BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

VILLAGE OF ROBBINS and ALLIED WASTE TRANSPORTATION, INC., Petitioner,	)	
v.	)	PCB No. 04-48
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	(Permit Appeal)

NOTICE

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

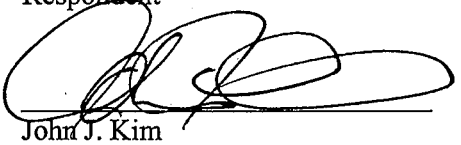
Charles F. Helsten
Hinshaw & Culbertson
100 Park Avenue
P.O. Box 1389
Rockford, IL 61105-1389

William Mansker
Village of Robbins
3327 West 137th Street
Robbins, IL 60472

PLEASE TAKE NOTICE that I have today filed with the office of the Clerk of the Pollution Control Board a RESPONSE TO PETITIONERS' MOTION FOR SUMMARY JUDGMENT, copies of which are herewith served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



John J. Kim
Assistant Counsel
Special Assistant Attorney General
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)
Dated: May 28, 2004

BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

VILLAGE OF ROBBINS and ALLIED WASTE TRANSPORTATION, INC., Petitioner,	)	
v.	)	PCB No. 04-48
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Respondent.	)	(Permit Appeal)

RESPONSE TO PETITIONERS' MOTION FOR SUMMARY JUDGMENT

NOW COMES the Respondent, the Illinois Environmental Protection Agency ("Illinois EPA"), by one of its attorneys, John J. Kim, Assistant Counsel and Special Assistant Attorney General, and, pursuant to 35 Ill. Adm. Code 101.500, 101.504 and 101.516, hereby respectfully responds to the Motion for Summary Judgment and Memorandum of Law ("Petitioners' motion" or "motion for summary judgment") filed by the Petitioners, Village of Robbins ("Village") and Allied Waste Transportation ("Allied"). In response to the Petitioners' motion, the Illinois EPA states as follows:

I. INTRODUCTION

On April 29, 2004, the Petitioners filed a motion for summary judgment, arguing that there are no genuine issues of material fact and that the Illinois EPA's failure to issue a permit as requested resulted in a violation of the Illinois Environmental Protection Act ("Act"). Petitioners' motion, p. 3.[1]

The Petitioners recited facts they believe to be relevant and uncontroverted in support of their arguments. Petitioners' motion, pp. 1-3. The Petitioners then provided the two key components of their argument; namely, that Section 39.2(e-5) of the Act (415 ILCS 5/39.2(e-5))

[1] Citatations to "Petitioners' motion" will be referencing pages from the Memorandum of Law in Support of Motion for Summary Judgment.

provides legal authority for the Village to confer siting approval for the proposed transfer station, and that the scope of the siting application that led to the issuance of siting approval on February 9, 1993, encompassed the proposed transfer station.

However, contrary to the assertions of the Petitioners, there are material facts that are in dispute. Further, the legal argument proffered by the Petitioners is without merit and should be denied on its own merits if necessary.

II. THERE ARE GENUINE ISSUES OF MATERIAL FACT

Based upon the facts presented by the Petitioners, the Board should determine that there are genuine issues of material fact. For example, the Petitioners claim that on February 9, 1993, the Village approved the siting approval application of Robbins Resource Recovery Company ("RRRC") for a "regional pollution control facility" to be located in the Village. Petitioners' motion, p. 1; AR, pp. 64-73.[2] The Petitioners then make numerous arguments based on the wording in the ordinance approving siting for a "new regional pollution control facility." AR, p. 65. However, that ordinance also states in its heading that it is an ordinance approving the application of RRRC for a regional pollution control facility. Repeated references to the application of RRRC are made throughout the ordinance. Id. The record does not contain the siting application that RRRC submitted to the Village. Therefore, the Board cannot determine exactly what type of facility was described and identified in the application as being the subject of the request.

As the Petitioners described in the permit application seeking approval of the proposed transfer station, the original siting approval granted by the Village to RRRC was issued on October 25, 1988. AR, p. 158. Though that ordinance made reference in its heading as approving a regional pollution control facility, it also specified that the type of facility identified

[2] References to the Administrative Record shall henceforth be made as, "AR, p. ___."

in the siting application was a qualified solid waste energy facility. AR, p 61. Thus, the original ordinance described the type of facility that was proposed. A qualified solid waste energy facility was the statutory description given for a municipal waste incinerator that was subject to the Retail Rate Law.

