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STATE OF ILLINOIS
Pollution Control Board

ILLINOIS POLLUTION CONTROL BOARD

August 28, 2012

AMERICAN DISPOSAL SERVICE OF)
ILLINOIS, INC.,)
)
Petitioner,)
)
v.)
)
COUNTY BOARD OF MCLEAN COUNTY,)
ILLINOIS; HENSON DISPOSAL, INC.; and)
TKNTK, LLC;)
)
Respondents.)

PCB 11-60
(Third-Party Pollution Control Facility
Siting Appeal)

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HEARING OFFICER ORDER

On July 30, 2012, respondent County Board of McLean County (County) filed objections to petitioner's interrogatories and document requests with the Board's Clerk. The objections had been provided to respondents and the hearing officer at an earlier date, thus explaining the July 24, 2012 motion filed by respondents Henson Disposal Inc. (Henson) and TKNTK, LLC (TKNTK) to adopt the County's objections as if filed on their own behalf. On August 10, 2012, petitioner filed a response to the objections. Respondents agreed to petitioner's motion for extension of time to respond. For the reasons set forth below, the objection to interrogatory 3 is sustained in part, the objection to interrogatory 9 is sustained, and the remaining objections to interrogatories and document requests are overruled. Respondents have 28 days to respond to petitioner's interrogatory and document requests.

Background

On March 22, 2011, petitioner appealed the County's decision to grant siting approval for Henson. First, petitioner claims that the County did not have proper jurisdiction because the pre-filing notice failed to meet the requirements of Section 39.2 of the Environmental Protection Act (Act). 415 ILCS 5/39.2(b)(2010). Second, petitioner claims that the County's approval is not supported by the record, and is against the manifest weight of the evidence. Specifically, Henson did not meet Criteria 1 through 9, and the County incorrectly determined that criterion 4 was not applicable. Third, petitioner claims that the local siting review was fundamentally unfair due to, at a minimum, the unavailability of the public record.

On April 20, 2011, respondents Henson and TKNTK filed a motion to strike and dismiss, arguing, among other things, that the petition was not factually sufficient. On February 16, 2012, the Board denied the motion.

Objections to Interrogatories

During the July 23, 2012 status conference, respondents clarified that there was no objection to interrogatories 1, 2, and 5. This was reiterated in petitioner's response to the objections.

Interrogatory 3

Interrogatory 3 asks respondents for the basis of its defense to the assertion that jurisdiction did not vest with the County due to insufficiency of the pre-filing notice. Subsections (a) through (f) ask for information on filing dates and identification of persons entitled to notice.

Respondents object on grounds that disclosure of the basis of its defense calls for theories, mental impressions, or litigation plans that are not subject to discovery pursuant to Illinois Supreme Court Rule 201(b). With respect to the identification of notice recipients and the dates of service, respondents argue that the questions are irrelevant and beyond the scope of discovery because all information related to notices are contained in the record. Henson has already advised the Board that it did not have additional information to add to the record on this issue.

Petitioner responds that the basis of defense does not fall under the work product privilege, and even if there is a litigation plan, respondents should disclose and list that document as an item not being produced, identifying the privilege. Also, the issue of who should have received notice, what was done to identify those people, and whether and when notice was served is relevant to the jurisdictional issue and should be disclosed.

Without additional information, it is reasonable to conclude that respondents' basis for its defense to the pre-filing notice allegation may constitute a privileged theory or litigation plan, thus this portion of the objection is sustained. However, subsections (a) through (f) seek factual answers that are subject to discovery, thus this portion of the objection is overruled.

Interrogatory 4

Interrogatory 4 asks what measures were taken to ensure that the public record from the Henson siting application was available for review at the County Clerk's Office. Respondents object due to vagueness as to what constitutes the public record.

Petitioner responds that it is clear that they are asking for the local-level record on the siting application. Alternatively, insert "the record as required by Section 39.2 of the Act, including, but not limited to the hearing record as provided in Section 33-11 of the County Code.

Respondents' objection is overruled.

Interrogatories 6, 7, 8, 9 and 10

Interrogatories 6, 7, 8, and 10 seek information about all communications between the respondents during the relevant time period pertaining to the siting application, the host agreement, and the performance agreement.

Respondents argue that the communications are not relevant to the issues raised in the appeal, namely, defects in pre-filing notice; siting approval not supported by the record; and fundamental unfairness, due to at minimum, the unavailability of the public record. Respondents also argue that the requests are overly broad because petitioner seeks every communication regardless of content.

Petitioner responds that any communication between the County and Henson during the siting process is *ex parte* and discoverable as part of a fundamental fairness inquiry. It is not for respondents to decide what content is appropriate.

On appeal of a decision to grant or deny a siting application, the Board generally confines itself to the record developed by the County. 415 ILCS 5/40.1(b). However, the Board will hear new evidence relevant to the fundamental fairness of the proceedings where such evidence lies outside the record. Land and Lakes Co. v. PCB, 319 Ill.App.3d 41, 48, 743 N.E. 2d 188, 194 (3d Dist. 2000). The existence of *ex parte* contacts, prejudgment of adjudicative facts and the introduction of evidence are important, but not rigid, elements in assessing fundamental fairness. American Bottom Conservancy v. Village of Fairmont City, PCB 00-200 (Oct. 19, 2000).

