ILLINOIS POLLUTION CONTROL BOARD
May 15, 2014

AMERENENERGY RESOURCES GENERATING COMPANY,	)	
Petitioner,	)	
v.	)	PCB 14-41
	)	(Permit Appeal – Land)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

ORDER OF THE BOARD (by J.D. O'Leary):

On April 2, 2014, Ameren Energy Resources Generating Company (AERG) filed a motion to reconsider the Board's March 20, 2014 order (Mot.). On April 11, 2014, the Office of the Attorney General, on behalf of the Illinois Environmental Protection Agency (Agency), filed a response in opposition to the motion to reconsider (Resp.). For the reasons given below, the Board denies the motion.

Below, the Board first summarizes its March 20, 2014 order, AERG's motion to reconsider, and the Agency's response. The Board then provides its ruling on the motion.

BOARD ORDER OF MARCH 20, 2014

AERG seeks review of the disapproval of AERG's beneficial use determination (BUD) request, pursuant to Section 3.135(b) of the Environmental Protection Act (Act) (415 ILCS 5/3.135(b) (2012)), concerning its use of coal combustion by-product (CCB) as structural fill material to construct a railroad embankment and a haul road at the Duck Creek generating station in Canton, Fulton County. Because the Agency did not act on the BUD request within the statutory timeframe, the request was deemed disapproved by operation of law, prompting this appeal. *See* 415 ILCS 5/3.135(b) and 40 (2012); 35 Ill. Adm. Code 101.300(b), 105.206.

The Board's March 20, 2014 order resolved AERG's motion to strike from the administrative record a September 12, 2013 intra-Agency memorandum that addresses AERG's BUD application (internal memorandum). AERG argued that the internal memorandum should be struck because it does not fall into any category of materials that must be included in the record pursuant to Section 105.212(b) of the Board's procedural rules (35 Ill. Adm. Code 105.212(b)). The Board rejected this argument, finding Section 105.212(b) does not control the materials that may be included in the record on appeal. The Board found that the internal memorandum belongs in the record under the settled rule that the administrative record must include all documents on which the Agency relied or reasonably should have relied in its review.

AERG's MOTION TO RECONSIDER AND THE AGENCY'S RESPONSE IN OPPOSITION

AERG maintains the Board erred in applying existing law in the "unique circumstance[s]" of this case. Mot. at 3. According to AERG, the Board's order created a new category of "permissive" materials to be included in the record, *i.e.*, those the Agency "reasonably should have relied upon." *Id.* at 3-4. AERG adds that the Board erred in equating materials the Agency "merely relied upon" in its review with materials the Agency relies on when it actually makes a timely decision. *Id.* at 4. AERG notes that although the Board's rules once required the Agency to file the "entire Agency record of the permit application," the rules have since been revised such that the Agency must file only its record of decision. *Id.* at 4 n.2.

Further, the cases on which the Board relied are distinguishable, according to AERG, since in each the Agency actually made a final decision. Mot. at 4. In that situation, AERG adds, it is reasonable to require the Agency to include in record any materials the Agency relied or should have relied on so the Agency cannot come up with new grounds for its decision for the first time on appeal to the Board. *Id.* at 5-6. AERG also asserts that none of the decisions cited by the Board addresses what is allowed as part of a "record of decision when no decision or determination was made." *Id.* at 5. AERG further contends those cases recognized only the permit applicant's right to request that the record be supplemented with materials the Agency omitted; they do not support allowing the Agency, after failing to make a timely decision, to claim it relied or should have relied on "a particular memorandum never before seen by the applicant." *Id.*

In addition, AERG points out that there is a statutory distinction in landfill siting appeals between the siting authority's "final action" and "decision": the former requires only a vote of the governing body, while the latter requires a written decision specifying the reasons for the decision. Mot. at 6-7. AERG maintains that a similar distinction exists between a final appealable action in the BUD context, *i.e.*, a default disapproval, and a written BUD decision. *Id.* at 7. AERG concludes that in the latter situation, there is no record of decision at all. *Id.*

Further, AERG argues that the Board misconstrued AERG's reason for citing West Suburban Recycling & Energy Center, L.P. v. IEPA, PCB 95-119 (Oct. 17, 1996). AERG claims it did so, not to establish that internal memoranda can never be part of the record, but to emphasize that the internal memorandum in this case cannot be considered the Agency's decision. Mot. at 7. It is absurd, according to AERG, to include in the record a document that was not relied on by the Agency in making a decision where a decision was never made. *Id.* at 8. To avoid "punishing" AERG for a "quandary not of its making," AERG continues, the Board should pursue the "legal course" urged in the motion to strike. *Id.* at 8 n.3.

