

ILLINOIS POLLUTION CONTROL BOARD
December 7, 2006

PEORIA DISPOSAL COMPANY,)	
)	
Petitioner,)	
)	
v.)	PCB 06-184
)	(Pollution Control Facility Siting
PEORIA COUNTY BOARD,)	Appeal)
)	
Respondent.)	

ORDER OF THE BOARD (by N.J. Melas):

On June 7, 2006, petitioner, Peoria Disposal Company (PDC), filed a petition for review of the Peoria County Board's (County) alleged failure to take action by May 3, 2006, on a pollution control facility siting application. PDC filed an application seeking a vertical and horizontal expansion of its existing hazardous waste landfill located in Peoria County on November 9, 2005. According to the petition, the County failed to take final action with regard to PDC's application within 180 days, as required by statute.

PDC argues, alternatively, that if on May 3, 2006, the County actually denied the siting application based on the merits, several aspects of the decision were against the manifest weight of the evidence. There are nine criteria a local siting authority must consider when deciding whether to grant siting to a pollution control facility. 415 ILCS 5/39.2(a) (2004). In addition to appealing the County's alleged findings on criteria i, ii, and iii, PDC states that any purported finding that criterion v (the facility is designed to minimize danger from fire, spills, or operational injury) had been proven only if certain special conditions were imposed was also against the manifest weight of the evidence. On September 8, 2006, PDC moved the Board for partial summary judgment in its favor. In the motion, PDC seeks summary judgment on the County's decision to attach a special condition to criterion v requiring a \$5.00 per ton fee to be allocated to a perpetual care fund for the landfill.

For the reasons set forth below, the Board denies PDC's motion for summary judgment as not yet ripe for review. Below the Board discusses the procedural background of this siting appeal, the statutory background, the Board's standard of review on a motion for summary judgment, and the parties' arguments. Finally, the Board provides its reasons for finding the motion premature.

PROCEDURAL BACKGROUND

On June 15, 2006, the Board accepted the petition for hearing.

On June 26, 2006, the County moved for more time to file the administrative record of its proceedings. In a written June 30, 2006 order, the hearing officer granted the County until

July 28, 2006, to file the record. On July 5, 2006, the County waived the Board's decision deadline until January 4, 2007.

The Peoria County Board allegedly imposed certain special conditions in approving PDC's application for siting as to criterion v, including the following:

Effective upon PDC's receipt of a permit from Illinois EPA to operate the proposed expanded landfill, PDC shall pay additional sums into a perpetual care fund, on at least a quarterly basis equal to \$5.00 per ton of the Expanded Volume of Waste deposited in the PDC Landfill, but if the volume of waste disposed of at the landfill facility in any calendar year is less than 150,000 tons, PDC shall pay into the fund a minimum of \$750,000 for 15 years. Said payments shall be calculated based upon the same information and figures used to calculate the Host Benefit Fee pursuant to Section 9 of the Host Community Agreement, and shall be subject to the same documentation and verification requirement of the Host Benefit Fee. Said Perpetual Care Fund shall be used exclusively for the care and maintenance of the entire PDC site after the period of post-closure care for the expanded landfill has been terminated by IEPA. Memo. at 2; citing C13743.

The County responded to the motion for partial summary judgment on October 5, 2006 (Resp.). PDC moved for leave to reply, accompanied by a reply (Rep.), on October 16, 2006.

On October 20, 2006, Peoria Families Against Toxic Waste and Sierra Club, Heart of Illinois group (collectively, Opposition Groups), filed a motion for leave to file an *amicus curiae* brief.

PDC filed a second motion for summary judgment on November 20, 2006, but that motion is not yet ripe for review.

STATUTORY AND REGULATORY BACKGROUND

Before the County can make a decision on siting a landfill within its boundaries, the Environmental Protection Act (Act) (415 ILCS 5/1 (2004)) requires PDC to submit sufficient details describing the proposed facility to demonstrate compliance with nine criteria of Section 39.2(a). 415 ILCS 5/39.2(a) (2004). PDC contends that the County's conclusion that PDC only satisfied criteria (v) if a special condition was imposed is against the manifest weight of the evidence. Criterion (v) requires that:

the plan of operations for the facility is designed to minimize the danger to the surrounding area from fire, spills, or other operational accidents. 415 ILCS 5/39.2(a)(v) (2004).

Regarding the imposition of special conditions, Section 39.2(e) states:

In granting approval for a site the county board or governing body of the municipality may impose such conditions as may be reasonable and necessary to

accomplish the purposes of this Section and as are not inconsistent with regulations promulgated by the Board. 415 ILCS 5/39.2(e) (2004).

Section 40.1(a) of the Act provides:

If the county board . . . refuses to grant or grants with conditions approval under Section 39.2 of this Act, the applicant may, within 35 days after the date on which the local siting authority granted siting approval, petition the Board for a hearing to contest the decision of the county board 415 ILCS 5/40.1(a) (2004).

The Act also requires that Board hearings on landfill siting decisions are to be based “exclusively on the record before the county board or governing body of the municipality.” 415 ILCS 5/40.1(b) (2004).

