

ILLINOIS POLLUTION CONTROL BOARD

July 24, 2003

CITIZENS AGAINST LANDFILL)	
EXPANSION,)	
)	
Complainant,)	
)	
v.)	PCB 03-236
)	(Citizens Enforcement - Noise)
)	
AMERICAN DISPOSAL SERVICES OF)	
ILLINOIS, INC. and LIVINGSTON)	
COUNTY BOARD,)	
)	
Respondents.)	

ORDER OF THE BOARD (by T.E. Johnson):

On June 24, 2003, Citizens Against Landfill Expansion (CALE) timely filed a petition asking the Board to review a May 15, 2003, decision of the Livingston County Board (County Board) approving the application of American Disposal Services of Illinois, Inc. (American Disposal) to expand the Livingston County Landfill. On July 7, 2003, American Disposal filed a motion to dismiss. On July 18, 2003, CALE filed a response to the motion. Also on July 18, 2003, CALE filed a motion for leave to amend the petition for review. For the reasons below, the Board denies American Disposal's motion and accepts CALE's petition for hearing. CALE's motion for leave to amend is denied as moot.

MOTION TO DISMISS

American Disposal argues that the Board should dismiss the petition because CALE, an unincorporated voluntary association of residents, did not participate in the siting hearings before the county board, as required by Section 40.1(b) of the Environmental Protection Act (Act). Mot. at 1, 415 ILCS 5/40.1(b) (2002). American Disposal states that Section 40.1(b) provides in part:

a third party other than the applicant who participated in the public hearing conducted by the county board or governing body of the municipality may petition the Board within 35 days for a hearing to contest the approval of the county board or governing body of the municipality. Mot. at 1, citing 415 ILCS 40.1(b) (2002).

American Disposal argues that Carolyn Gerwin, the attorney who filed the petition for CALE, only participated at the hearings as an individual objector, and she is therefore only entitled to bring the petition as an individual. Mot. at 1.

In support of its motion, American Disposal attaches Gerwin's entry of appearance for the siting hearings, where she indicated she would be participating as a witness and an objector. Mot. at 2, Exh. A. American Disposal notes that Gerwin did not mention she was representing any other people or groups. Mot. at 2.

American Disposal also argues that during the hearings, Gerwin "vaguely indicated" that she was acting as the attorney for some other objectors, but did not name those individuals. Mot. at 2. Referencing the hearing transcript, American Disposal argues that Gerwin identified herself to the hearing officer as "Carolyn Gerwin on behalf of myself and several private citizens." Mot. at 2, Exh. B. Also at hearing, Gerwin stated "My name is Carolyn Gerwin, and I am here today officially as an objector and as objectors' counsel." Mot. at 2, Exh. C.

American Disposal argues that CALE was only referenced twice during the hearings. CALE was mentioned by Julie Russow in an unsworn comment. Mot. at 2, Exh. E. Russow stated "And this is the kind of activity that Citizens Against Landfill Expansion would like to see our own county officials take." Exh. E. Gerwin included CALE in a question to one of American Disposal's witnesses. Mot. at 2, Exh. F. Specifically, Gerwin asked, "That figure appeared on some of the materials that our Objector's group or CALE had circulated, right?" Exh. F.

American Disposal concludes that there was no indication that Gerwin was representing anyone other than herself at the hearings. Mot. at 3.

RESPONSE

CALE Members' Participation

CALE responds that it participated in all aspects of the siting process through its members and counsel. Resp. at 2. Specifically, CALE states that Doris Burnside, Julie Russow, Phyllis Ryan and Barb Christensen are all members of CALE, and they participated at the hearings. Resp. at 2. Burnside sat at the objectors' table with Gerwin, CALE's counsel, during the five days of testimony. Resp. at 2, Exh. A. Burnside also made a public comment and submitted documents at the hearings. Resp. at 2, Exh. A.

CALE further argues that Russow made a public comment at the hearings and submitted a written comment. Resp. at 2, Exh. B. Russow also attended all the afternoon and evening sessions of the hearings. Resp. at 2. CALE notes that American Disposal acknowledges that Russow directly referenced CALE in her public comments. Resp. at 2, Exh. B.

CALE states that Ryan and Christensen made public comments. Resp. at 2, Exh. C. CALE also states that Burnside, Russow, Christensen and Gerwin represented other CALE members who did not attend the hearings. Resp. at 2, Attachment 2.

Gerwin's Participation

CALE argues that the county board's siting ordinance does not indicate that an unincorporated, voluntary association of citizens must file a formal "entry of appearance." Resp. at 2. Specifically, the ordinance requires that "members of the public who desire to be participants in the hearing must submit written notification . . . to the County Clerk ten days before the first day of the public hearing." Resp. at 2, Exh. E. CALE states that Gerwin provided notice of her intent to participate, and American Disposal acknowledged her notice. Resp. at 2-3; Mot. at 2.

CALE argues that Gerwin presented witnesses on CALE's behalf. Resp. at 3, Exh. F. Specifically, Professor Sondra Sixberry testified for CALE. Resp. at 3, Exh. F. Additionally, during hearing, Gerwin stated, in regard to Professor Sixberry, that "She's providing services not to the governmental body but to our citizens group . . ." Resp. 3, Exh. F. CALE notes that no one questioned the reference to the citizens group or asked that the group be further identified. Resp. at 3.

