

ILLINOIS POLLUTION CONTROL BOARD
November 17, 2011

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| CONGRESS DEVELOPMENT, COMPANY, |) | |
| |) | |
| Petitioner, |) | |
| |) | PCB 11-90 |
| v. |) | PCB 12-12 |
| |) | PCB 12-55 |
| ILLINOIS ENVIRONMENTAL |) | PCB 12-56 |
| PROTECTION AGENCY, |) | (Permit Appeal - Land) |
| |) | (Consolidated) |
| Respondent. |) | |

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

Today's order addresses procedural matters in four land permit appeals. Each of the appeals was brought by Congress Development Company (CDC), seeking review of Illinois Environmental Protection Agency (Agency) permit determinations concerning CDC's sanitary landfill, which is located in Hillside, Cook County. For the reasons below, the Board accepts CDC's petition for review in docket PCB 12-56. The Board also grants CDC's unopposed motion to consolidate the PCB 12-56 appeal with three previous permit appeals that have already been accepted for hearing, PCB 11-90, PCB 12-12, and PCB 12-55. These four appeals, however, are consolidated only for purposes of hearing, not necessarily decision.

In this order, the Board first provides a brief procedural history of the four permit appeals, after which the Board considers whether to accept the petition filed by CDC in docket PCB 12-56. The Board then rules upon the unopposed motion to consolidate the four permit appeals. Next, the Board addresses, in turn, the hearing, the Board's decision deadline, and the Agency's record filing.

PROCEDURAL HISTORY

On June 16, 2011, the Board accepted CDC's petition for hearing in PCB 11-90. The petition contested the Agency's April 29, 2011 denial of CDC's application for significant permit modification, which CDC submitted in the form of an "Expanded Assessment Monitoring Report."

On July 21, 2011, the Board accepted CDC's petition for hearing in PCB 12-12. The petition contested the Agency's June 3, 2011 denial of CDC's application for significant permit modification, which CDC submitted in the form of a "Remedy Selection Report." In the same order, the Board consolidated PCB 11-90 and PCB 12-12 on CDC's unopposed motion, but the Board did so only for hearing, not necessarily for decision. Further, the Board required that the Agency file a separate administrative record in each of the two appeals.

On October 20, 2011, the Board accepted CDC's petition for hearing in PCB 12-55. The petition contested the Agency's September 7, 2011 denial of CDC's application for significant

permit modification, which CDC submitted in the form of a “revised Expanded Assessment Monitoring Report.”

In docket PCB 12-56, CDC timely filed a petition (Pet.) on October 20, 2011, to contest the Agency’s September 15, 2011 denial of CDC’s application for significant permit modification, which CDC submitted in the form of a “revised Remedy Selection Report.” This petition, which has not yet been accepted for hearing, was accompanied by CDC’s unopposed motion to consolidate the four permit appeals (Mot. Consol.).

PETITION IN PCB 12-56

Under the Environmental Protection Act (415 ILCS 5 (2010)), the Agency is the permitting authority, responsible for administering Illinois’ regulatory programs to protect the environment. If the Agency denies a permit or grants one with conditions, the permit applicant may appeal the Agency’s determination to the Board. *See* 415 ILCS 5/4, 5, 40(a)(1) (2010); 35 Ill. Adm. Code 105.Subpart B.

As discussed, the subject of docket PCB 12-56 is the Agency’s determination on September 15, 2011, denying CDC’s application for significant permit modification, which was submitted in the form of a “revised Remedy Selection Report.” Pet. at 4-5. In appealing the Agency’s denial, CDC alleges that the Agency “erred in denying the Permit because (1) it failed to give a sufficiently specific or detailed reason for its denial, (2) even if its reasons were sufficiently specific and detailed, the regulations upon which it relied do not provide a basis for denying the Permit application, and (3) [the Agency] based its decision on [CDC’s] inability to obtain access to adjacent properties for groundwater sampling, misconstruing the potentially relevant statute.” *Id.* at 1. CDC’s petition meets the content requirements of 35 Ill. Adm. Code 105.210. The Board accepts the petition for hearing.