Here, despite references made in the permit application by the Petitioners to the content and provisions of the 1992 siting application (e.g., AR, pp. 416, 417), the siting application itself is not part of the Administrative Record. The siting application was not submitted with the permit application, and thus the Illinois EPA did not have the benefit of the siting application at the time of its decision under review. As a result, the Illinois EPA could not make any determinations as to what type of facility was being proposed by the siting applicant that led to the 1993 siting approval.

As the Petitioners explained in the permit application, a court ruling caused RRRC to reapply to the Village for local siting approval to cure some notice deficiencies. The Petitioners noted that the Village then issued the 1993 ordinance approving site location. AR, p. 158. The Petitioners did not state that the 1992 siting application, which was a re-application for the previously issued 1988 siting approval, changed the scope or description of the proposed facility in any way. All that was implied in the permit application was that the notice problems of the first siting request were addressed. Thus, it is likely that the 1992 siting application asked for site location approval for a municipal waste incinerator. Indeed, though the permit is not included in the Administrative Record, the Petitioners argue that the permit granted by the Illinois EPA based upon the 1993 siting approval encompassed all of the activities proposed in this most recent permit application. AR, p. 418. However, none of the permits referenced in the

permit application or in the Petitioners' motion are included in the Administrative Record before the Board. AR, pp. 418; Petitioners' motion, p. 2.

Without complete factual support for the allegations in the Petitioners' motion, the Board cannot determine whether or not there are any disputes of material fact. The Illinois EPA contends that the siting approval offered by the Petitioners is insufficient to demonstrate that siting approval has been provided for the transfer station permit application. The Petitioners allude to contents of documents that are not before the Board in support of their contrary position.

However, there is evidence within the Administrative Record that directly contradicts the Petitioners' contentions. In May 1989, the Illinois EPA's Division of Land Pollution Control ("DLPC") issued comments to RRRC regarding identified issues with permit applications submitted by RRRC. AR, pp. 54-56. Specifically, DLPC identified a potential problem involved with the possibility that the RRRC facility would include the operation of a garbage transfer station, and how such operation should be reconciled with a statutory set back for such operations. AR, p. 55. The noted response of RRRC is that a garbage transfer station is principally a facility that accepts refuse from small compactor trucks and reloads, using a variety of methods into larger transfer trailers in order to reduce the transportation cots of hauling refuse to a distant landfill. The position of RRRC was that the proposed facility would not be a regional pollution control facility used as a garbage transfer station in addition to being used as a municipal waste incinerator. Thus, RRRC did not believe that any compliance with Section 22.14 of the Act (415 ILCS 5/22.14) (which imposes a set back between transfer stations and nearby dwellings) was relevant. AR, p. 56.

These notes were apparently made based upon responses received from RRRC, and memorialize the permit applicant's position that its proposed facility was not a garbage transfer station. This contention is inapposite to the argument now being made by the Petitioners, and the Board should attempt to reconcile this issue before concluding that no factual issues remain.

Even more specific and relevant is information found within the 1993 siting approval, from which the Petitioners now claim siting requirements have been met. The Petitioners argue that the 1993 ordinance referenced only a "pollution control facility," and that term is so broad as to include any and all of the types of activities found within Section 3.330 of the Act (415 ILCS 5/3.330). Petitioners' motion, pp. 4-5. But a review of the 1993 ordinance and accompanying "Decision Approving The Application Of Robbins Resource Recovery Company For A Regional Pollution Control Facility In The Village Of Robbins" ("1993 decision") refutes the Petitioners' claims. The 1993 decision was attached as an exhibit to the 1993 ordinance and is incorporated by reference therein. AR, p. 65. In paragraph 13 of the 1993 decision, the Village notes that the facility under review was a waste-to-energy facility. AR, p. 69. That term is commonly referred to as a waste incinerator intended to generate electricity, as specified in paragraph 15 of the 1993 decision. AR, p. 70. This is a clear and irrefutable statement by the Village that the 1993 ordinance approved a municipal incinerator for siting, and nothing else.

Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Dowd & Dowd, Ltd. v. Gleason, 181 Ill.2d 460, 483, 693 N.E.2d 358, 370 (1998); See also, 35 Ill. Adm. Code 101.516(b). When ruling on a motion for summary judgment, the Board "must consider the pleadings, depositions, and affidavits

strictly against the movant and in favor of the opposing party." Dowd & Dowd, 181 Ill.2d at 483, 693 N.E.2d at 370.

