

ILLINOIS POLLUTION CONTROL BOARD
June 5, 2003

SOLID WASTE AGENCY OF NORTHERN)
COOK COUNTY,)
)
Petitioner,)
)
v.) PCB 03-210
) (Pollution Control Facility
) Siting Appeal)
CITY OF DES PLAINES, ILLINOIS and,)
DISPOSAL MANAGEMENT SYSTEMS,)
INC.)
)
Respondents.)

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

On April 29, 2003, Solid Waste Agency of Northern Cook County (SWANCC) filed a petition contesting a decision of the City of Des Plaines (Des Plaines). *See* 415 ILCS 5/40.1(a) (2002); 35 Ill. Adm. Code 107.204. Des Plaines voted to approve Disposal Management System's (DMS) application to site a 200 ft. by 200 ft. waste transfer facility at 101-103 Sell Road in the City of Des Plaines on February 18, 2003.

On May 14 and again on June 4, 2003, the president of DMS filed objections to SWANCC's petition in this matter. However, since it appears that an attorney did not make the filings on behalf of DMS, the Board can give DMS's filing only the weight of public comments pursuant to Board procedural rules. 35 Ill Adm. Code 101.400(a)(2), 101.628.

On May 15, 2003, the City of Des Plaines filed a motion to dismiss SWANCC's petition (mot.) for lack of jurisdiction. Des Plaines filed the motion 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.

On May 29, 2003, SWANCC responded to Des Plaines' motion to dismiss (resp.). For the reasons set forth below, the Board does not accept SWANCC's petition for review, and denies Des Plaines' motion to dismiss as moot.

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

Section 40.1(a) of the Act (415 ILCS 5/40.1(a) (2002)) authorizes SWANCC's appeal to the Board as a third party under Section 107.200(b) of the Board's rules. 35 Ill. Adm. Code 107.200(b). The Act and Board rules also require a petition for review to be filed within 35 days after the local siting authority's action to approve or deny siting. 415 ILCS 5/40.2(a); 35 Ill. Adm. Code 107.204.

SWANCC's Arguments

Des Plaines voted to approve siting of the DMS facility on February 18, 2003. Pet. Exh. 3, at 7. 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, however, 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." Pet. Exh. 4. 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 moves the Board to dismiss SWANCC's petition for lack of jurisdiction. 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. 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 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.

Des Plaines also argues the Board lacks jurisdiction to hear SWANCC's petition because the doctrine of *res judicata* applies here. Des Plaines claims that because the Board dismissed for lack of jurisdiction another petition by SWANCC contesting the same siting approval in an order dated April 17, 2003, this issue has already been resolved.

DMS's Arguments

DMS argues that SWANCC's petition should be dismissed for two reasons. First, DMS, like Des Plaines, argues that SWANCC's petition was not timely filed. DMS claims the siting application was "approved by default" on February 4, 2003, because Des Plaines received DMS's siting application on August 5, 2002. *See* 35 Ill. Adm. Code 107.204. Second, DMS argues that the Board should not hear this petition because SWANCC is not a proper petitioner. DMS argues that Section 40.1(b) of the Act requires the petitioner to be so located as to be affected by the proposed facility. 415 ILCS 5/40.1(b). DMS claims that SWANCC's transfer station is 4.5 miles away, 6 miles by road, from the DMS facility. DMS maintains that SWANCC is not affected by the proposed facility, and therefore, the petition should be dismissed.

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).

SWANCC also argues the issue of *res judicata* does not apply here. Resp. at 11. SWANCC states that a motion for reconsideration stays the effect of the order for which reconsideration is sought until final disposition of the motion. Resp. at 11; citing 35 Ill. Adm. Code 101.520(c). 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 does not accept SWANCC's petition for review because it 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 (Pet. Exh. 3), constituted 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 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 minutes, 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 matter, SWANCC’s petition was not timely filed. In addition, Des Plaines’ argument that *res judicata* bars SWANCC’s appeal in this matter is without merit. Because the effect of the final decision in PCB 03-161 has been stayed due to SWANCC’s motion to reconsider, the Board has not yet issued a final judgment on the merits regarding this issue and these parties. *See* 35 Ill. Adm. Code 101.520(c). Accordingly, the Board lacks jurisdiction to hear this appeal.

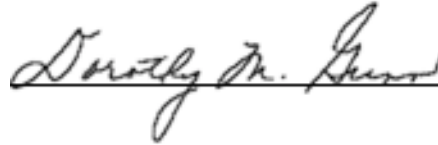
CONCLUSION

The Board does not accept SWANCC’s petition for hearing, dismisses this action, 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", is written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board