ILLINOIS POLLUTION CONTROL BOARD
January 19, 2017

BRICKYARD DISPOSAL & RECYCLING, INC.,	)	
Petitioner,	)	
v.	)	PCB 16-66
	)	(Permit Appeal - Land)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	

ORDER OF THE BOARD (by J.A. Burke):

Brickyard Disposal & Recycling, Inc. (Brickyard) applied to the Illinois Environmental Protection Agency (Agency) to modify the permit for its municipal solid waste landfill at 601 Brickyard Road, Danville, Vermilion County. Brickyard's landfill has two units, Unit 1 and Unit 2. Its current permit requires a wedge of clean fill separating the units. Brickyard sought to dispose waste in the wedge area, which requires a permit modification.

The Agency determined that the permit application was incomplete because it did not include (1) a new siting approval from the Vermilion County Board and (2) a new groundwater impact assessment (GIA). The Board granted summary judgment for Brickyard on both grounds. The Board found that Brickyard's proposal to fill the wedge area with waste would not create a "new pollution control facility" and, therefore, did not require new local siting approval. The Board also found Brickyard's GIA submittal complete.

The Board made no determination on the technical sufficiency of Brickyard's permit application. The Agency's determination was solely based on the application being incomplete and did not include any technical grounds. Accordingly, the Board directed the Agency to perform a technical review of the application.

The Agency filed a motion asking the Board to reconsider its order (Mot.), and Brickyard responded (Resp.) that the motion should be denied. The Agency presented three arguments relating to whether the Board properly granted summary judgment. The Board finds it properly granted summary judgment and, therefore, denies the Agency's motion.

LEGAL STANDARD

Brickyard sought review of the Agency's decision—that the permit application was incomplete— under Section 40 of the Environmental Protection Act (Act). 415 ILCS 5/40 (2014). That section authorizes the appeal of Agency permit denials. The Board's review is

based exclusively on the record before the Agency at the time the decision was issued. Thus, any hearing the Board holds is limited to the Agency's record. *See* 35 Ill. Adm. Code 105.412.

Prior to hearing, a case can be disposed of through a motion for summary judgment. Summary judgment is appropriate when the record, including pleadings, shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* 35 Ill. Adm. Code 101.516(b). The Board considers the pleadings and reviews the record to determine whether there is a genuine issue as to any material fact.

While this appeal is brought under Section 40 of the Act, the same burden of proof does not apply. In a typical permit appeal, the petitioner must prove that operating its facility pursuant to the requested permit would not violate the Act or Board regulations. Browning-Ferris Indus. v. PCB, 179 Ill. App. 3d 598, 607 (2nd Dist. 1989). However, it is the Agency letter that specifically frames the issues on the appeal. Chicago Coke Co. v. IEPA, PCB 10-75, slip op. at 8 (Dec. 20, 2012). In this case, the Agency determination letter states that Brickyard's permit application was reviewed "for purposes of completeness only." R47531. The issue, therefore, is not whether operating the facility pursuant to the requested permit would violate the Act or Board regulations. Rather, the burden on Brickyard is to prove that it submitted a complete application. If proven, the Board remands the application to the Agency for a technical determination. *See* Atkinson Landfill Co. v. IEPA, PCB 13-8, slip op. at 12 (June 20, 2013).

The Agency's letter presented two reasons why Brickyard's permit application was incomplete. Both reasons present legal issues on the meaning of statutory and regulatory language and not genuine issues of material fact.

First, the Agency found the application incomplete because it lacked new local siting approval. Specifically, new local siting approval, the Agency determined, is needed because the proposed landfill modification meets the definition of "new pollution control facility" in Section 3.330(b)(2) of the Act (415 ILCS 5/3.330(b)(2) (2014)). R47531. Whether the proposed modification meets this definition is not a question of fact, but rather a question of law as to the statutory meaning of the phrase "boundary of a currently permitted facility" in the definition.

