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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

TOM EDWARDS/RIVER RESCUE,)
)
Petitioner,)
) PCB No. 08-42
v.)
) (Permit Appeal – Third Party)
PEORIA DISPOSAL COMPANY,)
)
and ILLINOIS ENVIRONMENTAL)
PROTECTION AGENCY,)
)
Respondents.)

NOTICE OF FILING

To: Tom Edwards, River Rescue
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PLEASE TAKE NOTICE that on this date I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois the following instrument(s) entitled POST-HEARING BRIEF OF RESPONDENT.

Respectfully Submitted,



e-signature valid for IPCB e-filings ONLY

Michelle M. Ryan
Special Assistant Attorney General

Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
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Dated: May 19, 2008

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**POST-HEARING BRIEF OF RESPONDENT,
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY**

NOW COMES the Respondent, Illinois Environmental Protection Agency (“IEPA”), by and through its attorney, Michelle M. Ryan, Special Assistant Attorney General, and states as follows:

INTRODUCTION

This is a third-party appeal pursuant to Section 40(b) of the Environmental Protection Act, 415 ILCS 5/40(b)(2006) (“Act”), of a permit issued on November 27, 2007, by IEPA to Peoria Disposal Company (“PDC”). The permit, RCRA Log No. B-24R, was a renewal of a RCRA Part B permit issued for PDC’s existing hazardous waste management facility in Peoria. Record-133, p. 8.¹

Petitioner, Tom Edwards (“Petitioner”), filed three documents in this case variously requesting an extension of time and/or administrative review. *See* “Initial Filing” filed January 4, 2008, and two “Initial Filings” filed January 7, 2008 (dated January 1 and January 5, 2008).

¹ All of the electronic documents in the IEPA Record have been designated with the following notation: “1438120003_PDC Appeal-#,” or, for large drawings, “1438120003_PDC Appeal-Inc-#” where the “#” symbol

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On February 21, 2008, the Illinois Pollution Control Board (“Board”) issued an order in this case allowing Petitioner until March 3, 2008 to properly file and serve a petition for review, which was done. Therefore, this brief will refer to the March 3, 2008 filing as the “Amended Petition,” unless otherwise indicated.

BURDEN OF PROOF

Section 40(b) of the Act provides that in a third-party appeal of a RCRA permit, “[t]he burden of proof shall be on the petitioner.” 415 ILCS 5/40(b)(2006). A hearing in such an appeal is “based exclusively on the record before the Agency.” *Id.* It has long been established that in carrying this burden, “a third-party petitioner must show that the permit, as issued, would violate the Act or Board’s regulations.” *Prairie Rivers Network, v. Illinois Pollution Control Board*, 781 N.E.2d 372, 401 (4th Dist. 2002), *citing Damron v. IEPA*, PCB No. 93-215 (April 21, 1994).

ARGUMENT

PETITIONER HAS NOT EVEN ALLEGED THAT THE PERMIT AS ISSUED WILL RESULT IN A VIOLATION OF LAW

Both PDC and IEPA filed separate motions to dismiss this case at the outset (on January 23, 2008 and February 6, 2008, respectively), asserting in part that Petitioner had failed to state a claim upon which relief could be granted. The Board did not directly address this concern in its February 21, 2008 order, and IEPA maintains that the refiling, hearing and briefing process has done nothing to improve Petitioner’s case on this threshold issue.

Nowhere in any filing or oral comment does Petitioner actually claim that the permit issued to PDC violates the law. Petitioner fails to point to any section of the Act that is violated

indicates the numbered documents. For ease in reference, this brief will refer to these documents simply as “Record-

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by the issuance of the permit, and has not cited one applicable Board regulation at any point in the proceedings. In fact, the only law cited by Petitioner at any time (other than assertions as to his standing to bring this case) are the references to the Illinois Constitution and the Preamble to the Act contained in his brief. By failing to even assert the very claim upon which Petitioner holds the burden of proof, Petitioner has waived any argument on that issue, and the Board must find in favor of IEPA and PDC.

The only possible claim that can even be inferred from Petitioner's filings is that the issuance of the permit deprived him of the right to a healthful environment, as guaranteed by Article XI of the Illinois Constitution. However, this precise argument was rejected thirty years ago by the Illinois Supreme Court in *Landfill, Inc. v. Pollution Control Board*, 74 Ill. 2d 541, 559 (1978). Therefore, although Petitioner has demonstrated his standing to file a case, he has utterly failed in stating a claim in this case, and as such, the case should be dismissed.