Summary judgment "is a drastic means of disposing of litigation," therefore the Board should grant it only when the movant's right to relief "is clear and free from doubt." Dowd & Dowd, 181 Ill.2d at 483, 693 N.E.2d at 370, Citing Purtill v. Hess, 111 Ill.2d 229, 240, 489 N.E.2d 867, 871 (1986). However, a party opposing a motion for summary judgment may not rest on its pleadings, but must "present a factual basis which would arguably entitle [it] to a judgment." Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2nd Dist. 1994).

The Illinois EPA has already set forth that, based on the previous representations of RRRC and the Petitioners, there is ample evidence demonstrating that the 1993 siting approval should be read consistent with the 1988 siting approval, which specified that the proposed facility was a municipal waste incinerator, and specifically not a garbage transfer station. Based upon factual issues described above, the Board should deny the motion for summary judgment on the basis that there exist material issues of fact.

III. THE PETITIONERS ARE MISAPPLYING SECTION 39.2(e-5) OF THE ACT

Even if the Board were to conclude that there are no issues of fact, the Petitioners' motion should still be denied as it presents no meritorious arguments of law. The Petitioners primarily rely on Section 39.2(e-5) of the Act as the legal authority allowing for the acceptance of the notion that in 1993 the Village granted siting approval for a transfer station. A plain reading of Section 39.2(e-5), however, indicates that the Petitioners' reliance on that subsection is misplaced.

Section 39.2(e-5) provides in part that siting approval obtained pursuant to Section 39.2 of the Act is transferable and may be transferred to a subsequent owner or operator. If siting is transferred, then the subsequent owner or operator assumes and takes subject to any and all conditions imposed upon the prior owner or operator of the unit of local government. However, such conditions may be modified by agreement between the subsequent owner or operator and the unit of local government. Based on that language, the Petitioners present the following argument. The 1993 siting approval was for a "pollution control facility," and that term is defined in Section 3.330 of the Act as being any waste storage site, sanitary landfill, waste disposal site, waste transfer station, waste treatment facility, or waste incinerator.

Since the term "pollution control facility" is so broad, the Petitioners argue that whatever else may have been previously permitted by the Illinois EPA for this facility in a former guise, certainly a waste transfer station is within the scope of the definition and therefore the 1993 siting approval extends to encompass the proposed transfer station. Petitioners' motion, pp. 4-5.

Therefore, the Petitioners argue that the broad, unspecified terminology employed in the siting approval, in conjunction with the siting agreement between the Village and Allied (AR, pp. 76-80) and the Village mayor's affidavit (actually a form certification of siting approval) (AR, p. 75), all lead to the conclusion that the 1993 siting approval is adequate to conclude that siting approval for a transfer station was transferred to Allied. Petitioners' motion, p. 5.

Unfortunately, scrutiny of this reasoning yields little substance and many questions. Starting at the beginning, for there to be any offering of local siting approval, it must first be established that the Village effectively transferred siting approval to Allied. AR, pp. 76-80. Since the 1993 siting approval was granted by the Village to RRRC (AR, pp. 65-73), the Village must demonstrate that it transferred siting approval to Allied since RRRC is not a part of the

subject permit application. It has already been established that the 1993 decision clearly stated that the 1993 ordinance granted siting approval for a municipal waste incinerator, and not a waste transfer station. Therefore, the only siting that could conceivably be transferred to Allied by the Village would be that for a municipal waste incinerator.

That fact thus calls into question the certification signed by the Village mayor that the Village granted siting approval for a waste transfer station in 1993. AR, p. 75. No documents presented by the Petitioners to the Illinois EPA support that contention. Indeed, if the Petitioners' argument is to be believed, one would have expected the certification form to have check marks for all types of activities in Item 2 of the certification, since all such activities are included under the definition of pollution control facility. Id. That only one box was (erroneously) checked is yet another inconsistency in the Petitioners' arguments.

The next flaw in the Petitioners' case is that Section 39.2(e-5) of the Act somehow confers the ability of the Village to transfer siting authority to Allied. The language of Section 39.2(e-5) is clear and speaks for itself, and in plain language states that conditions to siting approval may be modified upon transfer. Here, the change from a municipal waste incinerator being granted siting approval to a waste transfer station being granted siting approval is not a mere change in condition. Rather, it is a wholesale change in the very type of facility contemplated. The statutory provision that a condition may be modified must be kept in context with the overall limits of the Act itself.