Regarding the filing of *amicus curiae* briefs, the Board’s procedural rules provide:

Amicus curiae briefs may be filed in any adjudicatory proceeding by any interested person, provided permission is granted by the Board. Response briefs may be allowed by permission of the Board, but not as of right. The briefs must consist of argument only and may not raise facts that are not in evidence in the relevant proceeding. Amicus curiae briefs, and any responses, will be considered by the Board only as time allows. The briefs will not delay decision-making of the Board. 35 Ill. Adm. Code 101.110(c).

MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF

The Opposition Groups state that pursuant to Sections 101.110(c) and 101.628(c) of the Board’s procedural rules, they wish to file an *amicus curiae* brief with the Board. Mot. at 1; citing 35 Ill. Adm. Code 101.110(c), 101.628(c). The Opposition Groups state that they participated actively in the local siting hearings before the County and that they would be “adversely affected by a decision reversing the correct finding of the Peoria County Board.” Mot. at 2. If granted leave, the Opposition Groups expect to file their brief by the deadline given to the County to file its post-hearing brief.

The Board grants the Opposition Groups’ motion and grants them leave to file an *amicus curiae* brief. Any brief filed by the Opposition Groups must consist of argument only, must not raise facts that are not in evidence, and must not delay the decision-making of the Board. 35 Ill. Adm. Code 101.110.

MOTION FOR PARTIAL SUMMARY JUDGMENT

Summary Judgment Standard of Review

The Board will not disturb the County’s decision on local siting unless the decision is against the manifest weight of the evidence. Land and Lakes, 319 Ill. App. 3d at 53, 743 N.E.2d

at 197. A decision is against the manifest weight of the evidence only if the opposite conclusion is clearly evident, plain, or indisputable. *Id.*

Pursuant to the Board's procedural rules, "[i]f the record, including pleadings, depositions and admissions on file, together with any affidavits, shows that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law, the Board will enter summary judgment." 35 Ill. Adm. Code 101.516(b).

PDC's Arguments

PDC claims that the alleged finding of the County, that PDC has only proven siting criterion v if certain special conditions were imposed, is against the manifest weight of the evidence and not supported by the evidence. Mot. at 2. "PDC acknowledges, for the purposes of this motion, that the Peoria County Board believes that it may have adopted certain findings of fact with regard to siting criterion v." *Id.* PDC that there are multiple and complex issues in this appeal, and a grant of partial summary judgment would reduce the number of issues promoting judicial economy and expedite a resolution of the remaining issues. Memo. at 4.

PDC states that the County allegedly voted on April 6, 2006, that PDC had satisfied siting criterion v only on the condition that PDC pay to the County five dollars per ton of waste received during the life of the proposed expansion to establish a perpetual care fund. Mot. at 3. PDC contends that the motion to amend the County's findings as to criterion v were never seconded and no minutes, resolutions, ordinances, or other written evidence of what occurred at the April 6, 2006 meeting exists. PDC states that a transcript of the meeting was recorded and posted on the Peoria County Government website. The transcript, however, according to PDC, was never made part of the public record. *Id.* at 3. On April 27, 2006, findings of fact with regard to criterion v were filed in the Peoria County Clerk's office, but the County claims that the findings do not conform to what happened at the April 6, 2006 meeting. *Id.*

PDC next contends that on May 3, 2006, the County met and voted on various issues regarding the PDC application. Mot. at 4. The original movant, states PDC, stated "I move to adopt the findings of fact as presented this evening" *Id.* PDC states that immediately before the vote an assistant State's attorney stated "you're voting to support the finding of fact previously decided." *Id.* PDC claims that no findings of fact were presented on May 3, 2006, and that the proposed findings dated April 27, 2006 were not what was "previously decided" because they did not reflect what occurred at the April 6, 2006 meeting. According to PDC, the County has indicated that the transcript of the oral proceedings on May 3, 2006 constitutes the "record and transcript of Peoria County Board's decision and findings." Mot. at 5; citing C133710-C13748. PDC asserts that the transcript was never part of the record available to the public in this case prior to PDC's petition for review. *Id.*

Even assuming that the County adopted the proposed April 27, 2006 findings at the May 3, 2006 meeting, PDC contends that summary judgment should be granted in its favor on criterion v. Mot. at 5.

For all of these reasons, PDC urges the Board to grant summary judgment in its favor as a way of reducing the number of issues, promoting judicial economy, and expediting resolution of the remaining issues.

The County's Response

The County contends that the idea of the perpetual care fund was first introduced into the proceedings by PDC, not the County. According to the County, the Board should deem PDC's arguments waived, estop PDC from arguing them, and deny the motion for summary judgment. The County states that the record of proceedings shows that PDC proposed the perpetual care fund in response to opponents that raised concerns about the longevity of hazardous constituents in the wastes PDC was proposing to deposit into an expanded landfill. Memo. at 2. The application, explains the County, asked for the siting of a hazardous waste landfill that would accept wastes consisting largely of heavy metals. The fact that the hazardous components to be accepted at the landfill would persist for hundreds, if not thousands, of years after expiration of the post-closure care period became a very serious concern during the siting proceedings. *Id.*

The County further contends that the Peoria County siting ordinance requires that all siting applications include plans for perpetual care of the proposed facility. Memo. at 2. The County notes that while PDC discussed the potential economic benefits of the landfill expansion at hearing, neither the application nor PDC's presentation provided any information about costs to the community if the expansion were approved. *Id.* at 3.