PETITIONER HAS NOT PRESENTED ANY RELIABLE EVIDENCE IN SUPPORT OF HIS CASE

Petitioner submitted no sworn evidence at hearing. The Board's rules require that oral statements made at hearing be under oath and subject to cross examination. 35 Ill. Adm. Code 101.628(a). After questioning by the Hearing Officer in this case, Petitioner chose not to be sworn in to present such an oral statement. Transcript, pp. 11-12. The Hearing Officer then confirmed that Petitioner's statements would be considered Public Comment and weighed accordingly. *Id.* Petitioner presented no witnesses at hearing, and his written statements were not subject to cross examination. As such, the Board's rules require these statements to be "afforded lesser weight than evidence subject to cross examination." 35 Ill. Adm. Code 101.628(b).

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As will be argued further below, many of these statements would be inadmissible as evidence, and should not be considered at all. Because they were all given as Public Comment, IEPA was not allowed to cross examine Petitioner on any of his statements. This hinders IEPA's ability to assist the Board in determining whether any real legal issues exist in this case. Petitioner almost entirely failed to cite to any portion of the record in this case, making it further difficult to parse out any potentially valid concerns from general dislike of the landfill. Mere assertions of error without supporting argument or citation do not merit consideration and can be rejected outright. *Prairie Rivers, supra*, 781 N.E.2d at 408-09. Petitioner's unsworn statements do not meet his burden to prove that the permit would violate the Act or regulations. IEPA generally supports the right of the public to make comments. However, Public Comment without any supporting references or citations should not be allowed as the entire basis for an appeal.

PETITIONER HAS AGAIN FAILED TO EVEN ATTEMPT SERVICE ON THE RESPONDENTS

Parties to Board proceedings are required to serve all documents filed with the Clerk's Office on the other parties. 35 Ill. Adm. Code 101.304(b). "A proceeding is subject to dismissal, and parties are subject to sanctions...if service is not timely made." 35 Ill. Adm. Code 101.304(d). Proof of service must "accompany all filings of all parties." 35 Ill. Adm. Code 101.304(d).

Once again, Petitioner appears to have made no attempt at service of his brief or supplemental brief on IEPA. The Board previously acknowledged Petitioner's failure of service with respect to his three "Initial Filings," and generously allowed him to file a fourth petition with proper service. Order (February 21, 2008), p. 6. Continued disregard for the Board's rules merit sanctions, particularly in light of Petitioner's failure to reform his inappropriate behavior following admonishment. Because Petitioner failed to serve IEPA with his brief and supplemental brief in this

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case, both of these documents should be stricken, pursuant to 35 Ill. Adm. Code 101.800(b)(5), and judgment should be entered on behalf of the Respondents.

PETITIONER'S ALLEGATIONS ARE UNTIMELY

The Hearing Report in this case required Petitioner's brief to be filed by May 5, 2008, and ordered that the mailbox rule would not apply to briefs. Hearing Report (April 23, 2008), p. 1. Petitioner's Supplemental Brief, filed on May 7, 2008, was not within the filing deadline set by the Hearing Officer in this case, and should be stricken for this reason, as well. *See* 35 Ill. Adm. Code 101.610(k) (allowing Hearing Officer to set briefing schedule and exclude late-filed briefs).

Furthermore, several of Petitioner's allegations were initially raised during the hearing or even in his briefs. All of these issues should have been raised in the Petition, initially due on January 2, 2008, and later allowed by the Board to be amended by March 3, 2008. Included among these untimely issues are: (1) "Much leaking reported from landfill's new section" (Petitioner's Brief, p. 2, Item 4); (2) "...because only grab samples from the top of any incoming load are tested, and loads may be left sitting out for weeks or months after arrival, any mercury would have volatilized into the city's air." (Petitioner's Brief, p. 4, Item 9); (3) "The EPA permit give PDC 30 days to report any problems it may find, even breakdowns in the landfill." (Petitioner's Brief, p. 4, Item 11). One particularly offensive discussion was scrawled along the bottom of Exhibit 10 to the *supplemental* brief for the first time. By raising these issues in an untimely manner, Petitioner has deprived IEPA of the opportunity to prepare a defense, where necessary. The only way for IEPA to even attempt to refute the allegations presented at this late stage of the proceedings would be if good fortune allowed for contrary information to be available within the Record or the regulations (e.g., pursuant to 35 Ill. Adm. Code 724.198(g))

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and Permit, page VI-14, J.10., the owner/operator must notify IEPA of statistically significant evidence of groundwater contamination in a compliance monitoring well within seven (7) days, not the 30 days claimed by Petitioner for “any problems.”). Therefore, to preserve the fairness of the proceedings, IEPA requests that all untimely raised issues be stricken and disregarded.