To allow a change in the type of facility covered under a siting approval would defeat the whole purpose of the siting process; specifically, to allow for sufficient public input and comment that will provide a local unit of government the ability to render a final decision. If siting approval is granted to a waste transfer station, then a unit of local government purports to

transfer that siting to a subsequent owner or operator and in the process changes the facility type to a hazardous waste incinerator, the whole purpose behind the establishment of the siting process would be subverted. And though the present case does not involve such a very drastic change, to allow the Petitioners' arguments would still allow for that more egregious example in the future.

The attempt by the Petitioners to claim that Section 39.2(e-5) of the Act allows for a change in the type of sited facility should not be condoned by the Board. Rather, Section 39.2(e-5) should be read in conjunction with Section 39.2 as a whole, and the local siting approval process should be protected. Simply put, this is not a change in condition, but rather a change in the type of facility to be approved. There is no past example of Section 39.2(e-5) being used in this manner, and to allow it here would create a bad precedent.

Another argument made by the Petitioners is that the Illinois EPA permitted a municipal waste incinerator at this location, and the activities of a transfer station are a subset of a waste incinerator and thus there should be no problem with issuing a permit here. This argument is without any basis in law, since there is no provision of the Act that allows for a "lesser included facility" to be effectively permitted by virtue of permitting a more comprehensive facility. Any activities that may arguably overlap between a dedicated transfer station (as was proposed in the instant case) and a municipal waste incinerator are of no consequence, since the Illinois EPA was not dealing with a transfer station. Simply put, a permit issued to a municipal waste incinerator is just that, and not (by consequence) also a *de facto* permit issued for a transfer station, or treatment facility, or storage facility.

Finally, the Illinois EPA notes that the Petitioners offer one last flawed argument in support of their motion for summary judgment. The Petitioners argue that it is well-settled that

the local siting authority is responsible for determining the scope of siting approval, citing to Saline County Landfill, Inc. v. Illinois EPA, PCB 02-108 (May 16, 2002). The Petitioners state that in Saline County, the Board made it abundantly clear that it is the duty of the siting authority to determine "whether a change in a facility is consistent with the local siting approval granted to a facility." Petitioners' motion, p. 6. This citation to the case is close, yet omits one small yet important detail. In Saline County, the Board stated that the local siting authority considers not only the location of a proposed facility, but also its design. The changes referred to by the Board in Saline County were changes to a facility's design, not to the facility itself. In no case has the Board given approval to a change in the type of facility granted through an application of Section 39.2(e-5) of the Act, and it should not do so here.

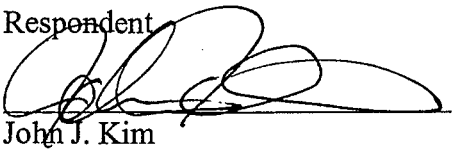
IV. CONCLUSION

The Petitioners' arguments in the motion for summary judgment are without merit. There are at the very least disputes in material facts, though the Board could and should easily conclude that the facts are wholly consistent with the Illinois EPA's position that the 1993 ordinance approved local siting for a municipal waste incinerator only. There was no siting for a transfer station granted in 1993, and therefore there was no such siting approval that could be transferred to Allied. Further, Section 39.2(e-5) of the Act does not allow a unit of local government to make a wholesale change in the type of facility that received a grant of local siting approval, such that a transferee of local siting receives siting of a completely different type of facility.

WHEREFORE, for the reasons stated above, the Illinois EPA hereby respectfully requests that the Board deny the Petitioners' motion.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent



John J. Kim
Assistant Counsel
Special Assistant Attorney General
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)
Dated: May 28, 2004

CERTIFICATE OF SERVICE

I, the undersigned attorney at law, hereby certify that on May 28, 2004, I served true and correct copies of a RESPONSE TO PETITIONERS' MOTION FOR SUMMARY JUDGMENT, by placing true and correct copies in properly sealed and addressed envelopes and by depositing said sealed envelopes in a U.S. mail drop box located within Springfield, Illinois, with sufficient First Class Mail postage affixed thereto, upon the following named persons:

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

Charles F. Helsten
Hinshaw & Culbertson
100 Park Avenue
P.O. Box 1389
Rockford, IL 61105-1389

William Mansker
Village of Robbins
3327 West 137th Street
Robbins, IL 60472

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,
Respondent

John J. Kim
Assistant Counsel
Special Assistant Attorney General
Division of Legal Counsel
1021 North Grand Avenue, East
P.O. Box 19276
Springfield, Illinois 62794-9276
217/782-5544
217/782-9143 (TDD)