ILLINOIS POLLUTION CONTROL BOARD
September 16, 2004

VILLAGE OF ROBBINS and ALLIED WASTE TRANSPORTATION, INC.,	)	
Petitioners,	)	
v.	)	PCB 04-48 (Permit Appeal)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

ORDER OF THE BOARD (by T.E. Johnson):

This matter is before the Board on a petition to review filed by the Village of Robbins and Allied Waste Transportation, Inc. (petitioners) to appeal an August 29, 2003 determination of the Illinois Environmental Protection Agency (Agency). At issue is the Agency's denial of the petitioners' requested modification of a solid waste management facility permit to allow the petitioners' to develop and operate a recycling and waste transfer facility at 3327 West 137th Street, Robbins, Cook County.

On April 29, 2004, the petitioners filed a motion for summary judgment accompanied by a memorandum in support thereof. On June 1, 2004, the Agency filed a response to the motion for summary judgment. On June 14, 2004, the petitioners filed a motion for leave to file a reply and two replies – one filed by each attorney of record. On June 16, 2004, the petitioners filed a motion to supplement the record.

For the reasons articulated below, the Board denies the petitioners' motion for summary judgment and directs the hearing officer to proceed expeditiously to hearing.

BACKGROUND

On February 9, 1993, the Village of Robbins (Village) adopted an ordinance that approved the siting application of Robbins Resource Recovery Company (RRRC) for a regional pollution control facility to be located in the Village. AR at 64. On June 2, 1997, the Agency issued operating permit No. 1977-072-OP for the facility. The permit allows the operation of a 16-acre solid waste management site to manage waste for introduction into a waste-to-energy facility in the Village, and specifically provides for the operation of various units listing the approximate size and proposed use of each. *See* Permit No. 1977-072-OP (June 2, 1997). On February 13, 2003, the Village entered into a siting authority agreement with Allied Waste Transportation, Inc. (Allied) that provides that Allied be allowed to use the facility for waste receipt and handling, waste processing, waste solidification, waste load consolidation and to operate as a solid waste transfer station. AR at 76. The agreement states that the siting approval

previously granted to the facility by the Village is sufficiently broad to cover the proposed use of the facility by Allied and that the proposed use can be undertaken without the necessity of additional local siting approval procedures. *Id*.

On February 13, 2003, Village Mayor Irene Brodie submitted a sworn certification of siting approval (a signed affidavit) on behalf of the Board of Trustees for the Village. AR at 75. Ms. Brodie was the village president when siting was granted in 1993, was involved with the original siting hearings, and signed the ordinance that granted siting. AR at 66. The affidavit states that the Robbins Recycling and Transfer Station had received local siting approval by the Village on February 9, 1993, to perform the functions of a waste transfer station. *Id*.

Allied is seeking to operate a waste transfer station at the facility. To that end, an application for a permit to develop and operate a municipal solid waste transfer and recycling facility was filed with the Agency on May 6, 2003. AR at 1. On August 28, 2003, the Agency issued a final decision denying the application. *Id*. In the denial letter, the Agency states, *inter alia*, that the Village failed to submit sufficient documentation that the facility has obtained local siting approval to conduct a waste transfer facility and receive special waste; and that the Village proposed to conduct waste management activities outside the proposed new solid waste management site and that no person may cause or allow the development of any new solid waste management site without a developmental permit issued by the Agency. AR at 1-2.

The petitioners filed a petition for review of the Agency's decision on December 23, 2003. In the petition, the petitioners assert that the Agency's decision was improper and without basis under the regulations of the Board and the Environmental Protection Act (Act). Pet. at 2. Further, the petitioners contend they submitted documentation that demonstrated the facility had obtained a local siting approval (without conditions) to conduct a range of waste receipt, handling and processing operations that include those set forth in the application for permit to modify a solid waste management site. *Id*. The petition also asserts that the Agency permitted a number of waste receipts, handling and processing activities that essentially included those requested in the application to modify, and by that action recognized that the requirements of Section 39(c) of the Act had been met. Pet. at 2-3. The petitioners assert that the site security and access control grounds cited in paragraph two of the denial letter does not involve the storage and transfer of waste. Pet. at 3.