PETITIONER’S CONCERNS WERE NOT PROPERLY RAISED DURING THE PUBLIC COMMENT PERIOD ON THE PERMIT APPLICATION

The rule specific to third-party RCRA appeals requires that the petition contain “a statement of the reasons supporting that review” as well as a “demonstration that any issues being raised were raised during the public comment period.” 35 Ill. Adm. Code 705.212(c). Many of the issues raised by Petitioner in his Petition, at hearing, and in his brief were not raised by him during the public comment period, and as such, should be disregarded. In addition to the three items enumerated in the previous section (which were also not raised during the public comment period), these items are as follows:

- 1) Better oversight, independent inspections (Brief, p. 1; Amended Petition, p. 1, Item 1A).
- 2) Capacity, acreage, height (Brief, p. 2, Item 2; Amended Petition, p. 1, Item 1).
- 3) Pre-law section has little monitoring (Brief, p. 3, Item 5; Amended Petition, p. 2, Item 5).
- 4) PDC collecting data and using its own lab (Brief, p. 4, Item 10; Amended Petition, p. 1).
- 5) Flow rate of groundwater (Brief, p. 3, Item 13).

IEPA certainly does not intend to imply any validity to any of these arguments by listing them individually here. Regardless of whether they have any merit, they were not been properly preserved by being raised in public comment, and as such, must be disregarded. *American Bottom Conservancy v. IEPA, et al.*, PCB No. 06-171 (September 21, 2006), p. 5.

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PETITIONER'S ARGUMENTS HAVE NO RELIABLE BASIS AND SHOULD BE DISREGARDED

Petitioner makes several arguments based on “research” and “experts.” There are several major problems with these arguments, the first being that the research and experts are even not identified, in many cases. By way of example: “A county hired engineering consultant found Cell No. 1 to be leaking” (Brief, p.2, Item 4); “Research in New Jersey and five European Union countries...” (Brief, p. 3, Item 6); “recent detailed studies (noted above) in New York State...” (Brief, p. 3, Item 7); “...according to the chemistry professor.” (Transcript, p. 6); “...we are informed.” (Amended Petition, p. 3). It is impossible to determine from this lack of identification whether the experts and research are considered trustworthy, whether the research or opinion is applicable to this facility, or whether they even state what Petitioner claims they do. As such, all claims based on unknown “authorities” are inherently unreliable and should be disregarded.

Petitioner does mention one expert by name: Charles Norris, a “geohydrologist” (sic) who apparently gave “testimony” in another proceeding. (Transcript, p. 13). Unfortunately, neither Mr. Norris, nor his testimony, nor any reports he may have written were made available to the Board in this case. He was not qualified as an expert in this case, nor subject to cross examination. This makes it very difficult to determine the validity of his alleged claim that “all of the landfill...is leaking to the bottom” (Transcript, p. 13), or indeed, whether Petitioner’s statement accurately represents his expert opinion at all. These statements about Mr. Norris and all unknown experts and unidentified research are hearsay, and not admissible evidence in this case.

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Other statements by Petitioner are clearly based on speculation, which can be easily determined from the statements themselves. Among such statements are the following: “I don’t think one of those barrels is still standing. They are all rusted away. I’m sure there’s air pollution coming out of there.” (Transcript, p. 13); “Other air pollutants from the site are certainly being dispersed by PDC elsewhere.” (Brief, p. 3, Item 7); “...that limit has not been reached after 20 years of dumping.... That must be impossible.” (Amended Petition, p. 2) (emphasis original). Some of these statements devolve into hyperbole, with scary references to Love Canal (Brief, p. 3), and purportedly frightening references to the Toxic Release Inventory (*Id.*) Sometimes Petitioner asks rhetorical questions, and occasionally even answers himself: “EPA tests like, I want to say, 21. How do they do so few? I don’t know, but they are allowed to.” (Transcript, p. 18); “Is there anyplace else for such a landfill in this area? Why isn’t PDC looking for another place? Why isn’t the EPA asking them to or telling them to? The EPA says they have no authority to do that.” (Transcript. P. 21). Arguments based on speculation and fear cannot be considered as evidence that this permit would violate the Act or regulations.