If the Board "continue[s] to feel that it cannot find its way to [AERG's] position," AERG adds, the Board should at least follow a logical alternative: conclude that in a case like this there is no "record of decision" under Section 105.212. Mot. at 8. AERG claims this means the Board's review would be limited to the BUD application, to determine whether it complied with the Act and the Board's regulations. *Id.* at 8-9. The Board, according to AERG, took this kind

of approach in a prior permit appeal where the Agency "failed to file the permit record." *Id.* at 9, citing Partylite Worldwide, Inc. v. IEPA, PCB 08-32, slip op. at 4 (Mar. 20, 2008).

In its response, the Agency argues that the Board correctly treated Section 105.212(b) as not providing an exhaustive list of what may be included in the record on appeal. Resp. at 3. The Agency asserts that the record consists of information the Agency considered or should have considered in making its decision. *Id.*, citing United Disposal of Bradley, Inc. v. IEPA, PCB 03-235, slip op. at 2 (June 17, 2004). Moreover, the Agency notes, Section 105.116 of the Board's procedural rules (35 Ill. Adm. Code 105.116) requires the Agency to file the "entire record" of its decision—which, the Agency adds, it did here. *Id.* at 3-4.

The Agency further maintains that Section 3.135(b) of the Act (415 ILCS 5/3.135(b) (2012)) does not support AERG's assertion that the administrative record in this case should be limited to AERG's BUD submittal. Resp. at 4. The Agency recites the Board's finding that when the Agency misses the statutory decision deadline, the BUD request is deemed denied, and the lack of an Agency decision is not grounds to strike the internal memorandum. *Id.* at 4, citing Ameren Energy Resources Generating Co. v. IEPA (AERG v. IEPA), PCB 14-41, slip op. at 9 (Mar. 20, 2014).

DISCUSSION

In ruling on a motion for reconsideration, the Board will consider factors including new evidence or a change in the law, to determine whether the Board's decision was in error. 35 Ill. Adm. Code 101.902. The Board has observed that "the intended purpose of a motion for reconsideration is to bring to the court's attention newly discovered evidence which was not available at the time of hearing, changes in the law or errors in the [Board's] previous application of existing law." Citizens Against Regional Landfill v. County Board of Whiteside, PCB 93-156, slip op. at 2 (Mar. 11, 1993), citing Korogluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 627, 572 N.E.2d 1154, 1158 (1st Dist. 1992).

The Board has reviewed the parties' filings and is not persuaded to reconsider the March 20, 2014 order. AERG's motion asserts that the Board erred in its application of existing law. The premise underlying AERG's arguments is that the materials reviewed in a BUD disapproval by operation of law must necessarily be different than those reviewed on appeal from an actual BUD determination. However, this notion does not square with Section 3.135(b), which makes no distinction for purposes of appeal between a BUD denial by operation of law and a written BUD denial. Rather, as explained in the March 20, 2014 order, through that provision the legislature chose to deal with the lack of a timely Agency decision by providing for Board review pursuant to Section 40 of the Act—the same process that applies to review of actual BUD determinations. *See* AERG v. IEPA, PCB 14-41, slip op. at 9. With no basis in the statute to limit the record to the applicant's submittal to the Agency, the record in this case properly includes all documents on which the Agency relied or reasonably should have relied. *See id.*

For the reasons given in the March 20, 2014 order, the internal memorandum clearly is such a document and thus belongs in the record. The Board also is not persuaded that Section 105.212(b) provides any basis to limit the Board's review to the BUD application alone, as

AERG seems to argue. In addition, the Board has reviewed Partylite and, as it does not address the precise record-related issue presented here, finds it does not support reconsideration.

For the reasons discussed above, AERG's motion to reconsider is denied.

IT IS SO ORDERED.

I, John Therriault, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on May 15, 2014, by a vote of 4-0.

John Therriault, Clerk
Illinois Pollution Control Board