CONSOLIDATION

With its PCB 12-56 petition, CDC filed a motion to consolidate the PCB 12-56 permit appeal with the previously-filed PCB 11-90, PCB 12-12, and PCB 12-55 permit appeals. As noted, PCB 11-90 and PCB 12-12 have already been consolidated for hearing, but not necessarily for decision. In the pending motion to consolidate, CDC states that all four permit appeals involve the same parties and concern groundwater monitoring and assessment at the landfill. Mot. Consol. at 2. CDC represents that its permit application in PCB 12-55 is a “new version” of its permit application in PCB 11-90, while its permit application in PCB 12-56 is a “new version” of its permit application in PCB 12-12. *Id.*

According to CDC:

The administrative record for the appeals will include many of the same documents. The appeals also involve overlapping factual and legal issues, such as whether the well water survey performed by [CDC] was sufficient and whether [CDC] can compel neighboring property owners to provide access to their

properties for groundwater investigation. *** Because of the overlap between the proceedings, it will be more convenient, efficient and expeditious for [CDC], [the Agency] and the Board to have all four permit appeals heard and decided together. Consolidation of the proceedings will not cause material prejudice to any party. Mot. Consol. at 2-3.

CDC also represents that Agency counsel is not opposed to the relief sought in the consolidation motion. *Id.* at 3.

The Board observes that its procedural rules allow for consolidating proceedings. Section 101.406 of those rules provides:

The Board, upon the motion of any party or upon its own motion, may consolidate two or more proceedings for the purpose of hearing or decision or both. The Board will consolidate the proceedings if consolidation is in the interest of convenient, expeditious, and complete determination of claims, and if consolidation would not cause material prejudice to any party. The Board will not consolidate proceedings where the burdens of proof vary. 35 Ill. Adm. Code 101.406.

The parties are the same in the PCB 11-90, PCB 12-12, PCB 12-55, and PCB 12-56 appeals, and the four appeals concern the same landfill. All four cases are permit appeals challenging denials of applications for significant permit modifications. Two of the denied permit applications, according to CDC, are revised versions of earlier-denied applications. The appeals are at a similar procedural juncture, having only recently been filed, and CDC's burdens of proof do not vary. According to CDC's motion for consolidation, the administrative records would have many of the same documents, and the appeals may have facts and legal issues that overlap. Further, the motion to consolidate is unopposed.

The Board finds that consolidating the four permit appeals for purposes of hearing is in the interest of convenient, expeditious, and complete determinations of the claims. The Board also finds that such consolidation would not cause material prejudice to either party. Under these circumstances, the Board grants CDC's motion to consolidate PCB 11-90, PCB 12-12, PCB 12-55, and PCB 12-56, with one exception. The appeals are consolidated only for hearing, not necessarily for decision. *See, e.g., National City Environmental, LLC v. IEPA*, PCB 03-138, PCB 03-139, PCB 03-140 (consol.), slip op. at 3 (Mar. 20, 2003). Future filings must reflect the amended caption of this order.

HEARING

CDC has the burden of proof in each appeal. *See* 415 ILCS 5/40(a)(1) (2010); *see also* 35 Ill. Adm. Code 105.112(a). Hearings will be based exclusively on the record before the Agency at the time the Agency issued its permit determination. *See* 35 Ill. Adm. Code 105.214(a). Accordingly, though the Board hearing affords a permit applicant the opportunity to challenge the Agency's reasons for denying the permit, information developed after the

Agency's determination typically is not admitted at hearing or considered by the Board. *See* Alton Packaging Corp. v. PCB, 162 Ill. App. 3d 731, 738 (5th Dist. 1987); Community Landfill Co. & City of Morris v. IEPA, PCB 01-170 (Dec. 6, 2001), *aff'd sub nom. Community Landfill Co. & City of Morris v. PCB & IEPA*, 331 Ill. App. 3d 1056 (3rd Dist. 2002). The hearing will be scheduled and completed in a timely manner, consistent with the applicable decision deadline, which is discussed below.

DECISION DEADLINE

At present, the statutory decision deadline in both PCB 11-90 and PCB 12-12, by CDC waiver, is March 2, 2012. *See* 415 ILCS 5/40(a)(2) (2010). CDC has represented to the hearing officer that the company (1) waives the decision deadline in PCB 12-55 from February 9, 2012 (120th day after receipt of the petition) to March 2, 2012, and (2) waives the decision deadline in PCB 12-56 from February 17, 2012 (120th day after receipt of the petition) to March 2, 2012. Accordingly, all four permit appeals currently share a decision deadline of March 2, 2012.

