

ILLINOIS POLLUTION CONTROL BOARD
June 5, 2003

SOLID WASTE AGENCY OF NORTHERN)
COOK COUNTY,)
)
Petitioner,)
) PCB 03-161
v.) (Pollution Control Facility
) Siting Appeal)
CITY OF DES PLAINES, ILLINOIS,)
)
Respondent.)

ORDER OF THE BOARD (by N.J. Melas):

On May 1, 2003, the Solid Waste Agency of Northern Cook County (SWANCC) filed a motion asking the Board to reconsider an April 17, 2003 decision by the Board to dismiss this petition. On May 15, 2003, the City of Des Plaines (Des Plaines) filed a motion in opposition to SWANCC's motion to reconsider (mot.). On May 29, 2003, SWANCC responded to Des Plaines' motion (resp.). For the reasons set forth below, the Board grants SWANCC's motion for reconsideration, and reaffirms the Board's April 17, 2003 decision to dismiss SWANCC's amended petition as untimely.

BACKGROUND

On March 24, 2003, SWANCC filed a petition asking the Board to review a decision made by Des Plaines. See 415 ILCS 5/40.1(a) (2002); 35 Ill. Adm. Code 107.204. The petition stated that on February 18, 2003, Des Plaines approved Disposal Management System's application to site a 200 ft. by 200 ft. waste transfer facility at 101-103 Sell Road in the City of Des Plaines. Pet. at 2. However, SWANCC did not name the siting applicant, Disposal Management System (DMS), as a respondent in the original petition. On April 2, 2003, SWANCC filed a motion for leave to file an amended complaint adding DMS as a respondent. The Board found it lacked jurisdiction to hear the petition because SWANCC failed to timely name DMS as a party. The Board did not accept the amended complaint and dismissed this action on April 17, 2003.

STANDARD

In ruling on a motion for reconsideration the Board will consider factors including new evidence, or a change in the law, to conclude that the Board's decision was in error. 35 Ill. Adm. Code 101.902. In Citizens Against Regional Landfill v. County Board of Whiteside, PCB 93-156 (Mar. 11, 1993), the Board explained "the intended purpose of a motion for reconsideration is to bring to the court's attention newly discovered evidence which was not available at the time of hearing, changes in the law or errors in the court's previous application of the existing law."

Korogluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1992).

RELEVANT STATUTE

Section 39.2(e) of the Environmental Protection Act (Act) provides:

[d]ecisions of the . . . governing body of the municipality are to be in writing, specifying the reasons for the decision, such reasons to be in conformance with subsection (a) of this Section If there is no final action by the . . . governing body of the municipality within 180 days after the date on which it received the request for site approval, the applicant may deem the request approved. 415 ILCS 5/39.2(e).

DISCUSSION

SWANCC's Arguments

In support of its argument that the Board's April 17, 2003 decision was in error, SWANCC attached to its motion a letter from the city manager dated March 26, 2003. Mot. Exh. 2. SWANCC notes that Section 107.204 of the Board procedural rules requires a petitioner to file a petition for review within 35 days after the local siting authority takes action to approve or disapprove siting. 35 Ill. Adm. Code 107.204. SWANCC emphasizes that Section 107.204 also provides "[a]ction means the local government's official written decision granting or denying local siting approval pursuant to Section 39.2(e) of the Act. . . ." 35 Ill. Adm. Code 107.204. Therefore, SWANCC argues, the 35-day filing period was not triggered until March 26, 2003, when Des Plaines issued its "official written decision." Mot. Exh. 2. Accordingly, SWANCC contends this petition was timely filed with the Board within the 35-day filing period on April 29, 2003.

Des Plaines' Arguments

Des Plaines filed its motion in opposition to SWANCC's motion to reconsider and attached an exhibit unsupported by a signed affidavit. Section 101.504 of the Board's procedural rules regarding the contents of motions and responses provides "[f]acts asserted that are not of record in the proceeding must be supported by oath, affidavit, or certification." 35 Ill. Adm. Code 101.504. However, for the purposes of this discussion, the Board will accept these facts as true.