The Board's procedural rules provide that all relevant information and information calculated to lead to relevant information is discoverable. 35 Ill. Adm. Code 101.616(a). When a fundamental fairness issue is raised before the Board, discovery is needed to uncover evidence that is presumably unknown to the party propounding the discovery. Fox Moraine, LLC v. United City of Yorkville, PCB 07-146 (Hearing Officer Order, Sept. 20, 2007).

In this instance, respondents do not object on grounds that the discovery requests are unduly burdensome. Rather, respondents argue that the requests do not relate to the petition's specific example of fundamental unfairness, i.e. the unavailability of the public record. However, without the ability to discover events that may have transpired between Henson and the County behind closed doors, petitioner could not allege fundamental unfairness with more specificity. The fact that fundamental unfairness was alleged is sufficient for petitioner to request discovery relevant to that issue. With respect to the objection that the request is overly broad, it seems unlikely that there would be communications between the respondents that would not relate to the siting application or the agreements. Thus, the objections to interrogatories 6, 7, 8, and 10 are overruled.

Interrogatory 9 seeks information about communications between the County Board members and their staff concerning the siting application, performance agreement and host agreement. Respondent only objects on grounds of relevance in that the communications do not relate to the issues alleged in the appeal.

Without more information, it is unclear how communications between the County Board members and its own staff would be relevant to uncovering fundamental fairness issues or other

issues. The County Board members and staff would be remiss if they had not internally debated the pros and cons of siting approval, but that does not make their internal discussions unfair to the public process. The communications are not considered *ex parte*. Thus, the objection to interrogatory 9 is sustained.

Interrogatories 11 and 12

Interrogatory 11 asks why Philip Dick executed another Certification of Siting Approval, and the date, if any, of the County's approval for the change. Interrogatory 12 asks for the basis for the change to the Certification of Siting Approval. Respondents argue that actions taken by a County staff member with respect to the Certification of Siting Approval are not subject to review and are not relevant to issues petitioner raised in appeal. Petitioner responds that the interrogatories are relevant, and that petitioner has a right to investigate fundamental fairness issues outside the record.

These questions seek factual explanations for unusual actions taken in this siting approval, and are thus relevant to petitioner's claims. Therefore, the objections to interrogatories 11 and 12 are overruled.

Document Requests

Document request 1 seeks all documents reviewed, used or relevant to respondents' answers to interrogatories. Document request 5 seeks all documents related to the host county agreement. Document request 6 seeks all documents related to the performance agreement.

Respondents object to these requests because they seek information outside the record, and are overly broad. Petitioner responds that request 1 is very traditional; and requests 5 and 6 seek documents related to the host county agreement and performance agreement, both of which appear to have been negotiated behind closed doors during the siting process.

Document request 2 seeks all documents related to Henson's pre-filing notice. Respondents object to request 2 because all documents related to the pre-filing notice are contained in the county record. Petitioner responds that, if there are no other documents, then that should be stated.

Respondents are directed to disclose the documents requested, or state that they do not exist. Documents outside the record may be used to refute evidence in the record, thus these documents are discoverable.

The Board's procedural rules provide that parties may seek Board review of discovery rulings pursuant to 35 Ill. Adm. Code 101.616(e).

IT IS SO ORDERED.

Carol Webb


Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, Illinois 62794-9274
217/524-8509
webbc@ipcb.state.il.us

CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were mailed, first class, on August 28, 2012, to each of the persons on the attached service list.

It is hereby certified that a true copy of the foregoing order was hand delivered to the following on August 28, 2012:

John T. Therriault
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph St., Ste. 11-500
Chicago, Illinois 60601



Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, Illinois 62794-9274
217/524-8509
webbc@ipcb.state.il.us

PCB 2011-060
Kathy Michael
County Board of McLean County
115 E. Washington Street
Room 102
P.O. Box 2400
Bloomington, IL 61702-2400

PCB 2011-060
William A. Yoder
State's Attorney
McLean County State's Attorney
104 W. Front Street
Room 605
Bloomington, IL 61702-2400

PCB 2011-060
Thomas E. Kirk, Reg. Agent
Henson Disposal, Inc.
1010 Old Farm Road
Bloomington, IL 61704

PCB 2011-060
Amy L. Jackson
Rammelkamp Bradney, P.C.
232 West State Street
P.O. box 550
Jacksonville, IL 62651

PCB 2011-060
Richard T. Marvel
202 N. Center Street, Suite 2
Bloomington, IL 61701

PCB 2011-060
Jennifer J. Sackett Pohlenz
Clark Hill PLC.
150 N. Michigan Avenue
Suite 2700
Chicago, IL 60601

PCB 2011-060
Matt Sorensen
County Board of McLean County
115 E. Washington Street, Room 102
P.O. Box 2400
Bloomington, IL 61702-2400

PCB 2011-060
Thomas F. Kirk, Reg. Agent
TKNTK, LLC
1010 Old Farm Road
Bloomington, IL 61704

PCB 2011-060
Hannah R. Eisner
County Board of McLean County
115 E. Washington Street, Room 102
P.O. Box 2400
Bloomington, IL 61702-2400