The second Agency reason was that the application did not include a new or updated GIA under 35 Ill. Adm. Code 811.317(a)(1). R47531. Brickyard's application included a GIA evaluation and stated that the Agency already had in its possession a GIA that Brickyard believed sufficient. R47002-3, R47137. Because the Agency framed its review as being "for purposes of completeness only" (R47531), the only question before the Board was whether Brickyard's application included a GIA. The Board, therefore, only reviewed this issue and not the technical sufficiency of the GIA. There was no genuine issue of fact on whether Brickyard's application included a GIA. Any factual questions regarding the sufficiency of the GIA are not before the Board at this time because the Agency's review was "for purposes of completeness only," not technical sufficiency.

DISCUSSION

Recognizing its authority in this appeal, the Board now addresses each of the Agency's arguments. The Agency's motion for reconsideration presents three arguments, all relating to whether the Board properly granted summary judgment: the Board (1) granted summary judgment on a new ground not raised by the parties; (2) misconstrued the record and overlooked evidence; and (3) resolved a genuine issue of material fact. The Board finds that it properly granted summary judgment.

Board Did Not Base Summary Judgment on a New Ground

The Agency states that Brickyard only challenged its GIA determination on the ground that the landfill expansion would not be a new unit requiring a new GIA. Mot. at 3. The Board found that the expansion would be a new unit, but that Brickyard's previously submitted GIA, along with new information included as part of its permit application, met the regulatory requirements. Brickyard v. IEPA, PCB 16-66, slip op. at 10 (Nov. 17, 2016). The Agency contends that the Board improperly granted summary judgment on a ground neither party raised and in doing so denied the Agency an opportunity to respond. Mot. at 5. The Board disagrees.

The Agency's letter limits the issues for the Board's review. Chicago Coke, PCB 10-75, slip op. at 8. That letter states Brickyard's application is incomplete because it did not include a new or updated GIA, citing Board regulations at 35 Ill. Adm. Code 811.317(a)(1), (c)(1). R47531. Brickyard petitioned the Board to review this Agency decision and asked for summary judgment on it. Among many statements along these lines, Brickyard phrased the question as:

> Do the Board rules cited by the Agency in denial point #2, which are relevant to new "units", require that Brickyard present an entirely new/updated Groundwater Impact Assessment ("GIA") model specific to the area of redesign, prior to technically reviewing the merits of its application? Brickyard Mot. at 8.

Brickyard also asked for technical review of its existing GIA. *Id.* at 20-21. The Agency therefore had notice that this issue would be raised. *See* Johnson v. Decatur Park District, 301 Ill. App. 3d 798, 811 (4th Dist. 1998). The Board also does not find Peterson v. Randhava, 313 Ill. App. 3d 1 (1st Dist. 2000) instructive, as there the trial court acted on its own in awarding summary judgment where no such motion was brought. Here, Brickyard filed a motion for summary judgment, and both the motion and the Agency letter set forth the grounds relied on by the Board in its decision.

Once the Board concluded that the expansion would be a new unit, subjecting Brickyard to the cited Board regulations, the remaining question for the Board was whether the Agency correctly determined Brickyard's application was incomplete for lack of a new or updated GIA. Brickyard's application concluded that the GIA already in the Agency's possession did not have to be updated. R47002-3. The Board, therefore, found the application complete because the Agency was already in possession of the GIA that Brickyard wanted to use. Brickyard, PCB 16-66, slip op. at 10. Whether that GIA is technically sufficient is not a question before the Board because the Agency did not determine technical sufficiency.

Board Did Not Misconstrue the Record or Overlook Evidence

The Agency believes that a genuine issue of material fact exists regarding the adequacy of Brickyard's GIA to reflect the proposed landfill expansion, and that the Board did not liberally construe the record in the Agency's favor as required. Mot. at 6-7. In support, the Agency contends that its determination letter did not simply demand a new GIA, but instead concluded that the current GIA did not adequately represent the proposed expansion. *Id.* at 7-8. Brickyard responds that the Agency's determination letter went only to the completeness of the application and not its technical sufficiency. Resp. at 5.