CALE argues that American Disposal knew that Gerwin, Burnside and Russow were leaders for CALE. Resp. at 3. Gerwin presented copies of petitions opposing the landfill's expansion when American Disposal began to apply for the expansion. Resp. at 3, Exh. A. Additionally, members of CALE, including Gerwin and Burnside twice met with landfill representatives at the landfill's offices. Resp. at 3, Exh. A. In sum, CALE claims that its existence and leadership were known to all of the parties before, during and after the hearings. Resp. at 3.

Exemption from the fee for certification of record

CALE argues that because it participated at the hearings as an informal association of concerned citizens, CALE may claim the exemption under Section 39.2(n) of the Act and not pay the costs of preparing and certifying the record. Resp. at 4.

MOTION FOR LEAVE TO AMEND PETITION FOR REVIEW

On July 18, 2003, CALE also filed a motion for leave to amend the petition for review to add individual members of CALE as additional petitioners, if the Board grants American Disposal's motion to dismiss. As the Board discusses below, the motion to dismiss is denied, and therefore the motion for leave to amend is denied as moot.

ANALYSIS

The Board has previously found that "mere" attendance at a local hearing is sufficient to confer standing to appeal. *Alice Zeman et al. v. Village of Summit*, PCB 92-174 and 92-177 (cons.) (Dec. 17, 1992). The record is clear that Gerwin and identified members of CALE attended the siting hearings conducted by the county board, and therefore have standing to appeal. The only question is whether they have standing to appeal on behalf of CALE.

The record shows that Gerwin indicated that she was representing herself and other private citizens at the siting hearings. Specifically, Gerwin suggested that CALE was the group she was representing when she referred to CALE as “our objectors group” during questioning of one of American Disposal's witnesses. Gerwin also stated that Professor Sixberry was providing services to “our citizens group.” In her opening statement, Gerwin stated she was there as “an objector and as objectors' counsel.” Moreover, members of CALE participated at the hearings, and Russow specifically mentioned CALE in her public comments.

The Board finds there is evidence in the record showing that CALE participated at the underlying hearings. Not only did Gerwin represent herself and CALE at the hearings, but CALE was also represented by individual members. Accordingly, CALE satisfied the requirements for an appeal under Section 40.1(b) of the Act. Therefore, pursuant to Section 39.2(n) of the Act, CALE is exempt from paying the costs of preparing and certifying the record.

The Board denies American Disposal’s motion to dismiss and finds CALE's motion to amend the petition moot.

ACCEPT FOR HEARING

Under the Act, before the Illinois Environmental Protection Agency can issue a permit to develop or construct a new or expanding pollution control facility, the permit applicant must obtain siting approval for the proposed facility from the local government (*i.e.*, the county board if in an unincorporated area or the governing body of the municipality if in an incorporated area). If the local government denies siting or approves siting with conditions, the siting applicant may appeal the local government’s decision to the Board. *See* 415 ILCS 5/39(c), 40.1(a) (2002); 35 Ill. Adm. Code 107.

In this case, the county board granted American Disposal’s application for expansion of the Livingston Landfill located in Pontiac, Livingston County. CALE appeals on the grounds that (1) the county board lacked jurisdiction; (2) the procedures used by the county board to reach its siting decision were not fundamentally fair; and (2) the county board's decision was against the manifest weight of the evidence as to criteria (i), (ii), (iii) and (viii). 415 ILCS 39.2(a) (2002)

The Board accepts the petition for hearing. CALE has the burden of proof. 415 ILCS 5/40.1(a) (2002); *see also* 35 Ill. Adm. Code 105.506. Hearings will be based exclusively on the record before Livingston County Board. Accordingly, though the Board hearing affords petitioner the opportunity to challenge the local government’s reasons for its decision, information developed after the local government’s decision typically is not admitted at hearing or considered by the Board. However, if relevant, evidence may be introduced on (1) the local government’s jurisdiction over the siting application; and (2) the fundamental fairness of the procedures used by the local government in reaching its decision. *See* 415 ILCS 5/40.1(a) (2002); Land & Lakes v. PCB, 319 Ill. App. 3d 41, 48, 743 N.E.2d 188, 194 (3d Dist. 2000).

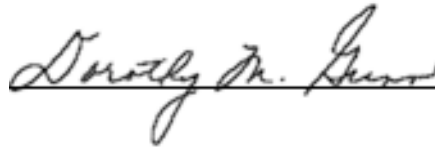
Hearings will be scheduled and completed in a timely manner, consistent with the

decision deadline (*see* 415 ILCS 5/40.1(a) (2002)), which only American Disposal may extend by waiver. *See* 35 Ill. Adm. Code 107.504; 35 Ill. Adm. Code 101.308). If the Board fails to take final action by the decision deadline, American Disposal “may deem the site location approved.” 415 ILCS 5/40.1(a) (2002).

Currently, the decision deadline is October 22, 2003 (the 120th day after June 24, 2003). *See* 35 Ill. Adm. Code 107.504. The Board meeting immediately before the decision deadline is scheduled for October 16, 2003. The Livingston County Board must file the entire record of its proceedings within 21 days after the date of this order. *See* 35 Ill. Adm. Code 107.302. The record must comply with the content and certification requirements of 35 Ill. Adm. Code 107.304, 107.308. Although 35 Ill. Adm. Code 107.304(c) sets forth the number of copies to be filed, the Livingston County Board may file five copies of the hearing transcript, and one original and five copies of all other documents in the record with the Board. Pursuant to Section 39.2(n) of the Act, CALE is exempt from paying the costs of preparing and certifying the record. 415 ILCS 39.2(n) (2002).

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on, by a vote of 6-0.

A handwritten signature in cursive script, reading "Dorothy M. Gunn", written over a horizontal line.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board