

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CITY OF JOLIET, )  
)  
)  
Petitioner, )  
)  
v. ) PCB No. 09-25  
) (Permit Appeal-Water)  
ILLINOIS ENVIRONMENTAL )  
PROTECTION AGENCY )  
)  
Respondent. )

**NOTICE OF FILING**

TO: Roy M. Harsch  
Yesenia Villasenor-Rodreguez  
Drinker Biddle & Reath, LLP  
191 North Wacker Drive  
Suite 3700  
Chicago, Illinois 60606

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

PLEASE TAKE NOTICE that on February 20, 2009 I filed with the Clerk of the Illinois Pollution Control Board, the Respondent's Post Hearing Brief and Certificate of Service, a copy of which is attached and served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY

By: Gerald T. Karr

Gerald T. Karr  
Senior Assistant Attorney General  
Environmental Bureau  
69 West Washington Street  
Suite 1800  
Chicago, Illinois 60602  
(312) 814-3369

DATED: February 20, 2008

**THIS FILING IS SUBMITTED ON RECYCLED PAPER**

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

CITY OF JOLIET,	)	
	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB No. 09-25
	)	(Permit Appeal-Water)
ILLINOIS ENVIRONMENTAL	)	
PROTECTION AGENCY	)	
	)	
Respondent.	)	

**RESPONDENT ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S  
POST-HEARING BRIEF**

NOW COMES Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, by and through its Attorney and for its Post-Hearing Brief, states as follows:

**Introduction**

This matter is straight forward, the Agency Record is clear and the facts are not in dispute. The Petitioner, the City of Joliet ("Petitioner" or "Joliet"), owns and operates three wastewater treatment plants. (R- 104)<sup>1</sup> Petitioner obtained a permit from the Respondent Illinois Environmental Protection Agency ("Illinois EPA") which allowed the sludge from the wastewater treatment plants to be land applied. This permit was renewed in October 2006 and contained a special condition limiting the increase of radium in the soil to 0.1pCi/g. This limit was later revised after an analysis done during the development of a draft Memorandum of Understanding between Illinois EPA and Illinois Emergency Management Agency-Department of Nuclear Safety to 0.4pCi/g. (R-29). This

---

<sup>1</sup> All references designated (R- ) refer to the record filed in this matter on December 11, 2008.

new limit was embodied in a new permit issued by Illinois EPA on or about February 16, 2007. (R-29). By a permit modification application Petitioner sought to revise this limit further upward to 1.0pCi/g. (R- 6 to 8). The Illinois EPA denied this permit modification and the present appeal was taken. (R-1 to 2).

**Applicable Statutes and Standards**

The Illinois EPA, pursuant to Section 39(a) of the Illinois Environmental Protection Act (the "Act"), 415 ILCS 5/39(a)(2006), has the duty to issue any permits required under the Act upon proof of a permit applicant that the permitted activity will not cause a violation of the Act or regulations there under. Section 40(a)(1) of the Act, 415 ILCS 5/40(a)(1)(2006), provides an appeal right to an aggrieved permit applicant, and further provides that the burden of proof during the appeal rests with the petitioner. *Browning-Ferris Industries of Illinois v. Pollution Control Board*, 179 Ill.App.3d 598, 601, 534 N.E.2d 616, 619, 128 Ill.Dec. 434 (1989). The issues in a permit appeal are framed by the denial letter issued by the Illinois EPA and the Board can look to the reasons in such a denial letter when reviewing the Agency's actions. *ESG Watts, Inc. v. Pollution Control Board*, 286 Ill. App.3d 325, 335, 676 N.E.2d 299, 306, 221 Ill. Dec. 778 (1997). During the appeal the Board's actions are judicial in nature and in reviewing an Agency permit denial the Board is bound by the Agency record and the evidence introduced at the hearing. *Illinois Environmental Protection Agency v. Pollution Control Board*, 88 Ill.App.3d 71, 77-78, 410 N.E.2d 98, 104, 43 Ill.Dec. 98 (1980).

**Argument**

The denial letter issued by the Illinois EPA to the Petitioner on or about September 12, 2008, is very specific in the reason for the denial of the requested permit modification. The denial letter provides that Sections 12 and 39 of the Act prohibit the Agency from issuing a permit to a facility which would threaten, cause or allow the discharge of contaminants which might cause or tend to

cause water pollution in Illinois. (R-1). Even more specifically, the causing, threatening or allowing of the discharge of contaminants which might cause or tend to cause water pollution will occur because the Petitioner is seeking an increase in soil radium from 0.1 pCi/g above background levels to 1.0 pCi/g above background levels, which will exceed the limit set in the Memorandum of Agreement ("MOA") between Illinois EPA and Illinois Emergency Management Agency. (R-1, R-8 & R-336-339). The denial letter has now framed the issue and provides a basis or justification for the Agency's action. Now the Petitioner has the burden, based on the Agency record and evidence at hearing, of showing that the Agency's action of denying the permit is not supportable.