PRELIMINARY MATTERS

On June 16, 2004, the petitioners filed a motion to supplement the record. In the motion to supplement, the petitioners assert that the administrative record is devoid of permits granted by the Agency to the Village, Robbins Resource Recovery Partners, L.P. and Foster Wheeler Illinois, Inc. as the owners and operators of the facility in Robbins, Illinois. Mot. to Supp. at 1. The petitioners argue that the permits are directly relevant to the issues presented in this case, were erroneously overlooked in the creation of the record, and should be included in the record. Mot. to Supp. at 1-2.

The Agency did not respond to the motion to supplement. If a party files no response to a motion within 14 days, the party will be deemed to have waived objection to the granting of the

motion. *See* 35 Ill. Adm. Code 101.500(d). The Board finds that the permits in question are relevant to the issues in this case and were before the Agency at the time of the decision. Accordingly, the motion to supplement is granted, and the permits are included in the record.

STANDARD OF DECISION

Summary judgment is appropriate when the pleadings and depositions, together with any affidavits and other items in the record, show 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, 693 N.E.2d 358 (1998); People v. City of Waukegan (Waukegan), PCB 01-104, slip op. at 2 (Aug. 23, 2001). In 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, 181 Ill. 2d at 483, 693 N.E.2d at 370; Waukegan, PCB 01-104, slip op. at 2.

Summary judgment "is a drastic means of disposing of litigation," and therefore it should be granted only when the movant's right to the relief "is clear and free from doubt." 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, the party opposing a motion for summary judgment may not rest solely 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); Waukegan, PCB 01-104, slip op. at 2.

The Board's procedural rules provide that "if the record, including pleadings, depositions and admissions on file, together with any affidavits, shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law, the Board will enter summary judgment." 35 Ill. Adm. Code 101.516.

ARGUMENTS

Petitioners

The petitioners argue that there is no genuine issue of material fact that a modification of the solid waste facility permit should have granted because no violation of the Act would occur by granting the permit. Mem. at 3. To the contrary, asserts petitioners, the Act would actually be violated by not granting modification of the permit. *Id*. The petitioners assert that the sole question before the Board is whether the applicant proves that the application, as submitted to the Agency, demonstrated that no violation of the Act would occur if the permit were granted. *Id*.

The petitioners contend that it would be a violation of the Act not to grant the permit, as modification of the permit after the original siting approval is specifically provided for under Section 39.2(e-5) of the Act. Mem. at 4. The petitioners argue that the Village of Robbins' use of the term pollution control facility in their siting approval establishes that the Village intended the facility to act in a number of different capacities, including as a waste transfer station. Mem. at 4-5. The petitioners assert that based on permits issued by the Agency, the "regional pollution control facility" approved by the Village of Robbins on February 9, 1993, was permitted to

perform the same operations as a transfer station, with the added component of incineration. Mem. at 1.

The petitioners assert that it is clear that the facility was intended to serve as a waste transfer station because the original application for siting specifically provides the facility is to treat and consolidate certain waste, as well as separate, remove and transfer recyclables and other types of materials. Mem. at 5. The petitioners contend that these activities specially and squarely fit the definition of a transfer station. *Id*.

The petitioners argue that the fact the resolution entered into by the Village does not specifically identify the facility as a "transfer station" should not be determinative because the activities to be performed clearly encompass transfer station activities. Mem. at 5. The petitioners state that it is clear the facility was approved to act as a waste transfer station based on the affidavit signed by the Mayor of the Village that specifically provides the facility was granted siting approval to act as a waste transfer station. *Id*.

No dispute exists, asserts the petitioners, that Allied entered into a siting agreement with the Village that sets forth that Allied be allowed to use the formerly approved pollution control facility as a waste transfer station. Mem. at 5-6. The agreement specifically provides that the siting approval previously granted to the pollution control facility is sufficiently broad to cover the proposed use of the property and that the present proposed use can be undertaken without the necessity of additional local siting approval procedures. Mem. at 6.

The petitioners argue that the Village was specifically authorized via section 39.2(e-5) of the Act to enter into the siting authority agreement with Allied to modify any and all conditions imposed on the previously approved pollution control facility. Mem. at 6. The petitioners contend the siting authority has the sole power and responsibility to modify any terms and conditions of original siting approval with a subsequent owner of a pollution control facility as the Village has done here. *Id*. The petitioners assert that it is well settled that the local siting authority is responsible for determining the scope of siting approval granted to a pollution control facility. *Id*.