The Agency's letter defines the issues for the Board's review. Chicago Coke, PCB 10-75, slip op. at 8. The Agency may not raise new denial reasons before the Board that were not a part of the letter. EPA v. PCB, 86 Ill. 2d 390, 405 (1981). The opening sentence of the Agency's letter states that Brickyard's application was reviewed "for purposes of completeness only." R47531. The letter makes no reference to the Agency having conducted any technical review of Brickyard's application or the results of such a review. The Agency used the word "adequately" in citing the regulatory requirement to submit a GIA, not as part of an Agency determination on the adequacy of Brickyard's GIA. The Board disagrees with the Agency's argument that such a determination can be construed from the letter. The Agency provides no explanation in the letter as to how Brickyard's GIA may be technically insufficient. Accordingly, the Board finds that reviewing the adequacy of the GIA goes beyond the Agency's letter, which the Board cannot do.

In addition, the Agency contends that the Board overlooked evidence in the record contrary to the Board's holding. Mot. at 9. The Agency specifically references an Agency memorandum describing why the GIA was inadequate. *Id.* Brickyard responds that the memorandum is inconsequential because it does not constitute a technical review of the application. Resp. at 5. The Board considered the entire record in its review, including the Agency memorandum, which was cited in Brickyard's motion for summary judgment at page 21. However, neither this memorandum nor any of its findings were included in the Agency's letter informing Brickyard that its application was deemed incomplete. Any conclusions drawn in the memorandum as to the adequacy of the GIA go beyond the Agency's completeness determination. The Board's review was limited to the Agency's letter, and the Board made no determination on the technical sufficiency of Brickyard's application. *See* Brickyard, PCB 16-66, slip op. at 11.

Board Did Not Resolve a Genuine Issue of Material Fact

The Agency contends that a controlling issue disputed by the parties is the scope of Vermilion County's 1992 siting approval. Mot. at 11-12. The Agency further maintains that this issue is a factual question making it improper for the Board to resolve through summary judgment. *Id.* at 13.

Initially, the Board found that the Agency's letter did not specify—as a ground for denial—the lower portion of the wedge being beyond the siting approval's scope. Brickyard, PCB 16-66, slip op. at 9. The Agency, therefore, was precluded from raising this argument before the Board. *See* EPA v. PCB, 86 Ill. 2d at 405.

Even if this issue were properly raised, the Board concluded that the wedge would not extend beyond the expanded boundary approved by Vermilion County in 1992; specifically, the 40-foot increase in height over 90 acres of the existing landfill. Brickyard, PCB 16-66, slip op. at 6. The Board did not need to resolve an issue of fact to reach this conclusion. The Agency and Brickyard stipulated that the local siting request included "a forty foot (40') vertical increase in height of the existing facility over a 90-acre portion of the total 293-acre facility." Joint Statement of Facts at 2, ¶4d. The Board did not find otherwise.

The legal question before the Board was whether filling the wedge with waste would be an "expansion beyond the boundary of a currently permitted facility" within the definition of "new pollution control facility" (415 ILCS 5/3.330(b)(2) (2014)). Brickyard, PCB 16-66, slip op. at 6. Vermilion County approved a "lateral and vertical expansion of permitted landfill boundaries." R47498. The Board was faced with legal interpretations of these phrases; the facts were undisputed. The 1992 siting approval included a 40-foot increase in height over an existing landfill. The wedge falls inside of this 40-foot area and the existing landfill below. The wedge was created solely through Agency permitting, three years after the County granted siting approval for the expansion. The County considered the Act's siting criteria with the understanding that only waste would be placed in what would later become the wedge. Taking the Agency's argument to its conclusion, the Agency would have the County consider whether to approve siting for waste disposal in the middle of an existing landfill under a 40-foot waste layer it already approved in 1992. This cannot be what the General Assembly intended.

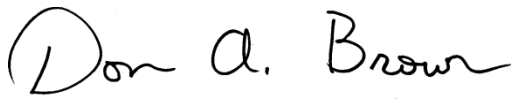
CONCLUSION

The Board denies the Agency's motion for reconsideration.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2014); see also 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statue, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; see also 35 Ill. Adm. Code 101.902, 102.700, and 102.702.

I, Don Brown, Assistant Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on January 19, 2017, by a vote of 5-0.



Don Brown, Assistant Clerk
Illinois Pollution Control Board