Only CDC may extend the decision deadline by waiver. *See* 35 Ill. Adm. Code 101.308. If the Board fails to take final action by the applicable decision deadline, CDC "may deem the permit issued." 415 ILCS 5/40(a)(2) (2010). The Board meeting immediately before the March 2, 2012 decision deadline is scheduled for March 1, 2012.

RECORD

CDC submitted four different applications to the Agency: one on January 27, 2011, as an "Expanded Assessment Monitoring Report" (PCB 11-90); a second on December 13, 2010, as a "Remedy Selection Report" (PCB 12-12); a third on June 8, 2011, as a "revised Expanded Assessment Monitoring Report" (PCB 12-55); and finally, a fourth on June 22, 2011, as a "revised Remedy Selection Report" (PCB 12-56). These applications ultimately resulted in four different Agency determinations: one on April 29, 2011 (PCB 11-90); the second on June 3, 2011 (PCB 12-12); the third on September 7, 2011 (PCB 12-55); and the last on September 15, 2011 (PCB 12-56). To avoid potential confusion that could result from a single administrative record of multiple Agency determinations, the Agency must file four separate administrative records pursuant to 35 Ill. Adm. Code 105.212, one for each of the Agency's determinations. *See, e.g., National City*, PCB 03-138, PCB 03-139, PCB 03-140 (consol.), slip op. at 2-3.

Presently, by the hearing officer's grants of agreed motions for extensions, the administrative records in PCB 11-90 and PCB 12-12 must be filed by February 10, 2011. Pursuant to procedural rule, the administrative records in PCB 12-55 and PCB 12-56 would be due by November 13, 2011 and November 21, 2011, respectively. *See* 35 Ill. Adm. Code 101.300(a), 105.212(a). CDC agrees, however, to an extension of the Agency's deadline for filing the administrative records "so that [the Agency] may file the administrative record for all of the appeals at the same time." Mot. Consol. at 3. Accordingly, unless the Board or the hearing officer orders otherwise, the Agency must file all four administrative records by February 10, 2012. If the Agency wishes to seek additional time to file any record, it must file a request for extension before the date on which the record is due to be filed. *See* 35 Ill. Adm.

Code 105.116. Each record must comply with the content requirements of 35 Ill. Adm. Code 105.212(b).

CONCLUSION

The Board accepts CDC's petition for review in docket PCB 12-56. The Board also grants CDC's unopposed motion to consolidate the PCB 11-90, PCB 12-12, PCB 12-55, and PCB 12-56 permit appeals. However, the Board consolidates the appeals only for purposes of hearing, not necessarily decision. The Board requires the Agency to file separate administrative records, one for each of the four permit denials. The records must be filed by February 10, 2012, unless the Board or the hearing officer orders otherwise. The Board's statutory deadline for rendering a final decision in each appeal is presently March 2, 2012, the Board meeting before which is scheduled for March 1, 2012.

SUMMARY

1. The Board accepts CDC's petition for review in PCB 12-56.
2. The Board grants CDC's motion to consolidate PCB 11-90, PCB 12-12, PCB 12-55, and PCB 12-56, but the appeals are consolidated only for purposes of hearing, not necessarily decision.
3. The Agency must file separate administrative records as provided in this paragraph. Unless the Board or the hearing officer orders otherwise, the Agency must file the following by February 10, 2012:
 - a. The administrative record of the Agency's April 29, 2011 determination;
 - b. The administrative record of the Agency's June 3, 2011 determination;
 - c. The administrative record of the Agency's September 7, 2011 determination; and
 - d. The administrative record of the Agency's September 15, 2011 determination.
4. The current statutory decision deadline in each permit appeal is March 2, 2012.

IT IS SO ORDERED.

I, John Therriault, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on November 17, 2011, by a vote of 5-0.

A handwritten signature in black ink that reads "John T. Therriault". The signature is written in a cursive style with a long horizontal flourish extending to the right.

John Therriault, Assistant Clerk
Illinois Pollution Control Board