Several issues that Petitioner raises are completely irrelevant to the issue of this renewal permit. The Toxic Release Inventory (“TRI”) with respect to PDC does not weigh into the decision of whether to grant a permit, because it is not part of the RCRA regulations or the Act. It is an information database provided by U.S. EPA regarding both releases of chemicals and those sent to facilities for further waste management. As a RCRA-permitted landfill, PDC *should* have a high TRI, because that is an indicator that hazardous waste is ending up where it belongs. Issues relating to the request to increase the height of the landfill (Amended Petition, p. 2) and the County Board’s decision on siting an expansion (Brief, p. 4) are entirely unrelated to this permit application or renewal. All of these issues must be disregarded.

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Illinois EPA argues that for all of the above reasons, both procedural and substantive, the Board has more than a sufficient basis to hold for IEPA in this case on every issue raised by the Petitioner. However, for the benefit of the Board, in the event it decides to review the merits of the case, IEPA will address a few of the substantive issues where it perceives the Board may have some concern.

ILLINOIS EPA DID NOT CHANGE THE ACTUAL CAPACITY OF THE LANDFILL

Petitioner claims IEPA disregarded the capacity limitation in the original permit and made an “Illegal volume change.” (Brief, p. 2, Item 2). This is not true. As quoted in the Public Comment submitted by Joyce Blumenshine on May 8, 2008, Illinois EPA modified the total cubic yardage limitation when it discovered calculation errors in the original submission. Therefore, this was a clarification, not a change. Furthermore, this change was made in a December 18, 2002 permit modification. It has no bearing on the appeal of this 2007 renewal permit. Besides failing to raise this issue at public comment, Petitioner is over five years late in raising it to the Board at all.

THE LAW DOES NOT REQUIRE SPECIFIC AIR MONITORING IN A RCRA PERMIT

Petitioner is very concerned with the PDC landfill, in part because “research has shown air pollution to be a health hazard in the vicinity of toxic landfills elsewhere.” Brief, p. 2. Petitioner clearly believes IEPA has shirked its duty by being “totally unaware of the vents that were out there venting pollutants in the landfill. I went out there one time and found them.” Transcript, p. 20. Illinois EPA does not contest that Petitioner was on the landfill, or that he saw pipes, or that he smelled something unpleasant. However, there is no evidence of “vents on the site [designed] to release gaseous fumes to the air.” Amended Petition, p. 2, Item 6. The landfill does have leachate collection sumps and manholes, as well as groundwater monitoring wells and

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piezometers. Record-Inc-033. The record does not support the contention that secret gas vents exist. Again, all of Petitioner's comments are unsworn, but he commented that IEPA personnel were not aware of his "vents." Transcript, p. 20. If anything, this is further evidence that supports the record that no such vents are present.

With respect to other air pollution issues, this RCRA permit has addressed the issue as well as it can. There is no provision in the RCRA regulations for air monitoring at a hazardous waste landfill unit. *See generally*, 35 Ill. Adm. Code 724.101- 724.201 and 724. 400-724.417. Section 9(a) of the Act prohibits a person from causing or allowing air pollution in Illinois, which requirement is included verbatim in the permit at Page V-5, Section C.18. Further, PDC's Exhibit 2 submitted at hearing is a copy of the Lifetime Operating Permit issued by IEPA's Bureau of Air for this facility. Therefore, there is no evidence in this record that this permit will violate Section 9(a) of the Act, or any related requirements.

THE GROUNDWATER MONITORING PROGRAM IN THE PERMIT MEETS THE REQUIREMENTS OF THE ACT AND BOARD REGULATIONS

The major issues raised with respect to the groundwater monitoring program are: (1) the change from quarterly to semi-annual monitoring, and (2) the number of indicator parameters used in the detection monitoring phase. PDC requested semi-annual monitoring in Sections E.6 and E.7 of the permit application. Record-008, pp. 20, 30, 32. It is the duty of IEPA to issue a permit upon proof by the applicant that the facility will not cause a violation of the Act or regulations. 415 ILCS 5/39. The RCRA regulations require monitoring "at least semi-annually" in both the detection and compliance monitoring programs. 35 Ill. Adm. Code 724.198(d) and 724.199(f). Therefore, the semi-annual monitoring requirement in the permit complies with applicable law.