Agency

The Agency argues that there are material facts in dispute in this matter, and that the legal argument proffered by the petitioners is without merit and should be denied on its own merits if necessary. Resp. at 2.

The Agency asserts that the ordinance approving siting states in its heading that it is an ordinance approving the application of RRRC for a regional pollution control facility. Resp. at 2. However, the Agency contends, the record in this case does not contain the siting application that RRRC submitted to the Village and the Board cannot therefore determine exactly what type of facility was described and identified in the application as being the subject of the request. *Id*.

The Agency asserts that the original siting approval granted by the Village to RRRC was issued on October 25, 1988, and specified that the type of facility identified in the siting

application was a qualified solid waste energy facility – the statutory description given for a municipal waste incinerator that was subject to the Retail Rate Law. Resp. at 2-3.

Further, notes the Agency, despite references made in the permit application by the petitioners to the content and provisions of the 1992 siting application; the siting application itself is not part of the administrative record, and the Agency did not have the benefit of the siting application at the time of its decision under review. Resp. at 3. As a result, the Agency continues, it 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. *Id.*

The Agency contends that the petitioners argue that the permit granted by the Agency based on the 1993 siting approval encompassed all of the activities proposed in the permit application even though the permit is not included in the administrative record. Resp. at 3. The Agency argues that without complete factual support for the allegations in the motion, the Board cannot determine whether or not there are any disputes of material fact, and that the siting approval offered by the petitioners is insufficient to demonstrate that siting approval has been provided for the transfer station permit application. Resp. at 4.

The Agency asserts that evidence within the record directly contradicts the petitioners' contentions. Specifically, the Agency contends that in May 1989, its division of land pollution control issued comments to the RRRC that identified a potential problems with the permit applications including the operation of a garbage transfer station and how such operation should be reconciled with a statutory set back. Resp. at 4, citing AR at 55. The Agency contends that, in response, the RRRC's position was that the proposed facility would not be a regional pollution control facility used as a garbage transfer station, and that it did not believe that any compliance with the set back provisions was relevant. Resp. at 4. The Agency asserts that this contention is inapposite to the arguments now made by the petitioners and that the Board should attempt to reconcile this issue before concluding that no factual issues remain. Resp. at 5.

The Agency argues that in paragraph 13 of the 1993 decision, the Village notes the facility under review was a waste-to-energy facility, as specified in paragraph 15 of the 1993 decision, and that this is a clear and irrefutable statement by the Village that the 1993 ordinance approved a municipal incinerator for siting and nothing else. Resp. at 5.

The Agency asserts that for there to be any offering of local siting approval, it must first be established that the Village effectively transferred siting approval to Allied. Resp. at 7. The Agency argues that since the 1993 decision stated that the 1993 ordinance granted siting approval for a municipal waste incinerator, not a waste transfer station; that the only siting that could be transferred to Allied by the Village would be that for an incinerator. Resp. at 8. The change from siting for a municipal waste incinerator to siting for a waste transfer siting is not a mere change in condition, contends the Agency, but a wholesale change in the very type of facility contemplated. *Id*. To allow such a change, concludes the Agency, would defeat the whole purpose of the siting process – to allow for sufficient public input and comment that will provide a local unit of government the ability to render a final decision. *Id*.

The Agency argues that a permit issued to a municipal waste incinerator is just that, not also a de factor permit issued for a transfer station, treatment facility or storage facility. Resp. at 9.

Replies

Two replies were filed by the petitioners - the first (Reply1) was filed by attorney Charles Helsten; and the second (Reply2) was filed by Village of Robbins attorney William Mansker.

The petitioners assert that the arguments of the Agency must fail because none of them establish that a genuine issue of material fact exists with respect to the facility approved by the Village in 1993. Reply1 at 2. The petitioners argue that using the plain meaning of the ordinance, it is clear that the Village intended to approve a pollution control facility as specifically defined in the Act and there is no need to resort to the application to interpret what the Village approved. Reply1 at 2-3.