Des Plaines claims that DMS's siting application was deemed approved on February 3, 2003, due to Des Plaines' failure to act within the 180-day statutory deadline. Mot. at 1. In support of its motion, Des Plaines attached a photocopy of DMS's siting application on which a handwritten note indicates the application was received on August 6, 2002. Mot., Exh. A. Des Plaines contends 180 days after August 6, 2002, falls on February 3, 2003. Thus, Des Plaines argues that because the city council did not act to approve or deny siting within the 180-day period, the siting application became approved after February 3, 2003. Mot. at 2. Des Plaines

concludes that this petition for review was filed well after the 35-day filing period for appeals and, therefore, the Board is without jurisdiction to hear this petition.

SWANCC's Response

In response, SWANCC argues DMS waived the statutory deadline by continuing to actively participate in the siting review process. SWANCC claims that phone calls and email correspondences illustrate that DMS verbally agreed to waive the statutory deadline. Resp. at 2-9. SWANCC claims that precedent supports the position that by "actively participating," DMS waived its right to a decision by default. See City of Rockford v. County of Winnebago 186 Ill. App. 3d 303, 542 N.E.2d 423 (App. 2nd Dist. 1989); Citizens Against the Randolph Landfill v. PCB, 178 Ill. App. 3d 686, 533 N.E.2d 401 (App. 4th Dist. 1988). Therefore, SWANCC maintains that Des Plaines' March 26, 2003 written decision is the action that triggered the 35-day appeal period. Resp. at 10.

Analysis

The Board grants SWANCC's motion for reconsideration. SWANCC has presented the Board with new evidence not available when the Board issued its April 17, 2003 decision in this matter. However, the Board reaffirms the April 17, 2003 decision, finding that SWANCC's petition in this matter was not timely filed.

At issue here is from what date the 35-day period for appeal begins. Based on the limited record before the Board, the Board cannot decide whether DMS agreed to waive the 180-day decision deadline. However, the Board finds that regardless of whether waiver existed, SWANCC's amended petition filed on April 2, 2003 was not timely.

If there was no waiver by DMS, DMS's siting application was deemed approved on February 4, 2003, due to lack of action by Des Plaines within the statutory deadline. Even assuming DMS waived the statutory deadline, the Board finds that the Des Plaines city council vote on February 18, 2003 to approve siting, as reduced to writing in the minutes of that meeting (Mot. Exh. 5), constituted a final action for the purposes of appeal. The Board relies on the Act and Board precedent in making this finding.

Specifically, the Illinois Supreme Court has held that an administrative entity can take "final action" without written findings, but such action is not necessarily final and appealable for purposes of review. Waste Management of Illinois, Inc. v. PCB, 145 Ill. 2d 345, 352, 585 N.E.2d 606, 609 (Nov. 21, 1991). The Court reasoned that a decision by an administrative agency must have findings to make review possible. *Id.* Section 107.204 of the Board procedural rules defines a local government's action to approve or deny siting as an "official written decision." 35 Ill. Adm. Code 107.204.

The record in this proceeding establishes that the only "written decision" and "final action" issued by Des Plaines itself is Des Plaines' vote to approve siting on February 18, 2003. Pet. Exh. 1, 3. Because it is a siting approval, it is inherent in Des Plaines' vote that according to the city council, DMS's application met all criteria established by Section 39.2(a) of the Act.

This conclusion is also supported by SWANCC's own petition. The certification of siting approval, an Environmental Protection Agency form executed by the mayor of the city of Des Plaines on March 25, 2003, lists February 18, 2003, as the date of the city's siting approval. Pet. Exh. 4. The city manager's letter of March 26, 2003, also lists the approval date as February 18, 2003. Pet. Exh. 4. The city clerk did not certify the city manager's letter as Des Plaines' final action. The letter merely references the city's vote on February 18, 2003. *Id.*

The Board finds that whether or not waiver applies in this proceeding, SWANCC's petition was not timely filed. Accordingly, the Board lacks jurisdiction to hear this appeal.

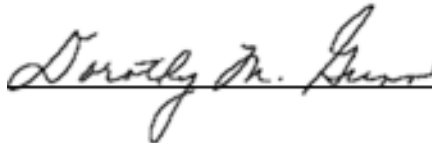
CONCLUSION

The Board grants SWANCC's motion for reconsideration and reaffirms the Board's April 17, 2003 order to dismiss this matter. The Board finds that SWANCC's motion to amend its petition to name a necessary party was not timely. Accordingly, the Board dismisses this case and closes the docket.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2002); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on June 5, 2003, by a vote of 6-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written in black ink. The signature is positioned above a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board