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Petitioner is also concerned about the number of constituents to be monitored in groundwater. Amended Petition, p. 3, Item 8. The permit requires a minimum of 50 constituents to be monitored each year, with approximately one-half of those being monitored semi-annually. Permit, pp. VI-6 – VI-8. The RCRA regulations do not require monitoring for all possible constituents in a waste management unit, but rather an approved list of “indicator parameters,” which are designed to be a reliable indicator of hazardous constituents in the groundwater. 35 Ill. Adm. Code 724.198(a). This regulation provides four factors to be considered in determining indicator parameters, including waste constituents and how they behave, detectability and background levels. These were explored by PDC in its application and evaluated by IEPA in reviewing the application. Record-008, pp. 22-30. Illinois EPA included indicator parameters that met the required criteria in the permit. Permit, pp. VI-6 – VI-7, Lists G1 and G2. In addition, if there is statistically significant evidence of contamination, PDC is required to monitor all wells for the entire Appendix I list, consisting of over 200 constituents. 35 Ill. Adm. Code 724.198(g); Permit, page VI-14, J.10. PDC has actually conducted such monitoring in the past. *See* Record-010, pp. 356-364. Petitioner’s complaint of testing for “only 24 chemicals” (Amended Petition, p. 3, Item 8) is baseless.

PUBLIC COMMENT

It is clear that there is substantial public sentiment against this facility, for an assortment of reasons. The general tenor of comments indicate that the public would like a “guarantee” that no environmental impact will occur at the PDC facility. Transcript, p. 43. While no one is in a position to give such a guarantee, the Act and RCRA regulations make every attempt to provide a reasonable measure of security. Unfortunately, the public commenters are not satisfied with the application of law to the facts at this site. They don’t want IEPA or the Board to do what the

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law *requires*, but what the public *wants*. Even though IEPA has addressed the relevant issues with respect to this permit, the problem remains that the landfill is still there. A permit appeal before the Board is not the forum for changing the law, but an opportunity to ensure that IEPA follows the law as enacted. This is a situation where the desires of the community far exceed the requirements of the law. But IEPA and the Board are both creatures of statute, and only have the authority granted to them by the Act. *Granite City Division of National Steel co. v. Illinois Pollution Control Board*, 155 Ill. 2d 149, 171 (1993), *citing Bio-Medical Laboratories v. Trainor*, 62 Ill. 2d 540, 551 (1977). Illinois EPA has exercised its authority consistent with the Act and regulations which govern it, even if contrary to the wishes of the commenters.

CONCLUSION

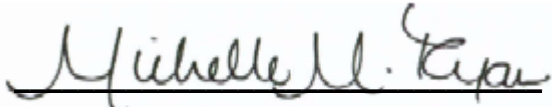
Illinois EPA has not addressed every individual issue raised by Petitioner, for a variety of reasons, some of which are noted above. The simple fact remains that Petitioner has presented no evidence, and there exists no evidence in the record, that this RCRA renewal permit would result in a violation of the Act or applicable regulations. Mere dislike is not sufficient to satisfy Petitioner's burden of proof. *Village of Lake Barrington, et al., v. IEPA, et al.*, PCB No. 05-55, (April 21, 2005), p. 7. The record supports the renewal permit. The only credible evidence in this case is that the permit as granted will *not* violate the Act and underlying regulations.

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WHEREFORE, for the foregoing reasons, Respondent, Illinois Environmental Protection Agency, respectfully requests that the Board DENY the Amended Petition for review in this case and uphold IEPA's issuance of the RCRA renewal permit to PDC.

Respectfully Submitted,

DATED: May 19, 2008



e-signature valid for IPCB e-filings ONLY

Michelle M. Ryan
Special Assistant Attorney General

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PROOF OF SERVICE

I hereby certify that I did on the 19th day of May, 2008, send by U.S. Mail with postage thereon fully prepaid, by depositing in a United States Post Office Box a true and correct copy of the following instrument(s) entitled POST-HEARING BRIEF OF RESPONDENT

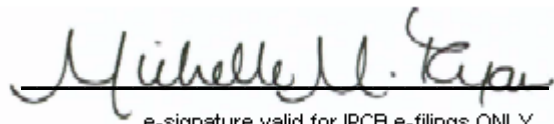
To: Tom Edwards, River Rescue
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Claire Manning
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and an electronic copy of the same foregoing instrument on the same date via electronic filing

To: John Therriault, Acting Clerk
Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, Illinois 60601



e-signature valid for IPCB e-filings ONLY

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