Electronic Filing - Received, Clerk's Office, February 27, 2009

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 27, 2009 I filed with the Clerk of the Illinois Pollution Control Board, the Respondent's Reply to Petitioner'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
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Chicago, Illinois 60602
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DATED: February 27, 2008

THIS FILING IS SUBMITTED ON RECYCLED PAPER

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Respondent.	)	

RESPONDENT ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S REPLY TO PETITIONER'S POST-HEARING BRIEF

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

Introduction

Petitioner, in its brief spends an inordinate amount of time talking about building codes, the virtues of its land application program and the failure of the Respondent to present witnesses at hearing. These arguments have nothing to do with the standard of review for a permit appeal hearing. As set out in the Respondent's opening brief, the burden of proof rests with the Petitioner and Petitioner has failed in meeting its burden. The Illinois Environmental Protection Act (the "Act"), provides in Section 39(a) that the Agency shall issue a permit upon proof of the applicant that the permitted activity or facility will not cause a violation of the Act or regulations. 415 ILCS 5/39(a)(2006). It is this standard that must be met, rather than whether or not the activity will "cause harm or undue risk to human health or the environment." (Petitioner's Brief, Pg. 2).

Building Codes

Petitioner goes to great lengths to stress that its building codes require the removal of topsoil before residential construction takes place. (Petitioner's Brief, pg. 3). Further, Petitioner argues the issue before the Board is whether the record supports Petitioner's assertion that house will be built as required by the local building code. (Petitioner's Brief, pg. 23). Again, this argument misses the point of what standard is required to be met for issuance of a permit. Compliance with building codes is not at issue before the Board. The denial letter issued by the Agency framed the issue and it relates to the increase of concentration of radium in the soil above background, not the removal of topsoil. Additionally, Petitioner never shows where the removed topsoil will end up. The soils could be consolidated thus increasing the concentrations to even greater levels.

Application of the MOA

The city of Joliet must treat its drinking water to remove radium. See; 35 Ill. Adm. Code 302.307. Although the drinking water maximum contaminant level for radium is a long-existing standard, for a variety of reasons it was not implemented until the early 2000s. See Generally; PCB R04-21, In the Matter of: Revisions to Radium Water Quality Standards: Proposed New 35 Ill. Adm. Code 302.307 and Amendments to 35 Ill. Adm. Code 302.207 and 302.525. After treatment of the drinking water the radium containing wastes are sent directly to the POTW and are concentrated in its bio-solids. However, when the City of Joliet's public water supply started removing radium from the drinking water, and sending it directly to the POTW, the radium levels in the bio-solids and the appropriate levels at which radium could be permitted in the soils became issues for the Petitioner and the Illinois EPA. The 2006 permit is the first permit issued to Petitioner in which radium limits apply.

Petitioner implies that Illinois EPA engaged in untoward behavior by waiting 24 years to

apply the limitation contained in the Illinois EPA/Illinois Emergency Management Agency MOA. Petitioner is aware that the radium limitations became an issue in its land application permit after Petitioner began removing radium from its drinking water. In fact one of Petitioner's own witnesses, Mr. Dennis Duffield, a former 26 year employee for the Petitioner spends a great deal of his pre-filed testimony explaining U.S. EPA's regulations and the setting of radium limits in drinking water and the necessity of Petitioner to begin removing radium starting in the early 2000's. While the MOA has been applicable to the Petitioner's activities since 1984, the Illinois EPA's initial understanding was that the regulation of radium was outside the Agency's jurisdiction. U.S. EPA's final determination on drinking water standards on December 7, 2000 caused the Illinois EPA to revisit this issue beginning immediately thereafter. As a result of reassessing the issue, the Illinois EPA included radium limits in the Petitioner's 2006 permit.

Model Program/No Violations

Petitioner argues it has a model bio-solids program which has had no complaints or violations. (Petitioner's Brief, pgs. 6, 7-9, 16-17). The Illinois EPA does not disagree. However, Petitioner's bio-solids application permit must now address a limit for radium. The 2006 permit is the first permit that contains radium limits. Whether Petitioner runs a model program or not does not allow the Illinois EPA to ignore its duty under the Act and deny a permit when the applicant has failed in its burden.

No Witnesses/IEPA and IEMA Disagree

Petitioner on at least four occasions in its brief (Petitioner's Brief, pgs. 5, 13, 14 and 26), argues that the Illinois EPA offered no witnesses at the hearing. It is unclear why this is relevant to Petitioner meeting its burden, other than trying to cast the Illinois EPA in an unfavorable light. Decisions on strategy and defense of a permit appeal are not a basis for reversing a decision of the

Illinois EPA when it is fulfilling its duties under the Act. The record filed in this case, which includes the denial letter, frames the issues on appeal and provides the basis for the decision reached by the Illinois EPA. The basis for the denial of the permit modification is contained in the denial letter. (R.1-2)[1]. This letter references the MOA between Illinois EPA and IEMA, no disagreement is evident. Petitioner's argument that the Illinois EPA permit writer agrees with the Petitioner's conclusions (Petitioner's Brief, pg. 11) is irrelevant. Additionally, Illinois EPA and IEMA agreed to the interim permit modification revising the limit for increases in concentration of radium in the soil. Illinois EPA and IEMA are not at odds, and even if they were it is not a basis for granting or denying a permit. Further, Petitioner argues that IEMA does not refute Petitioner's claims (Petitioner's Brief, pg. 21), but yet the record is clear that IEMA disagrees with Petitioner's position. See R. 33-34 and 328-335. In its August 13, 2007, letter IEMA explains the deficiencies it found in Petitioners submittal. (R-33-34).