The petitioners contend there is no evidence in the ordinance that the Village intended only to approve a facility that would be used exclusively as an incinerator, and that had the Village so intended, it would have expressly stated so in the 1993 ordinance. Reply1 at 3-4. The petitioners contend it is particularly telling that the Village specifically excluded any descriptive term for the facility other than pollution control facility, especially in light of the inclusion of a more descriptive term in the 1989 ordinance. Reply1 at 4.

The petitioners argue that the Agency's past statements make it clear that the Agency concluded the facility, as sited, would be used as a transfer station. Reply1 at 5, citing AR 55. The petitioners assert that based on the application, the Village believed (as did the Agency) it was granting siting approval to a facility that would act in part as a transfer station, thus rendering irrelevant the applicant's later suggestion that it was not intending to operate a transfer station after the siting approval had already been granted. Reply1 at 5.

The petitioners assert that the original siting and permitting covered a number of pollution control activities including collection, processing, sorting, storing, recycling and disposing of municipal solid waste. Reply2 at 1. The petitioners contend the Agency's entire argument concerning Section 39.2(e-5) of the Act is flawed because it is based on the presumption that the siting approval granted by the Village in 1993 was for a waste incinerator when the ordinance never makes any mention of the term incinerator, but repeatedly refers to the facility as a pollution control facility. Reply1 at 7. The petitioners argue that because the siting authority granted by the Village encompassed waste transfer components, it establishes that the petitioners are not attempting to entirely change the type of facility approved but merely intending to slightly modify the focus of the operations at the facility. Reply1 at 8.

The petitioners assert that Agency memoranda make clear that, but for the statutory setback, siting approval was for a transfer station and incinerator, and that the fact that RRRC did not need to be sited as a waste transfer station at that time, in no way negates the fact that the siting also substantially qualified other buildings at the facility for additional pollution control uses. Reply2 at 3. The petitioners contend the setback issue was resolved prior to the

application for permit modification by a change in zoning and that no violation of the Act would result in the Agency granting the permit. *Id*.

The petitioners assert that no new siting approval should be required in this case because the impacts to the environment will actually be reduced by the permit applications sought. Reply1 at 8, citing Waste Management v. IEPA, PCB 94-153 (July 21, 1994). The petitioners contend that the Agency's desire to assume and usurp the responsibility of the local governing body relative to siting, would result in the Agency having a role never intended by the Legislature. Reply2 at 7.

BURDEN OF PROOF AND STANDARD OF REVIEW

Section 105.112(a) of the Board's procedural rules provides the petitioner has the burden of proof on appeal of permits under Section 40 of the Act. The standard of review under Section 40 of the Act is whether the application, as submitted to the Agency, would not violate the Act and Board regulations. Ted Harrison Oil Co. v. IEPA, PCB 99-127, slip op. at 5 (July 24, 2003); citing Browning Ferris Industries of Illinois v. PCB, 179 Ill. App. 3d 598, 534 N.E.2d 616 (2nd Dist. 1989). Here, then, the petitioners must demonstrate that approval of the permit application would not cause a violation of the Act or underlying regulations. "On appeal 'the sole question before the Board is whether the applicant proves that the application, as submitted to the Agency, demonstrated that no violation of the Act would occur of the permit was granted.'" Saline County Landfill, Inc. v. IEPA, PCB 02-108 (May 16, 2002); citing Panhandle Eastern Pipe Line Co. v. IEPA, PCB 98-102, slip op. at 10 (Jan. 21, 1999).

The Board will not consider new information not before the Agency prior to its final determination regarding the issues on appeal. Kathe's Auto Service Center v. IEPA, PCB 95-43, slip op. at 14 (May 18, 1995). The Agency's denial letter frames the issues on appeal. Pulitzer Community Newspapers, Inc. v. EPA, PCB 90-142 (Dec. 20, 1990).

DISCUSSION

As noted previously, summary judgment is appropriate when the record shows that no genuine issues of material fact exist, and that the moving party is entitled to judgment as a matter of law. *See* 35 Ill. Adm. Code 101.516. Initially, the Agency has argued that a number of issues of material fact in this matter should prevent the granting of petitioners' motion for summary judgment.

Specifically, the Agency contends the record in this case does not contain the 1992 siting application that RRRC submitted to the Village or the permits cited in petitioners' motion. In light of the motion to supplement the record that the Board grants in this order, the permits are now in the record and their absence cannot be a basis for any genuine issue of material fact.