The following overview of the Illinois EPA and Act was set out by the Illinois Supreme Court in the case, *People of the State of Illinois v. NL Industries*, 152 Ill. 2d 82, 604 N.E. 2d 349, 178 Ill. Dec. 93 (Ill. Sup. 1992). The Supreme Court stated in part as follows:

The Illinois Constitution of 1970 provides that every citizen has a right to a healthful environment. (Ill. Const. 1970, art. XI, § 2.) Section 1 of article XI, in fact, declares it to be the public policy of the State to provide and maintain a healthful environment for the benefit of future generations. (Ill. Const. 1970, art. XI, § 1.) Prior to enactment of the Constitution of 1970, however, common law remedies were available to abate and enjoin public nuisances which caused pollution. At the same time, in 1970, the Illinois General Assembly enacted the Illinois Environmental Protection Act (Ill.Rev.Stat.1989, ch. 111 1/2, par. 1001 *et seq.*). Repealing several statutes, including the sanitary water board act (Ill.Rev.Stat.1969, ch. 19, § 145.1 *et seq.*) and the Illinois Air Pollution Control Act (Ill.Rev.Stat.1969, ch. 111 1/2, § 240.1 *et seq.*), the Act established a unified statewide program to restore, protect and enhance the quality of the environment in the State.

The purpose of this Act was set forth as follows:

"(b) It is the purpose of this Act, as more specifically described in later sections, to establish a unified, statewide program supplemented by private remedies, to restore, protect and enhance the quality of the environment, and **to assure that adverse effects upon the environment are fully considered and borne by those who cause them.**" Ill.Rev.Stat.1987, ch. 111 1/2, par. 1002(b).

(c) The terms and provisions of this Act shall be liberally construed so as to effectuate the purposes of this Act as set forth in subsection (b) of this Section, but to

the extent that this Act prescribes criminal penalties, it shall be construed in accordance with the "Criminal Code of 1961", as amended.

In denying the permit modification application the Illinois EPA is fulfilling the mandate of the Illinois Constitution and the Illinois Environmental Protection Act of ensuring all citizens enjoy the right to a healthful environment. Petitioner's proposed activities, for which it is seeking a permit, would be in contravention to this stated purpose. The Agency record and the Petitioner's own witnesses make numerous references to how the actions it would like to permit will increase the radium concentrations in the soil above what is already there and that it is the increase in concentration that leads to an increase in risk. For example the Joliet Director of Public Works, in a letter to Illinois EPA states that, "The hazard to the public is not related to the source of the radium, but to the concentration in the soil matrix and the potential for the accumulation of radon" (R-317). A report attached to a submittal to the Illinois EPA by the Petitioner, dated October 25, 2004, provides that, "The application of the sludge to land raises radium concentration of the soil." (R-109). One of Petitioner's witnesses, Mr. Eli Port testified at the Hearing in this matter that the land application of the sludge as proposed by the Petitioner will lead to an increase in the radium concentration over what is already in the soil. (H.T., pg. 25)<sup>2</sup>. An additional witness for the Petitioner, Dr. Richard Touhey testified that an increase in the concentration of radium would lead to an increased dose and assumed for regulatory purposes an increased risk. (H.T., pg. 31).

Petitioner goes to great lengths to show this increase in the concentration of radium in the soil and hence the increased risk to the general population is insignificant. This is beside the point. The Illinois EPA is charged with *inter alia* enforcing the Act. 415 ILCS 5/4 (2006), and issuing permits if

---

<sup>2</sup> All references designated (H.T., pg.-) are to the Hearing Transcript prepared in this matter of the Hearing held on January 13, 2009.

an applicant meets the requirements of the Act. The standard for issuing a permit is whether the Act will be violated not whether the activity will not lead to a significant risk of harm to the general population. Petitioner has failed in its burden of showing that the Act will not be violated.

Petitioner also argues that the Agency erred in denying this permit modification because without the increased level of radium in soil concentration it will have no alternative but to landfill the sludge from its wastewater treatment plants. (H.T., Exhibit 1, pg. 2). But yet during the hearing a witness for the Petitioner, Mr. Harold Harty admitted that there are other alternatives to deal with this sludge, but Joliet only considered landfilling. (H.T., pg. 13). Mr. Harty also testified that the land application of sludge by Petitioner had become a model for others to follow, but yet could not name any other communities or sanitary districts following Petitioner's model in its entirety. (H.T., Exhibit 1, pg. 2 & H.T., pg 11-12). The fact that it may cost Petitioner more money to comply with the Act, does not allow the Agency to issue a permit applicant a permit. In other words, cost is not a basis for allowing a violation of the Act. Again Petitioner has failed in its burden.

WHEREFORE, Respondent, Illinois Environmental Protection Agency, respectfully request the Illinois Pollution Control Board enter an order affirming the denial of Petitioner's July 30, 2008 permit application.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY

By: 

Gerald T. Karr  
Senior Assistant Attorney General  
Environmental Bureau  
69 West Washington Street  
Suite 1800  
Chicago, Illinois 60602  
(312) 814-3369

**CERTIFICATE OF SERVICE**

I, GERALD T. KARR, an Assistant Attorney General in this case, do certify that on this 20th day of February, 2009, I caused to be personally served the foregoing Notice of Filing and Respondent's Post Hearing Brief upon the individuals listed on the attached Notice of Filing.

  
GERALD T. KARR