No Alternatives

Petitioner also argues that if it does not get the modification to its permit in question, Petitioner will have to discontinue its bio-solids program and dispose of its sludge in a landfill at significant cost. As set out in Illinois EPA's opening brief, Petitioner's own witness admits there are other application alternatives. Additionally, increased financial burden is not a basis for granting a permit. Petitioner has failed to show the permit modification it seeks will not lead to a violation of the Act.

Impermissible Rulemaking

Petitioner argues that reliance upon the 1984 MOA by Illinois EPA would constitute an improper rulemaking. Illinois EPA would argue in response that Petitioner has waived this

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

argument. The Board in its procedural rules provides in part in Section 105.210(c), Petition Content Requirements:

In addition to the requirements of 35 Ill. Adm. Code 101. Supart C, the petition must include:

(c) A statement specifying the grounds for appeal.

35 Ill.Adm. Code Section 105.210(c). Petitioner did not specify this as grounds for the appeal of the Illinois EPA decision to deny its permit modification. As such Petitioner has waived this argument and is foreclosed from asserting now.

If the Board finds Petitioner did not waive its argument regarding an improper rulemaking, Illinois EPA would make the following argument. The MOA between the Illinois EPA and IEMA is not an impermissible rulemaking. Section 4 of the Illinois Environmental Protection Act gives the Director of the Illinois EPA the ability to "by agreement secure such services as he or she may deem necessary from any other department, agency, or unit of the State Government . . . as may be required." 415 ILCS 5/4 (2006). IEMA's department of nuclear safety has made determinations on the health effects and bioaccumulative properties of radium. "Any power . . . which may be exercised by a public agency of this State may be exercised . . . and enjoyed jointly with any other public agency of this State" pursuant to Section 3 of the Illinois Intergovernmental Cooperation Act. 5 ILCS 220/3 (2006). Governmental agencies may enter into memorandum of agreement to memorialize a joint exercise of power. The Illinois EPA and IEMA did so in this case to combine areas of expertise on radium contamination.

Petitioner argues that the MOA between Illinois EPA and IEMA cannot bestow upon Illinois EPA any enforceable authority to set limits in permits issued by the Illinois EPA. (Petitioner's Brief, pg. 26). Illinois EPA does not derive its authority from the MOA but from the Act, specifically in

relation to permits from Section 39. 415 ILCS 5/39 (2006). The denial letter cites to Section 12 and 39 of the Act, 415 ILCS 5/12 and 39 (2006), as the basis for the denial. Section 12 is contained in Title III of the Act which is captioned Water Pollution. In adopting the Illinois Environmental Protection Act the Illinois General Assembly, in Section 11 of the Act, made the following legislative declaration:

> (a) The General Assembly finds:
>
> (1) that pollution of the waters of this State constitute a menace to public health and welfare, creates public nuisances, is harmful to wildlife, fish and aquatic life, impairs domestic, agricultural, industrial, recreational, and other legitimate beneficial uses of water, depresses property values and offends the senses.

415 ILCS 5/11(a)(1)(2006). Section 12 of the Act provides the prohibition against causing or threatening to cause water pollution through certain activities or means. It is this Section coupled with the Agency's duty contained in Section 39 of the Act when issuing permits that gives the Illinois EPA the authority to act in this case. The Petitioner's proposal to increase the allowable concentration of radium in the soil above background by 1000% are the types of activities that the Illinois EPA must consider when fulfilling its duty of ensuring that permit applicants have proven their activities will not lead to a violation of the Act. The Illinois EPA fully considered Petitioner's permit modification application and fulfilled its duty under the Act because the Petitioner failed to meet its burden.

The City of Joliet must prove that its proposed activity will not cause a violation of the Act. The Petitioner's arguments that (i) the activity is safe; (ii) other alternatives are more costly; (iii) building codes are being complied with; and (iv) the Illinois EPA permit writer disagrees with IEMA are all diversions. The Petitioner failed in this burden and the Record filed in this matter supports

the decision of the Illinois EPA to deny Petitioner's permit application. Petitioner is seeking to increase the concentration of radium in soil above the background level to a level the Illinois EPA found will not allow it to issue a permit and the record in this case supports such a conclusion.

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

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Electronic Filing - Received, Clerk's Office, February 27, 2009

CERTIFICATE OF SERVICE

I, GERALD T. KARR, an Assistant Attorney General in this case, do certify that on this 27th day of February, 2009, I caused to be personally served the foregoing Notice of Filing and Respondent's Reply to Petitioner's Post Hearing Brief upon the individuals listed on the attached Notice of Filing.

Gerald T. Karr

GERALD T. KARR