQMP. (65 PCB 284, 286.)

In the Village of Sauget and Monsanto v. IEPA, 71 PCB 38, PCB 86-57 and 86-62, (July 11, 1986), the Board set forth a two-prong test to determine whether Monsanto had standing to appeal the Agency decision on a NPDES permit for the Village of Sauget. The first prong of the test was whether 35 Ill. Adm. Code 105.102(b)(3) was invalid pursuant to Landfill, Inc. (71 PCB 38.) The Board found that the third party appeal was valid under the NPDES provisions in the rules and statute. The Board distinguished NPDES third party permit appeals from third party permit appeals discussed in Landfill, Inc. (71 PCB 40-41.)

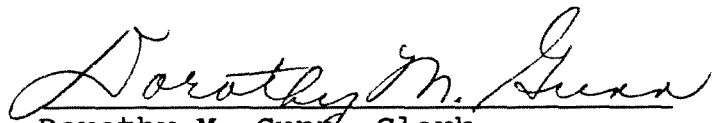
The second prong, enunciated in Sauget/Monsanto was whether "Monsanto has fulfilled the preconditions to acquire standing pursuant to the rule's terms". (71 PCB 38.) Specifically, the Board looked to the level of participation in the proceeding before the Agency as no hearing was held or requested by Monsanto. The Board found that the level of participation of Monsanto did give Monsanto standing to appeal the NPDES permit.

Therefore, the Board finds that third party appeals in NPDES permit proceedings are proper under the provisions of the Board's rules and the Act. Further, in this case the parties appealing the decision did request a hearing before the Agency and therefore have standing to appeal.

This leads to the issue as to whether or not the subject matter of the petition is proper for the Board's review. As stated above, the Board agrees that it lacks jurisdiction to review provisions of the Illinois WQMP. The Board notes that the issue in the Jurcak case cited by petitioners was whether the Board could review a condition of a permit which contained provisions of the plan. In the instant matter, the petitioners have not specifically stated which conditions of the permit the petitioners are contesting. Nor have the petitioners stated what portions of the Act or Board regulations will be violated if the permit is issued. Thus, the Board finds that the subject matter of this petition relates solely to the Agency's decision on the Illinois WQMP. Therefore, the Board dismisses the petition as the Board lacks jurisdiction to review the Illinois WQMP.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, do hereby certify that the above order was adopted on the 17th day of June, 1993, by a vote of 7-0.


Dorothy M. Gunn, Clerk
Illinois Pollution Control Board