The County disagrees that the fee condition is an attempt to require a demonstration of financial responsibility. Memo. at 7. The County further contends that PDC should be estopped from arguing on appeal that the County should not have considered the issue because PDC regularly raised the issue of financial assurance during the local siting proceedings. Memo. at 8.

Although not cited to, the County argues "there are clearly facts in the record on which the County Board could reasonable conclude the Perpetual Care Fund voluntarily offered by PDC during the course of the proceedings was reasonable and necessary." Memo. at 11. The County concludes that the decision was not against the manifest weight of the evidence.

If, however, the Board finds that PDC agreed to the idea of creating a perpetual care fund, but not at the rate of \$5.00 per ton, the County contends the Board should still allow the special condition. Memo. at 11. The County argues that the Board should then impose, at a minimum, the amount contained in PDC's compromise, which was a minimum of \$281,250 per year for (12) years in annual installments, or at the rate of \$1.50 per ton with a minimum of \$225,000 contained in the staff report, and agreed to by PDC. Memo. at 12. For all of these reasons, the County urges the Board to deny PDC's motion for partial summary judgment on criterion v.

PDC's Reply

In its reply, PDC maintains the arguments it raises in its motion and objects to the County's responsive arguments. PDC contends that the County's assertion that PDC waived its

right to object by failing to object to the perpetual care fund during the hearing process must fail. Reply at 3. PDC disputes the County's statement that PDC promised to accept a fee condition. Resp. at 4. PDC notes the County's failure to cite to a single piece of evidence contradicting PDC's proof on criterion v. Memo. at 4. PDC claims no evidence that PDC's plan of operations was insufficient was entered into the record, and the County cites to none. *Id.* at 5.

PDC maintains that the post-closure funding has nothing to do with the operations of the facility, because at that point operations will have ceased at the facility. For all of these reasons, asserts PDC, the County's decision to impose a fee condition on the approval of criterion v "should be overturned." Memo. at 6.

Board Discussion

In the petition for review, in addition to contesting the County's findings on criteria i, ii, and iii, PDC contests the County's imposition of a special condition as against the manifest weight of the evidence. In its motion for summary judgment, PDC further narrowed the issue on which it sought judgment. The question PDC poses to the Board is whether it was against the manifest weight of the evidence for the County to find that PDC had only satisfied criterion v if a special condition was imposed requiring a per ton fee to be deposited into a perpetual care fund.

The Board notes that PDC has misstated the standard of review of conditions imposed on a site approval. The standard is not whether the applicant has only satisfied a criterion if the contested condition is imposed. Rather, in reviewing the local siting authority's imposition of a special condition, the Board must determine whether the special condition to a site approval is reasonable and necessary to accomplish the purposes of the Act and not inconsistent with Board regulations. 415 ILCS 5/39.2(e) (2004). Both parties have correctly cited authority for the principle that the Board is not in a position to reweigh the evidence, but must determine if the decision is against the manifest weight of the evidence. Fairview Area Citizens Taskforce v. PCB, 198 Ill. App. 3d 541, 555 N.E.2d 1178 (3rd Dist. 1990).

Section 40.1 of the Act states that if a local siting authority "refuses to grant or grants with conditions approval under Section 39.2 of this Act" an appeal may be filed. 415 ILCS 5/40.1(a) (2004). The Act does not, however, contemplate conditions on a denial. Lowe Transfer, Inc. et al. v. County Board of McHenry County, PCB 03-221, slip op. at 75 (Oct. 2, 2003). Section 39.2(e) also only discusses conditions imposed on "granting approval for a site." 415 ILCS 5/39.2(e) (2004). The Board, therefore, finds that PDC's motion for partial summary judgment on a condition of a siting denial is not ripe for review. Questions of fact remain as to whether the County failed to act and the application should be deemed approved or whether the County denied siting based on criteria i, ii, and iii. The Board does not consider conditions on a denial, and PDC has not yet met its burden to show the application was approved. *See* 415 ILCS 5/40.1(b) (2004) ("The burden of proof shall be on the petitioner.").

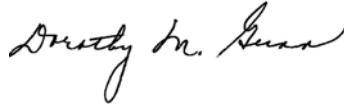
CONCLUSION

The Board finds that PDC's motion for partial summary judgment on a special condition of criterion v is not yet ripe for review given that questions of fact regarding whether the

application was approved or denied remain. Today's order also grants the Opposition Groups' motion for leave to file an *amicus curiae* brief in this proceeding consistent with the post-hearing briefing schedule to be set by the hearing officer. The Board orders the hearing officer to proceed to hearing as scheduled for January 8 through 11, 2007.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on December 7, 2006, by a vote of 4-0.

A handwritten signature in cursive script that reads "Dorothy M. Gunn".

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board