The 1992 siting application, however, was not included in the motion to supplement the record. The Agency has stated that it did not have the benefit of the siting application at the time of its decision under review. *See* Resp. at 3. As noted above, the only question before the Board in a permit appeal is whether the application, as submitted to the Agency, demonstrated that no

violation of the Act would occur if the permit were granted. To that end, the Board will not consider information that was not before the Agency prior to its final determination. Because the 1992 siting application was not before the Agency at the time of its final determination, the Board is proscribed from considering it here, even if it had been submitted. Thus, the absence of the 1992 siting application cannot raise a genuine issue of material fact. The Board finds that no genuine issues of fact exist.

Having found that no genuine issue of material fact exists, the Board must now decide whether the petitioners are entitled to judgment as a matter of law. As discussed above, the burden of proof is on the petitioners to prove that approval of the application for permit modification would not cause a violation of the Act or underlying regulations. Further, in considering the motion for summary judgment, the Board must consider the pleadings strictly against the petitioners and in favor of the Agency. The Agency denial is based on petitioners' purported failure to submit sufficient documentation that the facility has obtained local siting approval to conduct a waste transfer facility and receive special waste. *See* AR at 1-2.

The Board finds that the petitioners failed to meet their burden to prove that approval of the application for modification would not result in a violation of the Act or regulations. In 1993, the Village issued an ordinance approving the application of Robbins Resource Recovery Company for a regional pollution control facility. AR at 64. Contrary to the petitioners' assertions, the ordinance specifically defines the pollution control facility that was sited as a waste-to-energy facility. AR at 69. Moreover, the ordinance specifically provides that the purpose of the facility, as proposed in the siting application, is to generate electricity from the combustion of municipal waste. AR at 70. The ordinance does not make any reference to the facility being used as a transfer station. The ordinance itself is the best evidence of the Village's intent regarding the type of facility it sited, and the Boards finds the intent of the Village is clear from a review of the ordinance.

The petitioners argue that the Village contemplated the facility would operate, in part, as a transfer station, citing the certification of siting approval submitted on February 13, 2003, that indicates the facility was approved to act as a waste transfer station in 1993. AR at 75. The law is well settled that if the meaning of a statute or an ordinance is clearly expressed in the language of the statute or ordinance, the courts cannot imply any other meaning. Triple A. Services, Inc. v. Fred Rice, 131 Ill. 2d 217, 545 N.E.2d 706, 137 Ill. Dec. 53 (1989), citing City of Decatur v. German (1924), 310 Ill. 591, 595. As the ordinance clearly indicates the type of facility that was sited, the Board gives less weight to the certification filed as part of an application to modify a permit ten years after siting was initially approved than it does to the ordinance itself.

Further, the Board is not persuaded by the petitioners' assertions that a pollution control facility, as defined in the Act, includes a waste transfer station and that the operating and supplemental operating permits issued by the Agency indicate that the facility will perform operations similar to those it would perform as a transfer station. The ordinance grants siting approval for a waste-to-energy facility, not a waste transfer station. Although the permits indicate that the sited waste-to-energy facility did have transfer station components, the change sought by the petitioners is not a mere change in condition; but a wholesale change in the very

type of facility contemplated. The instant situation is similar to that recently discussed by the Board in United Disposal of Bradley v. IEPA, PCB 03-235 (June 17, 2004). Here, as in United Disposal, the nature of the change that the petitioners are seeking may impact the criteria considered in determining whether to site or re-site a pollution control facility. Further, to allow the use of Section 39.2(e-5) in this context would deprive members of the public an opportunity to participate in the local siting process.

The Board finds that record demonstrates that Section 39.2(e-5) of the Act cannot be used to transfer the siting approval granted in 1993 to Allied Waste in this case. Accordingly, the petitioners failed to prove that the application, as submitted to the Agency, did not demonstrate that no violation of the Act would occur of the modification of the permit was granted. The Board therefore denies the petitioners' motion for summary judgment.

CONCLUSION

No genuine issues of material facts exist, and the petitioners are not entitled to judgment as a matter of law. The Board denies petitioners' motion for summary judgment.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on September 16, 2004, by a vote of 5-0.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board